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Constitutional Adjudication and Standards of Review under Pressure from Biological Technologies

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CONSTITUTIONAL ADJUDICATION AND STANDARDS OF REVIEW UNDER PRESSURE FROM BIOLOGICAL TECHNOLOGIES

Michael H. Shapiro[†]

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I. THE PROJECT, IN GENERAL

"THE LAW" IS REGULARLY ADMONISHED to run faster because technology is outpacing it. Whatever this means,¹ it is a confused call and leaves out important aspects of the idea of law and of the relationships between techno-cultural changes and law. Some technological developments require, if anything, only modest changes in the substance, procedures and institutions of law,² and do not require rethinking the foundations of our empirical beliefs and moral attitudes. (Think of the move from steam to diesel locomotives.) Other changes, however, press law and moral theory to recognize and deal with previously hidden or under-recognized issues—although even here, foundations, or what passes for them, can (and should) often be avoided, depending on the circumstances. (Human cloning may strain our ideas of procreation, but there is no basis for thinking that it shreds our core notion of human personhood.)³ They cannot be avoided indefinitely, however, and here I suggest that some important problems in constitutional theory require attention because of the nature of certain fields of science and technology. These developments change the world enough to require re-inspection and perhaps even reconstruction of some constitutional argument structures.

Canvassing a wide range of these technological changes and prospects all at once would be overwhelming. I will rely instead on certain examples and try to show why they inspire intensified probing of some areas of constitutional law. What follows is part of a larger work in progress that investigates these matters more extensively. In the interest of promoting informed consent to reading, I should say now that I am more concerned in this work with what we might learn about consti-

¹ See generally, Michael H. Shapiro, *Is Bioethics Broke?: On the Idea of Ethics and Law "Catching Up" With Technology*, 33 IND. L. REV. 17 (1999).

² Such changes may be far less needed or useful than is commonly thought, but this can't be assessed here. See generally ROGER B. DWORKIN, LIMITS: THE ROLE OF THE LAW IN BIOETHICAL DECISION MAKING 2, 18, 169-71 (1996) (expressing reservations on the need to change law to accommodate technological developments, but observing that it must play a role in dealing with biomedical changes); Carl E. Schneider, *Bioethics in the Language of the Law*, HASTINGS CENTER REP., July-Aug. 1994, at 16 (arguing that the law's language is inept for discussing bioethical disputes).

³ See generally Michael H. Shapiro, *I Want a Girl (Boy) Just Like the Girl (Boy) That Married Dear Old Dad (Mom): Cloning Lives*, 9 S. CAL. INTERDISC. L.J. 5 (1999) (discussing public opposition to human cloning).

tutional law when it confronts these problems, rather than the other way around.

My use of technological disputes as probes into the nature of constitutional adjudication involves a somewhat less-traveled path: the focus is on (gasp) the nature, application and future evolution of standards of review.⁴ Properly understood and used (I doubt this is an overly heroic goal), they are very far from being—as some seem to think—misleading constitutional artifacts that conceal their circularity with fusty formalism, thereby masking the Real Issues. They are in fact a—perhaps the—principal adjudicatory mechanism through which our constitutional hierarchy of values is recognized and implemented. These ruling standards often do their work silently as part of the infrastructure of constitutional argumentation, but they are “there” nonetheless. Resolving constitutional disputes involving biological technologies that sharply revise basic life processes will require us to survey the standard and their links to each other, and to make them more responsive to the added pressures placed upon them. As I will argue, the more we know about standards of review, the more we know about the Constitution and how it embeds critical values. This *defining* aspect of standards of review in our constitutional system is frequently overlooked, which is quite unfortunate, for they are far from mindless incantations: they serve as indispensable filters for constitutional analysis precisely because they implement a hierarchy of constitutional values derived from standard forms of interpretation. (For present purposes, I take the idea of “constitutional value” as primitive. Complete analysis of standards of review would clearly require a serious attempt at explication, but the task here is not meant to be that comprehensive.)

Because this less-traveled road is crooked and bumpy (as most lines of constitutional analysis are), a map seems called for. I start with assuming that we indeed have a constitutional text, then briefly outline the principal interpretive trails we fol-

⁴ For present purposes, I do not draw sharp distinctions among the processes of constitutional theorizing, analysis, and interpretation, although they bear different, if overlapping, meanings. “Constitutional adjudication” of course refers to a formalized endeavor that resorts to all these processes and is examined within those processes. I mention this set of terms simply to record the point that, although standards of review are ubiquitous (because necessary) in constitutional decision making, their operational content varies from decision-maker (say, a legislator) to decisionmaker (say, a court).

low in working with that text. I next suggest (without presenting detailed arguments) that most or all of these routes converge in establishing a hierarchy among constitutional legal relations—a hierarchy that reflects and embodies constitutional values. The exact membership and ordering of the hierarchy, and whether we think it fixed or variable, may rest on the interpretive scheme used. (By “legal relations” I mean the rights, powers, privileges and immunities associated under the Constitution with individuals and governmental entities and branches.⁵) I then link the hierarchy to its “operational meaning”—which depends heavily, if not entirely, on the use of constitutional standards of review.⁶ In doing so, I attend to the ambiguities of meaning of “standards of review,” and, by referring to several notable cases involving applied biological technologies, I go on to urge the need to push the idea of standards of review—and thus of constitutional value itself—to enhanced levels of specificity.

Once again, the point of this presentation is to use some modern biotechnological disputes to highlight limitations in our understanding of constitutional values and of how they are recognized and implemented. These limitations, although not entirely ignored in the “pre-bioethics” age, are now more vivid and pressing and thus harder (though not impossible) to ignore. In later sections, I will refer to several cases involving both simple and advanced technologies for controlling physiological functions that shape thought and behavior. First, however, I refer to the elements of constitutional interpretation generally; when applied, they soon yield the inevitable idea of a standard of review, in both its global and particular senses.

⁵ This interpretation of “legal relations” draws on the familiar Hohfeldian account, which I will not examine. See generally WESLEY NEWCOMB HOHFELD, *FUNDAMENTAL LEGAL CONCEPTIONS AS APPLIED IN JUDICIAL REASONING AND OTHER LEGAL ESSAYS* (Walter Wheeler Cook ed., 1923). The term “constitutional value” is vague and is especially beset by level-of-generality problems, but clarifying it here is unnecessary. As I say in the text, the phrase as used here is primitive, without further direct explication.

⁶ For a still-informative overview of standards of review, see generally Scott H. Bice, *Standards of Judicial Review Under the Equal Protection and Due Process Clauses*, 50 S. CAL. L. REV. 689 (1977). For a careful look at the nature and operation of such standards, see Roy G. Spece, Jr., *A Purposive Analysis of Constitutional Standards of Judicial Review and a Practical Assessment of the Constitutionality of Regulating Recombinant DNA Research*, 51 S. CAL. L. REV. 1281 (1978).

II. CONSTITUTIONAL INTERPRETATION, HIERARCHY, AND STANDARDS OF REVIEW: THE LOGIC OF RANKING LEGAL RELATIONS *INTER SE*

A. Converging interpretive paths lead to hierarchy

1. Remarks on interpretation

There are defining aspects of interpretation that are well worth exploring in a more extended work, but are only mentioned here in greatly simplified outline. I do not claim that this outline gathers and links the strands of interpretation in the best way possible; it is simply one way to capture the complexity of interpretive processes.

The main axes of interpretation seem to coalesce into variables dealing with characteristics of a text's author(s) or "senders" (their intentions, motivations, and circumstances); with the (generally intersubjective) nature of the linguistic or other symbolic entities used to "carry" the message; and with the responses of the message's recipients, based on their own characteristics. Other lists of criteria seem to fit within one or more of these larger interpretive trails, including temporal variables. "Tradition," for example, straddles all of them: it might help to determine an author's understandings and purposes, or to fix the lexical meaning of some symbolic entity, or to gauge a recipient's likely understanding of a message. If another system of abstractions seems more illuminating than the preceding three-axis structure, fine; for present purposes, this general scheme will do.

A few points made for the sake of completeness: First, at the highest level of abstraction relevant here (when all we know is that we have a text), all these axes, separately or in any combination, must at least be considered as possible interpretive paths. This is part of the logic of interpretation: "interpretation" *has* these interweaved threads of meaning.

Second, beyond this threshold, I am not claiming that the full set of axes must be seriously applied across the board for all texts. Nor am I claiming, at the start, that any particular axis or combination of axes is excluded from consideration across the board or for any given text. There is no unique path or set of paths that is universally required or permitted, or is licit or il-

licit, for all texts. There is, however, the possibility that a given axis or set of axes is required or excluded for a given kind of text. I don't pursue this very large topic here.

Third, as suggested, these interpretive paths overlap considerably, bearing connections that are required by the very nature of these aspects of interpretation. Authors generally have intentions and hopes concerning the effect and impact of a message, and, more specifically, about the likely ways in which the linguistic entities will be grasped. Moreover, the supposedly intersubjective meanings contained within the language used have manifest limitations and cannot always stand as independently sufficient tools of interpretation; they may require reference to variables concerning authors and audiences and perhaps to some aspects of moral analysis. And audiences puzzling over a message will themselves often consider author-variables and inquire into intricacies of lexical meaning. (This is, however, far from saying that with every text, its readers should regularly hit the history books and the Oxford English Dictionary or its non-English-language relatives.) The sets of interpretive variables thus cross-reference each other in complex ways.

Fourth (and very closely connected to "Third"), certain basic terms used in commentaries about interpretation are hugely ambiguous, partly because they bestride these interpretive lines. Think, for example, of "originalism," which might refer to Framers' intentions about an enormous variety of matters: the values they wished to implement; the general or specific near- and long-term goals they had in mind (or would have had in mind had anyone asked them?); their rationales, motivations and purposes generally; their understandings of the nature and purposes of the social, economic and political institutions around them; their expectations concerning how their text(s) would be understood; and—not of least importance—about the intersubjective meanings of the very words, phrases and structural devices they placed in the Constitution. "Original meaning" can thus refer to matters of lexical understanding, or to various other far-flung aspects of the Framers' states of mind. "What I look for in the Constitution is precisely what I look for in a statute: the original meaning of the text, not what the original draftsmen intended."⁷ "Originalism" insofar as it rests on

⁷ ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 38 (1997). It is possible of course, that "the original meaning of the text" is

intersubjective meanings at a particular time and “originalism” insofar as it refers to an assortment of intentions and purposes (etc.) of the Framers are radically different (even if overlapping) notions.

Finally, a comment on the well-known ambiguities of “text.” I deal with this because of the risk of conflating the idea of a text with that of a particular text-interpretive path—intersubjective linguistic meaning.⁸ (There are other examples of difficulty in understanding the relationship between concepts and their “criteria”—e.g., between death and “irreversible cessation of all brain function.”⁹) There is also a particular well-known ambiguity in putting this question in a constitutional context. Is “the Constitution” a certain sequence of symbols (including its organization and structure)? Or is it that plus—what? Our common understandings of its language? The body of Supreme Court precedent? (And so on.) I avoid this issue, and I think I can get away with that here. At least for present purposes, the simplest alternative is to use “text” to refer to a sequence of marks and their structural interconnections, understood to be an array of symbols, even though we might not understand their meanings.¹⁰ Of course, one can raise serious questions about the phrase “understood to be symbols,” but I will raise none of them.

sufficiently unclear that an interpreter might have to look into what the Framers or drafters “had in mind” more generally.

⁸ This axis of interpretation seems to be similar to “textualism.” See generally MICHAEL J. GERHARDT ET AL., *CONSTITUTIONAL THEORY: ARGUMENTS AND PERSPECTIVES* 65-95 (2d ed. 2000) (discussing textualism). See also SCALIA, *supra* note 7, at 23-25, 37-41 (discussing textualism in statutory and constitutional contexts).

⁹ On whether this definition blends “the thing itself” with one of its criteria, see DOUGLAS N. WALTON, *BRAIN DEATH: ETHICAL CONSIDERATIONS* 51-56 (1980). Walton states that brain death is “a bridge concept between the concept of death and the diagnostic criteria for the determination of death, so it is hard to know where to locate it in the usual concepts/criteria dichotomy.” *Id.* at 53. He also describes brain death as “more of a technical concept of medical science than the concept of death *simpliciter.*” *Id.*

¹⁰ It’s not entirely clear whether this differs from some usages by others. See, e.g., STANLEY FISH, *IS THERE A TEXT IN THIS CLASS?: THE AUTHORITY OF INTERPRETIVE COMMUNITIES* at vii (1980) (stating that “there is a text in this and every class if one means by text the structure of meanings that is obvious and inescapable from the perspective of whatever interpretive assumptions happen to be in force”). This might refer to interpretive assumptions indicating that something is indeed a text because the marks or sounds or movements are known to be symbols—communicative entities. It might also refer, more comprehensively, to particular interpretive assumptions that suggest specific meanings or ranges of meaning.

2. What “hierarchy” means here; one ambiguity (among others) of “standard of review”

There is a crucial distinction concerning the inferential path from interpretation to hierarchy to standards of review. The critique of standards of review (see also Part II.C., *infra*) could be taken most broadly to deny that *any* ordering—rather than any given one—can be derived for constitutional rights, interests, and other legal relationships. But this position makes little or no sense. There must be at least one specification of hierarchy, however simple. For example, we could say that in disputes between individuals and governments where the former accuses the latter of unconstitutionally infringing on their interests, the government always wins.¹¹ While this simple but potent rule (one might hesitate to call it a “standard of review”) reflects an obvious ranking of sorts, it certainly does not overprotect “fundamental liberty interests” or equalitarian interests in not being classified in certain ways. Even with the qualification that government action must be taken “in good faith for a public purpose,” the standard of review comes close to being an automatic preference for any government action (possibly including porcine legislation). The opposing “standard of review” is equally

¹¹ This was never formally the case in constitutional law. The usual qualification in older formulations of constitutional standards of review was that the government had to be acting in good faith—i.e., for a public purpose (a rather large assumption, to be sure). Cf. Howard Gillman, *The Antinomy of Public Purposes and Private Rights in the American Constitutional Tradition, or Why Communitarianism Is Not Necessarily Exogenous to Liberal Constitutionalism*, 21 L. & SOC. INQUIRY 67, 71 (1996) (stating that “even at this time [the Lochner era] the doctrine of police powers and the concept of the public interest played a central role in determining when legislatures could interfere with liberty and property.”).

In fact, the constitutional test used by the Supreme Court in evaluating whether the state was to be permitted to “interpose its authority on behalf of the public” was not whether the government was interfering too much with liberty or property but rather whether “the interests of the public generally, as distinguished from those of a particular class, require such interference.” It is no exaggeration to say that *the* central question in constitutional law during this period was over the meaning of ‘the public interest’....When the justices believed that an interference with liberty or property promoted the health, safety, or morality of the community, then the laws were upheld Regulations were struck down if the justices believed that they did not in fact promote the general welfare or that their purpose was to illegitimately privilege the interests of certain market competitors at the expense of others....

Id. at 71-72.

simple and potent: government can't do much of anything because individuals always prevail in constitutional adjudication.

There are indeed domains of constitutional adjudication that suggest these slam dunk standards—for example: “economic” regulation tested under substantive due process standards (always upheld) as compared with content regulation of political speech in a public forum (perhaps never upheld, but the point is arguable). Foraging in all the domains of constitutional legal relations will indeed yield standards of review of sharply varying structures—but all are bent on the same overarching task: directing the decisionmaker to appraise the disputes in constitutional coin and to state at least the ordinal (and possibly the cardinal) rankings of competing claims by specifying who must show what, and how.

But if ordering is acknowledged, the road then forks: one might think that there is a virtually continuous ascension in value from the least important to the most important interests (individual or governmental/societal), yielding a “unitary” standard of review that says something of the form—“Find the interest, see how much it's worth under the circumstances, determine how seriously it is burdened, think about the government's interests (part of “under the circumstances”), and act accordingly.” This is not incoherent, but—as far as *appearance* is concerned—it is not generally the way business is done in constitutional adjudication (though some may prefer it).¹² Our present conceptual system of standards of review is articulated in quite different terms. We sort rights and interests into separate categories (“tiers”) that bear particular characterizations (“fundamental rights/liberty interests,” “suspect/semi-suspect classifications”) that mark the separate tiers (and their sub-tiers, if any). Because particular characterizations generally mark separate tiers, standards of review are often given particular names—“strict scrutiny” (a.k.a. “the compelling governmental interest test”), “intermediate scrutiny,” “the rational basis test,”

¹² It may also seem so vague that it presses the limits of the rule of law, at least in certain senses of that idea, but I do not press the point, which was suggested to me by Professor Roy G. Spece, Jr. Cf. Kenneth L. Karst, *Legislative Facts in Constitutional Litigation*, 1960 S. CT. REV. 75, 80 (1960) (stating that “to remove candor from one's description of the decisional process is to strike at the heart of the rule of law”). Of course, critics of standards of review would hold that their use obfuscates what is “really” going on and thus reflects the reverse of candor. The formulation in the text, however, is too vague to be a standard of review. See *infra* note 19 (explaining that standards of review must refer to hierarchy).

and several others indigenous to special areas (e.g., the undue burden “standard” for abortion regulations announced in *Planned Parenthood v. Casey*¹³).

It is hard to know exactly how to assess this situation even in a preliminary way. Some may think that the first path mentioned above—recognizing a finely calibrated ascension of constitutional value (perhaps not a “continuum,” but the term comes to mind)—is preferable to the arguably ham-fisted identification and naming of sharply divided categories marking increments in value *along the same ascension line(s)*. (One would also think there is a continuum that captures varying degrees of burden on a given constitutional value at any point along the value ascension line.) Attacks on recognizing discrete standards of review *do not deny that there is an ascension* in “constitutional value”; they complain of excessively sharp, discontinuous categories that do not reflect constitutional reality. These clunky categories, of course, are part of what is designated by specific standards of review bearing labels (“strict scrutiny”) such as those mentioned above.

To make matters worse (in the eyes of critics of tiered standards of review), there is yet another “discontinuous” line—the triggering points for particular standards of review: however important the interest in question, no serious scrutiny is drawn unless its impairment has reached some threshold. At that point, there is an instantaneous constitutional “phase change,” and we move from little or no judicial scrutiny to what, again, *seems* to be an all-or-nothing leap to a much higher level of scrutiny. This system of discrete bins and their associated standards of review gives some observers the vapors, as evidenced by Justice Marshall’s (and later Justice White’s) endorsement of a “spectrum” or sliding scale of standards.¹⁴

¹³ 510 U.S. 1309 (1994) (holding there is a liberty interest in abortion that cannot be unduly burdened by government).

¹⁴ See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 98-99 (1973) (Marshall, J., dissenting). Courts sometimes seem to pursue this spectrum approach without much explanation of how it fits into the prevailing official formulations of standards of review. See *California Democratic Party v. Jones*, 169 F.3d 646 (9th Cir. 1999) (upholding Proposition 198, a California initiative measure that changed the primary election system from closed to blanket, where any voter could vote for any candidate, without regard to party affiliation), *rev’d*, *California Democratic Party v. Jones*, 530 U.S. 567 (2000). The Ninth Circuit opinion (adopting the District Court’s opinion) stated:

Determining which is the better conceptual system—and on what standards of betterness—is outside the rough borders of this article, although I hope to address the task in another work. Some may argue that the two systems are not extensionally equivalent—that is, they will lead to different results in different cases, partly by “rescuing” some claims of right from the rigorously minimalist (nihilist?) versions of the rational basis test, and partly by bumping some countervailing governmental claims down from the set of compelling or important interests. These shifts are thought to avoid “distortions” generated by a mistaken view of sharp boundaries separating one kind of constitutional claim from another and separating different sorts of government interests offered to justify the constitutional intrusion.

Perhaps there will indeed be some shift in outcomes, but this is not a logical or doctrinal necessity. Switching from separate bins to continua doesn’t formally demand changes in outcome because marginal adjustments can be made (often not explicitly) within the bins. The change in conceptual systems, however, may have an effect because of the different rhetorical, emotional, and educative effects of the different systems.¹⁵ In

[T]he court finds that the parties have succeeded in showing that the blanket primary imposes a significant but not severe burden on their associational rights. To survive the challenge mounted by plaintiffs, Proposition 198 must be supported by interests that are sufficient to outweigh the burdens identified above. Those interests need not be compelling, given that the burdens are not crushing, but they must be important.

California Democratic Party, 169 F.3d at 659-60. The U.S. Supreme Court reversed, and Justice Scalia’s majority opinion seems to use the dominant mode of formulating standards of review. It recognized the special importance of political association: “Unsurprisingly, our cases vigorously affirm the special place the First Amendment reserves for, and the special protection it accords, the process by which a political party ‘select[s] a standard bearer who best represents the party’s ideologies and preferences.’” *California Democratic Party*, 530 U.S. at 575 (citation omitted). It then announced: “Proposition 198 is therefore unconstitutional unless it is narrowly tailored to serve a compelling state interest.” *Id.* at 582.

Justice Stevens’s dissent, however, seems more consistent with a “less categorical” approach: “As District Judge Levi correctly observed in an opinion adopted by the Ninth Circuit . . . the associational rights of political parties are neither absolute nor as comprehensive as the rights enjoyed by wholly private associations.” *Id.* at 593 (Stevens, J., dissenting); see also *Vlandis v. Kline*, 442 U.S. 441, 458 (1973) (White, J., concurring) (commenting favorably on Justice Marshall’s preferred conceptual system for standards of review).

¹⁵ See the brief remarks on choice of conceptual systems in Michael H. Shapiro, *Fragmenting and Reassembling the World: Of Flying Squirrels, Augmented Persons, and Other Monsters*, 51 OHIO ST. L.J. 331, 345 n.73 (1990).

any case, the fact that one cannot hold circumstances, judges and their respective views constant makes it difficult to tell whether a switch in standards of review in any given case, or in a class of cases, would generate a different outcome.¹⁶

Although I am not dealing with choice of conceptual systems comprehensively, I want to say enough to reduce the possibility of misunderstanding. I already noted that, as used loosely here, “hierarchy” comprehends various orderings of constitutional value. This holds whether we give names to certain ranked or graded regions of the scale, or view it as finely calibrated, bearing no clear internal boundaries or gaps that would mark a series of demarcated bins.

This choice-of-conceptual systems issue suggests the need for a terminological clarification. The term “level [or degree] of scrutiny” might be thought to refer only to a tiered system of supposed discontinuities, or to tiered and continuous systems both. For present theoretical purposes, nothing turns on this, and it should be clear in context (here or elsewhere) what formulations are in use. In the broad sense of “levels of scrutiny,” a system of levels of some sort, discrete or continuous, is dictated by our interpretive exercises insofar as they yield a constitutional value hierarchy. “Tier” will be taken to designate the discontinuous-appearing system of categories generating specific, usually named standards of review.

I also think that, whatever the merits of these competing constitutional visions of ordering, the battle is not about “using abstractions” as against some other process. There is no other possible process: every conceivable conceptual system will involve abstractions—that’s what a conceptual system is *about*. The issues concern *which* abstractions are arrayed in which structures, and how these abstractions are constructed, recognized and implemented.¹⁷

¹⁶ See *supra* note 14 (discussing *California Democratic Party v. Jones*, 530 U.S. 567 (2000)).

¹⁷ Cf. Jeffrey M. Shaman, *Cracks in the Structure: The Coming Breakdown of the Levels of Scrutiny*, 45 OHIO ST. L.J. 161, 174 (1984) (arguing that “[a]nother deficiency of the multi-tier approach is that it hampers legal analysis by focusing the inquiry toward abstractions that are divorced from the specific merits of a case”).

But if the abstraction is constitutionally relevant at all, it cannot be completely “divorced” from the particulars of a case. And the “specific merits of a case” cannot even be known to be “merits” without abstractions. Human thought generally, and perforce constitutional thought in particular, require abstractions—which we can then

A final question concerning how we describe these varying conceptual systems: Should the term "standards of review" apply only to the multi-tiered array or also to the (supposedly) "unitary" sliding scale of the sort urged by Justice Marshall? For present purposes, the important considerations are the recognition of hierarchy or ascension in the constitutional value of legal relations, and the tracing of operational differences in intensity of scrutiny that depend both on the legal relation's position in the hierarchy and on the nature of the burden placed on it. I will use "standard of review" to cover *any system of implementing or accommodating ascensions of constitutional value*, whether continuous, fine-tiered, or clunky. When necessary to address the differences, it can be done easily enough.

assess for their accuracy, utility, coherence with "neighboring" abstractions and conceptual systems, and their emotive impacts and learning effects.

Much the same applies to the comment that "[a]dditionally, the multi-level system impedes legal analysis, in a most serious way, by imposing categories upon the constitutional balancing process." *Id.* But we cannot always deal with even a determinate and clear continuum without categories. We would be driven to say something like: "This site—and its (immediately adjacent) (neighboring) sites—represent (greater) (lesser) constitutional value than that other site (down) (up) there." That claim also involves abstractions. Whether it is advisable, however, to move from highly reified (perhaps hallowed) categories to apparently less "rigid" ones, I leave aside, except for noting the risks of increasingly imprecise general concepts that take one still further from particularized situations. Consider whether the unitary standard articulated by Justice Marshall, and strongly endorsed by Professor Shaman, can do the work we want it to do (assuming we can even say what this work is). Professor Shaman states that:

While intermediate scrutiny was in an incipient stage, Justice Marshall authored a majority opinion for the Court in *Chicago Police Department v. Mosley* [408 U.S. 92 (1972)], which offered a single standard of review as an alternative to the multi-tier approach. Marshall's opinion stated that the crucial question in all equal protection cases is whether there is "an appropriate governmental interest suitably furthered" by the government regulation in question. This comprehensive inquiry consolidates the levels (or, as may be the case, the degrees) of scrutiny into a unified formula for all cases.

Id. at 164 (quoting *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 95 (1972)).

I suppose this is a battle involving (among other things), lumping versus splitting. One might wonder whether the unitary standard loses too much value-reinforcing potential because of its greater neutrality—and perhaps vapidly. Recall that *Mosley* came down (for reasons not fully explained) as an equal protection case, rather than a first amendment one. *See Police Dep't of Chicago v. Mosley*, 408 U.S. 92 (1972). One must consider what might be lost by attenuating honorific characterizations, such as (to restate in my own terms a common formulation): "The first amendment is a fundamental liberty interest protecting, among other things, political speech, and such speech, and other forms of speech as well, trigger the strictest scrutiny."

3. Convergence

All or some of these branching interpretive paths—author variables, lexical meanings, recipient variables—may (but need not) converge to similar or even identical outcomes. They may all, for example, point to the constitutionally elevated status of political speech and its resulting strong immunity from government interdiction, but differ sharply on other forms of speech (say, commercial speech). A parallel point applies to various aspects of personal privacy. And so on.

Whether or not these lines of interpretation converge in particular cases, most observers would agree on several outcomes. One is that the Constitution's text/structure¹⁸ establishes (or recognizes) certain constitutional value rankings among the legal relations designated in the Constitution. These rankings are supposed to reflect and implement underlying value orderings residing in the Constitution. The rankings are thus understood to involve complex links among different kinds of constitutional value. Inevitably, this broad accord on the results of constitutional interpretation extends to the perceived necessity of resolving conflicts within the hierarchy of legal relations, as when individual liberties are pitted against government powers, or government powers collide among themselves, or individual interests are in tension with each other.

There are, of course, huge differences among interpreters in their views of the nature of these rankings, and thus on what differing levels of justification are laid upon government action that impinges on these constitutional values. Some believe that commercial speech is no less valuable than political speech;

¹⁸ That is, its text/structure understood, at the start, as a sequence of symbols rather than as its specific intersubjective lexical meanings. The point of this qualification, as suggested, is to avoid conflating the chief concept (the Constitution) with one (or more) of its criteria. See *supra* text accompanying notes 8-10.

As for the awkward term "text/structure": I simply mean that whatever meaning is assigned to identified "units" within the text (words, phrases, full texts) must reflect considerations involving how these units (other than the full text itself) are joined or separated, how they are sequenced, and how they refer to each other or otherwise affect each other. These are inquiries into the structure of the text. "Structure" is thus not different from "text"—it is an aspect of it. How one goes from text/structure to specific interpretive outcomes may involve some important complexities. For examples that illustrate this account, see generally CHARLES L. BLACK, JR., *STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW* (1969). The term "structure" as used here is not restricted to any particular subset of problems, such as separation of powers or federal-state conflicts.

others believe it is only of modest consequence; still others say it is “intermediate” (as reflected in current doctrine). Some believe the set of “nonexplicit” fundamental liberty interests protected by the Constitution is very large; others think it nearly empty. Both Justice Brennan and Justice Scalia acknowledged such a hierarchy, but their own lists of critical interests sharply differed (though they overlapped).

To briefly tie things up: I argue that hierarchy among constitutionally established legal relations is, in some form, an *interpretive result* of any or all of the interpretive axes applied to the Constitution. The constitutional universe is not flat: some interests count more than others, and claims involving constitutional issues can thus be sorted and ranked. One has a far better chance of prevailing against government censorship or forced sterilization or other restrictions on reproduction than against local laws requiring sewer line connections in place of personal backyard septic tanks.

As I said, I do not try to definitively confirm interpretive convergence toward this sort of hierarchy. All I say here is that if constitutional hierarchies are recognized by converging interpretive theories and are taken seriously, they *must* be operationally reflected in standards of review *of one sort or another*. If they are not, then there are no hierarchies in the first place. To put it crisply, if constitutional hierarchy (among legal relations and their associated constitutional values) is accepted, to implement the hierarchy *is* to select and apply a standard of review. Doing so is *embedded* in realizing the hierarchy. Put otherwise, implementing a constitutional hierarchy *amounts to* the application of a standard of review. This is elaborated in the next few sections.

B. What *is* a standard of review and what does it do?
How is it identified and used?

This is a large and confusing question, but something must be said about it.

1. In general: sorting claims

The term “standard of review” does not have one standard meaning. Understood broadly, standards of review are constitutional meta-arguments that tell us to look for and apply hierarchies of constitutional value. They are thus (among other

things) sorting devices.¹⁹ How did we come to the issue of “sorting” in the first place? I don’t know what came first. Trying to answer this is at least remotely akin to inquiring into the origins of the Big Bang, or into whether abstract thought or language came first. At some point at or near an Origin in constitutional hermeneutics, our work with the ideas of text, interpretation, and value ordering crystallized the question of what it means operationally to say that there is an authoritative ordering of values embedded in the text, or in any communication.²⁰ The force of this question pushed us toward greater specificity—from the general, roughly intuited idea of hierarchy to more specific argument structures derived from particular hierarchies found in the text. We see the text as telling us, via a *global* “standard of review,” to sort generally and then to derive from

¹⁹ I want to avoid conflating standards of review with more general standards on how to proceed in constitutional adjudication. A standard of review, in both broader and narrower senses (*see infra* text accompanying notes 23, 26-27, 38-39, 54-55), reflects a constitutional terrain that is not “flat”: there must be within the standard some general or specific reference to constitutional hierarchies of value, and this reference is meant to influence the course of adjudication. For example: “In this case, make the decision that best ‘locates’ the outcome within the full fabric of our constitutional law, taking into account all rights, interests, values, and policies that are fairly implicated in the dispute.” This is too general to be a standard of review, rather than a rough method of proceeding (as in “do the right thing” or “make the best decision, all things considered”). This formulation is not a specific or even global standard of review, although there might be a body of precedent that reflects and implements our constitutional hierarchy, and from which an explicit standard of review could be inferred. For a directive to be a standard of review, it must specifically lock into either a general notion of hierarchy or a particular account of a specific hierarchy. The latter is the more common usage, as I suggest later.

I suggested in the text that “implementing a constitutional hierarchy *amounts to* the application of a standard of review.” Some might say that if the preceding claim is simply a deductive consequence of particular definitions of “constitutional hierarchy” and “standard of review,” the claim is empty or trivial. But not all such deductions are trivial. “P implies P” is trivial. But the deductions offered here—though “contained” within the premises—are more complex and are easier to lose sight of. Calling attention to deductive consequences may have illuminating and even jarring effects. I suppose we need a theory of triviality here, but I leave this issue of emptiness to logicians and cognitive psychologists.

The term “meta-argument” in the text is not used rigorously. It is meant simply to suggest that standards of review are arguments or directives about formulating arguments or directives, all within the language of constitutional analysis.

²⁰ At various points, I refer to standards of review; the idea of standards of review; the burdens of justification embedded in, or entailed by, or constitutive of standards of review; the meaning (including operational meaning) of “standards of review,” and so on. There are obvious ontological problems here, but I don’t think they require special attention here, even if some formulations technically category mistakes.

this sorting a set of separate argument forms to implement the sorting. These argument forms constitute particularized standards of review—"standards of review" in the *narrower* and more commonly used sense. The global standard is, roughly, "look for sorting or ranking by the constitutional text/structure." A narrower standard is the particular instruction, e.g., "if you find a fundamental liberty interest, see if the government's maneuvers are necessary to promote a compelling interest." Such phase separation is a hazy process but for now it is enough just to note this. (Some may want to withhold the term "standard of review" from the global instruction and restrict it to the narrower sort. I don't consider this here.)

Standards of review (in either the broader or narrower sense) are thus meant to typecast legal relations (rights, immunities, etc.) into categories that require varying degrees of justification for governments to burden or alter them. It is *supposed* to be harder for government to silence its critics than for it to, say, justify requiring a particular sort of community-wide waste disposal system. This view does not reflect any "begged questions" if it follows from good faith sorting through the axes of interpretation. The fact that most regulations of speech content are invalidated cannot rightly be taken to show that the strong standard of review in use betokens an issue improperly decided in advance. Nor does it signal that the Real Issues have been bypassed. On the contrary—it instead reflects the outcome of working with at least one of those critical issues: the identification and ranking of constitutional values. Speech-content regulations are *supposed* to fail most of the time. We *presume* they are invalid and place a heavy burden of justification on government to sustain them. *Doing is this is part of the adjudicatory objective, not an objection to it.* When standards of review work the way they are *supposed* to work, they aren't being "misused" or misunderstood.

