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Cover Page Footnote

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NOTES

A WOLF IN SHEEP'S CLOTHING?: A CRITICAL ANALYSIS OF JUSTICE HARLAN'S SUBSTANTIVE DUE PROCESS FORMULATION

*Anthony C. Cicia**

INTRODUCTION

In *Planned Parenthood v. Casey*,[1] the Court upheld both a woman's right to terminate her pregnancy and the legitimacy of substantive due process jurisprudence in constitutional law.[2] *Casey* was a critical case because of its timing; the Court decided the case at an important juncture in the Court's substantive due process jurisprudence. During the 1960s and 1970s the Court had generally extended the scope of protection secured by the Due Process Clause.[3] During the 1980s, however, the Court stopped extending the scope of due process protection in favor of a more restrictive approach.[4] Many observers thought the Court would take advantage of the opportunity presented by *Casey* and actually shrink the scope of the basic liberties secured by the Con-

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1. 505 U.S. 833 (1992).

2. *Casey*, 505 U.S. at 846-53. The Due Process Clause of the Fourteenth amendment provides, "nor shall any State deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1. Courts have interpreted the Due Process Clause as having two components: procedural due process and substantive due process. Procedural due process ensures that people will receive adequate legal procedure in any adjudication. Substantive due process, however, protects some rights that are so essential that the government may not abridge them regardless of the procedures used. *See* Walter F. Murphy et al., American Constitutional Interpretation 1061-62 (2d ed. 1995). Substantive due process, thus, gives meaning to the word "liberty" in the Due Process Clause, and has become an important source in the Constitution for protecting rights. *See infra* part IV.

3. *See, e.g.*, Moore v. City of E. Cleveland, 431 U.S. 494 (1977) (plurality opinion) (extending the right to live with one's family to families that were not traditional nuclear families); Roe v. Wade, 410 U.S. 113 (1973) (recognizing the right of a woman to choose whether to terminate her pregnancy); Loving v. Virginia, 388 U.S. 1 (1967) (recognizing the right to marriage without state interference).

4. *See, e.g.*, Michael H. v. Gerald D., 491 U.S. 110 (1989) (refusing to extend the right to raise one's child to illegitimate parents); Bowers v. Hardwick, 478 U.S. 186 (1986) (refusing to recognize a homosexual's right to intimate association).

stitution.[5] The *Casey* decision thus shocked those commentators who had expected the Court to overrule *Roe*.[6]

In affirming the vitality of substantive due process, the joint opinion[7] relied on Justice Harlan's formulation of substantive due process in his dissent in *Poe v. Ullman*.[8] In this dissent, Justice Harlan stated that:

> [T]he full scope of the liberty guaranteed by the Due Process Clause cannot be found in or limited by the precise terms of the specific guarantees elsewhere provided in the Constitution. This "liberty" is . . . . a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints and which also recognizes . . . that certain interests require particularly careful scrutiny of the state needs asserted to justify their abridgment.[9]

Justice Harlan's substantive due process formulation enjoys wide acceptance; it has received praise from both liberal and conservative fundamental rights theorists.[10]

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5. Many factors led people to believe that the Court would act this way. The Court had become increasingly conservative during the 1980s. George Bush's election in 1988 signalled another four years (at least) of potential conservative appointments. Bush fulfilled this prophecy by appointing Justices Kennedy, Souter, and Thomas by 1991. With Justice Blackmun's age (80 in 1990), the possibility existed that Bush would be in office to fill his spot with a conservative. This would leave Justice Stevens as the only liberal on the Court. Also, the Reagan and Bush administrations had asked the Court six times to overrule *Roe*, and this appealed to some of the conservative Justices. *See* Murphy et al., *supra* note 2, at 1281. Thus, all signs pointed to a radically conservative Court that would overrule cases that had extended the scope of basic liberties secured by the Constitution. Justice Blackmun even predicted such behavior by the Court. *See* Webster v. Reproductive Health Servs., 492 U.S. 490, 537-38 (1989) (Blackmun, J., dissenting). Many commentators also expected the Court to shrink the scope of basic liberties. *See infra* note 6.

6. *See, e.g.*, Ronald Dworkin, *The Center Holds!*, N.Y. Rev. of Books, Aug. 13, 1992, at 29; Linda Greenhouse, *Slim Margin: Moderates on Court Defy Predictions*, N.Y. Times, July 5, 1992, § 4, at 1; Richard J. Neuhaus, *The Dred Scott of Our Time*, Wall St. J., July 2, 1992, at A8; Kathleen M. Sullivan, *A Victory for* Roe, N.Y. Times, June 30, 1992, at A23.

7. In *Casey*, Justices O'Connor, Kennedy, and Souter issued the Court's holding in the form of a joint opinion. In a joint opinion, no single Justice authors the opinion; instead, several Justices combine their views into one opinion. *See* David B. Anders, Note, *Justices Harlan and Black Revisited: The Emerging Dispute Between Justice O'Connor and Justice Scalia Over Unenumerated Fundamental Rights*, 61 Fordham L. Rev. 895, 895 n.6 (1993). Justices Blackmun and Stevens wrote separate concurring opinions giving a majority to the joint opinion's holding that a woman has a right to choose whether to terminate her pregnancy. *See Casey*, 505 U.S. at 911 (Stevens, J., concurring in part and dissenting in part); *id.* at 922 (Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting in part).

8. 367 U.S. 497, 522 (1961) (Harlan, J., dissenting).

9. *Id.* at 543. This passage is by no means a complete outline of Justice Harlan's substantive due process formulation. For a detailed discussion of Justice Harlan's formulation, see *infra* part I.

10. James E. Fleming, *Securing Deliberative Autonomy*, 48 Stan. L. Rev. 1, 60 (1995) [hereinafter Fleming, *Autonomy*] (citing Charles Fried, Order and Law 72

One jurist who has explicitly not accepted Justice Harlan's substantive due process formulation is Justice Scalia. In *Casey*, Justice Scalia bitterly dissented and blasted the joint opinion for relying on Justice Harlan's substantive due process formulation.[11] Justice Scalia's substantive due process formulation would thus appear to be very different from Justice Harlan's formulation adopted by the joint opinion. This, however, is not the case. In fact, upon close examination, the two formulations are strikingly similar.[12] This point is especially important because the joint opinion's reliance on Justice Harlan's formulation in *Casey* may make Justice Harlan's formulation the most important method of securing basic liberties in the coming decades.[13]

This Note argues that proponents of an expansive substantive due process formulation should repudiate the joint opinion's reliance on Justice Harlan's formulation because, in reality, it duplicates Justice Scalia's narrow, restrictive view of substantive due process. Part I outlines Justice Harlan's substantive due process formulation as embodied in his dissent in *Poe v. Ullman*.[14] Part II examines Justice Scalia's substantive due process formulation by extrapolating his beliefs from the four major substantive due process cases that have been before the Court during his tenure. Part III compares the two formulations and concludes that they are strikingly similar. Part IV argues that this similarity requires commentators and Justices who are committed to a Constitution that affords stringent protection to substantive due process rights to reject Justice Harlan's substantive due process formulation. This Note concludes that commentators and judges who favor an expansive scope of due process protection should recognize the hidden dangers of wholesale adoption of Justice Harlan's substantive due process formulation.

I. JUSTICE HARLAN'S "COMMON LAW" SUBSTANTIVE DUE PROCESS FORMULATION

Justice John Marshall Harlan was appointed to the Court in 1955.[15] During his tenure, Justice Harlan took part in some of the most influential Supreme Court cases in modern history, including *Brown v.*

(1991), and Laurence H. Tribe & Michael C. Dorf, On Reading the Constitution 76-79 (1991)).

11. *Casey*, 505 U.S. at 983-84 (Scalia, J., concurring in the judgment in part and dissenting in part) (likening "reasoned judgment" to "value judgment[s]," "political choice[s]," and "personal predilection[s]"). The joint opinion calls Justice Harlan's substantive due process formulation "reasoned judgment." *Id.* at 849.

12. *See infra* part III.

13. *See infra* part IV.

14. 367 U.S. 497, 522 (Harlan, J., dissenting).