This is easy to say, but hard to implement: one must still pass the often difficult characterization stage. (Is relocating X-rated theatres content regulation? Are must-carry rules for cable television content/speaker-identity regulations?²¹) And one must

²¹ As to the former, see *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986) (agreeing with district court's finding that city ordinance prohibiting adult motion picture theaters from locating within 1,000 feet of certain residential structures was not aimed at the content of those movies, but rather at the secondary effects of such theaters on the surrounding community); as to the latter, see *Turner Broad.*

also manage the challenging assessment of the government's interests and the mechanisms designed to further them. The fact that some analysts take the relative brevity of the process of using particular standards of review to indicate an underlying oversimplification of issues is unfortunate but not inevitable. It is, in any event, not at all clear whether hiding the bones of a constitutional argument structure will promote better reflection on constitutional values.

2. The ontology of standards of review

(a) The stages of argument and the "location" of standards of review

The purpose of this section is to explain, summarize, and elaborate on what has just been said about the character of standards of review. For present purposes, we can be non-comprehensive and deal only with a certain (large) family of disputes that have some threshold claim to being matters of constitutional law: individuals, associations, business organizations and other "units of autonomy" against government action. I will not deal with all standards of review in all circumstances (e.g., one government entity or official against another government entity or official, as in cases involving federal separation of powers or federal-state clashes).²² In the sorts of cases reviewed here, the claimants—as initiators of action or as civil or criminal defendants—complained of infringement of a right or interest, usually couched in terms of "liberty interests," "equality," or (more generally) "due process" (and so on).

What I say here is not intended as a canonical account of precisely how to proceed in constitutional adjudication—indeed, such precision seems conceptually impossible. I suggest, instead, that any constitutional argument structure must involve

Sys., Inc. v. FCC, 512 U.S. 622 (1994) (Turner I) and *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180 (1997) (Turner II) (holding that cable must-carry rules are content-neutral).

²² Intra- and inter-governmental claims of course have their indigenous standards of review, although they may seem structurally quite different from those illustrated here. But these argument structures expressly or impliedly embody directions for sorting and for imposing burdens of justification—even if couched in "functionalist" rather than "formalist" modes. *See, e.g.*, GERALD GUNTHER & KATHLEEN M. SULLIVAN, *CONSTITUTIONAL LAW* 355-56 (13th ed. 1997); ERWIN CHERMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 232-34 (1997).

at least the premises in the paragraph next below at *some* stage of the argument. Even argument structures offered as embodying “categorization” rather than “balancing” approaches must address the matters mentioned in argument stages [i]–[vii] below.²³ As we saw, there is an obvious question about how to identify “second-order” arguments (generic-level global standards of review)²⁴ that tell us what kind of “first-order” arguments (standards of review as more commonly and narrowly understood) to formulate here—and so on with higher orders. But I move on to other matters.

The required argument structure involves [i] a threshold characterization of the claim—the right/interest/etc. invoked; [ii] an account of how—and how seriously—it has been impaired; [iii] a ranking within the governing constitutional value hierarchy of the individual or other claims against government; [iv] the assignment (explicit or implicit) of a particular burden of justification (the “specific” or “narrow” standard of review); [v] the identification and valuation of legitimate government objectives (near and remote) and of the government’s power to further them; [vi] the application of the burden of justification via either a comparative assessment of the collision of personal interest claims and government claims against each other (and perhaps against other material constitutional value standards, even if not raised by the parties)²⁵, or by the identification of a particular interest that trumps *any* interest pitted against it;²⁶ and finally, [vii] the outcome.²⁷

Note several points about this account.

- First, as we saw,²⁸ there is the problem already mentioned of identifying the exact thing we call a “standard of review.” I suggested that the phrase has (at least) a narrower and a broader extension. The narrow one refers to step [iv] (or perhaps steps [i]–[iv] or [iii]–[iv], depending more on taste than logic) above—the outcome being the assignment of a particular burden of justification. This is the argument stage bearing colorful

²³ See *infra* text preceding and accompanying notes 24–25.

²⁴ See *supra* text preceding and accompanying note 19.

²⁵ As noted, whether and when courts raise issues on their own is a function of the derived hierarchy and its associated standards of review.

²⁶ Here, I’m trying to avoid begging questions raised in the critiques of “balancing.”

²⁷ This simple phrase is also quite ambiguous, but I leave it at that.

²⁸ See *supra* text accompanying note 19.

names such as “strict scrutiny” (a/k/a the “compelling interest test”); “intermediate scrutiny”; the “minimal rational basis test” (at least in substantive due process); the not-always-minimal rational basis test (in equal protection); and a number of others located in different branches of constitutional law (such as the First Amendment, separation of powers, and federal-state conflicts)²⁹ and which are not always clearly named.

The broad extension of “standards of review” covers the second-order argument that generates the entire sequence [i]–[iv], and perhaps [v]–[vii] also. That is, it is the global set of directions that might be said to constitute the standard of review. Blurring these two extensions is not of much significance for anything discussed here, although it suggests a minor clarifying point: it is usually the *anticipation* of known, specific standards of review and the justificatory burdens they impose—or don’t impose—that drives the search for location in a hierarchy.

After all, that is in significant part what operational constitutional value hierarchies are all about—the placement of the specific and sharply varying burdens of justification that vindicate those hierarchies.³⁰ (There is a cycling problem here; interpreters may end up revising the hierarchy in light of trying to implement it as previously unearthed. This is an important theoretical problem to pursue elsewhere.) The directions specifying those burdens are what we loosely call “standards of review.” But, as argued earlier, these specific standards are in theory derived from a prior independently established hierarchy derived from converging interpretive maneuvers. This is not a true “Which came first?” puzzle, but it suggests that the hope for a particular standard of review is almost certain to drive us to characterize claims in certain specific ways. This is, in part, why dealing with standards of review is so often viewed as question-begging, even though it isn’t:³¹ we invent new basic

²⁹ For example, “time, place, and manner” analysis, operating as a form of intermediate scrutiny, and “reasonableness” standards applied to regulations of non-public forums. See generally GUNTHER & SULLIVAN, *supra* note 22, at 1234-35 (discussing the regulation of free speech in public and non-public settings). Recall also the problem of identifying standards of review in “categorical in/exclusion” cases, see *supra* text accompanying note 22.

³⁰ These sharp differences are not confined to discontinuous tiers. Significant movement along a continuum will of course generate significantly varying burdens of justification.

³¹ See *supra* text following note 4 (referring to discussion of question-begging and circularity where standards of review are used).

rights, so it is argued, not because they're "really there" in the constitutional text but to buy into a standard of review that all but guarantees victory. Once again, however, increasing the likelihood that a rights-claimant will prevail this is not an objection to using named standards of review: it is part of the *very point*, of recognizing constitutional hierarchies of value and applying them in various regions of constitutional adjudication.

- Second, the initial step [i]—that of claims characterization—implicates huge hunks of constitutional theory concerning the nature and status of "specifically" mentioned rights, implied rights, and of equality claims. The need for claims characterization is driven by the previously derived hierarchy of legal relations and underlying constitutional values.³² The nature of and justification for ways of taking this step has been a major component of legal scholarship for decades.

- Third, the inquiry into the intrusion on the claimed interest raises several necessarily connected questions. Is there a *de minimis* threshold below which the impairment doesn't count? Or do we just (very roughly) assign a degree of intrusion along some continuous scale via a finely calibrated standard of review?³³ (These questions apply to equal protection cases too, though the issues require some reformulation into equality language. Different kinds of classifications are graded for (dis)value, and the degree to which the (dis)preferred classifications have been directly or indirectly made must be specified.)³⁴

- Fourth, as suggested, stage [iv] in the argument sequence above is what is most often identified with the phrase "standards of review." If no specially protected interest has been invoked, or it has not been seriously impaired or threatened,³⁵ the weak-to-nonexistent "rational basis" standard of review applies. (Even that standard, however, can be taken to have some independent punch because the government's goals must be legiti-

³² Except for the limiting (and generally absurd) hierarchy requiring that one party or claim always, and absolutely, trumps all others.

³³ See *supra* text accompanying notes 13-17 (discussing the critique of multi-tiered standards of review).

³⁴ Dealing with this would unduly expand this essay.

³⁵ See, e.g., *Whalen v. Roe*, 429 U.S. 589 (1977) (holding that security for a database containing information about patients' use of drugs having both lawful and unlawful markets avoided threats to any informational privacy interests, and also that no threat to privacy as independence in making certain important decisions was shown).

mate, and legitimacy does not depend exclusively on issues of fundamental liberty interests or (semi-)suspect classifications.)³⁶ But if a specially protected interest is shown to have been impaired to a sufficient degree (which cannot be precisely specified), then “heightened scrutiny”—strict or intermediate—is applied. The operational effect of this is to impose a serious—often unsustainable—burden of justification on government to show why the intrusion or mal-classification is permissible. The more rigorous the review, the likelier it is that the rights/interests/equality claimant will prevail. (What is entailed by “review” and “burdens of justification”—in our biomedical context, at any rate—will be discussed below.³⁷ The point of the later discussion will be indicate why, in many situations, we will have to reconstruct or reinvent standards of review to accommodate new circumstances.) This stage thus involves much the same heavy-duty probing required by characterization of interests, but with a focused concern on countervailing government interests. (To be sure, the characterization stage is likely to involve or even require looking ahead to justificatory arguments, as we saw.)

The reference in the preceding paragraph to “often unsustainable” burdens of justification requires comment. When the burden on government to justify, say, regulating the content of speech—seems impossible to meet, observers often denounce the use of standards of review as conclusory and misleading. But this is itself conclusory and misleading. The constitutional hierarchy of values, as we now know it, places immense value on freedom to select whatever content we want for speech. Some restraints on content regulation will in fact *never* be justified; any circumstances that *might* justify it are wildly improbable. Imagine, for example, a city ordinance forbidding persons from commenting favorably in public for a on the writing of Jane Austen. There is nothing *inappropriately* conclusory or otherwise irrational in saying that, for all practical purposes, such interference with speech content will never, ever be justified within the U.S. constitutional system as we know it now. This is the result of the value placed on speech, not the un-

³⁶ Finding examples of this argument poses particularly difficult interpretive problems. *See, e.g.,* *Romer v. Evans*, 517 U.S. 620 (1996) (striking down state constitutional amendment prohibiting all governmental action, at any level, that is meant to protect gay persons).

³⁷ *See infra* text accompanying notes 68-106.

wanted outcome of a mistakenly conceived standard of review that imposes impossible burdens on government to justify its actions. The practical impossibility of finding circumstances that would justify suppression of praise for Jane Austen is exactly what one would expect in a regime of strong speech protection.

For completeness, I note that, to reach an adjudicatory outcome, there must be at least a minimal hierarchy—i.e., *some* ranking that allows for placement of burdens and formulation of presumptions, in order to specify a default winner.

- Fifth, the general argument structure [i]–[vii] above (or parallel structures in other areas of constitutional dispute)³⁸ is required for *any* constitutional litigation. All such disputes require characterization of competing claims; inspection of harms to various interests, whether of individuals or governmental units or levels; and the use of some sorting mechanism that explains how to assess the competing claims so that an outcome can rationally be reached. Standards of review are involved in *any* constitutional adjudication, because *all* require stages of characterization³⁹ and *all* require specification of rules (whether dubbed “burdens,” “presumptions,” or anything else) governing who must show what to accomplish which outcomes.

- Sixth, on the role of biomedical technology and bioethical problems in investigating standards of review: The point made earlier is that bioethical disputes may impel (if not force) us to ask foundational questions about standards of review and their operational meanings. We will have to become more sophisticated in formulating and using them because they implement the recognition of rights, interests, powers (and so on) in novel circumstances, both when private parties contest government action and when governmental branches and levels move against each other.

(b) Characterizing standards of review

As we saw, a broad understanding of standards of review identifies them with the overall argument structure that directs

³⁸ See *supra* note 22 and accompanying text (referring to separation of powers and federal /state conflicts).

³⁹ Of course, the point applies to the planks of any argument—“Socrates is a person”; “fetuses are not persons”; “in forcing women to provide ova, the State of New York unjustifiably impaired constitutionally protected reproductive autonomy.”

us to search the text for hierarchies in legal relations, to take them seriously, and to act accordingly by formulating and using specific standards of review. More simply, the broad sense of “standard of review” (which comprehends all the narrower ones), says “sort values and act accordingly.”⁴⁰ The narrower sense refers to the “act accordingly” stages of argument. The phrase “sorting mechanism,” used earlier, can designate either the broader or narrower meaning of “standard of review”—the “meta-” or “second-order” argument as opposed to its “first-order” specific assignment of burden stage. In the broader sense, standards of review direct the very search for rights and interests and their rankings *inter se*. In the narrower sense, standards of review are confined to the argument stages [i]–[iv], or to [iv] alone—the particular assignment of burdens of justification after the rankings are made.⁴¹ The ambiguity, though inevitable, is not very important. Characterization (and resistance to particular characterizations) always looks ahead to—and in this case is driven by—the consequences of sortings that entail the assignment of (un)desired burdens. The full operation represents a logically (if not temporally or consciously) sequenced and unified process.

There is a possibility that the broader notion of standards of review will be conflated with that of constitutional interpretation itself. To deal with this, I suggest it is clearer to say that constitutional interpretation, whatever drives it, leads to the discovery or recognition of hierarchy, and thus generates both global and particular standards of review. (And the expectation of finding hierarchy affects interpretation; there are no easy roads here.) The phrase “standard of review” can for our purposes safely be taken to designate either [i]–[iv] or just [iv], but nothing more global, unless otherwise indicated. The prior stages of constitutional analysis are matters of interpretation at the threshold—though the interpreters are looking ahead to identifying and using standards of review.

⁴⁰ Recall the importance of the reference to the process of grading interests in defining “standard of review.” See *supra* note 19.

⁴¹ To some extent, the problem of separating “stages” of argument depends on the scope of the propositions we choose as premises. Compare “when faced with a constitutional conflict you must search for interests of high rank” with “because you are now faced with a constitutional conflict, to decide it you must begin this search, and to complete it you must inspect matters of lexical understanding, framers’ intent, audience responses, tradition, history, custom....” It doesn’t matter much, for present purposes, where the “global” standard of review ends and the “specific” one begins.

So, the argument stages [i]–[vii], taken seriously,⁴² are a loose set of instructions⁴³ that direct courts (and other constitutional interpreters—mainly legislators and other government officials or entities)⁴⁴ to characterize and sort disputes, and then to impose appropriate presumptions and instructions for overcoming them. The installation of the presumption and the specification of how to overcome it are the principal constituents of a specific standard of review. As we saw, this is the outcome of the general directive (the global standard) to find or determine characterizations of claims, to rank them, and to apply the ranking.

For example, for a state to force medical treatment on a competent person arguably impinges on a fundamental or important liberty interest in—things get still fuzzier here—personal security, or bodily integrity, or mental integrity, or “privacy.” This cannot constitutionally be sustained unless government shows that impairing the interest is at least a substantial factor (perhaps a necessary one) in promoting a significant (perhaps compelling) community interest.⁴⁵ All the normative and related empirical difficulties, including foundational questions of constitutional jurisprudence, are theoretically filtered through this stage, followed by the outcome.

(c) Applying the standards

Standards of review are rules directed primarily but not exclusively at courts.⁴⁶ They spell out the logically connected

⁴² “Taken seriously” can be taken as a text-derived meta-instruction, adjuring us to implement the specified stages. It too is part of the standard of review.

⁴³ It is tempting to invoke the idea of an algorithm here, but algorithms, in the technical sense, are not simply sets of general instructions for how to perform given tasks—they are a certain kind of instruction, one that satisfies requirements of rigor and certainty that legal analysis generally cannot (and is not meant to) match. See generally DAVID BERLINSKI, *THE ADVENT OF THE ALGORITHM: THE IDEA THAT RULES THE WORLD* (2000) (discussing the history of the algorithm and its modern applications).

⁴⁴ I adhere to a “thin” interpretation of *Marbury v. Madison*, 5 U.S. 137 (1803), not the *Cooper v. Aaron*, 358 U.S. 1 (1958), version, which seems to assign excessive authority to the Supreme Court as the sole and final determiner of constitutionality.

⁴⁵ See *infra* notes 117-173 and accompanying text (discussing *Washington v. Harper*, 494 U.S. 210 (1990), and *Youngberg v. Romeo*, 457 U.S. 307 (1982)).

⁴⁶ Some may prefer to restrict the term “standards of review” to formal adjudication by courts. It makes sense to do so because courts—trial or appellate—operate under constraints that do not limit legislators or other parties. The reason for con-

conclusions (a) that constitutional interpretation leads to recognition of hierarchies in claims of rights or interests; and (b) that the particular locations of interests within a hierarchy dictate what stance the court (or other reviewer) is to take on given kinds of claims involving those interests; and (c) that this stance consists of imposing particular burdens on particular parties (government and private) to show certain things.

How these showings are to be made will obviously never be completely specified. However, as the case review below suggests, there will be strong pressures for important incremental specification of the commands of standards of review, and thus of their interrelationships and interior structures. What are the elements of interest-recognition and interest-sorting? What are we to say about a claimed right to use human embryos for biomedical research or simply to discard them? What counts as a sound argument for or against such recognition and ranking? What existing constitutional boxes or spaces are relevant? What counts as a sound justification for impinging on one interest or another? What may or must a court look to or investigate to answer these questions? What must it avoid looking to? Is it to "defer" to factual findings by experts? (What does that mean—installing presumptions of correctness, or automatically accepting the findings, or what?) Should or must it investigate the methodologies of studies, or certain aspects of these methodologies? Can or should it institute its own investigation of "legislative facts" and "legislative values"?⁴⁷ How do our standards of review help us to establish value premises (or empirical accounts of what is valued by whom in what ways) in a constitutional argument? This is a particularly urgent matter when the nature and proper application of the values at stake are contested and their status in the community's norms are uncer-

sidering a broader sense is obvious, however: constitutional analysis by *any* party, governmental or private, will be incomplete unless account is taken of constitutional hierarchies, which are the foundation for standards of review.

⁴⁷ See generally Karst, *supra* note 12. Legislative facts, loosely put, concern factual issues taken into account or relied on by the legislature. "Legislative values," for present purposes, are value issues or conclusions taken into account or relied on by the legislature. See *id.* at 88 (mentioning the term "legislative values"). I do not pursue the evidentiary issues concerning expert testimony on legislative or adjudicative facts, beyond asking some general questions. See generally Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993) (interpreting Federal Rule of Evidence 702 concerning the admission of expert testimony based on scientific techniques and displacing the prior "general acceptance" test).

tain—as they are likely to be for out-of-the-box disputes?—We already know that motherhood and apple pie are wonderful, but what *is* motherhood when the woman who gives birth to a child is not the ovum source and the woman who is the ovum source does not give birth to her?⁴⁸

The question of how to discern and grade constitutionally protected interests has long been with us, and I have no intention of revisiting the underlying hermeneutic issues beyond the earlier comments on the axes of interpretation. But the application of these interpretive issues to problems that seem to escape—by large margins—existing constitutional abstractions involves unusual difficulties. The uncertain relationship between, say, human cloning and the generally acknowledged (though uncertain) constitutional protection of procreational rights is another obvious example.⁴⁹ Talk of comparison to a paradigm case of regular, natural, run-of-the-mill reproduction doesn't get us very far when the very identification of the material features of the paradigm is part of what is contested.⁵⁰

If we move beyond characterization of claims, we immediately encounter the related but distinct question of what counts as a justification for interfering with what the claimants want to do or avoid. We of course already know that this justification stage will involve normative/constitutional questions about how to deal with both empirical and value (and “mixed”) questions. And we know equally well (despite arguments against “balancing” in various contexts) that we must provide some account of how, in principle, to view the array of government interests *when pitted (if not “weighed”) against* those of the claimants. This argument stage has to be addressed, whether the argu-

⁴⁸ See, e.g., *Johnson v. Calvert*, 851 P.2d 776 (Cal. 1993) (holding that in a gestational surrogacy case, California's Uniform Parentage Act should be read to identify as the child's “natural mother” the woman who intended to procreate it and raise it as her own).

⁴⁹ See generally JOHN A. ROBERTSON, *CHILDREN OF CHOICE: FREEDOM AND THE NEW REPRODUCTIVE TECHNOLOGIES* (1994) (discussing how technology has shaped the reproductive enterprise). Although the constitutional status of reproductive rights and its application to human cloning remain unclear, there is no serious uncertainty about whether the cloned offspring are persons. Some may think otherwise, however. See, e.g., Jean Bethke Elshtain, *Ewegenics*, *NEW REPUBLIC*, Mar. 31, 1997, at 25, 25 (stating that “clones aren't fully human”).

⁵⁰ See Shapiro, *supra* note 3, 249-54 (discussing the problem of identifying the “defining” features of a supposed paradigm).

ment's configuration sets up a balancing or a trumping⁵¹ of one interest against another.

All these issues are partially constitutive of the operational meaning—at least for courts—of using given standards of review. Whoever else engages in constitutional analysis (legislators or executives, for example), courts face their own distinctive tasks because—well—courts are different. At some point, one must ask what procedures a trial or appellate court must, may, or should follow in finding legislative and adjudicative facts, and in making what seem either to be empirical judgments about community values or “independent”⁵² judicial value judgments. It is this last inquiry into operational meaning that will occupy most of the rest of this paper.

C. The critique of standards of review—in brief

It seems unlikely that, after being alerted to it, one would deny the conceptual link between hierarchies of constitutional value and standards of review. The matter seems simple and obvious. In fact, many (I do not know the exact proportion) contemporary constitutional adjudications explicitly invoke one or more standards of review. (They are of course part of the decision's infrastructure, whether explicitly so or not.) So why is attention to standards of review so often put down? Perhaps because they seem to promise far more than they deliver—and indeed, they do not deliver the impossible: neatly packaged resolutions to all constitutional disputes. The standards are there and may help one to “get started” and to continue once on the road—but it may be a long way toward closure of the argument. Standards of review—whether viewed as sharply differentiated or as continuous functions varying along one or more gradients⁵³—are necessary but not sufficient for closure. Despite the

⁵¹ In acknowledging the disputes about balancing and other aspects of constitutional adjudication, I do not necessarily endorse all alternative descriptions and recommendations as plausible. In many cases, critiques of balancing lead to proposed replacement processes that also involve balancing, rather than categorical trumping.

⁵² This is a tricky concept. For example, courts might believe (or we might believe) that they “embody” the community's basic values, whether they consciously attend to finding them or not. Should we view such judicial decision-making as not constituting “independent” value analysis because of such “outside” influences? This doesn't seem an apt description across the board: even though no one receives value attitudes and beliefs *ex nihilo*, most of us think that value analysis is often rightly called “independent.” See *infra* text preceding and accompanying note 93.

⁵³ See *supra* text accompanying note 30.

obvious fact that they take us so far and only so far, they are sometimes dealt with as if they were full solutions to complex problems and invoked (deliberately or not) as rhetorical covers for question-begging.⁵⁴ They are wrongly assumed to do all the “work”—but a conclusion drawn in advance is the wrong kind of work.

But the complaint linking standards of review to question-begging and “deciding in advance” can be carried much too far. The key to seeing the overstatement is to ask just how the silent *a priori* “decisionmaking in advance” (to be rationalized later by invoking a standard of review) was done in the first place. How did a court (or other constitutional analyst) ever come to the idea that the outcome must be this or that? Again assuming good faith, a legal professional’s schooled intuition incorporates and is informed by the constitutional hierarchy as she perceives it, and her decision making process moves in the pre-patterned grooves defined by the applicable standard of review (whatever she calls it, assuming she even consciously recognizes that it’s *there*). It is far too loose to view this process as a suspect form of stealth adjudication. Characterizations are required at the threshold and all along the way, and making them under the aegis of standards of review is not rightly viewed as circular; whatever one calls the process, it is necessary because it is constitutive of constructing a constitutional (or any) argument.

⁵⁴ For this and other criticisms of the multi-tiered system of standards of review, see Shaman, *supra* note 17. “Categorical balancing exacerbates the rigidity of the multi-tier approach by increasing its propensity to predetermine the result of cases. The *a priori* labels ascribed to governmental and individual interests tend to preordain their constitutional fate. Through the categorization of governmental and individual interests, their evaluation is diffused, and their relative merit is prejudged.” *Id.* at 175.

I believe that this is an overstatement. For one thing, threshold characterization of claims is not suitably described globally as *a priori* “labeling” or naming. But there is no doubt that any conceptual system can be misused or abused, and some are indeed likelier candidates for such malfeasance than others. So it is right to call attention to this, as Professor Shaman does. See Hans A. Linde, *Due Process of Law-making*, 55 NEB. L. REV. 197, 203 (1976) (citation omitted), arguing that “the two-tier model has its price. Since it requires the reviewing court to accept or reject the demand to exercise strict scrutiny, it does not let the court use equal protection precisely to avoid committing itself on the underlying constitutional claims. It denies the court one tool of ad hoc case-by-case disposition that is always a preferred judicial option.” The idea here seems to be that two-tier scrutiny in equal protection litigation may cause a court to prejudice a substantive constitutional issue by having to select or reject strict scrutiny.

In constitutional adjudication, a standard of review is rightly viewed as outcome determinative only in the sense that the standard's embedded assignments of presumptions and burdens of proof or persuasion skew and channel the adjudicatory process, in many cases "fixing" the outcome. This is the exactly the sort of thing standards of review are meant to do. When a serious burden of justification is imposed on government and government fails to present an argument in defense, it loses; on the other hand, if a claim is not one that imposes such a serious burden on government, the claimant is likely to lose. This sort of decision making process is far from being circular or clumsy. What critics call "question-begging" may be the intuitive non-articulated stage of constitutional analysis that is shaped by a judge's understanding of the hierarchy of constitutional values and its realization through applying standards of review. Of course, it would be foolish to deny that some decisionmakers, possibly (though not necessarily) acting in bad faith, decide what they want without attention to constitutional values and then make up a story involving standards of review. Indeed, it may even be routine—but this is not attributable to the baleful existence of standards of review.

Nevertheless, the understandable complaints about the obfuscating effects of some uses of standards of review may have been so taken to heart by some U.S. Supreme Court Justices (Justices Stevens and the second Justice Harlan come to mind)⁵⁵ that they often avoided any mention of standards of review, despite the logical necessity of using them, even if invisibly.

But it is a mistake for anyone, Justices or commentators, to hide the use of standards of review. Specifying a standard of review *conveys information* on constitutional valuation precisely because it announces where the argument-maker locates the legal relations under analysis within the constitutional hierarchy. Standards of review are thus decision making rules that implement our prior identification of constitutional values, ap-

⁵⁵ See, e.g., *City Council v. Taxpayers for Vincent*, 466 U.S. 789 (1984) (Stevens, J.) (holding ordinance that prohibited the posting of political campaign signs on public property as constitutional); *Cohen v. California*, 403 U.S. 15, 26 (1971) (Harlan, J.) (holding that the State may not, absent a "more particularized and compelling reason" than it had presented, make the "simple public display" of a single four-letter expletive a criminal offense). Justice Harlan's use of the term "compelling," however, seems to have signaled his use of strict scrutiny. In minimizing talk about standards of review, the Justices may have had reasons other than obfuscation in mind, but I pass this by.

plying—and possibly “reconciling”⁵⁶ them—in individual cases or classes of cases. They are thus clarifying, not obfuscating, when properly acknowledged and applied in light of their functions and limitations. In this broad sense of “standards of review,” they can be viewed (*very*) roughly as second-order “algorithms” that tell us how to address a constitutional dispute and ultimately assign a particular (first-order) standard of review for specified sorts of burdens on constitutionally based legal relations. The broad sense of “standards of review” thus coalesces into a general instruction on how to start, move, and finish a piece of constitutional adjudication (or other tasks involving assessments of constitutionality), given a constitutional hierarchy of values. Depending on how abstractly the global standard is framed, one might think that there is only *one* global standard of review, but this is a matter too slight to deal with here, except to recall that at truly dizzying levels of abstraction (“take everything material into account and do your best”) we are no longer dealing with standards of review.

This notion of standards of review as the infrastructure of *all* arguments that recognize and implement constitutional values may seem too broad to convey any information. This breadth, however, reflects the two senses of the phrase already marked out: standards of review as universal, omnipresent rules about how to construct *any* particular constitutional argument using a “specific” standard of review; and standards of review as one of these specific standards. This leads one to say, loosely, that using a—or *the*—global standard of review (the entire sequence of steps from discerning a constitutional dispute to the final outcome) is directed toward identifying narrower standards of review that reflect important constitutional value rankings and in turn lead one to an outcome.

These latter, more specific standards are supposed to embody at least rough directions on what to look for as possible bears of strong constitutional value (e.g., “fundamental liberty interests,” “suspect classifications”), and on how to structure the succeeding analysis—identifying and evaluating countervailing interests, and determining how to evaluate and “accom-

⁵⁶ I use “reconciling” as a neutral term to avoid (for now) that idea that values are not necessarily always “balanced” or “weighed”; it is theoretically possible that some claims of right trump (or nearly so) all countervailing considerations.

modate” the constitutional values at stake.⁵⁷ All this, taken together, follows from the earlier stage of recognizing hierarchies of interests in the constitutional text in the first place. And through all stages, the interpreters/deciders continue to work with the interpretive axes that previously revealed a constitutional hierarchy. In doing so, they locate what particulars they have before them within this hierarchy, and press the interpretive paths still further through a series of linked and overlapping steps, illustrated below in the review of several cases.⁵⁸ In these successive steps, the decision makers are pushed to consider increasingly complex and detailed fact and value⁵⁹ issues about how the matters before them fit into the constitution’s value hierarchy. How, in principle, are they to address claims about the adjudicative specifics—for example, the exact mechanisms and effects of particular technological applications, and the appropriate means open to them as decisionmakers to try to (dis)confirm the various claims. Without these specifics, the decisionmakers may not be able to rationally accommodate the values and reach a result. (Whether they may in the process craft “new” members of the constitutional hierarchy of legal relations—new fundamental liberty interests, new threats to equality—is too complex a matter to go into here.)

Unless these elements of constitutional analysis are used and understood (consciously or otherwise), a decisionmaker’s reasoning might not be channeled in accord with (at least her view of) the constitutional value hierarchy. Examining an account of her decision, then, would not reveal to the “consumers” of constitutional adjudication the nature and ranking of claims about constitutional legal relations—the rights, privileges, immunities, liabilities (etc.) set up among different entities and parties by the Constitution.

If the hierarchy is not made explicit by an account of its constitutional ordering—as by specifying the embedded standard of review—we could ultimately identify it on our own by

⁵⁷ I do not push any further the search for instructions on how to craft instructions on how to proceed in constitutional adjudication.

⁵⁸ See *infra* text accompanying notes 61-115 (discussing *People v. Woody*, 394 P.2d 813 (Cal. 1964), and *State v. Whittingham*, 504 P.2d 950 (Ariz. Ct. App. 1973), for an illustration of how to describe these steps).

⁵⁹ As I explain later, “value issue” may refer either to empirical questions about what people value or to moral valuation as such, as when we view courts (or certain others) as being required to make “independent” moral decisions. See *infra* text preceding note 93.

reading a body of opinions, if not solely the opinion at hand. But, rhetorical/political matters aside, there is generally little point in crafting opinions as puzzles for contestants and onlookers—and other courts—to work out.

So, standards of review (as understood here) are not useless and misleading anachronisms that generate (or are part of) circular arguments; nor are they optional instruments for us to use or not use as our tastes dictate. They are *there*—immanent in our recognized hierarchies. If writing them into an explicit argument leads a reader to think the question was “begged,” so be it. Their use is nevertheless no more question-begging than is the use of any sorting device, *provided* that such devices—presumptions and burdens of justification—are derived from rational interpretive moves that lead to the underlying value hierarchy that calls for these sorters. Formulating initial hypotheses about proper resolution of a constitutional dispute is not only not automatically circular, it is necessary if good faith⁶⁰ rational decision making is to proceed at all. What looks like question-begging may well be the result of applying interpretive criteria to a text.⁶¹

Summary: Standards of review, I have argued, are not just the sports of courts and writers too lazy to do the heavy labor of constitutional analysis. Indeed, one can't *do* this labor without them. They are doctrines (or meta-doctrines) derived from the Constitution as we have interpreted it—interpretations that contain rankings of different sorts of interests that persons or governments and their agencies might claim. For present purposes, I do not ask how this is shown, nor why *some* hierarchy is established at all. (What would it mean to *deny* that there are constitutional hierarchies?) I take the existence of hierarchy (though not particular hierarchies that partisans might press) as given, without reviewing the antecedent interpretive moves or

⁶⁰ This is still another slippery qualification that I leave aside, except to suggest one obvious counter-example—deciding a constitutional dispute by use of mechanisms of chance. Then again, when all possible outcomes seem to be in constitutional “equipose,” what’s a good faith decisionmaker supposed to do?

⁶¹ Of course, argument soon stops: we do not inquire after further foundations in an infinite regress. If all stopping points represent circular arguments, then all arguments are circular. Those who protest using standards of review and deny that they are using them in constitutional argumentation or judging are wrong—again, assuming they are proceeding in good faith. These standards embed the ordering of basic values we have interpreted the Constitution to contain. Still, after all this, we need to consider just what a standard of review is.

their justifications. These prior moves, however, go to what the Constitution's text and structure mean. To canvass fully the possible lines of interpretation would require several steps: applying the interpretive axes mentioned earlier; relating them to the standard interpretive canon used by courts and commentators—Framers' intent, history/tradition/custom/practice, lexical meaning, (independent?) normative analysis, and so on; using the results to reach conclusions about the what the Constitution protects and how strongly; and arriving at bottom lines in particular cases.

As I said, all these paths, separately and in various permutations, converge in showing that the Constitution establishes/recognizes rank-orderings of legal relations (although this does not exclude the possibility of "ties"). But the only matter probed here, and briefly at that, is to consider what it means for constitutional theory to say that the Constitution recognizes or establishes hierarchies of legal relations that must be identified and reconciled in particular situations. Part of what it means is that standards of review rule. (Sooner or later, the vernacular seeps down into academic discourse.)

III. MORE ON HOW STANDARDS OF REVIEW EMBED BASIC VALUES: CASES ILLUSTRATING THE CONSTITUTIONAL DEMANDS OF BIOETHICAL PROBLEMS.

A. In general

The thin, simple claim here is that resolving constitutional disputes arising from some uses of biological technologies will take us to the present limits of our understanding of standards of review; and that once we reach those limits we may want—or be driven—to make the standards more responsive to the increased pressures placed upon them. This involves raising questions that ordinarily need not be pressed in constitutional adjudication, but that may be harder to avoid as technological uses expand. Whether the outcome will be a reconstruction or simply a more detailed specification of the operational content of standards of review, the questions will sooner or later have to be put and answered. Although novelty is hardly novel and the Constitution has faced out-of-the-box problems many times

over, there is novelty and there is novelty; perhaps some cases will even escape the out-of-the-box box.

In any case, the more we know about standards of review, the more we know about the Constitution and the way in which it embeds basic values (and vice versa—cycling is inescapable here). But just what is it that biomedical-technology-inspired problems can tell us about the Constitution that we didn't already know? And what can they tell us that we don't know about the Constitution that we didn't already know we didn't know? As we move on to review actual and possible cases, questions will come up about what courts should or must or can't do in adjudicating disputes. They may have to determine whether the applicable standards of review directly answer this, or at least encompass some range of answers.

A government, for example, may claim a strong interest in regulating dangerous behavior by inmates of prisons and mental hospitals, and urge that the most efficient way to do this is to administer mind-altering drugs that seem to be safe and effective. Would these inmates be on sound ground in claiming to have a fundamental liberty interest in avoiding such intrusions into their minds and bodies? Assuming they do, suppose the government responds that the drugs "work" to promote compelling interests in institutional and public safety, and in rehabilitation and/or restoration of impaired mental functioning, and that they do so without undue risks to the inmates or anyone else. How far may or must the court probe in testing claims of safety and effectiveness? (Leave aside the strongly linked value premises for now.) Is the court to vet the methodologies of the studies, from design and data collection and statistical analysis to findings? If the government simply asserts its views on safety and effectiveness without offering evidence, is the court to require a showing and rule against the government if it fails to produce scientific evidence? Or fails to produce enough credible scientific evidence? Or should the court investigate the scientific issues *sua sponte*? In what ways? Can it do so without crashing the boundaries of separation of powers in a republic?

To work this out, turn to standards of review as imposed by the Constitution on courts. This is of course the common understanding of "standards of review." Lawmakers, officials, and armchair theorists who pursue constitutional analysis will have to apply these (or *some*) standards of review in certain ways—whether by thought experiments or empirical or other inquiries.

But trial and appellate courts are constrained in constitutional (or any) adjudication to adhere to principled limits on the inquiries and investigations they can mount. Legislators, although they may recite the same canonical standards of review the courts use, can and often do conduct inquiries or investigations of far greater scope and intensity than do courts (though possibly of no greater rigor). On the other hand, courts don't appear so tightly limited when they "take over" the administration of prisons or school districts or conduct Very Large Cases—mass torts, Microsoft's encounter with antitrust laws, and so on. (This is an observation, not a complaint or endorsement concerning such judicial ventures.) Such cases (not considered here) are, in part, illustrations of how some courts implement the standards of review they adopt—which are probably forms of strict scrutiny—in cases of racial or gender discrimination, or (though the standard is not usually named) in those involving cruel and unusual punishment, and so on.⁶²

B. Some demanding cases

The task here is to consider how the cases discussed illuminate constitutional adjudication and its embedded standards of review. In doing this, some of what is said may seem to be directed more to constitutional interpretation generally, rather than just to the idea of standards of review. This may be, but, as I have indicated, the standard axes of constitutional interpretation are what take us to the idea of standards of review in both the generic and specific senses. In U.S. constitutional law as we know it, there is no gulf between the topics of constitutional adjudication (on the one hand) and standards of review (on the other).

1. *People v. Woody*⁶³

Two older cases nicely set up or suggest several useful lines of inquiry into constitutional adjudication. These cases may at first seem odd choices because the technologies involved

⁶² See generally OWEN M. FISS & DOUG RENDLEMAN, *INJUNCTIONS* 528-830 (2d ed. 1984) (discussing "Government By (Structural) Injunction").

⁶³ The following discussion is adapted from a parallel account in MICHAEL H. SHAPIRO, ROY G. SPECE, JR., REBECCA DRESSER & ELLEN WRIGHT CLAYTON, *BIOETHICS AND LAW: CASES, MATERIALS AND PROBLEMS* Part III (2d ed. forthcoming).

are far from exotic—but technologies don't have to be exotic to raise important issues.

First, a word on the current constitutional status of *People v. Woody*.⁶⁴ *Woody* used the standard of review governing free exercise of religion cases at the time—strict scrutiny: the intrusion on the interest was said to be constitutionally justified if and only if it was necessary to further a compelling interest. But in *Employment Division, Department of Human Resources v. Smith*,⁶⁵ the Supreme Court ruled that only government action that purposely targets religious practice will trigger strict scrutiny. If there is no such purpose, then any impingement on religious exercise is an “incidental” burden, and as such does not trigger heightened scrutiny of any sort, never mind the strictest form. Whether *Woody* still stands under California law is unclear.⁶⁶ The defendants relied on both the U.S. and California constitutions, but the exact terms of the opinion focused only on federal constitutional constraints and do not expressly state whether the state constitution was an independent, adequate ground for the decision. It probably wasn't, but the question needn't be pursued further here.

On to what happened in *Woody*—at least as described by the court: A group of Navajo Native Americans were convicted of violating a state ban on the unauthorized possession of peyote. Despite its ambiguous doctrinal status, *Woody* remains interesting because of the judicial techniques used in resolving the defendant's appeal. Although it does not stand out as a “biological technology” case, it works for present purposes because it is one. It involves the deliberate ingestion of mind-altering substances to induce (relatively) specific states of mind (and possibly various associated behaviors) that are intrinsically and instrumentally valuable, given the religious beliefs of the users. Some may think this reflects too broad an understanding of “technology”: the mind-altering process is simple (the opinion does not indicate whether the peyote buttons are processed

⁶⁴ 394 P.2d 813 (Cal. 1964) (requiring California to allow members of the Native American Church to use peyote in their religious practices).

⁶⁵ 494 U.S. 872 (1990) (*Smith II*) (stating that it is permissible for a state to prohibit the religious use of drugs if a public policy exists promoting a valid public interest).

⁶⁶ *But cf.* *Donahue v. Fair Employment & Hous. Comm'n*, 2 Cal. Rptr. 2d 32, 39 (Ct. App. 1991) (viewing *Smith* as contrary to *Woody*, but noting that *Woody* invoked the state as well as the U.S. Constitution). This case is not citable pursuant to California Rules of Court.

after removal from the cactus plants) and also covers using drugs for recreation. Not all technologies are recent or complex, however, and many are often used for entertainment.

The state had stipulated at trial that the defendants and others were performing a religious ceremony of the Native American Church that involved the use of peyote. We might ask, as students of professional advocacy, why the state so stipulated. How clear was it that a "religious exercise" was in fact involved, at least on that particular occasion, and on what meaning of "religious"? The ease with which everyone slid over this hurdle—barely recognized as one—eliminated certain question-types that will be critically important in biological technology cases to come. These questions concern the threshold characterization stage—the critical layer of analysis necessary to determine what sort of right or interest is claimed and what its constitutional strength is. This is a major question even if we view ourselves as dealing with "specifically protected" rights such as free exercise of religion and free speech.

How does this bear on *Woody*? For one thing, the actions, events, or circumstances in question might not constitute a religious exercise or speech within the First Amendment's meaning. Of course, the difficulties in distinguishing matters of religion from "other" matters were not just recently discovered. It is by no means clear, for example, that certain forms of conscientious objection to military service are best described as matters of religion, despite some broad opinions issued by the Supreme Court.⁶⁷ Such major conceptual challenges occur in every branch of constitutional law and indeed wherever abstractions are in use, which is everywhere. Think of some well-known characterization challenges in free speech cases: although some forms of communicative conduct not involving "language" (as usually defined) have been viewed as forms of First Amendment speech (burning draft cards and flags, for example⁶⁸), others have not (political assassinations⁶⁹), although no coherent

⁶⁷ See, e.g., *United States v. Seeger*, 380 U.S. 163 (1965) (finding a broad understanding of the idea of belief in a "Supreme Being" under § 6j of the Universal Military Training and Service Act, which provides for exempting a draftee from military service based on his religious beliefs); *Welsh v. United States*, 398 U.S. 333 (1970) (also finding a broad meaning for "religious" training and belief).

⁶⁸ See, e.g., *United States v. O'Brien*, 391 U.S. 367 (1968) (draft card burning); *Texas v. Johnson*, 491 U.S. 397 (1989) (flag burning).

⁶⁹ See *Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1984), where the Court assumed *arguendo* that sleeping in a park might be a form of speech

theory for such (non)characterizations has emerged from the Court.

In any event, characterization of one's interest may well be crucial to whether one's claim prevails. Whatever else they may disagree on, professional observers of constitutional adjudication know quite well that characterizations generating heightened scrutiny will in most cases⁷⁰ immediately displace the starting advantage for the state and replace it with a major advantage for the claimants. But—a point often undervalued—the burden of persuasion is on the claimants to show that their proffered constitutional characterization is correct.⁷¹ The contours of this burden have never been clearly specified, however. This is partly because it doesn't always come up: although there are very troublesome doctrinal areas (e.g., the “non-linguistic conduct as speech” cases, to put it loosely), we generally know what we are dealing with—religion, speech, abortion, and so on. But when the issue of burden-to-establish-characterization does come up, it may *really* come up—as the first Supreme Court abortion case illustrated. The contest over whether abortion is a form of liberty (or, inaptly, privacy) that triggers heightened scrutiny is a characterization battle that goes on and is unlikely ever to cease.⁷²

within the First Amendment's meaning, but ruled that even under what was in effect an intermediate form of scrutiny it could nevertheless be prohibited, given the circumstances. Justice Marshall dissented, and in passing stated that political assassinations could be a form of speech, but also that compelling state interests in preserving life would override the speech claim. *Id.* at 307-08 (Marshall, J., dissenting). It is unlikely the Court will ever accept this characterization, even though the bare outcome—political assassinations remain punishable as criminal homicides—concurrs with the result of the refusing to call them forms of speech.

⁷⁰ The “almost always” qualification is to cover the possibility of non-minimal applications of the rational basis test—rationality “with bite.” This standard is said to fall short of the “intermediate scrutiny” occasioned by semi-suspect classifications. *See generally* GUNTHER & SULLIVAN, *supra* note 22, at 646-47. In such cases, the default presumption of constitutionality of government action seems weakened, but perhaps not displaced by the opposing presumption.

⁷¹ *See Clark*, 468 U.S. at 293 n.5 (explaining that it is the claimant's burden to show that the conduct is protected by the First Amendment). The issues involved may of course involve questions of fact (as in *Clark*) or conceptual issues (*Seeger* and *Welsh* (or both)).

⁷² *See generally* *Roe v. Wade*, 410 U.S. 113 (1973) (holding that the right to abortion is fundamental); *Planned Parenthood v. Casey*, 510 U.S. 1309 (1994) (holding that the liberty interest in abortion cannot be unduly burdened by government).

• *Characterization and reinforcement of norms.* An important point about characterization of constitutional interests may sometimes get lost, so I mention it here: a characterization (stage [i] in the loose argument-model above)⁷³ is chosen partly for its honorific or pejorative effects. These are perceptual effects and may have consequences for learning and behavior, although such claims are plainly very difficult—possibly impossible—to confirm.⁷⁴ One of the (possibly hidden) reasons that we have an explicit multi-tiered system of standards of review is precisely to generate such effects, which of course are strongly audience-dependent. For many, it is offensive to assert that abortion is a fundamental liberty interest—and for others, it is offensive to deny it. Sexually-oriented speech may be denounced as “not involving speech, just tawdry sex”—a conceptually odd remark that is partly explained by the reluctance to apply the honorific appellation “speech” to the offensive communication.

The point to take here is that awareness of the differing impacts of rival characterizations is a major aspect of disputes involving uses of biomedical technology. Consider whether germ line genetic control deserves to be viewed as constitutionally protected, at least to some extent, by viewing it as an aspect of “procreational autonomy” or of some other yet-to-crafted and similarly honorific category.⁷⁵ The characterization is so important that some opponents of germ-line alteration are likely to assert that such maneuvers “aren’t part of true human procreation”—a denial whose structure parallels that of, say, “burning

⁷³ See *supra* text preceding and accompanying notes 24-25.

⁷⁴ See generally Michael H. Shapiro, *Regulation as Language: Communicating Values by Altering the Contingencies of Choice*, 55 U. PITT. L. REV. 681, 685, 687 (1994) (discussing possible learning effects from observing or participating in social institutions and practices).

⁷⁵ Although it may seem far afield to cite *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819), educational or reinforcing effects were obliquely referred to in Chief Justice Marshall’s analysis of the Necessary and Proper Clause of U.S. Constitution, Article I, Section 8. During the earlier part of the opinion, Marshall concluded—without reference to this Clause—that a relatively simple doctrine of implied powers sustained Congress’ powers to create a national bank. When confronted with the obvious question about the Clause’s redundancy, he conceded this possibility, but concluded that the Clause helped resolve doubts about the existence of implied powers in favor of recognizing them generally, and in recognizing particular claims of implied powers. See *id.* at 420-21. In this light, the Clause is a rhetorical device meant to embody an interpretive canon.

flags isn't speech," or "Muggles [persons who can't do magic]⁷⁶ aren't really human persons."

These points about characterization are highlighted when *Woody* is paired with its "companion" case, *In re Grady*,⁷⁷ which involved a non-Native American who claimed his beliefs were religious. The California court, noting that there was a sixteen-year-old female guest sleeping in a bedroom (she was turned over to juvenile authorities), obviously thought little of Grady's claim, but nevertheless remanded his case for trial on the issue of whether his defense reflected a good faith religious belief and was not a cover for illegal conduct.⁷⁸

There are several questions here that are likely to be repeatedly raised in biological technology cases, and in trying to answer them, courts will be pressed to fill out their ideas of standards of review. The *Woody* characterization involves conceptual analysis that is heavily linked to ideas of tradition and custom generally, and to the collisions of particular traditions and customs with other, perhaps more dominant ones in a setting containing a variety of cultures. It may not even be clear whether there is an overarching tradition, or some meta-tradition governing matters of inter-tradition tensions. Many of the practices of the *Woody* defendants suggest the "closeness" of their peyote use to more familiar, majoritarian forms of religious practice. There is reference to the Almighty God and to enabling participants to "experience the Deity."⁷⁹ And although the comparison is a bit (but not completely) off, one thinks of sacramental ingestion of wine and foodstuffs. One might also think of other religious groups bent on entering mystical states of mind.⁸⁰ But peyote use also conveys images of partying and getting high for largely recreational or escape purposes. There is both a factual dimension (what exactly the peyotists were doing and why) and a conceptual dimension: can using drugs—rather than our own internal resources, possibly aided by group activity—be part of "religious practice" or "religious practice within

⁷⁶ For those out of the loop, see the sequence of children's books beginning with J.K. ROWLING, *HARRY POTTER AND THE SORCERER'S STONE* (1997). The text example is not a quotation.

⁷⁷ 394 P.2d 728 (Cal. 1964).

⁷⁸ See *id.* at 729.

⁷⁹ See *id.* at 817-18.

⁸⁰ See generally Walter Houston Clark, *Religious Aspects of Psychedelic Drugs*, 56 CAL. L. REV. 86 (1968) (discussing whether drugs create religious experiences and the possible legal issues raised by the use of these drugs).

the meaning of the First Amendment”? Is the lack of a tradition protecting the use of powerful psychotropic drugs (at least other than alcohol) for religious (or other nonmedical) purposes fatal to any characterization effort not backed by “history,” as with Peyotism? What “sub-traditions” in our heavily fragmented array of traditions might apply? And how—operating under a rigorous standard of review—are courts supposed to investigate and determine this? The *Woody* court presented a brief historical account of Peyotism as practiced by some Native Americans, but seemed simply to accept the defendants’ account *in toto* without serious examination or expressed reservations. Perhaps the court sensed that closer inquiry would be offensive to Peyotists, or to Native Americans, or to religious persons, or to everyone. But at least some methods of constitutional adjudication must be pursued even at the risk of offending some members of the audience.

Here, I make a quick forward reference in order to compare parallel questions: thought and speech may be heavily affected by ingesting substances to improve our memories or other intellectual functions. Is this form of consumption of drugs the *sort* of thing that counts as being intimately connected with speech, placing it within the coverage of the First Amendment?⁸¹ If it does, does it get strong, middling, or marginal protection? And from another arena: assuming reproductive autonomy is a fundamental liberty interest, are the various forms of surrogate motherhood to be characterized as *fully* protected by this constitutional category? What about cloning or germ line alteration?

An important generalization informs this forward look at biological technologies and constitutional adjudication. Life processes as we know them are going to be increasingly carved up and reorganized into other forms. These reorganized processes may involve any physiological functions, including those bearing on thought, behavior, and physical structure and ap-

⁸¹ See Michael H. Shapiro, *Legislating the Control of Behavior Control: Autonomy and the Coercive Use of Organic Therapies*, 47 S. CAL. L. REV. 237 (1974) (analyzing the coercive use of behavior control technologies and their impact on fundamental rights). I do not suggest, however, that ingesting psychotropic drugs is itself speech, although one might designate such ingestion as symbolic of something or other. (One might compare this to, among other things, political campaign expenditures and contributions.) There is, of course, a logical connection between speech and mental functioning.

pearance. The processes and their results may be viewed as falling far outside the material abstractions we now use as tools of thinking and feeling. If this is correct, then constitutional adjudication, and its necessarily included standards of review, are going to face increasingly complicated pressures, from the threshold characterization stage to the outcome.

Let us now finish the account of *Woody*, keeping in mind both the broad conception of standards of review as second-order directives instructing us to formulate the specific argument structures we know as standards of review.

First, a reminder: although the formal presentation of particular standards of review contains organized discrete stages of analysis, these stages are interlocked and hard to separate. For example, whether we assign the generally complimentary adjective "religious" to certain uses of mind-altering drugs depends heavily on whether we believe that significant interests are placed at risk by the claimed religious practice. Whether we become aware of these risks at earlier or later stages of analysis, we may ultimately decline to award a given characterization if we come to view the conduct as abhorrent. (Recall the reference to political assassination as a form of non-linguistic speech.)

To return to the particulars of *Woody*: the case reminds us that different religious ceremonies may not be equally important within a given religion. Peyote was said to play "a central role in the ceremony and practice of the Native American Church, a religious organization of Indians."⁸² The Church, however, had no formal prerequisites for membership, no membership rolls, and no recorded theology. It was unclear what the "membership" criteria were, thus making it difficult to know the extent of the Church's practices. (Figures of 30,000 to 250,000 were mentioned—a range so wide that they seem to be no more than uneducated guesses that sounded good to the defense and the court.) The court said that Peyotism began in the 16th century and was well established by the 19th century. Who were the historians who determined this? How did they conduct their investigations?

⁸² *People v. Woody*, 394 P.2d 813, 817 (Cal. 1964).

As we saw, the court took the religious-practice characterization as correct, noting the state's stipulation to that effect.⁸³ It then predictably invoked the compelling state interest test—"strict scrutiny"—because of the then-prevailing view that this was the standard required by the First Amendment's Free Exercise Clause, even though religion—or a particular religion or religious practice—had not been targeted *as such*. The court reviewed peyote's effects, stating:

When taken internally by chewing the buttons or drinking a derivative tea, peyote produces several types of hallucinations, depending primarily upon the user. In most subjects it causes extraordinary vision marked by bright and kaleidoscopic colors, geometric patterns, or scenes involving humans or animals. In others, it engenders hallucinatory symptoms similar to those produced in cases of schizophrenia, dementia praecox, or paranoia. Beyond its hallucinatory effect, peyote renders for most users a heightened sense of comprehension; it fosters a feeling of friendliness toward other persons.⁸⁴

This level of detail in assessing the effects of technology is not an everyday matter in constitutional adjudication. Of course, it arises in other contexts all the time—patent litigation, tort claims and products liability, antitrust, etc.—and occasionally pops up in constitutional adjudication.⁸⁵ *Woody* is an example of a case that provides a court an opportunity to test the meaning of a particular standard of review, but the opportunity is largely declined or not recognized. Indeed, where the government does not vigorously defend its assertion of compelling interests by relying on specific empirical evidence—perhaps coupled with expert opinion—the court is probably not bound to look for it on its own, and perhaps it shouldn't. If some opin-

⁸³ See *id.* at 815. One might ask why the Attorney General so stipulated if it was seriously interested in a ruling in its favor. (I am not suggesting that in fact there was no bona fide religious ceremony.)

⁸⁴ *Id.* at 816-17.

⁸⁵ See, e.g., *Craig v. Boren*, 429 U.S. 190, 211 (1976) (striking down, under the Equal Protection Clause, a regulatory scheme that prohibited sales of 3.2% beer to males under 21 but permitted such sales to females between 18 and 21). Justice Brennan, for the majority, attacked the methodology of the statistical analysis concerning differential arrest rates of male and female juveniles for driving under the influence of alcohol. *Id.* at 200-03 & n.14. This differential seemed to be the primary justification offered for the regulatory scheme.

ions seem deficient in their handling of what are ultimately empirical as well as value issues, this may be because of thin argumentation by government.

Still, one might argue that the court should have held a hearing on "legislative facts"⁸⁶ that might have been contested. (Some of them were, in nonrigorous ways.) On the face of it, there is no way to tell whether the court's description of peyote's effects (they are largely attributable to mescaline) is adequate, and no indication of where to get authoritative confirmation. Moreover, there are no explications of the clinical entities referred to in describing possible adverse drug effects (schizophrenia-like hallucinations, for example), no probabilities or even rough likelihoods of specific outcomes mentioned, no reference to the effects of dosage and mode of administration, no reservations expressed about the claimed effects, and only the thinnest conclusory mention of even the specific mental and behavioral effects desired for religious purposes.

Still, one might wonder whether the court's recitation was at least as helpful to the state as it was to the defense. After all, triggering hallucinations and feelings of friendliness are not trivial adversities. To the extent that the presentation of peyote's effects worked against the state, how was it to respond? By searching the literature for more alarming accounts? Calling expert witnesses? Conducting new studies? (No scientific sources were cited by either side or by the court, though they were easy enough to find.) Did the state at least receive adequate notice of the court's conclusions of fact (if that's what they were)? The court presented no information on the incidence of various effects under various circumstances, and contained no hints of evaluation of the adversity or benignity of these outcomes. How bad are the schizophrenic-like episodes, on any understanding of "bad"? Effects can be horrific even if they don't pose risks to persons and property. What, in general, should or could the state have done to defend its drug regulations as enforced in these circumstances, given the heavy burden of justification imposed on it? Did the court seem disposed to listen?

The anemic nature of the government's defense may partly account for the lack of arguably material information in the

⁸⁶ See generally Karst, *supra* note 12, at 75-77 (comparing legislative with adjudicative facts, and noting that the categories overlap).

opinion—information a rational person would want before deciding on a legislative policy. But suppose (as is likely in cases to come), the government defended itself with carefully wrought arguments urging explicit factual findings based on credible evidence, and clearly stating what value premises it applied to the evidence and what value conclusions it drew. This presents several questions about how the court could have dealt with the parties' contentions. The first question concerns the possible need for specific directions within the standard of review selected concerning both *whether* and *how* a court is to probe into matters of fact and value.

Consider the following inquiries, and whether they should have been dealt with, under the court's expressly identified standard of review. What do we know about the effects of certain "doses" of peyote/mescaline and of its varying modes of administration in religious and nonreligious contexts? What is the incidence and seriousness of the hallucinatory symptoms of "schizophrenia," "dementia praecox," and paranoia? (The court's reference to both "schizophrenia" and "dementia praecox" is suspect: the latter term is the old name for schizophrenia, emphasizing its usual onset fairly early in life. Perhaps it was looking at a very old—even for 1964—text that lacked pocket parts.) What was the methodology and the publication date of the court's sources of pharmacological information? Were any studies called to its attention by counsel? (I haven't inspected the briefs.) Could the court rightly search the scientific literature on its own? If it didn't, should it have? In vetting the studies, should the court "strictly scrutinize" (say, in the manner of peer reviewers for a scientific journal) the overall designs, structures, and mechanisms of the studies, their statistical soundness, the status of the investigators (experience, conflicts of interest, etc), the inferences drawn from the data collected, and even the exact form of data collection (self-reports by subjects, effects observable or measurable by monitors, etc.)? Do the studies indeed specify peyote's effects when it is consumed in certain ways and amounts? After all, mode of administration or ingestion and local situational variables might make a big difference in generating both the target effects significant for religious purposes and the unwanted "side" effects. Perhaps the two sets of effects might overlap when comparing religions; some religions encourage or require actions that may harm oneself or others, or at least put one at risk. It may not

even be entirely clear what outcomes are adverse or benign. What is the precise role of the court in determining not only what the likely outcomes are, but whether they are indeed “religiously relevant and important” within the defendants’ religion, and whether they are good or bad? If they are bad, how is this valuation to be applied to the defendant’s claims of immunity from state regulation?

These questions are about the court’s role in (dis)confirming claims about legislative facts and values as part of its strict scrutiny of the state’s action. Does strict scrutiny really entail such judicial depth of analysis? There is an obvious risk that a court’s careful pursuit of whatever truth is out there will usurp the functions of legislatures and executives, although it is notoriously hard to specify the nature of such misappropriations of the tasks of other branches of government. And the stricter the scrutiny, the greater the risk. How strict is strict, and is it consistent with our vision(s) of what courts are supposed to do or avoid, at least in constitutional adjudication? What degree of empirical and analytical rigor does the applicable standard of review demand of the court’s review of the claimant’s actions and the state’s responses? Of course, whatever degree of rigor is imposed suggests that the legislature itself should legislate only after careful investigation and reflection, if it is to protect its legislative offspring from invalidation. But, for the present, the subject is courts.

Although it may seem paradoxical, perhaps the high ranking of the liberty interest at stake cuts against heavy court involvement in some of the contested matters. Given the importance of Free Exercise rights and their degree of impairment in a given case, one might wonder whether the less intense the inquiry into the scientific findings the better. After all, the results of the inquiry may shore up the state’s claim of dangers to participants, bystanders, and the community (or communities) generally. And if the individual claimants *say* that peyote indeed does certain things, and does them pretty safely, can we rightly gainsay this?⁸⁷ Asking whether a wafer really becomes part of the body of Christ, or whether Elijah really comes to visit when the door is opened during a Passover seder. With fundamental rights or

⁸⁷ Dealing with similar factual claims may require different frameworks depending on what constitutional stage of adjudication we are in. This topic is too complex for present consideration.

liberty interests, there is, by design, a major asymmetry between the contending claims, with one side strongly favored. That's what burdens and presumptions are about. Perhaps, then, giving short shrift to those who burden religious rights might be just the thing to do: accept the defendants' attacks on the state's claims and findings unless the state, on its own, presents its factual and evaluative premises, and when it does, to view them askance. Otherwise, the court's independent search for significant contending societal interests may seem to attenuate and disrespect the perceived strength of the claimant's interest, and possibly the state's.

In any case, if the government does produce data and inferences it believes are sound, then—to vindicate the interests of both sides—strict scrutiny requires some serious judicial inquiry into the quality of the government's argument, and in particular, to the verification of its claims. A court cannot rightly push aside the state's efforts to defend itself, and so—taking the call of the standard of review seriously—a claim of compelling interests compels the court's attention. Alert state's attorneys, knowing of the strictness of strict scrutiny, might provide whatever studies aid their case. In these circumstances, the court cannot properly avoid questions posed about the nature of its scrutiny of the legislature's work product. After all, the claimed rights are presumptive or defeasible—precisely how this is put does not matter here.⁸⁸ Simply to assume a bottom-line right is pure circularity: we can only find the bottom-line right—“defendants, all things considered, have successfully resisted the effort to overturn the rights-presumption favoring them, so they have the right they claim”—at the end of the day.

But however lofty the rank of a constitutional right, no standard of review properly imposes a truly automatic loss on government, even though government may, overall, rarely win the battles fought within the strictest standards. As we saw, this is exactly what one would expect with highly protected rights: the relative rarity of state victories in cases where characterizations as fundamental rights or interests have been accepted does not by itself show we are afflicted by an epidemic of question-begging.

⁸⁸ See generally RONALD DWORIN, *TAKING RIGHTS SERIOUSLY* 90-94 (1978) (discussing types of rights).

• *A note on all-or-nothing systems.* I stop here for an important clarification of what was just said. One thinks here of the well-known, confusing, and perhaps ill-named issue of “categorization versus balancing.”⁸⁹ In form, an argument structure relying on categorization seems superficially to be pretty simple: “X-ing (designating the main category in use) is *not* constitutionally (and specially) protected under the Zth Amendment; Y-ing, which is what we have before, us, is a form of X-ing; so Y-ing is not protected in any way under the Zth Amendment.” Assuming the first premise is correct, evaluating the argument’s soundness requires us only to decide whether Y-ing (say, distributing a certain publication) is a form of X-ing (say, distributing obscene material). If it is, then Y-ing is, *from the start*, not protected by the Zth Amendment—period. The state can regulate or ban Y-ing merely by satisfying the minimal (and dominant version of) the rational basis test. The restriction is not “presumed” to be unconstitutional under the Zth Amendment, and (in theory) no argument that the presumption is overcome by the need to promote significant interests is necessary or even material. (We note the qualification that the very difficulties in determining membership in the unprotected category may drive us to consider such interests.) Either it’s in the unprotected category or it’s out—no ifs/ands/buts, no qualifications at all. Sounds absolute. Where is the Zth Amendment’s standard of review? Where is this directive on placing burdens of justification? There’s nothing to burden or justify and there’s nothing else to think about (beyond the default minimal scrutiny standard). (While we’re at it, think of other examples, which

⁸⁹ See generally Kathleen M. Sullivan, *Post-Liberal Judging: The Roles of Categorization and Balancing*, 63 U. COLO. L. REV. 293 (1992). I suggest the possibility that the issue is ill-named only because it seems to suggest that the use of categories—i.e., abstractions of certain sorts—is avoided by resort to “balancing.” Of course, no such avoidance is possible. We often develop argument structures that involve different abstractions doing different kinds of work, although the distinct possibility remains that many (or all) of the adjudicatory outcomes will be the same, whichever conceptual systems are chosen. This possibility of outcome-invariance, however, does not entail that it does not matter which conceptual system is used. For one thing, outcome invariance may not hold across the board because of differences in the way decisionmakers use the one or the other argument structure. For another, different forms of argument may seem to embody sound or unsound moral premises. In turn, the argument structures may have different rhetorical and educational effects, and this may affect outcomes in the long run. There is much more to be said about choice of conceptual systems, both within and outside of the law, but not here. See generally Shapiro, *supra* note 15.

appear explicitly in the Constitution: the Equal Protection Clause is unqualified—the state can't deny it (*not* “nor shall any State . . . deny to any person . . . the equal protection of the laws *without due process*”);⁹⁰ so also the ban on cruel and unusual punishment—no presumptions, just a categorical ban.⁹¹

This is, of course, old stuff. There is—there *must* be a standard of review in place, directing traffic, after fashion, although it is not articulated. The “global” standard of review in the category Z example provides that, given the outcome of the categorization stage (*Y*-ing is in the excluded category Z), no specially protective specific standard of review is to be installed. Reformulating the dispute into an exclusively is-it-in-or-is-it-out question doesn't really remove—though it may alter—the underlying infrastructure, and possibly the outcome. The reformulation packs the later argument stages [ii]–[vi] into stage [i]—the characterization stage—and immediately moves to [vii], the final outcome (assuming minimal scrutiny is operationally zero). Stage [i] remains a characterization premise that sorts claims into presumptively invalid or presumptively invalid bins, but it now (if not before) includes (implicitly) the arguments about the constitutional value of the rights said to be infringed and of the state's countervailing interests. Although the categorization as initially set up might be thought to make later argument structures simpler (pure in-or-out questions), it doesn't generally work that way: the obvious definitional difficulties require decisionmakers to revisit the original issues about whether and how to construct an excluded category. More, because the case is presented at the threshold as a possible case for strong individual interests—say, First Amendment protection—the constitutional hierarchy already developed by earlier interpretations might arguably dictate a skewed risk of error: when in doubt, place the claim in the protected rather than the unprotected categories of conduct. (I am not claiming that this is straightforwardly the present doctrine; at most, one might suggest a much thinner point—that after the rights-claimants have tried to satisfy their threshold burden but the issue remains in equipoise, doubts should be resolved their favor. But this may not reflect current doctrine either.)

⁹⁰ U.S. CONST. amend. XIV, § 1 (deliberately altered for purposes of argument).

⁹¹ See U.S. CONST. amend. VIII.