15. Bruce Ackerman, *The Common Law Constitution of John Marshall Harlan*, 36 N.Y.L. Sch. L. Rev. 5, 26 (1991).

Board of Education (Brown II),[16] *Baker v. Carr*,[17] *Griswold v. Connecticut*,[18] and *Miranda v. Arizona*.[19] Although Justice Harlan is generally considered to have been a conservative Justice,[20] not every aspect of his jurisprudence is regarded as conservative.[21] In particular, Justice Harlan's substantive due process jurisprudence is commonly categorized as liberal.[22] In fact, Justice Harlan is known as "the author of the constitutional right to privacy."[23]

An analysis of Justice Harlan's substantive due process formulation requires a preliminary appreciation of his position as a common law judge. His dissent in *Poe v. Ullman*[24] represents the only opinion in which Justice Harlan fully articulated his beliefs on substantive due process, and thus is the key to the development of his substantive due process beliefs.[25] This section first briefly outlines the role of a common law judge and then demonstrates how Justice Harlan's approach to substantive due process exemplified this common law tradition.

A. *Common Law Jurisprudence*

In a recent article, Professor Bruce Ackerman outlined the role of a common law judge and contrasted it with the role of a judge he calls

16. 349 U.S. 294 (1955) (implementing educational desegregation in the United States).

17. 369 U.S. 186 (1962) (recognizing the fundamental right to vote and the one person/one vote principle).

18. 381 U.S. 479 (1965) (recognizing the fundamental right to privacy).

19. 384 U.S. 436 (1966) (protecting arrestees from self-incrimination by requiring the government to make them aware of their constitutional rights).

20. *See, e.g.*, Ackerman, *supra* note 15 (criticizing Justice Harlan for being conservative); Charles Fried, *The Conservatism of Justice Harlan*, 36 N.Y.L. Sch. L. Rev. 33 (1991) (praising Justice Harlan for being conservative).

21. *See* Gerald Gunther, *Another View of Justice Harlan—A Comment on Fried and Ackerman*, 36 N.Y.L. Sch. L. Rev. 67, 68 (1991); Nadine Strossen, *Justice Harlan and the Bill of Rights: A Model For How a Classic Conservative Court Would Enforce the Bill of Rights*, 36 N.Y.L. Sch. L. Rev. 133, 133-34 (1991).

22. *See, e.g.*, Strossen, *supra* note 21, at 133-34 (characterizing Justice Harlan's substantive due process as liberal); Robin West, *Reconstructing Liberty*, 59 Tenn. L. Rev. 441, 442-44 (1992) (same).

23. *See* Fried, *supra* note 20, at 35.

24. 367 U.S. 497, 522 (1961) (Harlan, J., dissenting).

25. Although Justice Harlan wrote a concurrence in *Griswold*, that concurrence is not a second source of his beliefs about substantive due process. All Justice Harlan said about his substantive due process formulation in *Griswold*, is that he based his decision on the same "reasons stated at length in my dissenting opinion in *Poe v. Ullman*." Griswold v. Connecticut, 381 U.S. 479, 500 (1965) (Harlan, J., concurring).

Although *Griswold* was not specifically decided on due process grounds, it has come to be regarded as a due process case. *See, e.g.*, Michael H. v. Gerald D., 491 U.S. 110, 128 n.6 (1989) (Scalia, J.) (defending his substantive due process views by stating that he believes *Griswold* was rightly decided); Fleming, *Autonomy*, *supra* note 10, at 57 (referring to *Griswold* as a substantive due process case).

an "independent constitutionalist."[26] Three characteristics define common law judges and distinguish them from independent constitutionalists: reference point, view of the Constitution, and model decision maker. The first characteristic concerns the appropriate reference point to which a judge should look to determine if, and how, a right merits protection.[27] A common law judge's time frame begins at the amorphous birth of the common law (Ackerman calls this "time immemorial")[28] and emphasizes slow, evolutionary development of historical practices to protect rights.[29] Thus, a common law judge does not protect novel rights that involve departures from tradition. An independent constitutionalist, on the other hand, looks back only to the important "historical exercises in popular sovereignty" of the United States and emphasizes turning points (i.e., the Founding and Reconstruction) in protecting rights.[30]

The second distinguishing characteristic of common law jurists concerns their view of the Constitution. An independent constitutionalist believes that the Founders and their successors were "gamblers" who developed our nation based on unprecedented, untested abstractions.[31] Thus, independent constitutionalists view the Constitution as a charter of abstract ideals, and thus advocate for interpreting the Constitution in a broad, abstract manner.[32] Common law judges, however, are deeply suspicious of such novel social experiments. To common law judges, "these abstract projects are meaningless without the exercise of practical wisdom by practical [judges]."[33] Also, common law judges do not believe a judicial decision should rely on contemporary notions of fairness; instead, a decision should rest on past "judicial opinions written by hard-headed common law lawyers."[34] Thus, common law judges view the Constitution as an accumulated mass of precedent that has slowly shaped the nation's history.