So, such characterization issues often import considerations of the sort involved in “balancing” cases. Whether given materials are in or out of the protected/excluded speech categories depends on complex similarities and dissimilarities between the communications at hand and protected forms of communication. And this comparison is likely to draw on ideas about the benefits and harms of communications of various sorts. Assuming we have figured out just why we would want a system of categorization of this form (that general moral issue itself must be worked out within the constitutional hierarchy of values, including government powers in various domains), the individual in-or-out cases are decided in accordance with a hierarchy-dictated definition of the key category. Put otherwise, this reflects an attempt to construct a category set that is, overall, meant to implement a preference for speech while simultaneously according serious consideration to state interests that may be adversely affected by certain communications. (Some writers refer to this as “definitional balancing.”)⁹² Collapsing the outcome of conflicting considerations into a bottom-line category (“this *is*, all things considered, obscene”) cannot avoid a review of these conflicts when they reappear in the form of the basic categorization question: is *this* (distributing the publication) indeed a case of unprotected *that* (distributing obscene material).

Nevertheless, the result of this collapsing of premises is that both the speech-protective and society-protective considerations are generally obscured within the characterization (“definitional”) stage; the only visible “official” standard of review (if articulated at all) is the minimal rational basis test.⁹³

In general, then, suppressing a protective standard of review via a “categorization” maneuver doesn’t send the standard or its workings down a black hole. Although the point is arguable, there may be no net gain or loss of “correct” outcomes in choosing one conceptual system (say, categories, as in obscenity law) over an alternative scheme (say, more global categories

⁹² See MELVILLE B. NIMMER, NIMMER ON FREEDOM OF SPEECH §§ 2.02-.03 (1984) (discussing ad hoc versus definitional balancing by the Supreme Court).

⁹³ The Court was somewhat more explicit in *Paris Adult Theatre I v. Slaton*, 413 U.S. 49 (1973). Chief Justice Burger’s majority opinion reviewed various state interests, but expressly stated that the Court was not “to resolve empirical uncertainties underlying state legislation, save in the exceptional case where that legislation plainly impinges on rights protected by the Constitution itself.” *Id.* at 60. The Court also ruled that governments could—as they often have—act on “unprovable assumptions.” *Id.* at 61.

that presumptively protect “all” speech via a standard of review that invites comparison of interests). One might guess, however, that masking the testing, weighing, comparing, and balancing brought out in some conceptual systems is unlikely to improve constitutional adjudication (assuming we have at least some agreed-to criteria for “improvement”).

To return more directly to the operational meaning of standards of review, and in particular the questions that courts, under a given standard of review, must put to government: Don’t say without qualification that these inquiries into the quality of scientific fact gathering and reasoning are for the legislature. They are obviously for the legislature in the first instance: they are part of what legislatures do (or are supposed to do) under any plausible politico-philosophical theory. But if “strict scrutiny” and the determination of “compelling interests” mean anything, they mean that the court has to investigate whether the state’s defense of its action fails *or succeeds*. The court is hampered in doing that, however, when all it “knows” are the contents of a government’s terse, conclusory, unsupported account—an account, as in *Woody*, that doesn’t even have its concepts and terminology straight. Unless strict scrutiny means “the individual rights claim always wins”—which it doesn’t even if it sometimes looks that way—this way of proceeding is indefensible from a constitutional perspective.

In theory, then, the expected direct effects of peyote are crucial both to defendants’ case and the state’s case. (But recall that the prime concern for defendants in assessing direct physiological impacts would seem to be “safety”; religious value is probably ascribable, in theory, to a vast range of a drug’s mental, physical, and behavioral effects.) Moreover, even if the facts are well understood, they require evaluation, not just recitation. This point is strikingly illustrated by the fact that the parties on both sides could in theory have cited some of the *same* effects in making out their respective cases: producing an hallucinatory state might be viewed as a serious danger justifying prohibition—but that very state might also be identified as a (or even *the*) main reason for using the peyote in the first place.⁹⁴ As for risks of outcomes conceded on both sides to be harms, the issue is whether such dangers justify the state’s prohibition. How likely and grave are they? Are they the sorts of

⁹⁴ See *People v. Woody*, 394 P.2d 813, 817 (Cal. 1964).

risks that, serious as they may be, must be borne in the interest of religious freedom? Is religious freedom *really* sufficient to outweigh the baleful risks of producing “feelings of friendliness”? Here, describing the standard of review seems to require identifying procedures in formulating and confirming value premises, either as such or as empirical claims about community values.

Consider next another critical stage of analysis, whether from the perspective of the rights-claimants, the state, or the court. Suppose (very heroically) that all sides concur on the soundness of a list of pharmacological effects one might reasonably expect, and on their likelihoods under the given circumstances. The question now is: so what? The list raises two broad and overlapping families of still more questions, some empirical, some evaluative, some melding both kinds. Suppose there is an ascertainable risk—say, one percent per ceremony, that someone will undergo a psychotic episode that all agree will be extremely disturbing (at least 9.8 on a scale of 10) to the subject, and very frightening to the group. (Readers here can specify their own preferred hallucinatory content—say, an Indiana-Jones-like snake/roach/rat phobia.) The episode may have lasting effects, creating a new probability of, say, 10% for any given subject that another episode of similar gravity will occur in any given year from then on. Such episodes may last for seconds or days or weeks, and are in many respects inconsistent with the subject’s being able to function—from performing complex tasks in planning trips to Mars to simple maneuvers in scanning groceries at a check-out stand. In some cases, the effects may never fully dissipate. How bad is this? Is it bad enough to warrant prohibiting the religious practice? That depends on the constitutional value of freedom of religious practice generally and of the particular practice in question, and of the value losses arising from jeopardizing their pursuit.

Constitutional analysis doesn’t quite “run out” here, but we are in some trouble. On the face of it, asking how bad is bad is an evaluative question, though “evaluative” is hugely ambiguous. There is no clear consensus on how this evaluation is to be done—despite the foundational status of the question, which goes to the heart of what we think courts are meant to do or avoid. Every reasonably alert law student encounters these doctrinal black holes early on: Take your pick: ♦ “Judges are to make moral judgments ‘on their own’.” ♦ “No—they are to de-

fer to the valuations of the communities in which the judges are embedded by empirically investigating what the community's norms dictate about the worth of religious practice generally and about the beneficial and harmful effects of a given religious practice, and accepting these judgments; or, failing that, courts must consider what the community would conclude if it were adequately informed and had reflected on the issue." ♦ "Well, maybe, but judges don't have to take a poll or call anthropologists or moral seers to the bench because judges themselves are the community's proxies." But proxies to do what? To discern the community's views and speak for them via those particular views? Or to craft independent moral judgments⁹⁵ because this is a task that our basic law delegates to them? Or perhaps there is no way to sort these elements out. Making a moral judgment "on one's own" is not really acting entirely on one's own. On the contrary, we are all products of our culture and what we decide reflects the culture's norms, which have been wired into us over time.

Perhaps—quite likely—the relevant community norms are hard to identify and use, and they themselves "run out": they often are not specific or precise enough to yield the value premises needed to complete a constitutional argument. A striking illustration of this is the very quandary under discussion concerning the functions of courts. There seems to be no coherent community consensus on what courts are to do when they face normative uncertainties, including those concerning how factual uncertainties are to be dealt with.

To be sure, one might moot the issue by urging that, even under the strictest of scrutinies, assessing the legislature's value judgments is not a proper judicial task, whether one views the legislature as being empowered to make "its own" moral judgment—while courts are not—or as being required to "mirror" community sentiments, or as some complex melding of both. On the former view, courts should not displace the legislature's function of making moral judgments; and on the latter, they should not displace the legislature's views on what their constituents' valuations are (or would be if consulted)—courts are not to conduct independent judicial inquiries into community attitudes and beliefs. Under no circumstances, it is argued, should a court apply "its own" moral faculties to the task.

⁹⁵ See *supra* note 50 and accompanying text.

But shouldn't courts, acting under a rigorous standard of review, be able to raise objections of some sort to a state's norms, or to the accuracy of the legislature's determination of what they are or of how they are to be applied, or to the legislature's independent moral judgments? Why should courts be restricted to questioning factual determinations (if they can even do that)—assuming they could even compartmentalize the issues this way? If anything, this scheme is backwards: courts shouldn't second guess empirical determinations, but are better able to do "value analysis"—or are they? Much depends on what value analysis is to consist of *for courts*, as we saw in the preceding paragraph.

To further illustrate the problem of judicial valuing, consider again some of the adjudicative facts in *Woody*. The religious "meeting" was said by the court to be the "cornerstone" of Peyotism (yet another fact that can cut two ways—great benefit, great risk), and involved sacramental use of the drug.

A meeting connotes a solemn and special occasion. Whole families attend together, although children and young women participate only by their presence. . . . The central event, of course, consists of the use of peyote in quantities sufficient to produce an hallucinatory state.⁹⁶ (At a particular stage of the meeting, peyote "buttons" are passed around and chewed.) At sunrise on Sunday the ritual ends; after a brief outdoor prayer, the host and his family serve breakfast. Then the members depart. By morning the effects of the peyote disappear; the users suffer no aftereffects.⁹⁷

How did the court (or anyone) know there were no aftereffects? Many drugs have cumulative impacts over time. Does peyote? Is there a risk of addiction or habituation? Or is that not a "risk" as opposed to a desirable possibility, given the religious importance of continued peyote use? Isn't religious use protected and desired, even (or all the more so) if driven partly by addiction? For a given religion, being addicted to religious practice may be a rightly sought-after condition. If the risk of objectionable drug addiction is indeed material, however, how

⁹⁶ *Woody*, 394 P.2d at 817.

⁹⁷ *Id.*

big and bad is this risk? Does the risk overcome the presumption of constitutional immunity for the practice?

Still more layers of inquiry now open up in testing the constitutional propriety of restricting this simple peyote technology. What *is* addiction (or habituation, or dependence, etc.)? What are its global effects on a person, on non-religious functioning as well as religious exercise? Does continued use of peyote in religious practice risk impairing the efforts of law enforcement to control non-religious use of peyote, or most uses of other hallucinogens, or of narcotics, mood elevators, and so on?

After this run of questions, it's time to clarify and illustrate why we put them at all. What drives their formulation? Where do they belong in the abstract sequence of steps involving the specification and application of a standard of review?⁹⁸ Assume that we have already derived and worked with the relevant constitutional hierarchy and have installed a heavy burden of justification on the state (stages [i]–[iv]).⁹⁹ We are now pressed to identify government interests (stage [v])—or at least the ones touted by the state when enacting the laws—and to rate not only these interests but the power of the state to pursue them in certain ways. Then we apply the particular standard of review (stages [iv]–[vii]).

To stress a point made earlier, however, no existing standard of review as currently expressed dictates an answer to our question: Should a court be asking any of these questions about evaluative and empirical premises at all, and if so, how is the court to go about answering them? This question about putting questions is not likely to go away, and there is no obvious crisp answer to it. There is, however, an obvious non-crisp answer: The set of questions for courts that a particular standard of review should be taken to generate depends entirely on the perceived value of the constitutional and governmental interests at stake—say, an individual claimant relying on a “mental integrity” liberty interest, or a government relying on its constitu-

⁹⁸ As asked earlier, if the government hasn't raised such questions after the claimants have successfully invoked a fundamental liberty interest or (semi-)suspect classification, it is contested whether the court must, may, or shouldn't raise them on its own. The court may thus not have to worry over where any of these questions “goes” in an argument structure. In any event, the response to this issue may itself be dictated by the standard of review and its underlying hierarchy.

⁹⁹ See *supra* text preceding notes 24–25.

tional power to protect the public and to assist the miscreants themselves by protecting them from harm. The more seriously both sides are taken, the more material are the detailed questions about what was studied pursuant to what methodologies with what results. But if a particular standard of review embodying heightened scrutiny does not require a court to address significant empirical and value questions when they arise, it is hard to see what is heightened about the court's scrutiny.

To revisit the opinion's text and continue our scrutiny of its scrutiny: the Court in some passages couples its "findings" on peyote's effects with a determination of what in fact happens at meetings, but the link is not very precise; all we have are bland, favorable characterizations that evidence the court's strong orientation toward protecting the religious claimants. As we saw, the court did not ask questions about the incidence of hallucination, and said very little about the likely contents and probable effects (short- to long-run) of the hallucinatory states on the subject, the persons in the immediate vicinity, the subject's family, or on the various communities of which she was a member. It did not ask about the incidence of schizophrenia/paranoia, or its degrees of seriousness. It did not adjudge the risks of peyote ingestion in light of the possibility of intra-group pressure or undue influence—or is this a forbidden inquiry in Free Exercise cases? After all, religious exercise is a specially protected constitutional interest, and one must recognize that many, perhaps most, religions necessarily impose (often coercive) pressure to conform to religious doctrine. If one buys into a particular religion, one is likely to be obliged to do or refrain from doing certain things, whether they want to or not. (Some might even question whether a completely non-coercive system can even be a "religion.")

The court did go into some detail about the theology of Peyotism—a presentation meant to shore up the religious value of the peyote rituals, and thus to illustrate the constitutional value of the religious practice. It explained the religious significance of peyote use:

Although peyote serves as a sacramental symbol similar to bread and wine in certain Christian churches, it is more than a sacrament. Peyote constitutes in itself an object of worship; prayers are directed to it much as prayers are devoted to the Holy Ghost. On the other

hand, to use peyote for nonreligious purposes is sacrilegious. Members of the church regard peyote also as a “teacher” because it induces a feeling of brotherhood with other members; indeed, it enables the participant to experience the Deity. Finally, devotees treat peyote as a “protector.”¹⁰⁰

So, the Court concluded that peyote use “plays a central role in the ceremony and practice of the Native American Church....”¹⁰¹ The statutory prohibition thus “remove[s] the theological heart of Peyotism.”¹⁰² The court then addressed the compellingness of the state’s interests in justifying the abridgment of defendants’ First Amendment interests. The court rejected, virtually out of hand, all the state’s arguments. (I have interlineated some italicized comments in the following passage.)

The evidence indicates that the Indians do not in fact employ peyote in place of proper medical care; and, as the Attorney General with fair objectivity admits, “there was no evidence to suggest that Indians who use peyote are more liable to become addicted to other narcotics than non-peyote-using Indians.” Nor does the record substantiate the state’s fear of the “indoctrination of small children”; it shows that Indian children never, and Indian teenagers rarely, use peyote. Finally, as the Attorney General likewise admits, the opinion of scientists and other experts is “that peyote. . . works no permanent deleterious injury to the Indian. . . .” [*This doesn’t answer the charge that the court didn’t particularize its general findings about peyote’s effects—which includes determining what happened at specific meetings.*] Indeed, as we have noted, these experts regard the moral standards of members of the Native American Church as higher than those of Indians outside the church. [*What are these experts expert at? How do they identify “moral standards,” or measure compliance with them, or determine which groups rank higher in the moral standards pantheon than others?*]

¹⁰⁰ *Woody*, 394 P.2d at 817-18.

¹⁰¹ *Id.* at 817.

¹⁰² *Id.* at 818.

The Attorney General also argues that since “peyote could be regarded as a symbol, one that obstructs enlightenment and shackles the Indian to primitive conditions” the responsibility rests with the state to eliminate its use. We know of no doctrine that the state, in its asserted omniscience, should undertake to deny to defendants the observance of their religion in order to free them from the suppositious “shackles” of their “unenlightened” and “primitive condition.”¹⁰³ [*Note here the importance of the Free Exercise characterization. Secular drug use intended to enhance or otherwise alter mental functions for non-religious and non-medical purposes gets near- zero protection (under the minimal rational basis test) when the enhancement mechanisms are “street drugs” or other restricted substances. There is no fundamental secular interest in “freedom of mind” that does the threshold work of the fundamental interest in Free Exercise of religion.*]

The court also expressly rejected the state’s argument based on the risk of fraudulent claims of religious use, a risk jeopardizing enforcement of drug laws generally.¹⁰⁴

To loop back to our overarching topic, standards of review: *Woody* might be invoked as a classic example of the futility and vacuity of “standards of review.” Let’s be done with this sort of superficial nonsense about standards of review. The invocation of the compelling interest standard in *Woody* was simply an empty or even fraudulent gesture of pretended objectivity. The court wasn’t about to allow the state to stop the Navajos from practicing their religion; Native Americans had been pounded enough and were not to be made yet again to exit their faith. (Compare, to his disadvantage, Mr. Grady’s situation.)

But this won’t do either; we cannot be done with standards of review even if one thinks (as I do) that the prosecution’s case here was a particularly obtuse application of the generally obtuse idea of broad criminalization of the use of mind-altering drugs. The problem lies in how well or ill we think certain things through, whatever label we pin on the process. True, standards of reviews are both an effect and cause of how we think about certain matters; such back-and-forth cycling is in-

¹⁰³ *Id.*

¹⁰⁴ *See id.* (explaining why the Prosecutor’s contentions were unfounded).

evitable. But the standards are not the culprits responsible for inadequate judicial decision making—indeed, taking them seriously may be the best way to improve constitutional adjudication. The requirements for rational legal argument formation in any arena of law are not optional, to be discarded when we feel like doing so. Deleting references to standards of review will simply require us to re-describe what we are doing, or to be even more silent about the interior structure of our thought. The fact that a set of instructions—such as a standard of review—is mishandled or used dishonestly doesn't, alone, establish that the instructions are infirm. (To be sure, they might be, and to the extent that they are poorly formulated, they invite “mishandling.”)

The point of reviewing *Woody*, then, was to illustrate how a relatively modest technology that plays a central role in a constitutional case might (and should) move a court to raise critical questions to about what furthers or impairs our constitutional hierarchy of values. There are pressing questions about what is operationally entailed by a standard of review—about what must count as a material issue of fact or value and about the exact ways in which courts may or must resolve them.

Whether any of the particular questions a court might view as material can *rightly* be avoided can't be answered broadly. Questions of this sort escaped scrutiny in most prior constitutional adjudications not simply because of judicial perceptions about separation of legislative and judicial powers, but (perhaps) because these issues were not as vividly and urgently presented to us. Think, for example, of *Whalen v. Roe*,¹⁰⁵ where, in a superficial opinion, the Court seemed grudgingly to recognize¹⁰⁶ a patient's privacy interest in keeping sensitive information about the use of certain drugs confidential. But it saw no significant risks of breaching this confidentiality, and so ruled that there was no intrusion on any fundamental right of information privacy, thus avoiding the need for (further?) heightened scrutiny. One might say that the Court's view of data security

¹⁰⁵ 429 U.S. 589 (1977).

¹⁰⁶ See *id.* at 603-06. The opinion is a bit cryptic on this. One might argue that the Court assumed an informational privacy right *arguendo*. One might also say that because the Court, via Mr. Justice Stevens' majority opinion, seemed to rule that even conceding an informational privacy interest, it was not threatened in that case, there was therefore no holding on the constitutional status of informational privacy. See *id.*

seems remarkable only in hindsight, and that the Court did no wrong; nevertheless, the question of security of databanks was far from unknown in 1977.¹⁰⁷

Still, the Court had to look fairly carefully at the contested factual issues: the decision not to apply heightened scrutiny required, in a sense, some heightened scrutiny. Once again, the stages of argument are interlinked; earlier stages look ahead to later stages, and the latter look back in turn to what came before.

But putting the questions generated by a standard of review is one thing; answering them is another. Many of the questions seem terminally puzzling, and things will only get worse: as I argued, we are dealing with ways of sharply rearranging important life processes involving mental functioning and behavior, reproduction, genetics, and lifesaving and life-prolongation, and these rearrangements often do not "track" how we think and feel (at least now) in any simple ways.¹⁰⁸

2. *State v. Whittingham*¹⁰⁹

This is another peyote case. It raises some of the specific questions not considered by the *Woody* court, and so illustrates further some of the issues just raised about what courts are supposed to be doing under the auspices of particular standards of review. The appellants were convicted of possession of peyote. They said they had used it in the course of their marriage ceremony, and that the marriage was a true Native American Church religious observance. The trial court ruled that the ceremony was religious, but nevertheless found defendants guilty. The appellate court reversed, focusing on the state's evidence concerning the effects of peyote. A pharmacologist had testified during the trial, expressing opinions based on unpublished research on dogs and monkeys performed sixteen years earlier. (Whether it was his own research is not clear.) Many of the dogs apparently had convulsed and died. The expert testified that dogs could tolerate peyote doses about 100 times greater

¹⁰⁷ See, e.g., ALAN F. WESTIN & MICHAEL A. BAKER, *DATABANKS IN A FREE SOCIETY: COMPUTERS, RECORD-KEEPING AND PRIVACY* (1972).

¹⁰⁸ I discuss this feature of various biomedical technologies elsewhere; see, for example, Shapiro, *supra* note 15, at 333.

¹⁰⁹ 504 P.2d 950 (Ariz. Ct. App. 1973).

than humans—but no humans were involved in the research. The court stated:

The record . . . is devoid of any evidence of death or convulsions in humans. This is not to say that Dr. Seevers' testimony was incorrect or could not ultimately be proved to be correct with reference to the effects of peyote on humans. In essence, the testimony does substantiate the State's contention that the excessive use of peyote might be attended by certain ill effects or damage to humans. However, we take judicial notice of the fact that many products are marketed universally and yet if ingested in unusually large amounts can be harmful, to wit, aspirin and alcohol.¹¹⁰

The court then noted that the evidence showed peyote was not a narcotic, and that peyote use would not result in addiction.¹¹¹

The court, as in *Woody*, required a showing of a compelling interest in regulating the religious practice. It accepted at least part of the factual testimony of the expert—that in some cases dogs died from administration of large doses of peyote—but rejected the state's apparent inference that humans might be at similar risk. The court's rejection of that inference seemed to have flowed from its understanding of what constitutes sound scientific reasoning. (It is thus akin to what the U.S. Supreme Court did in *Craig v. Boren* in questioning inferences about differential arrest records for school-age males and females for possessing low-alcohol beer.¹¹²)

Did the court go too far? Probably not: the state after all, had raised the danger argument and tried to support it by expert testimony. The court simply pointed out that, given the flaws in the state's inferences from the data generated in the study, it had simply failed to satisfy the heavy burden of justification it bore, given the impairment of the claimant's free exercise right. Pointing to the obvious gaps between dog data and people data is far from a case of intrusive displacement of legislative judg-

¹¹⁰ *Id.* at 953.

¹¹¹ *See id.*

¹¹² *See Craig v. Boren*, 429 U.S. 190, 202-03 & nn.12-14 (1976). *See infra* text accompanying and following notes 112-13. *Craig's* outcome might also in theory be understood to accept the inferred findings as scientifically sound but to reject on value grounds the danger supposedly established by the state. However, Justice Brennan's opinion did not expressly take this form. *See Craig*, 429 U.S. at 191-210.

ment, particularly when the result bears on a strongly protected individual interest.

On the other hand, that very comparison between dogs and humans bears further scientific investigation—an investigation the court surely did not have to undertake here. The state failed to identify situations in which what happens to dogs strongly resembles what happens to humans under specified circumstances. (That human and dog reactions to similar stimuli or insults vary I take as common knowledge.) Perhaps if the state had introduced such evidence, it would have satisfied its burden. Would the court have been on sound ground in calling for further argument and demanding that the state show that these other situations were relevantly similar to the case at hand? If the state had introduced human/dog comparisons suggesting a nontrivial risk to humans, would the burden have shifted back to the claimants to show otherwise? Even if the dogs-to-humans argument were accepted, shouldn't the state also have to establish the value premise that the now-demonstrated risk to humans was enough to justify the free exercise intrusion?

Yet another issue concerns the "raw data" itself. Would it have been proper for the court to inquire into the manner of its collection and recording? How did the investigator assure that the dogs died because of the ingestion of peyote rather than from some other cause? Were any of the dogs unduly vulnerable—say, because of preexisting disorders? What dog breeds were involved? The opinion offers no guidance here. (Big difference between a mastiff and a dachshund.) Were there control groups of dogs not receiving peyote? How were dosages (which were very large) decided upon and controlled? Some of the proffered "information" about dog deaths may itself be the product of questionable action, observations and inferences. How many of the convulsions preceding (causing?) death were observed, rather than inferred, and if the latter, on what evidence?

Suppose the court had instead accepted the claim that, given the dog data, there was a calculable risk of harm of specified sorts to humans—perhaps even convulsions followed by death if the victim is not treated. Would it be open to the court to conclude that the (assumed) established risk—say, one in 10,000—was "too low" to amount to a compelling interest? How about one in 1,000? As asked earlier, is questioning the state's value conclusions inappropriate, even within heightened

scrutiny? How would a court make this value assessment? (For that matter, how does a legislature do it?) By inquiring into community values concerning the risks that individuals should be able to take for religion's sake? How would the inquiry be conducted? By making its own self-determined value judgment? Any of these paths to filling in value premises requires comparing the risks to individuals against the value of the religious practice to them—and the value to the community in upholding the right of individuals (and groups) to pursue religious values generally. Reaching value conclusions also requires that the speculative risks to the community's social and moral fabric must also be counted. These are formidable missions, and courts might well shrink from them and say that the most plausible judicial option is full deference to legislative value judgments.

Of course, even the clearest determinations or estimates of serious risk can be overridden in constitutional adjudication by the force of countervailing constitutional values. Indeed, if this were not so, the whole idea of specially protected interests would be vacuous. Think again of *Craig v. Boren*,¹¹³ where the Court rejected a statutory restriction disallowing access by young males to “3.2% beer” when similar-age females were allowed access. The state had introduced statistical data purporting to show a greater number of arrests of young males for drunk driving than for females within the same age range. The Court questioned both the methodology of securing the data (arresting many males while not arresting similarly afflicted females—although how this itself was known by Justice Brennan is unclear)—and the soundness of the inferences based on them. It also said, to undercut the state's defense, that “proving broad sociological propositions by statistics is a dubious business, and one that inevitably is in tension with the normative philosophy that underlies the Equal Protection Clause.”¹¹⁴

This is something of an overstatement (to understate the matter); it depends on what is sought to be shown and how. Still, it reflects the requirement that findings must generally be individuated to particular claimants. It thus isn't quite like saying: “Don't bother me with the facts.” It may instead be a call

¹¹³ 429 U.S. 190 (1976). This is of course not a biomedical technology case (although it does involve the primitive technology of imbibing alcohol to induce preferred states of mind), but I never said that the sorts of issues that will regularly arise in that domain never come up outside it.

¹¹⁴ *Id.* at 204.

for more finely calibrated facts. In any event, there is a serious open question remaining: if the facts about the probability of some described outcome were indeed taken as established through sound scientific methodologies, what would the Court's tasks have been and how would and should they have been pursued? If young males were rigorously shown to pose greater risks than young females, why wouldn't this overcome the presumption that the semi-suspect gender classification was invalid? Does the "individuation" requirement mandate rejection of any statistical findings that do not rest on the specific characteristics of each individual male/female? Does this even make sense? Findings about individuals with specified characteristics can be made only by generalizations based on findings concerning others with the same or similar specified traits. Is Justice Brennan's rather awkward handling of the statistical issue an example of the baleful effects of openly looking to standards of review? I think not. Standards of review didn't muck up the Court's opinion. The Court did this on its own.

There were at least two major problems that confused matters for the Court and for its analysts. One was the actual softness of the data and the inferences derived from them. Truly skilled statistical analysis wasn't required to see this, although the government's offerings here weren't as weak as those presented in *Whittingham*. The second problem is much deeper. It concerns the basic structure and application of rights and interests analysis. The interest here was in avoiding loss of opportunities because of one's gender status. Although this interest involves "only" a semi- (or quasi-) suspect classification, it remains fairly important. The state may have claimed too much for its data, but their case wasn't ridiculous. It's the sort of data that might move a competent behavioral scientist to formulate a tentative hypothesis and to conclude that more investigation was warranted. If so, did the state show enough to justify its classification—via a not-absurd inference that many persons—the arrestees, other drivers, pedestrians—were at risk for the seriously bad outcome of getting killed or hurt in road accidents? Or is this empirically somewhat shaky argument just not enough to overcome an important constitutional interest?

Given the Court's value stance here, the state had an especially difficult task. The Court's opinion, amazingly, dismissed an order-of-magnitude difference between male (2%) and female arrest rates (.18%), not just because it thought the data

were too soft to show this, but because both the percentages were too low. If there were one chance in fifty that you or anyone else would be killed when trying to cross Sunset Boulevard, would you think it a safe street? Of course, running someone over while you're driving (whatever your mental condition) is one thing; simply driving under the influence is something else—right? After all, you're not going to kill someone every single time you drive drunk—right? The state should just loosen up.

To briefly tie together the *Woody/Whittingham* discussion, recall the basic question raised here about the nature and “operational meaning” of constitutional standards of review. In principle, how are courts to identify, evaluate and compare or weigh the state's interests as against those claimed by the other side—a conflict that also appears at the characterization stage, though generally couched differently.¹¹⁵ If one claims a personal freedom (religious or not) to ingest substances of one's choice for medical or nonmedical reasons, how is this to be valued constitutionally?

This is no vrant question. It seems probable that, with the arrival of new generations of mind-altering and possibly mind-enhancing drugs, the earlier cases dismissing claims of right to ingest more primitive and imprecise drugs such as marijuana and peyote might not block recognition of secular rights to technologically shape one's mind through chemistry.¹¹⁶

¹¹⁵ There is a significant literature criticizing the notion of balancing, at least as practiced in certain areas of constitutional adjudication. See generally T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943, 997-1001 (1987) (presenting such criticisms). Although I do not press the issue here, I suggest once again that alternative conceptual systems that supposedly avoid rights-talk and/or balancing-talk offer no improvement in constitutional adjudication (assuming we have some agreed-to criteria for such “improvement”). The replacement systems either involve testing, weighing, comparing and balancing within a different conceptual system (whether with similar results or not)—or, if they don't, they are clumsy, hamfisted, formalistic systems that fail to attend to matters that *ought* to be compared and weighed, however difficult the process.

¹¹⁶ See, e.g., *People v. Werber*, 97 Cal. Rptr. 150, 156 (Ct. App. 1971) (rejecting defendant's claim that his marijuana use was religious and concluding that it was unprotected under the First Amendment; the court noted defendant's testimony that marijuana produced “a new awareness of various unfamiliar and abstract concepts”). See generally Michael H. Shapiro, *The Technology of Perfection: Performance Enhancement and the Control of Attributes*, 65 S. CAL. L. REV. 11 (1991) (discussing issues concerning the enhancement of human traits by technological means).

But what *is* the process of constitutional valuing in this context—whether pursued by courts, legislatures, government agencies, or anyone else? How should a court assess the state's claim that persons using, say, a memory-enhancing substance (effective for both the demented and normal) are at risk, say, for physical and mental harms that the state has a power (a right? a duty?) to prevent? On what political/moral theory would the state have—or not have—this power? Again, to what extent should the court defer to the state's factual claims or to the state's valuations of the gravity of adverse outcomes as compared with any beneficial outcomes (including the bare benefit of having one's preferences vindicated)? Does it make a difference if the state had already been heavily involved and thus experienced in the general field addressed by the litigation—for example, providing or paying for health care, or denying it, and in general dealing with the benefits and harms of medical and policy decisions?

The same set of oppressively hard questions arises in virtually every branch of biological technology. How do we even begin to morally evaluate the process of reconstructing our germ lines, or of edging into identity change through augmenting our mental and physical capacities? If the legislature is to be deferred to, it is surely not because it knows better than others how to work within the universe of moral principles, standards, and rules. If no one knows how to pursue sound valuation in these realms, perhaps the legislature is rightly deferred to as a (democratic) black box. The very murkiness of the substantive evaluation clarifies the quandary: important constitutional interests cannot simply be left to legislative whim, but our vision of the principled limits that courts should place on legislatures will become even foggier when new category-busting technologies arrive. This can drive fans of principled limits away from strengthening judicial standards of review toward suspending them and dumping still more tasks into dark legislative containers.

Suppose now any constitutional decisionmaker (court, legislature, executive) faces a well-populated set of major questions—some dictated by a standard of review and some about what a standard of review dictates. What follows from the fact that there is no handy moral metric available to compare discordant interests? (I do not pursue problems of incommensurability

and nontranslatability here.)¹¹⁷ Not a lot. One could say that it shows courts should not compare, weigh and balance the rival claims. If they don't do that, however, who wins? What is the default rule, and why? It makes as much sense (and it isn't much) to say that the government always wins when value claims are incommensurable as it does to say that the government always loses in those cases. After all, one can't even properly install presumptions about who wins if one can't compare the claims of competing parties.

Turn now to some other illustrative cases, this time from the Supreme Court.

3. *Washington v. Harper*¹¹⁸ & *Youngberg v. Romeo*¹¹⁹

(a) The extant constitutional grid in brief; the Court's opinion

In *Harper*, a convicted, imprisoned robber had been paroled but civilly confined, and while in custody committed several physical assaults. His parole was revoked and he was imprisoned in a special section of the prison for mentally disordered persons. Although he had initially accepted treatment with antipsychotic and other medications in the prison facility, he later refused them. The prison complied with state-mandated procedures for in-house review of the decision to medicate him over his objection. He filed an action under 42 U.S.C. § 1983, but the litigation's pre-Supreme Court history needn't be examined here. As the matter crystallized before the Court, the narrow issue for resolution was whether the prison could require Harper to submit to treatment without a prior judicial hearing.

There are several reasonably well-established paths toward answering this question. The "narrow issue" in *Harper* sounds

¹¹⁷ See generally Frederick Schauer, *Instrumental Commensurability*, 146 U. PA. L. REV. 1215 (1998) (arguing that commensurability and comparability often "have the character of attitudes, dispositions [etc.]," rather than being inherent properties of values, reasons, options and norms) (*Id.* at 1216-17)); Frederick Schauer, *Commensurability and Its Constitutional Consequences*, 45 HASTINGS L.J. 785 (1994); Richard Warner, *Incommensurability as a Jurisprudential Puzzle*, 68 CHI-KENT L. REV. 147 (1992).

¹¹⁸ 494 U.S. 210 (1990) (holding that the Due Process Clause allows the state to medicate a seriously mentally ill prison inmate against his will if the state has a legitimate interest in protecting the prisoner or others).

¹¹⁹ 457 U.S. 307 (1982) (holding that the state may not restrain mentally retarded residents except when it is necessary to assure the safety for all residents and personnel within the institution).

in procedure—the need, if any, for a certain type of hearing—so one begins to consider the procedural due process cases. On fairly stable views of federal procedural due process constraints, attention must at some point (early on) focus on matters of “substance.” Some interest, whether categorized as a matter of life, liberty, or property, must be at risk before the rigorous, lumbering mechanism of a judicial hearing is required. The Court here dealt with this in two ways. It described the state’s law, which itself might create a liberty interest of sufficient strength to trigger federal process protections under the Fourteenth Amendment. It also considered whether the Fourteenth Amendment itself—without reference to state-created interests—protected a liberty interest important enough to require protection through a judicial hearing requirement.

The Court did indeed find a nontrivial liberty interest, but said that, under the circumstances (particularly the various state procedural steps already completed), a judicial hearing was not required¹²⁰ before the imposition of treatment. Since the Court found an independent federal liberty interest under the Fourteenth Amendment, the description of state procedures was not offered as a demonstration of the value that the state accorded the liberty interest (though this might be federally relevant in various cases). Instead, it was part of an argument showing that the independently established federal liberty interest¹²¹ had been

¹²⁰ See *Harper*, 494 U.S. at 228. In *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 541 (1985), the Court rejected the “bitter with the sweet” approach in defining liberty interests by reference to their apparent procedural protections under state law. That idea reflected a reduction of supposed state-created and state-protected interests to the actual procedural protections afforded by state law. However grandiose the state’s formulation of a right (e.g., a right to continued employment by the state unless good cause is shown for termination), if the only state procedural protections afforded were toothless (e.g., the aggrieved was entitled only to a letter explaining her termination, and no recourse was possible), then no Fourteenth Amendment procedural protections could be invoked. The supposedly important right protected by the state had an operational meaning too trivial to support federal procedural due process protections. See, e.g., *Bishop v. Wood*, 426 U.S. 341 (1976) (holding that a dismissed law enforcement officer was entitled to no more protection than what was provided by the applicable ordinance—a written notice of discharge and the reasons for it). The status of *Bishop* is not entirely clear after *Loudermill*.

¹²¹ The term “liberty interest” does double duty here. It is used in both in substantive and procedural due process jurisprudence, and although its meanings in the two linked domains overlap, they are not the same. What counts as a liberty interest sufficient to trigger rigorous procedural protections may be quite different from what counts as a “substantive due process” liberty interest. Of course, both categories of

adequately protected by the state's required procedures, and nothing further—and certainly not a prior full-dress judicial hearing—was warranted.

In the federal “substantive” domain, the threshold characterization problem—is there an important right at stake (perhaps a “fundamental liberty interest”)?—was difficult enough to move the Court to an odd characterization: it recognized a “liberty interest” in refusing antipsychotic drugs.¹²² This is a curiously specific result—one that sounds like a bottom-line characterization deriving from some broader one. Still, it seems preferable to global claims of a fundamental right to “privacy” or, worse yet, to “be let alone.”¹²³ One wonders, however, whether the liberty interest excludes, say, antidepressant drugs. Shouldn't the liberty interest cover all medicinal psychotropic drugs, or all forms of mind and behavior control using the tools of biological psychiatry? Or are these categories too broad? One would think that *some* generalization above a particular set of drugs but less than a vast right to be let alone could serve passably well, but for present purposes there is no reason to offer anything beyond some suggestions made as we proceed.

Whatever the appropriate abstraction, the Court's characterization generated what seems to be a form of heightened but less than strict scrutiny, an intermediate position probably attributable to the prison context: the state was required to show that what it did was reasonably related to a legitimate penal interest, as in *Turner v. Safley*.¹²⁴ The workings of this standard are reviewed below.

liberty interest ultimately have “substantive” foundations because significant procedural protections presuppose some basic positive valuation of an interest that is not to be seriously burdened without proper procedures. See generally *Mathews v. Eldridge*, 424 U.S. 319, 332 (1976). Liberty interests of any kind require both substantive and procedural protections. This is partially illustrated below in *Cruzan v. Director, Missouri Dep't of Health*, 497 U.S. 261 (1990). As for the annoying question: Is *Harper* a procedural or substantive due process case?, the correct response is obvious.

¹²² See *Harper*, 494 U.S. at 221-22 (stating “[w]e have no doubt that, in addition to the liberty interest created by the State's Policy, respondent possesses a significant liberty interest in avoiding the unwanted administration of antipsychotic drugs under the Due Process Clause of the Fourteenth Amendment”).

¹²³ *Bowers v. Hardwick*, 478 U.S. 186, 199 (1986) (Blackmun, J., dissenting) (quoting *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting)) (upholding, as applied to sexual acts between males, a Georgia Statute that criminalizes sodomy).

¹²⁴ 482 U.S. 78 (1987) (upholding prison regulation restricting inmate correspondence but striking down marriage restriction).

(b) The conceptual pressures of technology's increasing precision of control

Describing the liberty interest in *Harper* requires attention to the nature of the mind-altering technology used there, though not to the point of mastering human neurochemistry. How do these antipsychotic medicines get into the body and what do they do physiologically once inside? They are generally administered orally or intramuscularly and alter the brain's electrochemical functioning with resulting effects on mood, cognition, alertness, and other mental states and operations. The mechanisms of action are thought to heavily implicate the workings of neurotransmitters, which mediate electrochemical activity.¹²⁵ Counsel for those in Harper's position would thus be well advised to say something about liberty interests in bodily integrity or personal security, but perhaps more specifically in mind-integrity.¹²⁶ The most pertinent threshold inquiry seems to be whether the technology used significantly alters—for better or worse—not just the subject's physical processes but his mental functioning, be it cognitive, emotive, volitional, or within some other category of mental operation.

Finding the underlying abstractions for any unmentioned liberty interest is of course a familiar problem, long antedating any high-technology biomedicine. It is not surprising that it remains unclear what underlying constitutionally-relevant abstractions best explain *Harper's* outcome. Recall that bodily integrity wasn't said to be the foundation of *Roe v. Wade*,¹²⁷ though it was obviously relevant. It was clearly of some moment in *Harper*, given the risk of serious physical side effects. (The mode of administration may also enter the fray, especially if some unusually invasive procedure is used.) But considering the likelihood of newer and far more precisely effective psychotropic drugs, future cases may require notions of mental in-

¹²⁵ See generally U.S. CONGRESS, OFFICE OF TECHNOLOGY ASSESSMENT, *THE BIOLOGY OF MENTAL DISORDERS* (1992) (examining the implications of studies of mental disorders); *THE NEUROTRANSMITTER REVOLUTION: SEROTONIN, SOCIAL BEHAVIOR, AND THE LAW* (Roger D. Masters & Michael T. McGuire eds., 1994) (discussing findings about the effects of neurotransmitters on human behavior and the impact of these findings on established ways of thought).

¹²⁶ They can also be administered directly into the brain. Without *Star Trek* technology, however, one would obviously have to make some sort of physical intrusion into the patient's head.

¹²⁷ 410 U.S. 113 (1973) (ruling that abortion is a fundamental right).

tegrity, the preservation of identity, or something cruder but more global, such as “personal security.”¹²⁸ Such formulations may fit later cases better than those resting simply on bodily impingements.

Harper thus foreshadows an increasing need to look to “foundations.” We understand well enough what a breach of bodily integrity or a limitation on freedom of movement is; we understand less well (if far more than minimally) what a “breach of mind” might be, and this complicates the use of standard interpretive paths in deriving or rejecting constitutional protection against it.

Whatever constitutional standard of review was (implicitly) selected by the Court in *Harper*, applying it required a degree of empirical analysis that, as suggested earlier, is usually absent and often unnecessary in constitutional litigation.¹²⁹ The obvious factual questions in *Harper* dealt with the palette of near and remote effects of a particular psychotropic drug. (Recall the *Woody* problem of figuring out what peyote did.) This is no easy matter to deal with—it cannot be a simple matter of describing and measuring exactly what happens physiologically and mentally; we need a theory of mind-intrusion. “Mind harm” would be too tendentious a description because many would characterize administration of medicinal mind-altering drugs as usually being, all effects considered, beneficial to the mind and so to the person. Still, one can’t even make the simple-seeming claim that reducing psychotic symptoms is a pure benefit. Their sudden disappearance from a person’s mental processes may cause mental or physical harms of various sorts, possibly including the loss of some valued “capacities.”¹³⁰

¹²⁸ That was the driving generalization in *Youngberg v. Romeo*, 457 U.S. 307 (1982), recognizing a liberty interest in personal security. Mr. Romeo, who was severely impaired mentally, was thus entitled to habilitative training to enable him to control his violent proclivities, which resulted in his being injured by the responsive violence of others. However, the selected “standard of review” specified all-but-total deference to “professional judgment” on what measures should or should not be undertaken.

¹²⁹ For an exception, see, e.g., *Craig v. Boren*, 429 U.S. 190, 211 (1976) (reaching its conclusion after evaluating the proffered statistical basis for a gender-based law).

¹³⁰ For example, a partial remission of symptoms may enable a previously nonfunctional patient—but still far from fully symptom-free—to accomplish certain harmful or even catastrophic goals, such as suicide. See also *infra* note 148, raising additional issues about “erasing” disorders.

Although the Court will defer in many ways to physicians and psychopharmacologists (and other techno-professionals), it must nevertheless know to what it is deferring. What is the expertise *about*? The force of expert testimony in this realm rests ultimately (but perhaps not exclusively) on empirical investigation, and one can (must?), ask whether the Court should vet the methodologies used in generating information, the experts' inferences from them, and even the way in which the "raw" data were gathered and recorded.¹³¹ Once again, the ways in which legislative facts and values are (dis)confirmed requires reexamination. (Recall the *Woody* and *Whittingham* discussion.)¹³² *Washington v. Harper* was unclear on these matters, and didn't even bother to specify the standard of review, although it seems clear that it was more than minimal but less than strict.¹³³ Some may argue that nothing more rigorous was called for, given the conceptual uncertainties in constitutionally characterizing the techniques for altering mental processes. And one might argue that this cuts the other way: confused conceptualization in a field requires judicial oversight to avoid even worse chaos. But of course this leads us back to asking what such oversight should consist of, absent reasonably clear conceptual constructs. In any event, the Court's failure to formally name its standard of review is not fatal to gaining at least partial understanding of its work product. The tenor of the opinion certainly does not

¹³¹ See *State v. Whittingham*, 504 P.2d 950, 953 (Ariz. App. Ct. 1973) (reversing judgment of conviction for possession of peyote during a Native American religious wedding ceremony). The court dealt with the state's effort to show peyote was harmful. It accepted at least some of the factual testimony provided by the state's expert, who said that in some cases the ingestion of peyote in large doses killed dogs, but rejected the empirical inference the state seemed to draw that humans may be at similar risk. See *id.* That non-inference itself apparently rested on the court's view of rational scientific reasoning. See *supra* text accompanying notes 107-11.

¹³² See *supra* text accompanying notes 61-115.

¹³³ Some observers may insist that minimal rationality was the operational standard of review in *Harper*, whatever the Court said. Perhaps so, but this is not shown just by attending to the bottom-line rejection of Harper's claim. Although significantly different questions were at stake, the Court's decision in *Riggins v. Nevada*, 504 U.S. 127 (1992), suggests a nontrivial burden of justification for infringing on the liberty interest in avoiding antipsychotic drugs. The Court reversed defendant's murder conviction because he was given antipsychotic drugs in violation of this liberty interest at trial. The varying contexts—aspects of a criminal trial as opposed to institutional security in a prison—seem to account for what seems to be the stronger standard of review in *Riggins*. The Court is itself the ultimate expert on the constitutional requirements for fair trials, and the notion of deferring to medical or correctional experts is sharply confined in this context.

suggest negligible (or non-) scrutiny. The Court did not dismiss Harper's claim out of hand, but wasn't bowled over by it either. A better rationalized opinion, however, would have been more explicit and offered more guidance for how to proceed in other technologically-troubled cases. (I am not asking for advisory opinions here; I'm suggesting significant incremental clarity that offers guidance as the Court more carefully articulates the rationales for whatever decision is at hand.)

For our part, we have to find out why the *Harper* Court recognized or formulated a liberty interest at all, why it investigated what it investigated, and why it decided the way it did. In this way, we may learn more about the pressures that some technological developments place on existing constitutional analysis, and one of the better ways of doing this is to inspect *Harper's* argument structure more closely.

(c) Another look at *Harper's* argument structure

As suggested, the Court was dealing with a set of problems deriving from the increasing precision of effect of "biological" treatments in psychiatry.¹³⁴ "Precision" of course is an imprecise term, inspiring the retort, "compared to what?" Compared to the therapeutic universe pre-dating psychotropic drugs, biological treatment for mental disorders or conditions (or "problems," to reduce the pathology aura) is now far more effective in reaching its target than nonbiological¹³⁵ therapies used alone. Some drugs aim for depression, others attack mania, still others are indicated for delusions, and many researchers, clinicians and other observers in the field believe that many studies purport-

¹³⁴ For better or worse, "organic" therapies in psychiatry—chemicals, shock treatment of various sorts, direct electrical or chemical stimulation of the brain, surgery on the brain—are often described as examples of "biological psychiatry." See, e.g., H.M. van Praag, *Biological Psychiatry Audited*, 176 J. NERVOUS & MENTAL DISEASE 195, 196 (1988).

¹³⁵ But note that "nonbiological" therapies—with emphasis on the various forms of "talk therapy"—also act "biologically." See generally SUSAN C. VAUGHN, *THE TALKING CURE: THE SCIENCE BEHIND PSYCHOTHERAPY* at xiv (1997) (arguing that "[p]sychotherapy works because it produces long-lasting changes in the neurons that make up your mind"). These observations are not meant to be ontologically reductive—i.e., they do not presuppose that mental conditions and processes (and mentalist talk) are completely reducible to physical conditions and processes (and physicalist talk).

ing to establish high probabilities of reasonably effective and safe relief for a variety of mental disorders are sound.¹³⁶

But there is precision and precision. Pharmaceutical companies are trying to design ever-more finely calibrated chemicals that aim for specific forms of disordered mental functioning, and specific forms of alteration or enhancement of mental processes. They seek magic bullets for single or multiple targets that do what they are supposed to do, no more and no less. (Of course, there are ultimately intractable problems in fully defining varying kinds of disordered or desirable functioning, and therefore in selecting exactly what to “target.”)

So, compared to what was available in earlier times, the *Harper* technology is far more exact, and the exercise of this substantial increment in precision of control intensifies the need to ask questions about constitutional adjudication that, while far from unprecedented, are now rather more apparent and pressing. The analytical/decisional tool called “strict (or other heightened) scrutiny must itself be strictly scrutinized—as must all particularized standards of review, including the rational basis test, in all the emerging contexts these standards are to be used. If in doing so we do not revise or extend our analytical tools, we may at least understand them better.

How is any of this different from what came before? Changes in how persons think and feel via persuasion and education is ordinarily characterized by gradual and at least partly resistible changes. Our system of constitutional and other legal norms is reasonably comfortable with this—and indeed is in theory directed toward furthering these processes in certain directions. But inducing such changes in mental functioning by altering the chemistry and structure of the brain seems quite different in various respects. What needs to be assessed within a constitutional framework, then, is not so much the physical impingements entailed by swallowing pills or receiving injections, but “mind-assault”—and for this, as suggested, there are

¹³⁶ This view of the studies is not universally held, but I will not pursue the controversy here. *Compare* FROM PLACEBO TO PANACEA: PUTTING PSYCHIATRIC DRUGS TO THE TEST (Seymour Fisher & Roger P. Greenberg eds., 1997) (discussing whether psychotropic therapeutic drugs are biomedically effective), with Frederic M. Quitkin et al., *Validity of Clinical Trials of Antidepressants*, 157 AM. J. PSYCHIATRY 327 (2000) (finding that, although there may be biases at work in clinical research, examination of the studies claimed to show that the validity of antidepressant trials is questionable does not support this view).

no clear precedents. For example, there is so far no well-worked-out doctrine suggesting that “biological treatment” or enhancement of prisoners raises concerns about cruel and unusual punishment, although the idea is worth consideration. (The Court did not take that path in *Harper*.) Until *Harper*, we had no named category of personal liberty interests in avoiding (or seeking) precise, fast-acting and hard-to-resist mechanisms for affecting specific mental states and operations and their accompanying behavioral dispositions. Our tools of behavior control were long limited to the uncertain effects of moral suasion, disablement via confinement, deterrence, and coercion, and perhaps to the gross effects of intoxicating liquors, sleeping potions, coffee, tobacco, or just plain knocks on the head.

The Court was thus faced with matters that, while not entirely out of the box, were viewed in some quarters as part of a “revolution” in treatment of mental disorders—and perhaps in control and prediction of unwanted behavior generally. The Court had had few encounters with this expanding technology,¹³⁷ and it was by no means clear what path it would or should follow. I don’t know how the Court thought it through, but it often helps in sorting out legal/conceptual and factual issues to put oneself in the positions of a trial court and/or trial counsel in a situation where there is no prior appellate (or even other trial court) decision that decisively governs. Consider a *Harper*-like situation from that perspective.

The trial judge, though lamenting the fact that the parties couldn’t settle their dispute without going to court, nevertheless seizes the opportunity to Make Law. She reviews the facts as presented by the contending parties and moves along, step by step, hoping to intuit at least a tentative resolution before too long. She acknowledges that each factual claim—for example, that antipsychotic drugs bear a risk of irreversible tardive dyskinesia and other serious, occasionally fatal adverse effects¹³⁸—

¹³⁷ See *Mills v. Rogers*, 457 U.S. 291 (1982) (remanding, without ruling on the merits, a right-against-treatment case in which voluntary and involuntary patients in mental health facilities objected to administration of antipsychotic drugs). The Supreme Court remanded *Rennie v. Klein*, 720 F.2d 266 (3d Cir. 1983), involving the right of a mental patient to refuse psychotropic drugs, for reconsideration in light of *Youngberg v. Romeo*, 457 U.S. 307 (1982). In *Youngberg*, the Court deferred to the “professional judgment” of care providers who were responsible for dealing with a severely mentally impaired patient in a nonpenal facility. *Id.* at 321.

¹³⁸ See Edmond Hsin-tung Pi & George M. Simpson, *Medication-Induced Movement Disorders*, in 2 KAPLAN & SADOCK’S COMPREHENSIVE TEXTBOOK OF

can be met with a “so what” retort by the state? Those defending both voluntary and involuntary use of such drugs are certain to say that these risks may and should (perhaps must) be borne to promote an invaluable benefit: the relief of psychotic ideation that renders its victims substantially or totally nonfunctional.¹³⁹ In this field of endeavor, as in most others, there are no free lunches, life isn’t fair, and that’s the breaks.

We clearly need some illuminating, constitutionally-relevant abstractions to help us to deal with the So-what questions and related issues. What might these conceptual tools be?

Because of the way the issues are formulated by counsel—or herself—the judge must now have to consider what the Constitution directs her to do. She needs to decide what should be the proper initial (“default”) stance to take when someone claims an individual right against certain government action and government either denies there is such a right, or says that if there is one it is of no special importance, or urges that the right is in fact not (heavily) burdened, or that whatever the severity of the intrusion on the right (and whatever the right’s value), there are adequate public policy justifications for what it did or is doing or plans to do. She will of course have to specify the justificatory standards she believes must be applied under the circumstances—the standard of review, in the narrower sense. Are the state’s goals sufficiently worthy (compelling, important, significant, at least legitimate)? Are its mechanisms necessary or substantially connected to furthering these state goals?

In order to reach decisions, courts use default rules, which operate in some way in every case via presumptions and burdens of proof/persuasion and other “procedural” devices. Some such rules are necessary in any rational adjudicatory system. If a party complains about being hurt by a defendant but offers nothing to show this, the defendant wins without having to establish anything on his own. The default rule could be otherwise, of course, but to most of us it seems to be the correct default rule in ordinary circumstances. If the default rule is “the government always wins absent a showing that it acted in bad faith,” then evidence on the effects of the antipsychotic drug is

PSYCHIATRY 2265, 2268-69 (Benjamin J. Sadock & Virginia A. Sadock eds., 7th ed. 2000).

¹³⁹ I won’t try to unpack “nonfunctional” here, except to note that there are degrees and kinds (some contested) of functionality.

immaterial (unless it bears on matters of good faith).¹⁴⁰ This latter default rule has the merit, one might urge, of allowing our democratically elected governments and their delegate agencies to efficiently promote the public welfare.

Suppose, however, the default rule is: "Anyone who claims and proves that the government physically invaded her body over her objection wins." Every interpretive axis of constitutional adjudication¹⁴¹ tells us that freedom from such unwanted invasion is a core aspect of both the ordinary and constitutional meanings of "liberty," and probably always has been. And just because a legislature thinks such invasions are called for in some cases and its bills are passed and duly enacted doesn't mean that the due process or other constitutional constraints were satisfied.¹⁴² That would lead to the absurdity—at least in our system—that government can do anything it wants.

Suppose the trial judge's stance is that because she is clueless about neurochemistry, she should rule that whatever the personal interests at stake, she must defer to the expert evaluations of Harper's medical and correctional situation, as counseled by the "professional judgment" standard of *Youngberg v. Romeo*.¹⁴³ For the trial judge, the task of examining new facts in

¹⁴⁰ Thus, even under this qualified default rule, if a claimant could show that there is no reasonable basis for expecting the drug to be efficacious in improving the course of the disorder and that there is, on the other side, a reasonable basis for expecting the drug to cause adverse physiological effects, the government's plan in this case was not adopted in good faith. But this isn't the end of the story. One must ask: "Efficacious with respect to what goal?" If the goal is not "medicinal" but to control unruly behavior whatever its genesis, and if this is a constitutionally permissible goal (this remains unclear in some contexts), then that particular bad faith argument is likely to fail, if the drug indeed forestalls or reduces the unwanted behavior.

¹⁴¹ See discussion *supra* Part II.A.1.

¹⁴² For a discussion of legislative procedures viewed from a due process lens, see generally Linde, *supra* note 54.

¹⁴³ 457 U.S. 307 (1982). Here, the Supreme Court recognized a liberty interest in "safety and freedom from bodily restraint." *Id.* at 319. The claim was raised by an institutionalized mentally-impaired person whose aggressive behavior occasioned self-defensive and retaliatory moves by others, resulting in a series of injuries to the claimant. The Court indicated that the liberty interest drew a form intermediate scrutiny, but held that the demands of this standard of review were met if the attending providers made a professional judgment, whatever they actually authorized or failed to authorize by way of habilitation services. Although it said that "respondent's liberty interests require the State to provide minimally adequate or reasonable training to ensure safety and freedom from undue restraint," *id.* it also said that:

[W]e agree that respondent is entitled to minimally adequate training. In this case, the minimally adequate training required by the Constitution is such training as may be reasonable in light of respondent's liberty interests

order to fashion new concepts or amend old ones is easily finessed by her extremely deferential standard of review—leave-it-to-the-professional—which requires only that parties be licensed generally to do what they do (specialists don't seem to be required), and that they actually do it: they look at (or are given information about) a patient or subject, figure out what might be ailing her, and then select appropriate (non)treatment. They must make a judgment, even if it falls far short of customary practice.

An all but complete deference to professional-judgment, however, requires more justification than a judge's unwillingness to learn some basic medical/scientific ideas. Although unformed or uncertain legal/moral conceptualizations make it hard to determine reliably what courts should look for, they can still undertake preliminary searches: they do not come to the situation with a blank slate.

Sooner or later, of course, the court will have to determine what it should make of what it has seen. It might try to discern some analogy between *sharply* altering our mental processes, on the one hand, and what we have already recognized as matters of privacy, personal security, and control of one's body, and then to craft a plausible category—perhaps cross-cutting the others—to characterize what has happened. Don't say that in doing this the court is hung up on abstractions. One can only spend so much time *looking at what happened* unless what happened *means something*—and transmission of meaning depends on receptive frameworks, which, by definition, are abstractions. If we see the person being administered something over his objection and we then observe behavioral changes, we haven't gotten very far unless these changes concern something we care about, and those somethings are, again, described—and evaluated—by abstractions. If an excited person calms down, is this good or bad under the circumstances? If he calms down but only at the price of becoming groggy or otherwise incapable of clear thinking, is it worth it? And so on.

in safety and freedom from unreasonable restraints. In determining what is 'reasonable'—in this and in any case presenting a claim for training by a State—we emphasize that courts must show deference to the judgment exercised by a qualified professional. By so limiting judicial review of challenges to conditions in state institutions, interference by the federal judiciary with the internal operations of these institutions should be minimized.

Id. at 322.

These are the sorts of things we see and look for—and we look for them because we assess them through the value-assigning frameworks that constitute our schooled intuitions. Perhaps the court should say that constitutionally relevant physical intrusions can be as simple as swallowing a pill—at least if the intrusion is closely tied to some recognizable mental or behavioral change, whether seen as good or ill or mixed. The results of some pill swallowings can be physically illness or even death. But suppose the intrusion makes us better—as when someone is forced to undergo an emergency appendectomy, for example. And—more pertinent to our situation—suppose the effects of the intrusion present themselves primarily as behavioral and mental changes, for better or worse. Do we have a fundamental liberty interest in “mental privacy” or “autonomy of mind”? Is this a plausible extension of what we already have in hand, or something wilder?

Before leaping to the Supreme Court, where our case has now arrived (leave aside the procedural path), a point of clarification: the mission of an appellate court is not the same as that of a trial court, though the tasks overlap. Here, the notion of “appellate standards of review” may generate some confusion in discussions of “constitutional standards of review.” There are of course shared meaning elements; in particular, constitutional standards of review do have something to say about what forms appellate standards of review can take in various cases (say, how closely the appellate court is to scrutinize findings of constitutionally material “fact,” such as “malice”), I don’t see any reason to take up this and related appellate review issues here.

Now to the Supreme Court: Suppose, as in *Harper*, the trial judge has already against a claimant’s request for a judicial hearing, but the state supreme court overturns this, and now the matter is before U.S. high court.¹⁴⁴ What set of abstractions/rules did the Supreme Court turn to in *Harper*, and why?

Through much of the twentieth century, the Court—to the dismay of some—has been working out a set of argument forms constituting or embodying standards of review. However murky the standards remain, they go far beyond the simple default standards mentioned earlier, which specify who won on the basis of the identity of a particular party making certain very general claims or bearing certain traits. The Court, in working out

¹⁴⁴ *Washington v. Harper*, 494 U.S. 210, 217-18 (1990).

the developing jurisprudential regime, took two basic steps: First, it specified that when individuals and governments contend, governments don't automatically win. (The reverse default standard—those resisting the government always win—never existed across the board, if at all.) Second, it roughly identified the now well-known “tiers” of review that tracked the more important rights and legal relations into one (ultimately subdivided) bin—the heightened scrutiny group—and much of everything else into another—the minimal-if-any scrutiny group. Interior sub-bins and layers have been added from time to time (e.g., commercial speech within First Amendment speech generally; semi-suspect classifications within suspect classifications generally).

Put otherwise, the key move was the Court's identification of certain claims of right whose impairment required heavy justification by government as compared with more run-of-the-mill claims. (This “heavy justification” includes both substantive and procedural matters—as exemplified in the *Harper* Court's detailed specification and evaluation of the state's review process.) This move was made for certain “specifically” covered rights (speech, religious practice, and some instances of property rights displacement governed by the contracts and taking clauses), and also for classifications of a particularly odious sort (race, gender) protected by the Equal Protection Clause and the Fifth Amendment's Due Process Clause. (I do not mean this to be an exhaustive list of strongly protected substantive or procedural rights.) Similar moves were made for other strongly protected rights and interests said to be implicitly protected by one or more of the same clauses (e.g., abortion and marriage via due process analysis, and the rights to vote and travel via equal protection analysis).

(d) Standard of review questions: hierarchies of interests

Beyond the foregoing, there are several important unresolved issues concerning both *Harper's* initial characterization of the constitutional interest at stake and its (necessarily) accompanying standards of review.¹⁴⁵ I am not going to recite all

¹⁴⁵ Again, one might want to characterize as a standard of review the larger argument structure that tells us first to look for hierarchies of rights and then directs us on how to deal with them by assigning particular burdens of justification. The specific burdens ultimately assigned are what we generally call “standards of review.” See *supra* text accompanying notes 19-43, 54-55.

of these continuing issues here, any more than I did in discussing *Woody* and *Whittingham*,¹⁴⁶ but some of them may have to be answered sooner rather than later because of the impact of the escalating technological revisions in life processes. In many ways, they parallel the inquiries about *Woody* and *Whittingham*:

- We still must deal with a basic question raised earlier concerning the very nature of Harper's liberty interest. What is it *about*? If it is not (solely) about physical invasiveness, is it about the risk of *adverse* physical and mental effects, or is it about *any* major impact on his mental functioning, whether for good or ill? (Recall that under the common law, competent persons can refuse beneficial—even lifesaving—medical treatment.)¹⁴⁷ To revive an earlier inquiry: If the state used a “magic bullet” that had simply “erased” Harper's disorder (this is both conceptually and factually a heroic assumption) without producing what we ordinarily view as adverse effects,¹⁴⁸ would he have had any case at all? On what rationale?

¹⁴⁶ See *supra* text accompanying notes 61-115.

¹⁴⁷ See *infra* text accompanying notes 176-204 (discussing *Cruzan v. Director, Missouri Dep't of Health*, 497 U.S. 261 (1990)).

¹⁴⁸ As mentioned earlier, eliminating a disorder is not a simple concept. Even something as innocuous as removing a small splinter leaves memories in place—to “undo” the wound is not to turn time back. To “erase” clinical depression and restore one to her *status quo ante* without “side effects” does not leave her exactly as she was before, even if this were her first episode and the condition never reoccurred. Moreover, disorders have multiple aspects, some of which could be looked on, in the abstract, as advantages. The “flight of ideas” and hypersensitivity to perceptual stimulation that characterizes some disorders may generate some genuine insights that outlast the patient's florid state. One can then speak (somewhat loosely) of special capacities or aptitudes that are intrinsic to the disorder. Moreover, the beneficial and adverse aspects of the disorder may not be separable into discrete units: the benefits, such as they are, may be bound up with the very nature of the disorder, as the preceding example indicates.

To eliminate a “capacity”, however, may be (looked at narrowly) to work an impairment. One can then speak loosely of “therapy by impairment.” Of course, in most cases this prospect does not justify avoiding treatment, for the very reason that the capacity is bound up, conceptually or otherwise, with serious disadvantaging conditions that may annul most or all benefits from disorder-connected capacity. And if that capacity is something intrinsically and instrumentally evil—say, to derive intense pleasure from inflicting pain on and/or killing other sentient beings—the sooner it is erased, the better, at least for persons not being trained as warriors. Impairing a capacity, in such cases, is precisely among the things we *want* to do. See generally SHAPIRO ET AL., *supra* note 63.

There are commentaries that illustrate some of these difficulties in thinking about eliminating or ameliorating disordered mental states. For example, some have suggested a possible association between mental disorders of certain sorts and “creativity.” See, e.g., KAY REDFIELD JAMISON, TOUCHED WITH FIRE: MANIC-DEPRESSIVE

- For any specific liberty interests, how “constitutionally distant” are they from each other (assuming they are indeed different)? To the extent that they differ in constitutional value, is this difference implemented by appropriate variance in the degree of burden placed on the parties under specified circumstances? For example, how much stronger is the protection for the right to engage in political speech than for the right to manage the disposal of your household wastes?

- What sorts of hierarchies are there *within* these ordered bins and how are they established? Again, start with political speech and compare it, not with a non-speech claim, but with a right to say something in commercialese. (“Buy our product and you’ll have more dates.”) First Amendment law is not limited to two tiers, and possibly not even to three. It’s hard to say just how many there are—which occasions the next point.

- The presence of many bins within bins of course signals fine-grained differences in the rankings of rights and interests. If so, there should be quite a few standards of review, or perhaps a continuum of justificatory burdens on the contending parties, keyed to the importance of the individual interest at stake and how seriously it is impaired. (These degrees of impairment form their own continuum of inflicted harm.) If there are indeed interior hierarchies within as well as among individual rights and interests—and among government interests and mechanisms for promoting them—then our universe of constitutional relations has become pretty complicated, but perhaps not irrationally so.

- A “continuous” standard of review (one might balk at calling it such) would of course still require appraisal of constitutional values in order to locate one’s case on the continuum—and on the related continua involving degrees of impairment, importance of government interests, and the extent to which they are impaired. Giving names to regions of what may indeed be a continuum is a common way of communicating: we know more about a person when we are told that she is tall, despite the adjective’s imprecision. It would be odd to respond to an inquiry about her height by saying that the concept of height designates a continuum and giving names to different portions of it would be arbitrary. Of course, we do have a true metric for

height, but we don't (and can't) always use it, so we continue to say things like "you're tall" and "look at Mutt and Jeff over there." But whether our ordering of values is continuous or segmented, we will almost certainly have names or characterizations for different regions of this ordering. And these regions are precisely what are named or described by standards of review.

- It is possible that our ways of describing constitutional disputes and their attendant standards of review serve certain purposes that are worth certain costs. Using specific standards of review that contain explicit characterizations of interests and burdens of justification may reinforce basic constitutional values and (perhaps corresponding) social norms. The fact that specific standards seem to presuppose and to trumpet odd discontinuities in constitutional values and their infringements ("you get either strict, intermediate, or non-scrutiny") may not even be a "cost": we make sharp differentiations of interests ("right P is fundamental and invading it requires heavy justification, but right Q is not and its impairment requires virtually no justification") in part because value reinforcement is enhanced by identifying a small number of discrete categories of interests bearing significant announced values. The "announcement" is made not only by invoking honorific characteristics ("this is about free speech and equality"), but by expressly requiring that countervailing interests must be "compelling" or "important" and government intrusions must be "necessary" to promote them or must "substantially further" them. A continuous, undifferentiated scale of review is difficult to describe except by charting functional relationships between "intensity" of scrutiny and degrees of constitutional value and harm. Conversion to such a "spectrum" scheme may result in loss of some beneficial opportunities for value reinforcement.