The last distinguishing characteristic is the view of whom a judge looks to as the model decision maker. A common law judge does not rely on the views of "some group of politicians" in deciding a case.[35] A common law judge instead looks to and relies upon the wisdom of

26. *See* Ackerman, *supra* note 15, at 8-10. Ackerman's article is by no means a complete outline of the common law tradition, but it will suffice for purposes of this Note.

27. *See id.* at 8-9.

28. *Id.* at 9; *see also id.* at 6 (stating that the common law "began in the forests of Northern Europe where Germanic tribes first tasted a liberty-loving alternative to Roman despotism").

29. *Id.* at 9.

30. *Id.* at 8-9.

31. *Id.* at 9.

32. This view is similar to that of a fundamental rights theorist. *See infra* note 47.

33. *See* Ackerman, *supra* note 15, at 9.

34. *Id.*

35. *Id.* at 10.

judges who came before her.[36] The judge, not the legislature, functions as the "true hero of our constitutional order."[37] For an independent constitutionalist, the ideal decision makers, the people upon whom a judge relies in decision making, are those who helped shape the abstract social experiment that is the United States.[38] An independent constitutionalist masters these decision makers' basic principles and uses them as a guide in deciding cases.

When Justice Harlan was appointed to the Court, he was intent on adhering to the common law tradition that had been disregarded during the New Deal.[39] "[F]aced with the disintegration of the [common law tradition], John Harlan sought to revitalize common law constitutionalism."[40] Nowhere was this commitment more evident than in Justice Harlan's substantive due process formulation.

B. *Justice Harlan's Substantive Due Process Formulation*

Justice Harlan's pronouncement of his due process beliefs came in his dissent in *Poe v. Ullman*.[41] The issue in *Poe* was whether Connecticut statutes that criminalized using contraceptives or giving medical advice about contraceptives violated the Due Process Clause.[42] The majority dismissed the case on justiciability grounds, holding that the plaintiffs had made an insufficient showing that the statute would be enforced against them.[43] In dissent, Justice Harlan argued that the case presented a justiciable issue and that the statutes violated the Due Process Clause.[44] This dissent evidences all the aspects of Justice Harlan's substantive due process formulation: reliance on tradition, evolution of tradition, judicial restraint, and a narrow definition of the rights at issue.

1. Reliance on Tradition to Decide Whether a Right Deserves Protection Under the Due Process Clause

Justice Harlan believed that due process is "built upon postulates of respect for the liberty of the individual," and constitutes the balance the United States has struck between that liberty "and the demands of

36. *Id.*
37. *Id.*
38. *See id.* at 9-10.
39. *See id.* at 6-7. During the New Deal, the Court began to uphold legislation that disrupted the distribution of wealth established and protected by the common law system. *See* Cass R. Sunstein, The Partial Constitution 51 (1993).
40. *See* Ackerman, *supra* note 15, at 7.
41. 367 U.S. 497, 522 (1961) (Harlan, J., dissenting).
42. *Id.* at 498; *see* Conn. Gen. Stat. Ann. §§ 53-32, 54-196 (West 1958). In Griswold v. Connecticut, 381 U.S. 479, 485 (1965), the Court held that these statutes were unconstitutional.
43. *Poe*, 367 U.S. at 508.
44. *Id.* at 522-23 (Harlan, J., dissenting).

organized society."[45] To Justice Harlan, due process represented "a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints."[46] This language evokes a fundamental rights theorist's view of a forward-looking, aspirational due process concerned with realizing the ideals of liberty and equality.[47]

Throughout the opinion, however, Justice Harlan tempered his language with emphasis on the common law tradition. Justice Harlan severely limited the scope of his substantive due process formulation by grounding it in tradition. Justice Harlan believed that the liberty due process secures, despite being a "rational continuum" that protects against "all substantial arbitrary impositions and purposeless restraints," cannot break from the nation's longstanding traditions.[48] The traditions Justice Harlan emphasized were not abstract, aspirational traditions, but rather historical realities.[49] For example, Justice Harlan believed that "Each new claim to Constitutional protection must be considered against a background of Constitutional purposes, as they have been rationally perceived and historically developed."[50] This demonstrates that, although Harlan believed in looking to "constitutional purposes," which sounds aspirational, he relied on how

45. *Id.* at 542.