- There are some additional observations to make about the logical (if not chronological) stages of constitutional argumentation, from the starting characterization of claimed interests through the assignment of burdens of justification and to final resolution. Consider how standard interpretive tools work here. We have our three closely tied interpretive axes at hand—authorial states of mind, lexical understandings of text and its structures, and recipient frameworks and reactions.¹⁴⁹ These in turn lead us to interlinked matters of tradition, history, custom,

¹⁴⁹ See discussion *supra* Part II.A.1.

lead us to interlinked matters of tradition, history, custom, details of textual structure, moral theory, analogy, precedent, comparison to paradigms, and still more, depending on variations in how we identify and compare such factors. As I said, I do not try to specify how these variables are embedded within the three higher-order interpretive axes—or whether they represent additional independent axes.

Assume we have already acquired data about the nature and effects of government dealings with involuntarily confined persons, from doing brain surgery on them to letting them run amok. We also know something about what the newer—and perhaps forthcoming—“mind control” techniques are. But, once again, what other, familiar processes do these techniques strongly resemble? Are they like physical restraints or confinement, thus possibly assimilating them to preexisting “liberty interest” bins protecting “personal security” or “freedom of movement”? If not, and no other similarities present themselves as more persuasive, how in principle do we manage these so-far constitutionally uncharacterized interests? Ask asked earlier: Should we connect the newer happenings to matters of matter (physical intrusions and effects), or to matters of mind (the autonomy or privacy of thought and feeling), or to both? Should our answers be incorporated within standards of review that are gradually becoming more detailed and thus instructive (or more confusing)? It’s easy to see the connection between being in the stocks and being confined to a locked room, but the leaps from confinement or beatings to biological treatments for mental disorder, or to controlling behavior without reference to a disorder model,¹⁵⁰ seem more challenging. (Recall the earlier questions about how to relate human cloning, and other departures from the usual ways of creating new human beings, to what many now view as constitutionally protected forms of procreational autonomy.)

The Court made little effort to describe exactly what Harper’s specific fears and complaints were, or if he was able clearly to articulate them. Nor did it stop for long on the pharmacology of antipsychotic drugs (in this case, Mellaril). One

¹⁵⁰ A “disorder” model is an abstract guide to both description (“What we see here is the effort to treat a disorder”) and evaluation—including action-justification (“Nonconsensual physical or mental intrusions are justified only to treat a disorder, not just unwanted but nonpathological thought and conduct”). The rival “custodial control” model is discussed later. See *infra* text accompanying notes 160-70.

senses at the outset that Mr. Harper's beef was considered less-than-titanic, although one reason for this was that he was being held in penal custody—he wasn't just a patient. The Court, after all, invoked a standard of review already set in place by *Turner v. Safley*¹⁵¹: prison measures need only be reasonably related to legitimate penological interests. Still, the Court did devote some time and space to explaining the general range of risks linked to medication administered to Harper—risks that seem to have played a role in his personal objections to the proposed medication.

(e) Assessing the Court's work to this point

In general. I have already suggested that the Court's efforts in *Harper* were inadequate in certain respects. Was it sufficiently attentive to the reasons for Harper's refusal of treatment, even given his penal circumstances, which seemed to call for deference to correctional/medical judgment? Did the Court give a cursory account of Harper's complaints against medication because of the impact of its non-strict (though nontrivial) standard of review for complaints by prisoners? If the Court had attended more carefully to the particulars of Harper's encounters with antipsychotic medication, it might have considered assigning greater weight to his claimed interest (in mental integrity?), requiring a more rigorous standard of review. This would have required refinement of the *Turner v. Safley* standard—subdividing it into sub-tiers—but maybe this was not called for under the circumstances.

Perhaps in some ways *Harper* displays the ills supposedly associated with standards of review—encouraging decisions at one stage to be made by looking ahead to later stages. But this is not in principle an “ill” feature of standards of review, given the intimate connection between rating a claimed interest and imposing a burden on others to justify its infringement. *Of course* the characterization stage “looks ahead” to the standard of review stage—it's *supposed* to. Still, it is open in any case to consider whether a court is excessively result-oriented, “justifying” its outcome through the illusive effects of a standard of review that was not applied in good faith. (I have no reason to think that this was the case in *Harper*, but no one—and no

¹⁵¹ 482 U.S. 78, 79 (1987) (upholding prison regulation restricting inmate correspondence but striking down marriage restriction).

court—escapes the influence of result-orientation, and this is not universally a bad thing. Part of the jurisprudential analysis problem here is to explicate what is meant by “result-orientation.”) In any case, it seems to get causation wrong when critics of standards of review to attribute a questionable outcome or opinion to the skewing effects of these standards, at least as an across-the-board claim.

Perhaps the simplest hypothesis about the Court’s argument structure is the most plausible one: the relatively soft standard of review in *Harper* follows from the Court’s modest valuation of Harper’s constitutional claims as made under the circumstances of his penal confinement. The Court (along with many others) is deeply suspicious of the merits of complaints by convicted criminals. It is the perceived lowly status of prisoners’ claims in the constitutional hierarchy that accounts for importing *Turner v. Safley*’s standard of review. The Court saw no occasion to investigate the nature and worth of mental integrity or to self-assess its judicial powers and obligations to examine the empirical and value foundations of a government’s asserted interests. But, sooner or later, it will have to, as I have argued.

On what basis could a stronger standard of review have been recognized? Where did the Court’s valuation go wrong—if it did? Suppose we try a “subtraction” experiment, excising the fact that Harper was in prison, and placing him instead in a mental health facility. What would we learn about how the Court might have valued his interest in avoiding forced alteration of mental functions? Would Harper’s preferences have received even *less* attention because of the professional judgment rule deriving from *Youngberg v. Romeo*? If the Court were given—in this setting—a vivid account of the serious risks of currently available antipsychotic medication, would it have assigned greater disvalue to such adverse effects, and compared them carefully to the claimed beneficial therapeutic effects on mental functions?

- *A valuation paradox: valuable liberty interests drive strong standards of review, but some valuable liberty interests won’t be recognized in the first place without prior installation of a strong standard of review.* Here, we do run into what at first seems to be a paradox. I think it dissolves upon reflection, but it scanning it reinforces the earlier accounts of constitutional valuation. The problem is this: everyone, as they say,

can understand a punch in the whatever, but evaluating punches in (or to) the mind is something else. Administering, say, a drug causing nothing but nondangerous feelings of pleasure (whatever their subject or content) is far from an unambiguous benefit. How do we value the core idea of imposing unwanted alterations in our mental functions? How is our ultimate valuation affected by contingent factual matters—what the drug or other modality actually does, mentationally and behaviorally? The point to stress here is that some overall constitutional valuations of liberty interests are heavily—but not entirely—fact dependent. But courts may be unlikely to address these empirical issues in the first place unless moved to do so by a rigorous standard of review—which won't be applied without a prior strong valuation of the very liberty interest that determines whether the standard of review is light or rigorous.

The “paradox,” however, is not much of a blockade to the jurisprudence of standards of review. It is much attenuated if one looks to the distinction between specific standards of review and the global instruction to do what is necessary to identify the precise standards to apply. One soon sees that the vulnerable plank in the paradox is the idea that courts may not address important factual issues that go to the characterization of liberty interests unless they are already governed by a rigorous standard of review. Why would one even think to inspect what an antipsychotic drug really does? The prisoner takes it, and (at least over time) one's disfavored behavior is improved. Who cares whether the mechanism is physical, mental, or magical? As a matter of theory, however, to interpret the plank that way is a mistake: careful factual investigation may be required at the threshold characterization stage simply because of the critical importance of that stage of constitutional adjudication. It is not driven by a particular standard of review, but, as noted, by the global standard of review that tells the courts what kind of work needs to be done—characterization of constitutional disputes within and in light of our previously derived hierarchy of constitutional values. If the application of a particular standard of review in later argument stages covers some of the same ground involved in the threshold valuation of a purported liberty interest, so be it. If the overlapping stages are conceptually connected, this is inevitable.

Of course, even a more rigorous standard of review might have reached the same result as *Harper* did. More generally,

there is so far no reason to think a stronger standard of review would hamper the proper maintenance of order in prisons. A stronger standard, of course, might well have unearthed additional critical legislative facts (beyond whatever was turned up at the threshold characterization stage) and stimulated more careful evaluations. Harper might have succeeded in showing that the avoidable harm to him was not outweighed by promotion of penal interests. But if so, this would have been a constitutionally desirable outcome, not a case of unwarranted thwarting of state interests.

The difficulty with the Court's way of proceeding is not that the Justices thought ahead to what they were going to do after they selected their initial working abstractions—*of course* they did. The problem, if there is one, is that they did not rate Harper's interests more strongly at any stage, and it isn't clear that they actively considered a stronger position. Perhaps they were inattentive to the global standard of review. The impression is of sloughing off because the somewhat anemic valuation of Harper's liberty interest generated a feeble version of "intermediate" scrutiny. The Court simply didn't think it had to explore any more than it did—and this seems wrong, even if the final result would remain the same: no judicial hearing required.

Suppose next that the Court is fully engaged within the global standard of review, directing it to mine the terrain for constitutional values in jeopardy and to select a particular standard of (further) review. On what grounds would one argue that the Court didn't rank Harper's interest strongly enough? Think again about whatever normative and empirical generalities explain the constitutional status of freedom from confinement and physical intrusion—personal security, physical freedom, bodily integrity, and so on. These notions only partly explain why we would want to protect the mind from unwanted, fast-acting and hard-to-resist changes, however induced—perhaps even without physical intrusion.¹⁵² Mental integrity may implicate a particularly strong interest: the mind, after all, is a—probably *the*—constitutive component of personal identity, more so than our physical constitutions. In this sense it is the prime substrate ("author"?) of all liberty claims.¹⁵³ To say this does *not* commit

¹⁵² Complete and prolonged sensory deprivation might be an example.

¹⁵³ There is no reason to probe the concept of personal identity here. *See generally* DEREK PARFIT, REASONS AND PERSONS 219-33 (1984) (discussing memory and psychological continuity in the course of examining the idea of personal identity).

one to anything approaching an automatic bar to intrusions on the mind, as some have mistakenly thought.¹⁵⁴ But it seems significant that the Court did not define the liberty interest at stake in physical terms: the right to refuse antipsychotic drugs was couched not by reference to physical intrusions or straightforward physical effects, but in mentalist terms—the right to refuse antipsychotic drugs, which, whatever their physiological mechanisms, are generally perceived as working on the mind. This of course does not guarantee a bottom-line right to refuse it; the target mental and behavioral effects may still, on balance, be sought, even in the face of non-target (and often adverse) physical and mental effects.

So far, then, constitutional analysis of *Harper* has required us to think more precisely about the sorts of things liberty interests generally protect, and in particular, about matters that, pre-technology, had never been threatened in the ways they are now. The escalation of, say, privacy intrusions from watching a house to using a telescope to using sensitive sound recording equipment to using heat sensors poses important challenges, to be sure, but the linkages among these techniques are relatively clear. But in the arena of behavior control, moving from physical confinement, beating, or torture to changing the contents of one's mind by physiological alteration rather than gradual education or persuasion (or even conditioning or "brainwashing") seems to be a greater incremental change. The current and future prospects for such biological controls include, as suggested, measures that quickly, precisely, and (in certain ways) irresistibly change one's mental functioning at the government's (or anyone's) behest. Thus, even if the Court need not have gone further in *Harper* itself (I still think it should have), the underlying issues remain and grow more pressing. The next judicial step—when it is called for—should inquire into what the Court's narrow description of a "liberty interest in avoiding antipsychotic drugs" left out and why. Any plausible basis for a liberty interest in refusing antipsychotic drugs seems in part to be of a piece with possible liberty interests in refusing antidepressants, stimulants, intellect-enhancing drugs, or any other mode of technologically altering mental functions. The changes induced by these means are of course (in general) wildly differ-

¹⁵⁴ See the discussion of this point in SHAPIRO ET AL., *supra* note 63, ch. 1, § 5-G (discussing the effectiveness and intrusiveness of different forms of treatment and responding to critics of prior accounts of the distinction).

ent. "Canceling" depression is an enterprise sharply different from eliminating delusions, and the two projects may well have a different constitutional status.

As things now stand, it ordinarily (if not universally) seems more benign to impose antidepressants¹⁵⁵ on someone than to require antipsychotic drugs or electroconvulsive therapy. One could argue, however, that delusional psychosis is more serious than depression, and the benignity of a mental intrusion rests not simply on a drug's effects, but on a comparison between such effects and the need for more radical improvements in a person's mental functioning. When "need" is matched to "remedy," then, antipsychotic drugs are also "benign," provided their adverse effects are suitably controlled. This seems oversimple, but it raises serious issues about the nature and gravity of mental intrusions. Although the general outline of the constitutional argument may be the same for different mechanisms of mind/behavior control, the outcomes need not be. Still, it is unsettling to multiply the universe of separately named liberty interests rather than relying on fewer, more comprehensive interests. Should the Court have recognized a threshold liberty interest in forced administration of *any* mind-altering agents, based on some account of the integrity of mind and identity?

I don't want to exaggerate the degree of conceptual innovation that constitutional jurisprudence will have to bear as biomedical technology develops. Not every case will be terminally mystifying. If the Court does eventually deal with *Harper*-like cases involving antidepressants, there would be no pressing need to break new ground; it would only have to say that the mood-elevating medicine's better risk/benefit profile makes it easier to justify the government's (coercive) use of it. Nevertheless, the Court would need to say something about how to describe the (new?) (expanded?) liberty interest. Perhaps some treatments would be seen as so non-intrusive and so strongly effective in controlling mental disorder that, whatever we call

¹⁵⁵ There still are no magic bullets, however. See Robert Langreth, *Researchers Seek Safer Drugs for Wide Array of Brain Disorders*, WALL ST. J., May 9, 1996, at B1: "The new-generation drugs work more like a dart aimed with greater precision, isolating one particular group of brain receptors and thereby having fewer unintended effects. . . . With the notable exception of the newer antidepressants, most existing mental-health drugs act with the subtlety of a sledgehammer, broadly knocking out or altering a wide spectrum of brain activities to get at the particular one they seek to affect. In doing so, they trigger an assortment of unwanted side effects, ranging from nausea to impotence."

the liberty interest, it is not sufficiently impaired to merit strong scrutiny of government action. The Court occasionally says things structurally similar to this, as in *Whalen v. Roe*.¹⁵⁶ As we saw, it conceded the existence of an important informational privacy interest held by patients concerning their histories of treatment with certain drugs. It nevertheless held that the database was secure and that therefore the interest wasn't impaired or threatened enough to trigger a heavy burden of justification.¹⁵⁷ The Court, however, did not inquire closely into the effectiveness of the security system, leaving us to wonder whether it even took the privacy claim seriously. As explained earlier, there is an obvious question about why the Court works with discontinuous standards of review (*no* elevated scrutiny—not just less—below a certain threshold of harm or risk) rather than smooth ones (a modest increment in risk is matched by a modest increment in scrutiny).¹⁵⁸

Despite the attractiveness of finding comprehensive liberty interests to cover “mind intrusions,” different drugs and different kinds of non-drug interventions may, as already stressed, differ sharply in their mind-alerting effects and in their physical and mental risks. “Mind intrusions”—whether benefits or harms—are not only not identical, they vary immensely, and we do not have a large palette of descriptive terms to help describe and evaluate them, partly because of our relatively limited experience in technologically directing such mental incursions.

• *Matters left out.* This is not the end of the critique of *Harper*. The discussion has so far bypassed several issues that had already come to light in the prior jurisprudence of mind alteration. They should be recounted briefly.

¹⁵⁶ 429 U.S. 589 (1977).

¹⁵⁷ *See id.* at 603-06. One might argue that the Court in *Whalen* in fact used a different argument structure in which the burden indeed triggered some degree of heightened scrutiny, but the government interest was efficiently promoted in a narrow way that preserved privacy interests because it had installed a security system. This seems a less accurate account of the Court's ruling, however.

¹⁵⁸ *See supra* note 17 and accompanying text. *See generally* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 98-99 (1973) (Marshall, J., dissenting) (discussing the idea of a spectrum of standards in an equal protection context). *See also* Peter S. Smith, Note, *The Demise of Three-Tier Review: Has the United States Supreme Court Adopted a “Sliding Scale” Approach Toward Equal Protection Jurisprudence?*, 23 J. CONTEMP. L. 475 (1997). It seems this approach would also be applicable to fundamental rights or fundamental liberty interests within a due process context.

• *Competence; mental disorder; the distinctive nature of prisons and its bearing on the standard of review.* One major dimension of *Harper*, which affects all stages of its argument structure, concerns the rights-claimant's competence to make the therapeutic decision at hand.

First, I insert a point of clarification: it appears that the Court viewed the issue of Harper's mental competence as constitutionally immaterial, at least in the context of penal confinement. It thus didn't improperly assume Harper's competence—it just didn't care about it. Moreover, no one seems to have argued that Harper was incompetent, so no issues arose concerning "proxy" decisionmakers and the standards they are to use in making decisions on behalf of incompetent persons.

The idea of mental competence (whether for particular functions or more globally understood) is well-known to the law.¹⁵⁹ The reason is easy to state, at least while we analyze the issue at comfortably vague levels of abstraction. Competence is a central component (element? aspect? presupposition?) of autonomy, and is generally viewed as a necessary and constitutive precondition for considering a person, her decisionmaking, and her decision itself, to be autonomous.¹⁶⁰ To say that a competent person's largely "self-regarding" personal decisions, medical or not, may be overridden by others is immensely threatening to—and perhaps in some cases destructive of—the very possibility of autonomy. Competence is thus not just some stray and dispensable side constraint in working through the concept of autonomy. Indeed, its centrality is universal: to assess the nature and limits of competence is to work at the heart of autonomy, which is far more than simply being able to pur-

¹⁵⁹ See generally Elyn R. Saks, *Competency to Refuse Treatment*, 69 N.C. L. REV. 945 (1991) (discussing patients' competence to make decisions about their medical treatment); Elyn R. Saks, *Competency to Refuse Psychotropic Medication: Three Alternatives to the Law's Cognitive Standard*, 47 U. MIAMI L. REV. 689 (1993).

¹⁶⁰ For comments on the conceptual structure of the idea of autonomy, see Michael H. Shapiro, *Is Autonomy Broke?*, 12 LAW & HUM. BEHAV. 353 (1988) (reviewing C. LIDZ ET AL., *INFORMED CONSENT: A STUDY OF DECISIONMAKING IN PSYCHIATRY* (1984)). See generally RUTH R. FADEN & TOM L. BEAUCHAMP, *A HISTORY AND THEORY OF INFORMED CONSENT* 235-73 (1986) (discussing the conditions necessary for autonomous action). The uncertainty about the appropriate terms to use—for example, "element," "precondition"—is not a question of "mere terminology." It is a conceptual issue that may (but need not) appear as a procedural problem—say, whether one must show in advance that one is competent, rather than wait to respond to a possible competence challenge.

sue one's preferences, whatever they are, without outside interference. Here, however, I offer no arguments about autonomy's ultimate moral and legal/constitutional status, nor about the range of its defeasibility, nor about paradoxes involving burdens placed on some aspects of autonomy in order to enhance some of its other aspects. Collisions between self-governance/individualism ideals and paternalism are also outside the present mission.

The assessment of competence is heavily (but not exclusively) involved with the idea of mental disorder. Most observers now agree (or say they agree) that mental disorder alone imports no automatic inference of broad incompetence or even specific incompetence for particular tasks. The possible (and admittedly frequent) concurrence of mental disorder and incompetence to make therapeutic decisions drives some serious legal disputes, given the formal legal doctrine that a competent person's refusal of medical treatment is decisive: he simply may not be treated over his objection, even if others (and perhaps he himself) believe treatment would in some sense promote his best interests. (This doctrine is not always honored, especially within state institutions.)

This account seems intuitively plausible to the liberal mind. Still, if a crazy person refused to tell us how to stop the microbe that will, if unchecked, destroy the human race, I would be quite willing—even eager—to assist in forcing (even highly intrusive) medication upon him to get the information that will save us (even if I thought the universe would be better off without the human race). More realistically, one might expect that in daily life, competent persons (even those not officially viewed as mentally disordered) are often pushed, prodded and tricked by physicians, family members, and friends into taking medication. If so, the supposed tradition of deferring to competent refusal of medical treatment is fractured: the statement of the legal rule may represent a liberal ideal, but private practices may not entirely conform to it.¹⁶¹

The *Harper* Court, however, did not explain why it acknowledged no direct role for a competent patient's views on the matter. What are we to make of the failure? Again, the prison context may explain, if not justify, the failure to confront

¹⁶¹ The problem of complex traditions is mentioned again later, see *infra* text accompanying notes 187-91.

the issue of competent refusal of therapy.¹⁶² But, to state the obvious for the sake of completeness, prisoners are not entirely without important constitutional rights, and the absence in *Harper* of any discussion of decision making competence requires explanation. If the government's goal is custodial control within an institution, one might think that the disorder model and competent refusal are irrelevant: if we don't ask prisoners for permission to place them in solitary confinement, why should we ask them if we can give them drugs to control their behavior, whether they are disordered or not? But the Court did not frame matters this way, and indeed noted in a footnote that Washington had not abandoned the disorder model and did not allow non-disordered prisoners to be medicated over their objection.¹⁶³ It did not, however, state that preservation of the disorder model was constitutionally required.

But bypassing competent choice is not the only problem here. Even if the constitutional materiality of competence is accepted, we may not fully understand what it is we are accepting. Competence is generally not an all-or-nothing predicate and it is hard to evaluate. Nor is it a matter of linear "more-or-less" vagueness in a single dimension. Moreover, incompetent persons are also legally and morally entitled to be heard, and often to be deferred to. Physicians, for example, may be reluctant to impose major medical/surgical treatments on non-assenting minors who may in fact be mentally incompetent as well as legally incompetent because of their ages. (I know of no cases in which an incompetent person of any age was made to serve as an organ donor where the record contained evidence that he or she affirmatively dissented.)¹⁶⁴ More generally, incompetent persons remain "persons" and are rights-holders, although there are serious problems in explaining what this means, both in theory and in operation.

In any case, the *Harper* majority did not inquire into Harper's competence, and only Justice Stevens' concurring and

¹⁶² There are other, quite different circumstances, in which the Court has had to take serious account of a claimant's incompetence, as in *Cruzan v. Director, Missouri Dep't of Health*, 497 U.S. 261 (1990).

¹⁶³ See *Washington v. Harper*, 494 U.S. 210, 222-23 & n.8 (1990) (discussing the requirements for forcing medication).

¹⁶⁴ See *Strunk v. Strunk*, 445 S.W.2d 145 (Ky. Ct. App. 1969) is not on its face a counter-example. The mentally impaired younger sibling was thought to affirmatively want to rescue his older brother with a kidney transplant, but the facts behind the record may be more complex than that.

dissenting opinion suggested the importance of the issue. He noted that Harper had never been adjudged insane or incompetent.¹⁶⁵ All we know from *Harper* is that in his circumstances—displaying dangerousness in a penal institution—it made no difference that Harper might have been competent. This seems a bit much even under the softer varieties of heightened scrutiny. Even if the explanation for the Court's inattention to "detail" was (at least partly) the prison setting, this does not excuse the failure even to mention a major, normatively material issue. Although *as decided*, the issue of competence was, for the Court, constitutionally immaterial under the circumstances, the materiality issue was material at the next higher level of generality. That upper level involved consideration of a liberty interest in declining drug therapy that sharply affects mental functions and bears serious risks.

But the penal setting and its urgent requirements for order may explain (without necessarily justifying) why the competence issue was not addressed. The Court's idea seemed to be that because Harper was in prison, it simply made no difference whether he was competent or not. Prisons, after all, have important things to do to, for, and about prisoners and staff, and various concomitants of life as a free person are lost or attenuated because prisoners are in the state's hands for various legitimate purposes. The prison setting thus explains (if any one factor can explain anything) the particular formulation of *Harper's* standard of review, taken up whole from *Turner v. Safley*:¹⁶⁶ what the prison does must be reasonably related to a legitimate penological objective.¹⁶⁷ Although this does not in terms invoke the minimal rationality test, it is tempting to say that because Harper lost his case and certain important matters (such as competence) were not even addressed, all the Court did was apply the rational basis test, dressing it up to make it seem otherwise. This reflects, one might argue, a simple default rule:

¹⁶⁵ See *Harper*, 494 U.S. at 250-57 (Stevens J., concurring in part and dissenting in part, joined by Brennan and Marshall, JJ.). Both the majority and the concurring/dissenting opinion noted the "substituted judgment" doctrine for vindicating an incompetent person's rights by inquiring into his true preferences. See *id.* at 222 (majority opinion).

¹⁶⁶ 482 U.S. 78, 89 (1987) (finding that "[s]ubjecting the day-to-day judgments of prison officials to an inflexible strict scrutiny analysis would seriously hamper their ability to anticipate security problems and to adopt innovative solutions to the intractable problems of prison administration.").

¹⁶⁷ See *id.*

in *Prison v. Inmate*, prison always wins. But there is no such rule, and prisons don't always win, as *Turner v. Safley* itself shows.

What sort of standard is the formulation "reasonably-related-to-a-legitimate-penological-objective"? Is it a kind of strict scrutiny crystallized into a particular shape for use in prisons, where government interests are generally viewed as compelling? Probably not. In terms, it seems in between the heaviest and the lightest justificatory burdens the Court has used. But what the Court calls it is one thing; what the Court does with it may be something else.¹⁶⁸ How did the Court implement it?

Think first what a penological interest might be, legitimate or otherwise, and how it bears on deferring to competent choice. Keeping order is an obvious candidate. Prisons contain persons, some dangerous and at close quarters with other inmates. It is easy for a small incident to cascade into a local war. A prisoner who may assault persons and damage property obviously may and ought to be controlled *in some way*, and deep thought on that point alone is not called for, at least not in the Court's opinion. But the "in some way" requires attention and a better accounting of penological interests. Identifying and evaluating them involve serious complications not dealt with precisely by the Court—and it should have dealt with them, considering the traditional status of competent refusal or acceptance of therapy.

We might pause here for what serves as station identification—asking, once again, how we came to consider the role of decision making competence in constitutionally valuing a prisoner's refusal of therapy. As before, one can simply say that the particular standard of review revealed by prior constitutional interpretation imposes these questions on us. But this blurs the underlying question of what the standard of review means operationally—and that depends on prior constitutional valuation. Perhaps the most we can say for now is, once again, that the Court did not place a high value on a prisoner's exercise of

¹⁶⁸ The Court, for example, sometimes invokes the rational basis test in equal protection cases involving important but formally protected interests, thus masking (purposely or not) the fact that it is applying a more rigorous standard. *See, e.g., City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432 (1985); *Romer v. Evans*, 517 U.S. 620 (1996) (striking down a Colorado constitutional amendment aimed at limiting legal protections of the status of gay persons; the Court ruled that it had no rational relationship to legitimate state interests, and that states cannot act to make gay persons unequal to all others).

choice, at least where there is an issue of prison security. How the Court ought to have performed this “entry-level” valuation is not a topic for this article, however.

There may be good reasons for correctional authorities to ignore or downplay the historic role of competent decision making, but these reasons need to be stated: If they are not, it is not clear how we can justify compromising a long-standing principle simply by saying that the person is in prison, *when the moral and constitutional significance of being in prison was not properly plumbed*. And once again, the need to do so is greatly magnified by the technological context: it is one thing to deny there is, say, a right to refuse “talk therapy”; it is another to deny there is a right against biological therapy directed toward the mind.

• *Dangerousness*. Little was said in *Harper* about standards for confirming the factual and value claims about Harper’s dangerousness, although in this case that was no great failing: Harper had acted violently before, and such a background is a fair (perhaps the only good) predictor of future violent incidents. Perhaps the detail could have been richer—after all, averting harm was the ultimate justification for forced therapy; controlling Harper’s mental disorder for his own sake was not high on the agenda, if it appeared there at all, and there is a question about whether it could properly be there.

In some cases, however, the components of the risk evaluation require attention, and a threat must be established empirically and appraised. (The role of mental disorder in establishing the risk of misbehavior is raised below.)¹⁶⁹ Is it a threat of homicide or bruises? Of mattress fires or blocked toilets? Who makes this evaluative judgment? And whoever makes it, is he, she or it supposed to weigh the benefits of compelled treatment against the disvalue—such as it is—of displacing the prisoner’s personal decision not to be treated with antipsychotic drugs?

In real life, both the prison authorities and the mental health professionals who are directly on the job make the decisions as they come up. Any other starting route would make little sense: even if an omnipresent court were hovering about, or quickly available via the Internet or other communication system, a judicial hearing would generally be an inefficient first-

¹⁶⁹ See the discussion of disorder and control models *infra*, pp. 450-54.

line decisionmaking process. That decision, however, is of constitutional dimension. The parties on the line, all agents of the state—physicians, prison administrators, and other professionals—are making value decisions that bear on constitutional liberty interests (however they conceptualize it for themselves).

Once again, should the Court have said more—this time, about the processes of fact-determination and value judgment in prisons when an inmate's nontreatment preferences conflict with the institution's security interests and with his own long-run health interests? And once again, the answer seems to be that the liberty interest at stake in a prison is either worth less than the parallel liberty interest on the outside, or is more easily intruded upon justifiably in a prison, or both.¹⁷⁰ Either way, the level of importance the Court discerned in the right to refuse treatment with antipsychotic drugs *in prison* was not high enough to warrant anything more than a simple outline of the physical risks to persons and property posed by the prisoner.

• *Disorder and control models.* The contrast between controlling behavior by treating mental disorder and controlling it without reference to such disorder is familiar topic, and was mentioned in the preceding section. The nature of the control "model" in use is yet another major variable that must be considered in judging *Harper*. (As used here, a model is simply an abstract guide for decision, action, analysis, etc.) This variable was of limited relevance before the introduction of technologies that targeted specific mental processes. (The use of strong sedatives, which have long been available, doesn't seem to have been a visible issue in prison contexts, as opposed to mental health facilities.) If correctional officials establish and evaluate an empirical risk posed by a prisoner, is this enough to make out a presumptive case for controlling behavior chemically, regardless of the presence of disorder? We know this much from *Harper*: Harper argued that the state could not constitutionally administer medicine to him over his objection without first establishing a medical need for it. As we saw, the Court, in a footnote, responded simply by saying that the substantive and procedural provisions of Washington law required an adequate showing of treatable mental disorder. But the Court did not say that such a showing was essential. So, what do we know?

¹⁷⁰ The two descriptions are closely connected.

Here, two linked sets of issues require separation: first, whether a given therapy-like measure (e.g., medicine as opposed to physical restraints) must, as a matter of constitutional law, be justified by diagnosis of a mental disorder and a showing that the proposed measure may be effective in treating it; second, what showings of such disorder and of its safe treatability are required. The former, we just saw, was not definitively answered, despite the Court's reference to Washington law requiring use of a disorder model to justify imposed therapy. Nor was the latter. Of course, the looser the requirements for showing that mental disorder plays a significant role in determining how dangerous the inmate is, the less operational sway a disorder model has. It is not hard to posit disorders, and some seem to do it at every opportunity.

I still am not suggesting that the *Harper* majority should have squarely confronted the ultimate role of mental disorder; under long-standing rules of constitutional adjudication, this was not at issue, and deciding the matter might have been improper. In any event, the constitutional (and moral?) materiality of mental disorder is the core issue here. It underlies the question whether biological "therapies" may constitutionally be imposed over a prisoner's objection only if she is found to be mentally disordered, and if so, whether she is likely to behave violently because of the disorder (though other variables may also be relevant). Even if the Court had had to address the issue, the record seemed to contain evidence adequate to support a relevant diagnosis and prediction of danger. (Whether the disorder and the danger were adequately shown to be causally linked is another issue.) The relative lack of effort to investigate the "risk/benefit" ratio of Mellaril and apply it to Harper has already been noted. But, sooner or later, the Court is likely to encounter a case in which the constitutional status of a custodial control or disablement model must be addressed. The point is familiar to nearly everyone in the corrections and mental health businesses: why is mental health or disorder even material? If a prisoner properly shown to be dangerous can be more or less neutralized by physical restraints or solitary confinement, why can't she be neutralized by "chemical restraints"? ("It's too dangerous" won't do, for various reasons, including the fact that physical restraints and solitary confinement are also dangerous.) Why do we care whether someone's dangerousness is (partly)

attributable to her mental disorder rather than to her being a rotten person? After all, disorder or no, the danger remains.

The issue arose in *Harper* simply because Harper and Justice Stevens raised it, though somewhat obliquely.¹⁷¹ The Court noted that the Washington statute required a showing of mental disorder, but, as we saw, it did not flatly rule that Washington law was constitutionally obliged to do so. Perhaps it is easy to evade the mental disorder requirement because the plasticity of the notion of mental disorder allows broad diagnostic discretion, but this is not the fault of legal analysis. Nevertheless, the requirements of legal/constitutional analysis (along with other factors) oblige us to press the inquiry. If the Court is ever confronted with this issue more directly, it will have to decide whether “medical” procedures (such as administration of mind-altering drugs) can be used to control non-disordered prisoners, whether through the “side” effects of the medicine or even its target effects, which can induce changes in the mental functions of the nondisordered. If a medicine can neutralize a danger, why not use it instead of shackles? This is a problem that implicates serious philosophical and moral issues about autonomy and state power that can never be fully settled.

For simplicity, one can assume that the chemical restraints are no riskier than the strait-jacket/hard-or-soft restraints/solitary confinement restraints (whatever the nature of the risks). Do due process, or equality constraints, or cruel and unusual punishment restrictions *require* the governance of a disorder model to justify biological controls originally developed to treat disorder? If so, is this *only* because of the (supposedly) greater risks posed by biological therapies? The situation may to some extent be transient: newer generations of psycho-

¹⁷¹ See *Washington v. Harper*, 494 U.S. 210, 222-23 (1990). As the Court put it, responding to Justice Stevens (concurring in part and dissenting in part):

[Justice Stevens] contends that the SOC [Special Offender Center] Policy permits respondent's doctors to treat him with antipsychotic medications against his will without reference to whether the treatment is medically appropriate. . . . For various reasons, we disagree. That an inmate is mentally ill and dangerous is a necessary condition to medication, but not a sufficient condition; before the hearing committee determines whether these requirements are met, the inmate's treating physician must first make the decision that medication is appropriate. The SOC is a facility whose purpose is not to warehouse the mentally ill, but to diagnose and treat convicted felons, with the desired goal being that they will recover to the point where they can function in a normal prison environment.

Id. at 222 n.8.

tropic drugs are, as I said, likely to be far more precise in their targeted anti-disorder actions, and thus less prone to generating adverse (“side”) effects. Indeed, such medicines may turn out to be *less* risky to a given inmate than, say, soft or hard restraints or solitary confinement.¹⁷² (Parallel questions apply to persons confined in mental health facilities, although penological considerations are only tangentially involved—unless the inmate has a “double” status as prisoner and patient in such facilities.)

This choice-of-models issue leads to another largely unoccupied space in *Harper*, and was mentioned briefly above: the nature of the legitimate penological goals to which prison measures must be reasonably related under *Turner v. Safley*. Most criminal law and prison cases do not deal with these issues, never mind the broad rationales for criminal punishment, and (usually) rightly so. But, because of the state’s incentives to use medical mechanisms of control as in *Harper*, the problem of identifying proper penological goals merits some attention. One might ask, for example, how the issue of whether to retain the need for a disorder model in justifying “biological restraints” bears on the concept of legitimate penological goals. How does its presence or absence promote or impair general and specific deterrence, retribution, disablement, reinforcement of appropriate norms, or any other rationale offered for criminal punishment? And even within a specified penal system that incorporates the requirement of disorder, one might ask whether restoring a prisoner’s mental health by force is a proper pe-

¹⁷² These choice-of-models issues were involved (using different terminology) in several well-known cases from the 1970s. *See, e.g.,* *Nelson v. Heyne*, 491 F.2d 352, 356 (7th Cir. 1974) (holding, *inter alia*, that use of psychotropic drugs “not as part of an ongoing psychotherapeutic program, but for the purpose of controlling excited behavior” was cruel and unusual punishment); *Knecht v. Gillman*, 488 F.2d 1136 (8th Cir. 1973) (holding that use of an emetic drug as part of an aversive conditioning program without inmate consent was cruel and unusual punishment); *Mackey v. Procunier*, 477 F.2d 877, 878 (9th Cir. 1973) (holding that a complaint alleging the state’s misuse of a paralytic drug as part of a conditioning process for prisoners should not have been dismissed, observing that “proof of such matters could . . . raise serious constitutional questions respecting cruel and unusual punishment or impermissible tinkering with the mental processes”) (citation omitted); and *Kaimowitz v. Department of Mental Health*, 1 MENTAL DISABILITY L. REP. (Mental Disability Legal Resource Ctr.) 147 (Sept.–Oct. 1976) (holding that legally adequate consent cannot be given by involuntary detained person to experimental psychosurgical procedures); *State v. Perry*, 610 So. 2d 746 (1992) (holding that the state may not coercively treat an incompetent death row inmate with antipsychotic medication in order to render him sane and thus eligible for execution while under the medication’s influence). *See generally* SHAPIRO ET AL., *supra* note 63.

nological—or other—state interest. What if a prisoner is neither dangerous nor gravely disabled? The *Harper* Court was of course not required to ask how restoring anyone's sanity (whether prisoner or mental health patient or neither) promotes any state interest at all.

• *A final review of Harper's standard of review; Justice Stevens's critique; Youngberg v. Romeo.* Early on, the Court in *Harper* said it was recognizing a liberty interest. This clearly suggested use of a nontrivial degree of scrutiny, one that imposes some serious burdens of justification on the state. The Court then sanctioned a nonjudicial administrative procedure that seems calculated to uphold the government's position in nearly every case: not only is there no judicial proceeding, *there is no proceeding with a detached, neutral, impartial decision-maker* at all. The prison health care providers are reviewed by in-house prison personnel and perhaps others, all of whom either work for or are retained by the state, many of whom are professional and/or personal colleagues of the on-the-line decisionmakers, and many of whom are strongly inclined to actively practice what they were professionally (and expensively) trained to do.¹⁷³ How could anyone reasonably expect anything other than routine confirmation of all but the most egregious decisions by grossly incompetent personnel?

Perhaps this puts the difficulty a bit hyperbolically, but its core idea was a major argument in Justice Stevens' concurring and dissenting opinion, and it was not answered satisfactorily by the majority. The Court simply dismissed, in platitudes, the idea that professionals would be likely to unreflectively affirm their colleague's decisions. These personnel are, after all, professionals, and professionals don't behave in such irrational ways, or so one might urge. This dismissal of a central procedural and ultimately substantive issue seems, once again, linked to the relatively low substantive value the Court assigned to Harper's interest in avoiding medication while imprisoned—an interest that the Court had just identified as a liberty interest, prison context or not.

¹⁷³ For a description of the reviewing process, see *Harper*, 494 U.S. at 215-16, 229 (describing the process for determining whether an inmate should be treated with antipsychotic drugs against his will). Justice Stevens complained that this process involved "disqualifying" conflicts of interest. See *Harper*, 494 U.S. at 251-57 (Stevens, J., concurring in part and dissenting in part). As I say in the text, his argument was not successfully refuted by the Court.

Given this sort of constitutional (dis-)valuation by the Court, why didn't it simply adopt the "professional judgment" rule announced earlier in *Youngberg v. Romeo*?¹⁷⁴ There, as mentioned earlier, a profoundly impaired man in a nonpenal facility was imperiled by his fellow inmates because he could not control his own assaultive conduct, which generated responsive violence. His mother filed an action on his behalf, arguing that he had a right to habilitative treatment. The Court said that Romeo had a liberty interest in "personal security" that it apparently thought significant, but then adopted the Circuit Court's very thin standard of review. It provided that if a professional made a good faith professional judgment about a particular course of (non)treatment, a court had no additional oversight role beyond reviewing the record to determine whether the evidence showed that the judgment actually was made in good faith by a qualified clinician. Beyond this, there was to be no inquiry into the nature of the diagnosis and treatment. Presumably, a good faith professional judgment would be preceded by, among other things, acquiring specific information about the patient in question.

Although it isn't entirely toothless, this isn't much of a standard of review. Whatever it means, it seems far closer to minimal scrutiny than the *Harper/Turner* standard. It all but automatically validates whatever the state does, acting through its therapists. Why did the *Harper* Court go through whatever hoops *Turner v. Safely* required instead of just citing *Youngberg* and deferring to what the psychiatrists and other professionals retained by the prison system wanted? The Court barely mentioned *Youngberg* and its professional judgment standard, and did not explain why the majority opinion was longer than the few lines needed to state the facts and apply that standard.

One possible explanation is the differing (though connected) nature of the respective forms of expertise in penal and nonpenal settings. The *Youngberg* situation was primarily therapeutic/custodial, not penal, and its indigenous professionals were evidently doing more or less what they were supposed to do in carrying out the facility's mission. But (as one might argue) the function of a prison is not to administer therapy to the mentally or physically impaired, except insofar as this promotes its legitimate penal objectives, or is required by the

¹⁷⁴ 457 U.S. 307 (1982).

Eighth Amendment.¹⁷⁵ So, one might think that medicating prisoners is therapeutically suspect—the action seems somewhat anomalous in the penal setting, despite the possible constitutional obligation of prisons to provide medical treatment in certain situations. The prison system's primary mission concerns criminal punishment, not helping out those in its charge to reclaim their lives; the prison is not *in loco physicianis*. The medical/professional judgment rule is thus weakened in prisons—but of course not entirely displaced. To complicate matters, the intersection of medical-professional judgment and correctional-professional judgment is not clear. But the prison system's professional judgments, medical and correctional, eventually carried the day in *Harper* as well as *Youngberg*, and the Court found it a much easier case than the length of its opinion might indicate. In any case, a simple-seeming question—given *Youngberg*, why was *Harper* so labored?—has moved us to revisit the differences between punishing and healing.

4. *Cruzan v. Director, Missouri Department of Health*¹⁷⁶

(a) Conceptual backdrop

The “rights-claimant” in *Cruzan* was Nancy Cruzan, and the scare quotes around “rights-claimant” are meant to highlight the importance of certain kinds of global incompetence that go far beyond incompetence to make therapeutic decisions. Ms. Cruzan, being permanently unconscious, represented the limiting case of maximum incompetence. (The dead are not incompetent.) Her organic system was sufficiently intact to allow various autonomic functions to continue, but she was gone for good as a person (in the philosophical rather than the more familiar legal sense).¹⁷⁷ Her parents wished to remove her from

¹⁷⁵ See *Estelle v. Gamble*, 429 U.S. 97, 104 (1976) (concluding “deliberate indifference to serious medical needs of prisoners” violates the Eighth Amendment).

¹⁷⁶ 497 U.S. 261 (1990) (stating that the right to refuse of certain forms of lifesaving care is a liberty interest, but that the Constitution does not require the state to allow the patient's family or anyone but the patient herself to make this decision; and also ruling that the state could disallow surrogate decision making, absent clear and convincing evidence of the patient's wishes).

¹⁷⁷ On the philosophical notions of personhood, see, for example, John F. Crosby, *The Personhood of the Human Embryo*, 18 J. MED. & PHIL. 399 (1993), discussing the criteria for personhood. The “gone for good” idea requires some qualification. “Recovery” of any sort from a permanent vegetative state (a vegetative state

life-support systems, but Missouri law required “clear and convincing evidence” of her pre-existing preferences. The evidence presented in court at the time could not support such an inference, in Missouri’s view. (After remand from the Supreme Court, additional evidence was introduced to bolster the claim that she would have preferred to have life support terminated so that she could really die. I cannot comment on the incremental probative value of the new evidence.)¹⁷⁸

Although the issue is peripheral to *Cruzan* itself, we can pause on the idea of death and how it bears on constitutional analysis. Courts may eventually have to deal with constitutional questions raised by statutes that adopt a criterion of death resting on whether there is a nontrivial possibility that a patient is or will be conscious to some ascertainable degree. On that criterion, permanently unconscious persons would be dead. Of course, with such patients, *something* is alive—an organic, physically-integrated shell, one might say. But from the standpoint of human interaction and striving, patients such as Nancy Cruzan are simply no longer with us and, on this view, would suitably—perhaps obligatorily—be viewed as dead.

This is an oversimplified justification, however. The point to stress is that this technological fragmentation of life into disparate (though connected) components—living organism once bearing a now-departed personality—pushes us to examine the course of constitutional valuation of contending interests more closely; the sharply new circumstances are not an easy fit with everyday notions of death. *Whatever* specific standard of review is ultimately developed and applied, we will have to review

is considered permanent after 12 months if the condition is caused by trauma and after three months otherwise), is said to be “exceedingly rare and almost always involves a severe disability in both adults and children” if caused by trauma. If non-traumatically caused, “recovery does occur, but it is rare and at best associated with moderate or severe disability.” See generally The Multi-society Task Force on PVS, *Medical Aspects of the Persistent Vegetative State (Second of Two Parts)*, 330 *NEW ENG. J. MED.* 1572, 1575 (1994). One might argue that recovery of some cognitive/perceptual functions indicates that the diagnosis of a permanent vegetative state was wrong, rather than that the condition has some small recovery rate for such functions. This stance, however, imports problems of its own.

¹⁷⁸ See Tamar Lewin, *Nancy Cruzan Dies, Outlived by a Debate Over the Right to Die*, *N.Y. TIMES*, Dec. 27, 1990, at A1 (referring to a hearing following the U.S. Supreme Court decision; three of Nancy Cruzan’s co-workers testified at the hearing that they remembered her saying she would not want to live “like a vegetable”).

what it might entail concerning the issues of fact and value that courts may, must, or must not deal with.¹⁷⁹

Just what are we to do, then, when we see that the *something* that is alive is inextricably linked to Ms. Cruzan? It is “merely” a remnant, perhaps, but a living one. So, maybe Nancy can’t quite be dead yet—not as long as some major (not former) *aspect* of her lives on. The connection between the living residuum of Ms. Cruzan and her departed personal identity is so close that viewing her as dead and then *killing* her living remainder by removing “life support” and then burying or cremating her “alive” may be too great a threat to our norms of respect for persons and life. If we are told that we should try to see it differently through revising our perceptual frameworks, we might respond that we are at bottom not cognitively and emotionally equipped to do so, and that there are thus limits on what and how we can learn, especially when it comes to basic culture-crossing norms. In any event, not everyone will sit by passively while the state declares thousands of permanently unconscious persons to be dead, so that they can be removed from life support systems and their remains properly dealt with. Opponents of the new regime will claim that the lives of these legions of victims are being taken without due process in both the substantive and procedural senses. Why would this be without due process? Because killing an innocent, nonthreatening living person (as they view her) by removing her life support, falsely claiming that the person is already dead, is an exemplar of unconstitutional state action. Of course, the proponents of the transformed definition of death will say that no life has been or could be taken if death has already occurred.

The courts will then have no option but to consider their proper role in understanding and redefining the concept of death, which is now, by hypothesis, a material issue of “constitutional fact.” Even if they ultimately defer, on whatever ground, to legislative judgment, they cannot responsibly *begin* with that deferential conclusion (although some courts might do so). They will have to confront the claim that the definitional/conceptual issue of the meaning(s) of “death” cannot be preempted by a legislative declaration that henceforth, all per-

¹⁷⁹ Assuming a standard’s formulation remains reasonably constant, its operational requirements will differ among courts, legislators, executive and administrative officials, and the citizenry.

manently unconscious persons are dead as a matter of law.¹⁸⁰ If it is part of a court's function in enforcing the rule that life cannot be taken without due process, shouldn't the court be able to say what being alive and being dead are, and what the nature of the phase change from life to death is?

If courts ultimately tend to these issues, they will soon see that, when placed alongside historic baseline understandings of life and death, the idea of a forever-unconscious-but-living-person (or entity) is hard to categorize. There is no clear "fact" of the matter about whether such entities are *really* alive or *really* dead because the baseline concepts "run out."

In this light, one might argue that courts should defer to the legislature's choice on the value issues involved: if an issue is difficult because it is not a matter of clear principle, decisions on such imponderables should be made by the usual black boxes supplied by our political and legal system, including legislatures, juries (where litigation arises), administrative agencies of certain sorts, and so on. (If we could isolate the criteria these black boxes use, or should use, we probably wouldn't need such boxes in the first place.)

Happily for supporters of endless deliberation, one might also argue the exact opposite. On the one hand, legislators, at least in the aggregate, are the true "proxies" for the people in a republic, and are the only parties to which we delegate certain normative decisions and factual determinations. On the other hand, why should the possibly transient views of a legislature decide matters of constitutional principle, fact and value? On the third hand (these are complex times), to say that courts should instead be bound by the historic, traditional value attitudes of the community—norms that transcend short-term variations—is not fully apt here because there are no such relevant community attitudes: we don't know what to think, and never did. Whatever new or old views on these issues that one might encounter in searching out community values would be at uselessly high levels of abstraction. (The "Life is sacred" tradition meets its rival, "That's not life.") Moreover, such community attitudes cannot reliably be inferred through "what-if" exercises: the problem of distinguishing permanently unconscious

¹⁸⁰ Compare legislative efforts to declare that fertilized ova, embryos, or fetuses are persons. *See, e.g.*, LA. REV. STAT. ANN. § 9:123 (West 2000) (providing that a human ovum fertilized *in vitro* is a "juridical person" until implanted in a womb).

persons from dead persons is too far out of our common frameworks of thought. (This holds despite accounts of persons coming out of years-long comas. Think of Sleeping Beauty, but not Rip van Winkle, who just had a really good night's rest that got away from him, and not zombies, who remain dead. The situation is further complicated by the view that irreversibility is not part of the concept of death.)

It is not clear, then, which way the relative novelty of the permanent-unconsciousness-as-death problem cuts—toward novel issues being left to the legislature as is fitting or even required in a republic; or toward viewing this very novelty as freeing the courts from bondage to a history and tradition no longer relevant under radically changed circumstances. Courts might absorb emerging, technology-driven community views (and help them fully emerge?), or do their own independent moral analysis—a possibility recounted earlier.¹⁸¹

Here again, the normative/constitutional problems generated by the technological separation of “personhood” life from “mere organic life” press our understanding of permissible routes of constitutional interpretation. We again face the basics—the multiple axes of interpretation—and their accompanying question of how we should use and (possibly) rank them in constitutional adjudication. Should courts take the stance that (*pace* Justice Blackmun) they do not have to settle the issue of who is alive and who is not—of when “death begins”?¹⁸² Could they legitimately do so?

(b) The opinion and outcome

The first and well-known challenge presented by *Cruzan* is to figure out what the Court held. The task was made more difficult than usual by a really confusing majority opinion. Chief Justice Rehnquist is well known for his sense of humor and for his (related?) lack of interest in the (non-)appearance of logical progression and (in)completeness of legal argument structures. He obviously wrote the opinion to befuddle us, and, in this respect, it is a highly skilled and effective opinion.

¹⁸¹ See *supra* text preceding note 93 (discussing independent moral decision-making by courts).

¹⁸² The reference is to Justice Blackmun's statement in *Roe v. Wade*, 410 U.S. 113, 159 (1973): “We need not resolve the difficult question of when life begins.”

To figure the opinion out, think first of the rights-claimants' positions—initially taking both Ms. Cruzan and her parents as such claimants—and how they should be formulated and established. (I will return to the issue of identifying rights-holders below.) This stage of analysis, admittedly difficult to manage, seemed at some points to stump the majority. The problem, not a novel one in law generally, is to identify someone who might have a threshold right or interest, whatever the ultimate outcome. The obvious first candidate here is the patient, but the idea that a permanently unconscious patient *really* has interests of any sort poses serious challenges. (Assume a zero chance of any return of consciousness to any degree, as the Court seemed to do.)¹⁸³ Nevertheless, in a kind of secular ritual,¹⁸⁴ we insist that these patients are rights-holders—a view I am not out to dispatch, at least insofar as it informs everyday thought; ritual has its uses. Talk of rights—at least of certain rights—and their implementation serves to reinforce notions of individual autonomy and respect for persons. In ordinary thought, we don't rationalize carrying out a testator's instructions simply on the ground that doing so encourages saving and brings satisfaction during life. We also, and more prominently, say (or think) things like "This is what Homer wanted, and his preferences endure and bind us as if he were still here—and maybe he is."

Why we defer to prior expressed or inferred preferences of permanently unconscious persons and of the dead bears much more discussion, but not here.¹⁸⁵ It seems clear that custom and tradition not only do not exclude Nancy Cruzan as a rights holder, they may affirmatively include her, although this is far from certain. The life-process fragmentation that accounts (in part) for the difficulty of dealing with the permanently unconscious suggests a "tradition-gap" leaving the rights-holding issue indeterminate. But even if there are analytically better ways

¹⁸³ There remains some controversy over the nature of vegetative states and of the permissible range of actions in managing them. See generally Marcia Angell, *After Quinlan: The Dilemma of the Persistent Vegetative State*, 330 NEW ENG. J. MED. 1524 (1994) (discussing social, ethical, and legal problems in caring for persons in persistent vegetative states).

¹⁸⁴ On the idea of "secular ritual," see generally Sally F. Moore & Barbara G. Myerhoff, *Introduction, Secular Ritual: Forms and Meanings*, in SECULAR RITUAL 3-24 (Sally F. Moore & Barbara G. Myerhoff eds., 1977).

¹⁸⁵ See generally Rebecca Dresser, *Life, Death, and Incompetent Patients: Conceptual Infirmities and Hidden Values in the Law*, 28 ARIZ. L. REV. 373, 404 (1986) (criticizing reliance on a determination of the patient's past preferences).

to deal with the permanently unconscious, we will probably keep talking, both in ordinary language and legal discourse, as if the permanently unconscious—perhaps even the dead—continue to hold interests.¹⁸⁶ The implementation of this view is, of course, not simple, and remains subject to certain rules that sometimes compete with each other, and pose intricate conceptual problems. (Think, for example, of the “substituted judgment” standard that requires us to follow the rights-holders probable preferences, and compare it with the “best interests” standard.)

The *Cruzan* Court did not clearly explain how it identified the supposed rights holder(s). This does not mean, however, that the Court illicitly jumped to a later argument stage, where it seems to have chosen some mid-level form of heightened scrutiny: the standard of review might be the same whether the patient or her parents or both were viewed as rights-holders. It thus need not in all cases unambiguously designate the rights holders (although any standard of review that fails to do so is quite incomplete). This impenetrability, as we saw, exists because alterations in the technological terrain have pushed us beyond simple conceptualizations of life and death. We didn’t always have the capacity to keep organic human shells alive after their inhabitants have departed.

But the Court in fact did in its own way address the who-holds-what-rights question. It seemed to conclude (perhaps reluctantly) that competent persons have liberty interests in refusing medical treatment. (“Conclude” may be a better term than “held” because Ms. Cruzan was obviously incompetent, and what the Court said about the rights of competent persons was technically “dictum.”) The Chief Justice said: “The principle that a competent person has a constitutionally protected liberty interest in refusing unwanted medical treatment *may be inferred from our prior decisions.*”¹⁸⁷ Dictum or no, the statement is fairly straightforward, so it seems provisionally reasonable to

¹⁸⁶ Perhaps another account would concede that the permanently unconscious person has no interests, but that other parties may have continuing interests in her body, in managing information concerning the person, and in promoting her memory in certain ways, both for themselves and for others. Such a path, however, might seem to jeopardize norms of autonomy and respect for persons, as noted in the text above. This is part of the more general problem of choosing among conceptual systems even when they lead to similar outcomes.

¹⁸⁷ *Cruzan*, 497 U.S. at 278 (emphasis added).

think *Cruzan* recognizes a significant liberty interest in refusing medical treatment generally, even if the majority opinion's author didn't seem overjoyed about saying so.

The Court spent little time explaining how it derived the liberty interest, but this was not inappropriate here. If there are any unmentioned liberty interests at all, the right of a competent person to refuse medical treatment seems to be one on most interpretive paths. Spending lots of time on showing this convergence may in some ways be counterproductive, raising doubts among readers about whether the liberty interest exists after all. The Court's principal maneuver was to mention the fairly uniform course of the common law in describing and enforcing such a right of refusal, and went on to other, more complex matters.¹⁸⁸

Although it came through less clearly in the opinion, the general idea that we have a tradition of constitutional dimension in protecting liberty as personal security against physical intrusion (beneficial or harmful, medical or nonmedical) seems plausible. In this area of conduct, we do not have the kinds of clearly Janus-faced practices and seriously fractured traditions we find in, say, matters of sexual orientation, where we keep laws that formally denounce certain conduct, but rarely enforce them, or even care to do so.¹⁸⁹ Still, the area of "competent refusal of medical treatment" is not entirely uniform, and the common law is not the sole (or depending on the circumstances, even the dominant) determinant of tradition. Some individual patient refusals may not be highly regarded by families, friends, and physicians, who may pressure or even fool reluctant patients into accepting a proposed treatment. In this light, *Cruzan* is a vivid illustration of our interpretive postulate that there are important constitutional rights that should be recognized by the Court, despite the absence of texts no more specific than "nor shall any State deprive any person of . . . liberty . . . without due

¹⁸⁸ See *id.* at 269-73 (observing that, at common law, everyone had the right to control her own body).

¹⁸⁹ But see *Bowers v. Hardwick*, 478 U.S. 186 (1986) (reflecting the occasional—and in this case somewhat accidental—exception). On maintaining clumsy institutions that are meant simultaneously to reinforce conflicting values and norms, see Michael H. Shapiro, *Introduction: Judicial Selection and the Design of Clumsy Institutions*, 61 S. CAL. L. REV. 1555 (1988) (suggesting that the judicial election process is a clumsy institution because it seems to pit the idea of law as principle against democratic values).

process of law.”¹⁹⁰ In theory, that recognition must impose serious burdens of justification on states bent on limiting these rights, at least beyond some (*de minimis*?) threshold of impairment.

The protest that one cannot “find” such liberty interests in the Constitution’s text is, on its own, too crude to be of much use, despite the reckless language of some who protest that because asserted rights X and Y do not appear *in haec verba* in the text, they cannot exist. (The First Amendment, after all, “says” nothing about protecting sign language, which isn’t “speech,” and if the Framers had meant “communication” rather than “speech,” they would have said it.) One often hears this hyperbolic objection from many quarters, including the Justices, partly because it expresses an important and often articulated idea: we promote republican democracy by deferring to legislative judgments and avoiding officious interference with them by courts. Moreover, one may ask, if some interest is so important that it bears mention in the constitutional text (speech, religion, and—why not?—property), why aren’t all these nonexplicit but supposedly very important rights and interests themselves specifically mentioned? The Framers, after all, didn’t set things up as an elaborate scavenger hunt for their general amusement.

But there are obvious, well-rehearsed counter-ideas, which I mention in passing. “Liberty” is an *abstract* term that *of course* fails to specify any particulars at all. It’s not *supposed* to be specific—indeed, it *can’t* be, if we really prefer our default rule to be that we are free to act unless rightfully prohibited, instead of being barred from doing so until we get specific permission.¹⁹¹ To insist that a liberty interest must be “presented” in the text *in haec verba* (more or less) is analytically indefensible on any known interpretive theory—at least given the assumption that the liberty/due process clauses are not redundant and are not there *simply* for show. The more respectable critique of an “implied fundamental rights” case lies in saying that there is no warrant for selecting one particular claim of right (say, to refuse medical treatment) for serious protection and rejecting another (say, to drive an unsafe vehicle), unless the selection is founded on long-standing views, attitudes and behaviors. That

¹⁹⁰ U.S. CONST. amend. XIV, § 1.

¹⁹¹ There are, of course, particular realms of conduct in which different regimes hold—for example, we are generally not permitted to use, on our own, certain self-locomotion devices, such as cars and airplanes, unless we first secure licenses.

investigation, in turn, requires attention to overlapping factors such as history, customary lexical understandings (perhaps both then and now), and authorial states of mind that in turn may require confirmation by reference back to traditional beliefs and understandings. The axes of interpretation are locked into a continuing *renvoi*.

Of course, we cannot rest with general formulations such as “liberty interest” or “fundamental right” (a term being used less often by the Court, at least where nonexplicit rights under the liberty clauses are concerned). Despite the general acknowledgement of a global right of some sort to refuse medical treatment, we cannot live with every application of it across the board, and the right is often couched—as here—in terms that express the major presupposition¹⁹² of competence.

But here we need to return to the *Cruzan* opinion because we are still far from grasping the full “holding” of the case (assuming we can do so at all), and major questions remain in determining its conclusions generally. First, does the refusal right extend to *lifesaving* medical treatment? It is one thing to refuse an antibiotic for a bacterial sinus infection, and quite another to refuse it for generalized sepsis, which can easily be fatal if untreated (and sometimes even if treated). We have traditional strictures against familiar forms of suicide, so why should we tolerate it in the form of protecting even competent refusals of lifesaving medical treatment? The question is all the more pointed if the lifesaving measures are not strictly “medical,” but are “medically administered” substitutes for food and water.

This last consideration seems to have been among Justice Scalia’s points in his concurrence, and, given his general views on how (not) to infer the existence of fundamental rights or liberty interests, his argument is in tension with his own interpretive canon, which relies heavily on tradition and history. The decisive consideration for him, absent specific textual protection or evidence about Framers’ intent, is limited to *whatever*

¹⁹² The exact status of such “qualifications” suggests the familiar questions about the distinction between exceptions and defining features. Recall battles over whether to view some factor as an “element” of a crime rather than to treat its absence as a defense (e.g., problems in “locating” an insanity defense or a claim of diminished capacity). See generally Frederick Schauer, *Exceptions*, 58 U. CHI. L. REV. 871 (1991) (discussing the concept of exceptions in the law).

*tradition and history turn out to be.*¹⁹³ He mentioned our strong traditions against committing or being complicit in suicide, but neglected to note the strong possibility that *by tradition, we do not generally say that refusal of lifesaving or life-supporting treatment or care is necessarily a form of suicide.* Perhaps an otherwise healthy person's refusal of treatment for an otherwise lethal infection is suicide, at least if not religiously based (as with Christian Scientists). Even more clearly, his refusal of food and water, as ordinarily ingested by oneself or a caregiver, would be analogized to deliberate starvation, which is dead certain to result in death, if more slowly than a death blow. But this is not necessarily so for persons who are terminally ill or in such a chronic painful and debilitated state that they decline further treatment, and further *care* (such as artificial nutrition and hydration), knowing that this is likely, perhaps certain, to advance the time of death. I do not claim anything near a universal consensus on this, but it is reflected in many decided cases.¹⁹⁴ If Justice Scalia believed that this was *not* a widespread traditional understanding, he should have said so because the issue is critical to explaining his *Cruzan* position, which otherwise seems to run counter to his own tradition criterion.

More specifically, Justice Scalia attacked (as applied here) the action/inaction distinction, which is regularly offered to "explain" why refusing lifesaving treatment is not necessarily suicide; he apparently thought the distinction senseless in that context. But the constitutionally material point here is that *by tradition, we don't* generally hold that refusing lifesaving care—whether classic medical treatment or "artificially" administered nourishment—is *ipso facto* suicide, and indeed we seem to presume that it's not, at least when we are dealing with some categories of very sick persons. Moreover, whatever strain of "tradition" that distinguished between deliberate starvation and refusal of medical treatment doesn't have much purchase where nutrition and hydration are administered via medical

¹⁹³ "It is at least true that no 'substantive due process' claim can be maintained unless the claimant demonstrates that the State has deprived him of a right historically and traditionally protected against state interference." *Cruzan*, 497 U.S. at 294 (Scalia, J., concurring).

¹⁹⁴ See, e.g., *Barber v. Superior Court*, 195 Cal. Rptr. 484, 490 (Ct. App. 1983) (stating that "medical" nutrition and hydration is more like other medical procedures than like "typical" ways of providing nutrition and hydration; the court issued a peremptory writ of prohibition against continuing homicide prosecutions against physicians for allowing the death of a permanently unconscious patient).

contraptions. Although Justice Scalia rightly observes that the focus should be, not on action versus inaction, but on comparing different forms of inaction,¹⁹⁵ he fails to credit the widespread (though not unanimous) view that artificial nutrition and hydration have been generally lodged in the “medical” category, rather than the one for feeding-as-natural nurture, which there is in general no right to refuse. His opinion is thus an impressive example of an *ad hoc* departure from his own tradition-oriented system of thought, whether the tradition—including its underlying rationales as part of that tradition—is sound or absurd. He was not free to discard the findings of a tradition inquiry—which he helped initiate—by segmenting a portion of the found tradition and dismissing it as ridiculous because, in his view, it involves an indefensible distinction between actions and omissions in the situation at hand. This is far more Brennan-like than Scalia-like.¹⁹⁶ On his own interpretive scheme, then, the supposed irrationality of the distinction is simply immaterial.

But this commentary on Justice Scalia’s concurrence has brought us somewhat ahead of ourselves; the majority opinion still requires attention. Although one has to hunt about in the majority opinion for nuggets that may be holdings, the exploration reveals that the Court not only held that there was a liberty interest in refusing medical treatment, but that this interest extended even to lifesaving medical treatment. As the Chief Justice put it: “It cannot be disputed that the Due Process Clause protects an interest in life as well as an interest in refusing life-sustaining medical treatment.”¹⁹⁷ That’s a holding—although why it as stated in more apodictic terms than the earlier holding about medical treatment generally is unclear.

Even at this stage, however, the Court is still not done with the task of characterizing rights and interests. We saw earlier that the life-maintenance technology used in *Cruzan* had “fractured” human personhood, creating a situation in which “personality-life” is irreversibly disjoint from “physical-organism-life.” But the question now is whether this life-maintenance technology, which “artificially” delivers nourishment and liq-

¹⁹⁵ See *Cruzan*, 497 U.S. at 296-97 (Scalia, J., concurring).

¹⁹⁶ See Justice Brennan’s dissenting opinion in *Michael H. v. Gerald D.*, 491 U.S. 110 (1988). See generally Note, *Developments in the Law: The Constitution and the Family*, 93 HARV. L. REV. 1156, 1178, 1180 (1980) (arguing for rational limits on tradition analysis).

¹⁹⁷ *Cruzan*, 497 U.S. at 281.

uids to patients, is rightly called “medical.” After all, it occupies the place of ordinary nurture in providing food and drink to patients (or anyone), and, if appropriate, even feeding them by hand. The point of the distinction is that patients have no common law right to refuse such (non-medical) care,¹⁹⁸ and so an incompetent person’s proxy arguably could not demand an end to providing food and drink to the patient.