46. *Id.* at 543.

47. *See* Ronald Dworkin, *Unenumerated Rights: Whether and How* Roe *Should Be Overruled*, 59 U. Chi. L. Rev. 381, 382 (1992) [hereinafter Dworkin, *Unenumerated Rights*]; Fleming, *Autonomy*, *supra* note 10, at 16-22; James E. Fleming, *Constructing the Substantive Constitution*, 72 Tex. L. Rev. 211, 264 (1993) [hereinafter Fleming, *Constructing*].

Fundamental rights theorists believe that the Constitution is an abstract scheme of principles. *See* Ronald Dworkin, Life's Dominion: An Argument About Abortion, Euthanasia, and Individual Freedom 118-19 (1994) [hereinafter Dworkin, Dominion]. They feel that individuals possess certain fundamental rights that are so essential to "the concept of ordered liberty" that the government cannot infringe upon these rights without a compelling justification. *See* Palko v. Connecticut, 302 U.S. 319, 325 (1937); Dworkin, Dominion, *supra*, at 119; Fleming, *Autonomy*, *supra* note 10, at 19-20 (stating that possession of fundamental rights is necessary for free and "equal citizenship"). They believe that because of the abstract nature of the Constitution, to derive fundamental rights from only the text of the Constitution is impossible. Instead, the clauses of the Constitution must be read in this abstract spirit of the document. *See* Dworkin, Dominion, *supra*, at 166.

48. Poe v. Ullman, 367 U.S. 497, 543 (1961) (Harlan, J., dissenting).

49. Two contrasting uses of the term tradition exist. First, a judge can use tradition embodied in the aspirational principles that a nation strives to achieve. *See* Fleming, *Autonomy*, *supra* note 10, at 56-57. A judge can also refer to tradition as embodied in the way a nation has traditionally acted, historical practices. *Id.* Thus, tradition can either be how a nation strives to act or how our nation has acted. *See also* Frank I. Michelman, *Super Liberal: Romance, Community, and Tradition in William J. Brennan, Jr.'s Constitutional Thought*, 77 Va. L. Rev. 1261, 1312-20 (1991) (drawing the distinction between tradition as historical practice and tradition as abstract beliefs).

50. *Poe*, 367 U.S. at 544 (Harlan, J., dissenting).

these purposes have "historically developed."[51] Thus, Justice Harlan's substantive due process formulation is confined to protecting only those rights that have enjoyed traditional protection in the United States.

For example, Justice Harlan began his dissent in *Poe* by rejecting two interpretations of the Due Process Clause: (1) that due process protects purely procedural rights, and (2) that due process only protects the rights enumerated in the first eight amendments.[52] Justice Harlan rejected these views because they "[had] not been accepted by th[e] Court as delineating its scope."[53] With this statement, Justice Harlan emphasized the grounding of his substantive due process formulation in tradition embodied in historical practices. Justice Harlan thus rejected these interpretations because history had rejected them, not for any aspirational reasons.

2. Substantive Due Process Concepts Can Evolve

In Justice Harlan's view of tradition, however, a judge is not completely bound to follow past historical practices. Justice Harlan indicated that the correct due process inquiry had "regard to what history teaches are the traditions from which it developed as well as the traditions from which it broke."[54] Thus, to Justice Harlan, "tradition is a living thing," and any decision "which radically departs from [tradition] could not long survive."[55] Justice Harlan's tradition contains an evolutionary element that would allow a judge to be critical of a historical practice and break away from that practice. Justice Harlan's due process jurisprudence, however, is not in the same category as a fundamental rights theorist's forward-looking version of due process. Justice Harlan relies too heavily on historical tradition for his substantive due process formulation to qualify as aspirational or forward looking.[56]

Also, although Justice Harlan indicated that tradition is a living thing, he clearly meant "living" in an evolutionary, common law way. He stated that a "decision . . . which radically departs from [tradition] could not long survive, while a decision which builds on what has survived is likely to be sound."[57] Justice Harlan further described the limited evolutionary nature of his living tradition by stating that a

51. *Id.* at 544 (stating that "the decision of an apparently novel claim must depend on grounds which follow closely on well-accepted principles and criteria").

52. *Id.* at 540-41.

53. *Id.* at 540.

54. *Id.* at 542.

55. *Id.*

56. *See* Fleming, *Constructing*, *supra* note 47, at 265 (describing how fundamental rights theorists conceive due process).

57. *Poe*, 367 U.S. at 542 (Harlan, J., dissenting).

"new decision must take 'its place in relation to what went before and further [cut] a channel for what is to come.' "[58]

3. Judicial Restraint is a Necessary Component of Any Legitimate Substantive Due Process Formulation

Justice Harlan further demonstrated the common law basis of his due process formulation by stressing the need for judicial restraint in applying due process. Justice Harlan cautioned that "[i]f the supplying of content to [due process] has of necessity been a rational process, it certainly has not been one where judges have felt free to roam where unguided speculation might take them."[59] Instead, judges should "exercise limited and sharply restrained judgment" in applying Justice Harlan's due process formulation.[60] This concept of restraint complements Justice Harlan's view of the slow evolution of a living tradition because, for tradition to evolve slowly, judges must exercise restraint in their judgments.

4. Narrow Definition of the Right in Question

A further characteristic of Justice Harlan's due process formulation is the level of generality at which Justice Harlan identified the right in question. In *Poe*, for example, instead of identifying the right in broad terms such as "decisional autonomy,"[61] Justice Harlan narrowly defined the right as protection of the marital relationship. Justice Harlan objected to the Connecticut law banning the use of contraceptives because the state was "intruding upon the most intimate details of the marital relation with the full power of the criminal law."[62] Justice Harlan believed that "the intimacy of husband and wife is necessarily an essential and accepted feature of the institution of marriage," and thus must enjoy protection from state interference.[63]

Justice Harlan's method of selecting the level of generality is classic common law jurisprudence. Justice Harlan first analyzed precedent and concluded that a traditional level of protection guarded "the private realm of family life."[64] Next, Justice Harlan narrowed the right in question by reasoning that "[o]f this whole 'private realm of family life' it is difficult to imagine what is more private or more intimate

58. *Id.* at 544 (quoting Irvine v. California, 347 U.S. 128, 147 (1954) (Frankfurter, J., dissenting)).

59. *Id.* at 542.

60. *Id.* at 544.

61. Subsequent cases have relied on *Poe* to protect such broadly framed rights. *See, e.g.*, Planned Parenthood v. Casey, 505 U.S. 833, 851 (1992) (joint opinion) (formulating the right to choose whether to terminate a pregnancy as decisional autonomy).

62. *Poe*, 367 U.S. at 548 (Harlan, J., dissenting).

63. *Id.* at 553.

64. *Id.* at 551-52.

than a husband and wife's marital relations."[65] This narrow framing of the right in *Poe* again demonstrates Justice Harlan's fidelity to the common law tradition; a narrow definition of an asserted right would lead to incremental evolution of the law. Any broader level of generality would result in more sweeping departures from tradition and thus be unsound.

C. *Summary of Justice Harlan's Substantive Due Process Formulation*

Justice Harlan was a common law jurist who applied his common law method to the area of substantive due process. As his dissent in *Poe* illustrates, the key components of Justice Harlan's substantive due process formulation are: (1) the requirement that a right be a part of a nation's tradition to receive due process protection; (2) the recognition that tradition can evolve; (3) the need for judicial restraint in deciding a substantive due process case; and (4) identifying the right in question at a narrow level of generality.

Commentators believe that Justice Harlan's common law substantive due process formulation is moderate, or even liberal, and thus differs from the radically conservative substantive due process of Justice Scalia.[66] A closer inspection of Justice Scalia's substantive due process formulation will reveal, however, that this distinction is illusory.

II. Justice Scalia's Substantive Due Process Formulation

Justice Scalia is an originalist; in fact, Justice Scalia is arguably the foremost originalist theorist in American jurisprudence. Thus, a general understanding of the constitutional theory of originalism is necessary to understand Justice Scalia's substantive due process formulation. This part will briefly describe the originalist theory of constitutional interpretation before turning to a description of Justice Scalia's substantive due process formulation.