It thus seems quite plausible to say—for any patient—that much of what is done for them is not *medical*, despite the clinical surroundings. The care that the sick receive isn’t all in the form of treatment administered with the backing of a disorder model. Intravenous infusions of antibiotics to clear an infection are obviously medical care. Feeding a person by hand (which obviously could not be done in *Cruzan*) is not *medical* care, even if administered by health care personnel when the patient can’t feed herself. Thus, if a patient doesn’t want to be fed, she cannot invoke the common law or the liberty interest in refusing medical treatment. This does not necessarily mean that she will—or can legally be—force-fed. (To do so might be battery.) She may be asked to leave the hospital, or to be transferred to one that promises not to feed her, or her physician may dismiss her as a patient. (To be sure, these measures pose risks of liability for abandonment or patient-dumping.)

The particular problem in *Cruzan* was of course that no one was “feeding” Ms. Cruzan in the ordinary sense of the term. She received nourishment from what look like medical devices attached to her body, not through the use of dining utensils wielded by health care personnel or family members. The Court was thus faced with having to compare intravenous nutrition and hydration first with ordinary feeding, and then with the use of medical contraptions to infuse the body with various medicinal substances. We have yet another example (perhaps a small one) of category straddling induced by technological changes.

This argument stage is where the issue of “holdings” *arguendo* becomes pertinent. This assumption-for-argument’s-sake

¹⁹⁸ For purposes of comparison, see *Bowvia v. Superior Court*, 225 Cal. Rptr. 297 (Ct. App. 1986), where the California Court of Appeal ruled that a competent but physically impaired woman with cerebral palsy could refuse forced feeding via a nasogastric tube. Note also that the California Supreme Court ruled in *Barber v. Superior Court*, 195 Cal. Rptr. 484, 490 (Ct. App. 1983), that there was no material difference between artificial nutrition and hydration, on the one hand, and full-fledged medical treatment, on the other.

device enabled the Court to (properly) avoid having to definitively assign artificial nutrition and hydration to either the medical or nonmedical categories or to a *tertium quid*. The Court said (my interlineations are bracketed):

Petitioners insist that under the general holdings of our cases, the forced administration of life-sustaining medical treatment, and even of artificially-delivered food and water essential to life, would implicate a competent person's liberty interest. Although we think the logic of the cases discussed above would embrace such a liberty interest [*this is perilously close to "holding" language*], the dramatic consequences involved in refusal of such treatment would inform the inquiry as to whether the deprivation of that interest is constitutionally permissible. [*Of course. Who said the right was absolute?*] But for purposes of this case, we assume that the United States Constitution would grant a competent person a constitutionally protected right to refuse lifesaving hydration and nutrition.¹⁹⁹

The last-quoted sentence is the Court's only *arguendo* conclusion or holding. If it is integrated into the non-*arguendo* conclusions, the Court's overall statement is that competent persons have a constitutional liberty interest in refusing all medical therapy, including life-sustaining treatment, and all care, including lifesaving measures.²⁰⁰

There are also some problems in sorting things out beyond the issue of identifying a holding. If the right to refuse treatment is a reasonably well-protected constitutional interest, then

¹⁹⁹ *Cruzan*, 497 U.S. at 279.

²⁰⁰ Taken as a true holding, the Court's assertion of a competent person's right to refuse treatment would seem absolute, comprehending all reasons for refusal, however questionable. The patient, for example, could refuse lifesaving treatment because she viewed her life as worthless, or for religious reasons. In neither case would the welfare of minor children (or other survivors) be material, although the point is arguable. But taken as an unnecessary conclusion (given Ms. Cruzan's incompetence), one might question the solidity of the right's absoluteness, and speculate about whether the Court would ever uphold a state's disallowing a competent person's refusal of lifesaving treatment, where the refusal is based on the patient's view that her life is worthless (to her, or others, or both). In *Cruzan*, the Court said that Missouri was free to disallow quality-of-life considerations from entering into decisions about withholding life-sustaining treatments. *See id.* at 262-63. Might it be free to discount it in cases of competent refusal?

it *must* impose a serious burden of justification on government action that intrudes upon it. (Again, there is a possible *de minimis* threshold.) But this burden of justification—captured in the particular but unnamed standard of review in fact applied—was not specified in the majority opinion. It was, of course *there*, as part of the (hidden) infrastructure of the case, and there may be reasons for being non-explicit about standards of review in various circumstances, if not in the *Cruzan* situation. Nevertheless, the lack of an explained connection between interest characterization and standard of review selection is confusing. This is illustrated by the Court's statement that "the dramatic consequences involved in refusal of such treatment would inform the inquiry as to whether the deprivation of that interest is constitutionally permissible." This is true and is not trivial, and encapsulates an obvious point about recognition of non-absolute liberty interests and the justifications for burdening them. But we are not told by this terse announcement just what is meant by "dramatic consequences" beyond the obvious and fundamental consequence that someone—or something—dies when a permanently unconscious patient's still-operating organism finally ceases to function, whether from inanition or any other cause. Nor are we told how to *assess* these dramatic consequences, or what other considerations determine whether the breach of the person's interest is permissible.

Again, one should ask whether the Court was being properly circumspect: was it necessary to extend the discussion? After all, for those who think that permanently unconscious persons are already dead, thus permitting closure for all concerned, then "death" may be for them a less "dramatic consequence" than for others. But perhaps it is enough that many persons, family included, would perceive the result of withdrawing care as catastrophic because it clearly up-ends existing and dominant views.

Turn next to another aspect of the majority's comment that "the dramatic consequences involved in refusal of such treatment would inform the inquiry as to whether the *deprivation* [my italics] of that [liberty] interest is constitutionally permissible." On the surface, this is not about the initial recognition of a liberty interest, but about the results of impairing it once recognized. Yet one could argue that the Court's tone melded matters of rights-recognition with countervailing government interests. In this sense, perhaps it was suggesting in its

subtext that if government interests are strong enough, there is no threshold presumptive right—at least for incompetent persons—at the start. This is in theory quite different from saying that there is no *bottom-line* right under particular circumstances that might be taken to justify impairing a conceded threshold right. Settling on the best way of putting it is not a minor question of labeling, but may involve serious questions of legal philosophy generally and constitutional law in particular that have real-world payoffs. The distinction between what one might see as threshold rights and as bottom-line rights may not always affect the outcome of constitutional adjudication, but it can, and the two conceptual systems represented are quite different, as has long been understood by rights theorists.

Return now to the issue of who holds what rights and what difference it makes. The Court's remarks about the role of (in)competence seem to suggest that the liberty interest in refusing care, whatever its scope, extends *in some form* both to competent and incompetent persons:

Petitioners go on to assert that an incompetent person should possess the same right in this respect as is possessed by a competent person. They rely primarily on our decisions in *Parham v. J.R.*, [442 U.S. 584 (1979)], and *Youngberg v. Romeo*, [457 U.S. 307 (1982)]. In *Parham*, we held that a mentally disturbed minor child had a liberty interest in “not being confined unnecessarily for medical treatment,” 442 U.S., at 600, but we certainly did not intimate that such a minor child, after commitment, would have a liberty interest in refusing treatment. In *Youngberg*, we held that a seriously retarded adult had a liberty interest in safety and freedom from bodily restraint, 457 U.S., at 320. *Youngberg*, however, did not deal with decisions to administer or withhold medical treatment.

The difficulty with petitioners' claim is that in a sense it begs the question: An incompetent person is not able to make an informed and voluntary choice to exercise a hypothetical right to refuse treatment or any other right. Such a “right” must be exercised for her, if at all, by some sort of surrogate. Here, Missouri . . . has established a procedural safeguard to assure that the action of

the surrogate conforms as best it may to the wishes expressed by the patient while competent. Missouri requires that evidence of the incompetent's wishes as to the withdrawal of treatment be proved by clear and convincing evidence. The question, then, is whether the United States Constitution forbids the establishment of this procedural requirement by the State. We hold that it does not. [*This is a true holding, resolving the narrow issue in the case concerning the constitutional validity of the clear-and-convincing-evidence standard.*]

Whether or not Missouri's clear and convincing evidence requirement comports with the United States Constitution depends in part on what interests the State may properly seek to protect in this situation. Missouri relies on its interest in the protection and preservation of human life, and there can be no gainsaying this interest. As a general matter, the States—indeed, all civilized nations—demonstrate their commitment to life by treating homicide as a serious crime. Moreover, the majority of States in this country have laws imposing criminal penalties on one who assists another to commit suicide. We do not think a State is required to remain neutral in the face of an informed and voluntary decision by a physically able adult to starve to death.

But in the context presented here, a State has more particular interests at stake. The choice between life and death is a deeply personal decision of obvious and overwhelming finality. We believe Missouri may legitimately seek to safeguard the personal element of this choice through the imposition of heightened evidentiary requirements.²⁰¹

The unsurprising gist of these passages is that we seem to have a liberty interest held by incompetent persons, but one that must be exercised by a proxy, if at all, as the Chief Justice observed. (It is not clear whether the Court would say this about a person who had never been competent, but I do not deal with this here.) But what does this mean? How can one have a right

²⁰¹ *Id.* at 279-81 (citation omitted).

to choose but be entirely unable to exercise it *oneself* because of a failure of the very capacity to choose (or to choose with some degree rationality)? If an interest is defined by reference to choice, one might well urge that no one who is entirely able to make a *present* choice can have that interest. A reference to temporality thus seems required to rescue—or reconstruct—the idea that the permanently unconscious have choice rights right now. We posit a continuing competent being who once had preferences, and these preferences—express or not—comprehended matters arising in the future, which has now arrived. This seems consistent with the opinion’s emphasis on “safe-guard[ing] the personal element of this choice,” and its endorsement of the state’s efforts “to assure that the action of the surrogate conforms as best it may to the wishes expressed by the patient while competent.”

This is not a complete “rescue,” to be sure, and one may still view askance the application of a liberty-interest-as-a-choice-right to a patient as she is now—and now is when the decision is to be made. The idea that a liberty interest in decision making can be held by permanently unconscious persons remains odd, at least if one thinks that such persons do not have interests in any commonly understood sense. (Even if an interest is defined by reference to some events or conditions not involving choice—e.g., being pain-free—how can an utterly *insensate* patient hold the interest?) Nevertheless, it displays in an intuitively (if partially) understandable way the link between a permanently unconscious patient who was once conscious, and the notion of autonomous choice (or autonomous choice “delayed”).

But what question was “begged” by petitioners? It doesn’t seem to be the question of what the patient’s preferences were while competent—or what preferences she would have expressed had the problem been called to her attention. There is also the possibility that the begged question is whether incompetents can indeed hold liberty interests at all.²⁰² Still another possibility is that the begged question concerned whether Ms. Cruzan’s parents could, on their own, exercise “her” choice for her, without attending to the specifics of *her* prior competent preferences; or, if the liberty interest is not a choice right but an

²⁰² See *infra* text accompanying notes 201-05.

interest in not being treated or violated, her parents could decide to vindicate that interest by their own lights.

These speculations simply confirm the point that the disjunct between organic life and personhood-life makes it difficult to talk sensibly within our present frameworks of discourse. Let's push on, however, accepting the characterization that unconscious incompetent persons have (present) interests involving choice, but that this choice-right can only be exercised by proxies. The *Cruzan* decision allows something far stronger than the traditional "substituted-judgment" test, which demands that proxies adhere to the patient's preferences, but does not necessarily impose a rigorous standard of proof to be applied to discerning those preferences. The Court explicitly rejected the idea that states were stuck with the unadorned idea of "substituted judgment" and couldn't require that test to incorporate rigorous standards of proof.²⁰³

The question now is whether it is indeed permissible, or even obligatory, for the state to skew the risk of error by making it significantly more difficult for proxies to find a patient preference for non-care (and thus for almost certain death in the usual sense) than for continuing care. Does this invade the supposed threshold liberty interest of incompetent persons?

Perhaps not. Consider again the proper designation of the liberty interest: is it about *not being treated*—or, instead, about *choosing* whether to be treated? It is not clear how this question can be answered even with a more explicit account than the Court provided about the constitutional value of the liberty interest "in not being treated" (choice aside)—particularly as held by permanently unconscious patients. It is well and good to say that when the patient is incompetent, doubts about her preferences should be resolved in favor of life, without which there is neither competence nor incompetence. But Ms. *Cruzan* wasn't merely transiently incompetent—temporarily indisposed until another day. By most accounts, she was to remain forever incompetent and insensate. What doubt was there to resolve? Whether she was indeed permanently unconscious, or utterly insensate while unconscious? The main doubt was about what she (would have) wanted, but it remains unclear why this should or should not be the main question. And because this issue-

²⁰³ See *Cruzan*, 497 U.S. at 284-87 (stating that the determination of a patient's prior preferences may be subject to a clear and convincing standard of proof).

framing matter remains unclear, one might argue that federalism requires deference to a state's resolution of a still-imponderable normative/conceptual quandary. Unless we construct a definitive account of a liberty interest in choice that a state clearly violates, the indeterminacy arguably ought to be resolved by the state. There is, so far, no sufficiently complete or coherent account of a liberty interest in choice that Missouri violated, whether or not one concurs with its policy.

(c) Further comments on the Court's decision: matters awaiting resolution (or illumination)

• *More on who holds rights to what?* The petitioners, as the Chief Justice observed, argued that incompetent persons have "the same right" as competent persons in this context. As we saw, he responds by saying that "in a sense this begs the question." I suggested earlier that this might refer to the very possibility that permanently unconscious persons hold liberty interests in refusing life-sustaining care, or simply in not having such care ("refusal" and other matters of choice left aside). It might also refer to the view that whatever kind of liberty interest the patient holds, her proxies may exercise it "for her."

Did the Court in fact say that all persons have a liberty interest in refusing medical treatment or that only competent persons have such rights? If incompetent persons *don't* have such rights,²⁰⁴ then, as things stand, there is no right held by anyone that requires exercise via a surrogate. In this case (no parental or familial rights were asserted independently of the rights of the patient), and the surrogate's right is parasitic upon the patient's rights—and if the latter has no rights, neither does the former.

The problem with the petitioners' claim that both competent and incompetent persons have the same rights is not that it begs any questions, but that it is either incompletely specified or incoherent. What does "the same rights" refer to? Are we talking about the same *threshold* or *presumptive* right held by all *persons*? (Incompetents are obviously legal persons, although

²⁰⁴ See *Cruzan*, 497 U.S. 261 at 331 (Stevens, J., dissenting) (stating that "a competent individual's decision to refuse life-sustaining medical procedures is an aspect of liberty protected by the Due Process Clause of the Fourteenth Amendment"). However, he immediately added that "upon a proper evidentiary showing, a qualified guardian may make that decision on behalf of an incompetent ward." *Id.*

some—such as the permanently unconscious—may fall short of personhood in the prevalent philosophical sense.)²⁰⁵ If the incompetent patient does not have this threshold right, choice-based or not, what is *Cruzan* all about? The opinion, as we saw, offered no rational reconstruction of the way we talk about what incompetent people and dead people would have wanted, or what some incompetent persons might “really” want right now but can’t articulate.

If, however, the claim is not about the premise that someone holds a threshold right of a certain sort (say, to speak freely), but about whether a person holds a *bottom-line*, end-of-the-argument right to do *this particular thing* she wants to do *in these particular circumstances* (say, to suggest to a crowd of enraged, mayhem-minded persons that storming a globalization meeting might be a good idea), then no question is begged—the question is simply being argued. If someone says that incompetents hold rights exactly like those of competent persons (even if this is an odd way to talk, many do talk this way), what does this mean, conceptually and operationally? The government can plausibly agree that *all* persons do indeed hold a presumptive right to refuse medical treatment or lifesaving care, but under certain circumstances the threshold claim is defeated. Which circumstances, established when and how? There are many examples of “having a right” in one sense (i.e., at the threshold, or “prima facie,” or “presumptive”) and not having a right in another sense (at the end of the day, when the situation has been examined). The state could argue that parents cannot refuse lifesaving medical treatment for themselves when this would endanger their minor children. It could argue that anyone who has critically important information vital to the survival of the Alpha Quadrant of the galaxy cannot refuse lifesaving medical treatment. It could also say that persons who are incompetent cannot exercise this right directly because their incompetence renders such immediate exercise inconsistent with the very foundations of the autonomy-based right. (Is “having a right that one can *never* exercise or implement for oneself” a coherent notion? Only if it is not a *choice-right*?)

Perhaps this talk of permanently unconscious patients holding rights that must be “exercised” by others involves a category mistake. Incompetence is not a “circumstance” that

²⁰⁵ See Crosby, *supra* note 177.

defeats an otherwise plausible *kind* of claim; it goes to the heart of who can rightly be said to *have* the claim. Moreover, even if incompetence might be a “circumstance” in some cases—in particular, where there is a nontrivial possibility that the incompetent can recover some or all of his former competence—it can’t be one here because the patient has no possibility of recovering anything at all.

So, we have a problem—not in “labeling,” but in choosing alternative conceptual systems which, even if they lead to the same bare outcome (X wins or loses whatever), reflect somewhat different normative attitudes. It is one thing to assert that *all persons* hold a certain right, but certain contingencies require that the claim of right is in that instance defeated. It is another to expressly fragment humanity into different parts and divide the set of persons into those who hold rights of a certain sort *from the start* and those who don’t. It *appears* to embrace exclusion rather than inclusion, and although matters of appearance are not always part of explicit constitutional doctrine, appearance counts for quite a bit. (Think of Establishment Clause cases dealing with whether government action appears to endorse particular religions or their branches, or—more controversially—religion over non-religion.)²⁰⁶

There is a continuing open question that links the issue of who holds what rights with many other matters implicated in *Cruzan*. If we avoid speaking of interests currently held by the permanently unconscious, how do we re-characterize the current modes of both ordinary and constitutional talk? Should we speak solely in terms of liberty interests held by others—next-of-kin, friends—to act on behalf of *themselves*, not the patients? (What if a patient’s identity is unknown?) And what are the sources and contents of *those* rights? To be sure, this maneuver of bypassing talk of patients’ rights does not avoid the difficulty of dealing with them. From the next-of-kin’s perspective, there remains the moral question of how *she* should exercise her right. One then has to deal with the moral pull, such as it is, of attending to a patient’s prior or supposed preferences and/or to her best interests. In our world, black boxes may have no block boxes for their own use, and need to develop their own criteria for choice.

²⁰⁶ For a review, see generally CHEMERINSKY, *supra* note 22, at 978-81 (discussing neutrality and symbolic endorsement criteria in Establishment Clause cases).

• *Non-choice rights.* This topic, mentioned earlier, is closely related to the preceding one about possible rights-holders. Perhaps we have been talking about the wrong sorts of rights. Suppose we separate different circumstances involving incompetent persons. One person may be temporarily incompetent—say, a hockey player who suffers a concussion, along with a large, bleeding gash caused by an encounter with someone’s skates. It makes sense to say he has a right to refuse treatment, and if the treatment involves a blood transfusion and he is known to be a rigorous Jehovah’s Witness (he believes he will suffer in the afterlife even if the transfusion is forced upon him), there isn’t much strain in acknowledging that giving him a transfusion would intrude upon his right not to be treated, whether his right is a choice right or a non-choice right.

But it’s much harder to say something like this for someone who has never been competent, such as a person profoundly impaired from birth. This is no fleeting indisposition that renders him temporarily incompetent. Talking of a right to refuse or accept treatment—or to *decide* anything that goes beyond elemental childlike choice (“I’ll run now and rest later”; “I won’t touch this wire because it will hurt me”) for such persons seems to be pushing it.

Of course, this person does have rights of certain sorts. All creatures capable of feeling pain arguably have rights both to *choose* to be free of pain, and to *be* free of pain. Perhaps this turns on the difference between preferring something (freedom from pain) and choosing it; incompetent conscious persons certainly have preferences. (Some unconscious persons may feel pain in some sense, but those in permanent vegetative states probably do not.) The point is that being free of pain is not solely the subject of a choice-right—of “*choosing* to refuse pain”—where that choice is part of a more complex decision to avoid one therapy or another, or anything else that risks pain. The incompetent person simply has a preference and a right not to suffer, unless there is some good reason (necessary or appropriate medical treatment, for example) to risk it.²⁰⁷

²⁰⁷ An incompetent person has a personal right to be dealt with in ways that promote her interests reasonably efficiently, and this means reducing avoidable costs such as pain and suffering. If it were thought that permanently “unconscious” patients were very likely to be suffering in some way, then it would be sensible to say they held various non-choice rights to avoid suffering. Indeed, if recovery was utterly beyond hope, one might well say that looking to her prior expressed preferences—say, to continue being cared for despite having to endure pain—would usually be ill-

We are, however, dealing with the particular situation of the permanently unconscious, not all incompetent persons. As we saw, it is thought that there is a class of patients who are indeed irreversibly unconscious and utterly insensate: they feel nothing—from their “viewpoint,” it is as if they were dead. One might then argue that they therefore have *neither* choice rights *nor* other kinds of rights. Still, as suggested, we might try to reconstruct the choice right to reflect and honor the person’s prior status as a competent, autonomous person.

But we do not always—or even often—talk this way about such persons. If their prior preferences have been adequately expressed, we still talk of vindicating their choice. And although they presumably feel no pain, we speak of their continuing rights to have their bodies dealt with as they wish (within limits) and, more generally, to their interest in closure—for themselves or others or both. Of course, this normative/conceptual difficulty is not a recent arrival on the scene. But it has become more pressing because biomedical technology now enables us to divide formerly integrated features of our lives—organic life, and life as a functioning, sentient person—for extended periods. Perhaps the precise situation in *Cruzan* didn’t require the Court to press the analysis of who holds what presumptive rights that can be defeated in what ways, and perhaps no situation will ever arise that *requires* the Court to better explain what it thinks it is doing. (Looking for a “full” explanation is at least remotely akin to looking for the boundaries of the universe.) For the rest of us, however, constitutional analysis can’t stop with the contents of a judicial opinion.

• *State interests in life and in its citizens’ interests in choice.* The *Cruzan* opinion, in reviewing possible government interests in regulating non-treatment decisions, referred both to a “commitment to life” and the protection of “the personal element of this choice”—referring to a patient’s choosing whether to remove lifesaving care in any form. One might argue that neither is even a legitimate government interest because there is no abstract value in life beyond the value of particular lives, and

y, to continue being cared for despite having to endure pain—would usually be ill-considered. Why allow someone to suffer when that suffering cannot be part of a treatment/care regime that could assist in her recovery—or promote national security or serve some other public purpose?

those lives are the responsibility of their livers.²⁰⁸ Sorry—I meant of those who live them.

As for safeguarding “the personal element” in life-or-death choices, I assume the Court was referring not to literal choice by the permanently unconscious patient at the present decision-point, but to the ideal of deciding the fate of incompetent persons by deferring to the preferences they had while still competent, and which in some sense still define them, even as permanently unconscious. But it remains a contested issue whether we should deal with incompetent persons on the basis of the outcome of this investigation into prior preferences—which to be sure appears to reinforce autonomy norms—or to devise some notion of how to promote the incompetent person’s best interests. (If the person is permanently unconscious, it is, as I said, especially difficult to assign meaning to “her best interests.”)

In any case, referring back to the patient’s prior preferences might colorably be said to preserve “the personal element” in decision making, although that element—construed to embrace the present need for decision—is exactly what has been compromised or even fully annulled by the patient’s condition. In this sense, preserving the personal element may serve norm reinforcement functions, though this depends on what the “audience” members “see.” (“The personal element” can’t refer merely to the proxy’s current preferences; it refers, at most, to her reconstruction of the patient’s past preferences, for the patient’s sake.) A “best-interests-of-the-patient” standard may also promote some of these norm reinforcement functions, but it omits (on its face, at least) any specific reference to the patient’s individual autonomy. (There is an obvious overlap between the substituted judgment and best interests standard that we need not address here.)

The reference to the patient’s views *ex ante* of course requires some procedures for confirmation and implementation of these views. Even if there are clear written documents that soundly evidence these preferences, someone or some entity technically must serve as a “proxy,” even if it is the court itself.

Having said all this, we still face the question of why a particular resolution of the issue of nontreatment of permanently unconscious is a matter of interest to the state?

²⁰⁸ See *supra* note 204.

Here is one responsive line: There is a conceptual and a rhetorical difference (if not always an operational one) between claiming that, as a proxy, one is following one's own preferences, as opposed to deciding matters on the basis of either the patient's preferences or her best interests. (The concept of best interests may or may not take account of her probable prior preferences or probable present preferences, if she could make them known during a fit of competence.) At least for purposes of value reinforcement, why can't a state choose one substantive standard for proxy decision making over another as its official state policy, and choose one rule of evidence over another to promote that policy? Perhaps the state is more attuned to the possibility that the prior expressed preferences of the patient would not endure, or might not be applied in the particular situation at hand. People write down all kinds of rubbish to describe anything, including their present views of what their future views might be on any given subject. I know of no generally accepted theory of what counts as a legitimate, important, or compelling government interest that would, as a matter of constitutional law rather than of a particular political philosophy,²⁰⁹ disallow Missouri's claims in this case, which seem devoted to determining the patient's previously held preferences, and thus may serve to promote the idea of personal autonomy.

On the other hand, perhaps this works best only if one doesn't look too closely at the situation, which most of us don't. Some social learning mechanisms may rest on the average observer's lack of perceptual acuity. Autonomy has multiple, often competing aspects, and one can discern disrespect for autonomy (in one aspect) in Missouri's scheme, as well as respect for it (in another aspect): most persons might well say they would prefer non-care if they end up in Ms. Cruzan's condition. Moreover, if we asked what the reasonable person would prefer, the likeliest response would be that such a person would prefer non-care under the assumed circumstances. From this standpoint, Missouri is impairing autonomy ideals by keeping Ms. Cruzan's parents from doing something overwhelmingly likely to have been what their daughter wanted. Why weren't studies introduced about what most people generally prefer in this sphere of decision making? Because the information presented isn't *individuated*

²⁰⁹ This is not a false opposition, despite the conceptual connection between text interpretation and philosophical views of various sorts.

to Ms. Cruzan? In the first place, why should this make a difference? In the second place, taking well-grounded empirical findings about matters of fact concerning a well-defined set of persons and applying them to persons within that set *is* a form of individuation, though obviously far short of rendering the person distinctive. The upshot, however, is simply that the phrase “X would have wanted life-sustaining to because of her permanent unconsciousness” is probably true, even without knowing further individuating traits. This is not, however, a song either in denunciation or praise of Missouri’s inclinations on how best to favor “personal choice” in this area. If the right to refuse medical treatment is a *really* important liberty interest—which is an interest in *choosing*—then, as already argued, it *must* be seriously protected by imposing a significant burden on government to justify invading it. This burden defines the core of (and perhaps is fully constitutive of) a given standard of review.

Assuming that decision making for the permanently unconscious has something to do with protecting personal choice in some sense, does Missouri indeed further or impair this personal choice ideal by requiring a careful showing of prior preference? The dissenters’ position suggests the deep irony here: Missouri’s preference for promoting personal choice may accomplish exactly the opposite: By insisting on clear proof of how she would choose, given findings about her prior express or implied preferences, her choice right is likely to be annulled, as one might argue. Of course, this is not done for nothing: there is in general no moral symmetry between choosing to live and choosing to die, and we often resolve doubts in favor of life in order to avoid the lesser of two errors.

This particular risk-of-error analysis of course bears much more probing, but not here, except to note a difficulty implicit in what has already been said about the status of patients like Ms. Cruzan: If unconsciousness is truly permanent, why isn’t the asymmetry between proving non-treatment and treatment decisions morally and legally irrelevant on the ground that from the “perspective” of the patient, there is morally and legally no difference between being really dead and being permanently unconscious? If there are no such differences, the state’s interest would seem to rest entirely on selecting the best way to enforce value norms, perhaps by acting as if the moral analysis did

establish some difference between death and permanent unconsciousness.

Then again, perhaps the asymmetry is “oppositely” relevant—i.e., the greater error here is not in mistakenly ending life but it mistakenly requiring it, in some form, to endure. Despite the assumption of permanent unconsciousness and the total absence of any capacity to sense or to feel, many may look upon the permanently unconscious patient (or her soul) as suffering, and thus enduring a needlessly painful life. Perhaps this has “brutalization” effects on our norms, helping to shape our future selves as pitiless drones. On the other hand, note the weasel words I used when referring to maintaining “life in some form.” Even if life “endures,” who is enduring it? The permanently unconscious, insensate person endures nothing. The “it” that “endures” (now in the sense of “continuing” rather of suffering) is not the life of a person but of a biologic casing. Keeping permanently unconscious patients on life support thus, rightly viewed, does not teach us to be harshly indifferent to suffering. Moreover, this casing is clearly of considerable moral significance because of its direct link to deep human emotions. That may be, for some, enough to sustain describing and dealing with it in ways that seem inconsistent with certain moral/philosophical concepts—e.g., autonomy, personhood—narrowly construed, but which promote those very values through norm reinforcement. More broadly construed, moral and philosophical analysis generally might permit or oblige us to pursue behaviors—even rituals—that promote basic values. Arguments from symbolism are clearly not without force, depending on the circumstances.

Suppose we now ask: Given the state’s goal of promoting the value of personal choice in life-and-death decision making, what *follows* for how we decide about treatment for the permanently unconscious (but not all incompetents)? Perhaps not much. In particular, Missouri’s decision to require clear and convincing evidence of a permanently unconscious patient’s prior preferences for non-treatment does not follow from its own general premises concerning life and autonomy. The importance of a right *to choose* does not entail that the criterion for dealing with the permanently unconscious must be their prior preferences. The very assertion of the importance of a *choice* right arguably demands that the person ultimately be capable of choice in the future, if not at the moment. If she is not,

then the priority assigned to the choice right seems less applicable. The permanently unconscious, and perhaps some other permanently incompetent persons, are out of the choice loop, or so one might argue. There is thus no reason to demand clear and convincing evidence of actual or hypothetical choice, social-educative considerations aside. (Indeed, if one assumes some slim chance of cognitive recovery, the better standard is the patient's best interests, not her prior preferences, in order to further the possibility of her being able to exercise choice in the future by keeping her alive.)

• *Choice of conceptual systems.* The difficulty of choosing a normatively satisfactory conceptual system for dealing with permanently unconscious persons may explain in part the *Cruzan* opinion's intermittent impenetrability. No one knows how to do this to everyone's reasoned satisfaction. In working with this case, we have again bumped against what seem to be the present limits of how we think about constitutional adjudication. What we already know about dealing with permanently incompetent patients—those afflicted with dementia or other severe mental impairment—only carries us so far because, as we saw, incompetence has reached its “maximum” where there has been a *complete* and *permanent* break between organic life and life as a functioning person.²¹⁰

This technological possibility of a permanent fracture between “mental life” and “physical (organic) life” roils our basic values. Because we have embedded these values in the Constitution, and because standards of review implement them as high-ranking *constitutional* values, we come to reexamine the idea of standards of review as foundational (because they reflect our basic values) and as practical implements (because they direct the courts' job of handling constitutional disputes). In doing this re-evaluation, we have had to review how we identify constitutional rights and rights-holders, and to inspect how we choose alternative conceptual systems. When we are outside the realm of those technological effects our current conceptual systems cannot easily track, we are less likely to bump against the

²¹⁰ As we saw, this is not wholly unprecedented, in light of the occasional story of someone who has been in a coma for years and then “awakens.” But the neurological condition of comatose persons is apparently distinct from that of persons in a persistent or permanent vegetative state, which seem not to be generally classified as comas. See generally Multi-society Task Force on PVS, *supra* note 177, at 1502-03.

limits of constitutional templates as we now know them. But when we are deep within new technological contexts, the constitutional limits close in on us.

CONCLUSION

The aim of this essay was to learn more about constitutional adjudication by watching it when it is pressed by biomedical technology. We may, in doing so, also learn more about technological impacts, but this is, for present purposes, gravy. The sequence of the commentary is pretty simple. After citing some general points about text interpretation and applying them more specifically to constitutional interpretation, I suggested that all interpretational axes converged in recognizing that the Constitution establishes hierarchies of legal relations. The existence of such hierarchies entails the existence of standards of review that, used properly, implement these hierarchies, and thus are critically important in furthering constitutional values and reinforcing them as community ideals. (I made no separate investigation of issues concerning the Constitution's authoritativeness.)

I then focused on standards of review as constituting the infrastructure of constitutional decision making, and argued that issues in biomedical technology often raise under-recognized questions about the nature and use of standards of review—and thus about constitutional analysis and adjudication generally. And if we are driven that far, we are necessarily driven to re-inspecting the basic values embedded in the constitution, and enlarging our understanding of them.

The historic complaints about standards of review²¹¹ are understandable but overdone. Invoking these standards is said to encourage—or reflect—question-begging and tendentiousness, and their use as integral parts of constitutional argument structures is thus condemned as a kind of judicial and advocative fraud. Related complaints include the objection that the standards are vague-to-meaningless, formalistic, and extra-constitutional judicial frolics having no textual or other constitutional foundation.

It is bootless to deny that some (perhaps many) uses of some standards of review by some courts are clumsy, mislead-

²¹¹ See *supra* note 17 and accompanying text.

ing, incomprehensible, or simply mistaken in some respects. Nevertheless, the broader view that standards of review rightly don't get no respect at all is wrong. Deficiencies in constitutional decision making by courts reflect the Peter Principle more than terminal infirmities in standards of review. These standards are *entailed* by any interpretive scheme that yields a hierarchy of legal relations. If there are no standards of review, there are no constitutional hierarchies, at least as far as actual constitutional adjudication is concerned. But such hierarchies do reside in the Constitution, and inevitably so, although one can imagine situations where they are very primitive. However seriously they are misused—and what constitutes “misuse” may be contested—they are *there*, and we had better learn to use them properly.

Technologies will continue to arrive and to thrive, and some of them may import ideas and effects that do not fully cohere with long-held assumptions about the properties of life and the extent to which we can precisely control its processes, whether of behavior, mental functioning, or any human characteristics. This “shape-shifting” of life confounds constitutional adjudication. We will have to refine and even revise some of our main tools of constitutional decision making—our standards of review—because they are the structures that mediate and carry out the value orderings we implanted into the Constitution.