A. *Originalism*[67]

Originalists believe that the Constitution only protects those rights specifically enumerated in the text of the Constitution or those rights

65. *Id.* at 552. Harlan further limited the right by stating that, although government cannot infringe upon the privacy of marriage, it is appropriate for the government to forbid homosexuality, adultery, or any extramarital sex. *Id.* at 553.

66. *See* Fleming, *Autonomy*, *supra* note 10, at 58-59 (stating that the joint opinion in *Casey* rejected Justice Scalia's highly restrictive substantive due process formulation in favor of Justice Harlan's widely accepted formulation); West, *supra* note 22, at 444-45 (stating that Justice Harlan had a "liberal understanding" of substantive due process, but Justice Scalia intends to shrink the scope of substantive due process).

67. What follows is by no means a complete or thorough outline of the originalist school of Constitutional interpretation. The following outline is sufficient, however,

that the Framers intended to protect.[68] Originalists further believe that courts exceed their legitimate authority when they create rights not specifically enumerated in the Constitution.[69]

Although all originalists profess these basic tenets, specific theorists "vary in the relative emphasis that they place on text [and] extrinsic evidence of intentions."[70] For example, Robert Bork believes that judges should strive to discover the original meaning of the Constitution as the Ratifiers understood it.[71] By contrast, Chief Justice Rehnquist believes judges must use the text or the Framers' intentions in interpreting the Constitution.[72] Justice Scalia's approach to originalism is called "faint-hearted" originalism.[73] Justice Scalia believes that sometimes originalist interpretation is "too bitter a pill" for a court to swallow.[74] At such times, he is willing to abandon originalism to reach a more palatable result.[75]

Nonetheless, Justice Scalia's approach shares certain characteristics of a more uncompromising originalism. First, originalists, including Justice Scalia, provide for only a limited role for judicial review of legislative decisions.[76] Originalists believe that the proper decision

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to understand the theoretical underpinnings of Justice Scalia's substantive due process formulation.

68. *See* Robert H. Bork, The Tempting of America: The Political Seduction of the Law 143-61 (1990); Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. Cin. L. Rev. 849 (1989). The originalist approach thus represents the opposite view of fundamental rights theorists. *See supra* note 47.

69. *Cf.* Bowers v. Hardwick, 478 U.S. 186, 194 (1986) ("The Court . . . comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language . . . of the Constitution.") Although the author of the *Bowers* majority opinion, Justice White, is not considered an originalist, his reasoning in *Bowers* mirrors that of an originalist.

Originalists are not opposed to fundamental rights in general. They believe, however, that the only fundamental rights are those specifically enumerated within the four corners of the constitution. *See* Murphy et al., *supra* note 2, at 389. For example, although originalism prohibits judges from creating unenumerated rights, it also prohibits judges from eradicating rights that have already been granted by the Constitution and the democratic process. *See* Bork, *supra* note 68, at 147; Anders, *supra* note 7, at 898.

70. Ernest Young, *Rediscovering Conservatism: Burkean Political Theory and Constitutional Interpretation*, 72 N.C. L. Rev. 619, 627 (1994).

71. *See* Bork, *supra* note 68, at 144-45.

72. *See* William H. Rehnquist, *The Notion of a Living Constitution*, 54 Tex. L. Rev. 693, 694 (1976).

73. Scalia, *supra* note 68, at 862.

74. *Id.* at 861.

75. *Id.* (stating that "in a crunch I may prove a faint-hearted originalist"). Scalia's example of his "faint-hearted" originalism involves the Eighth Amendment. Scalia states that historically public flogging was not considered cruel and unusual punishment, but a modern-day decision that upheld a law providing for public flogging as punishment would be outrageous. Thus, Scalia says faint-hearted originalists could hold public flogging unconstitutional, but still adhere to originalism as a doctrine. *Id.* at 861-62; *see* Young, *supra* note 70, at 628; Anders, *supra* note 7, at 899.

76. *See* Rehnquist, *supra* note 72, at 700; Young, *supra* note 70, at 629-30; Anders, *supra* note 7, at 898.

makers are popularly elected representatives, and that judges should thus be deferential to the legislative will.[77] Whenever a court declares a legislative act unconstitutional, it runs the risk of acting politically, rather than legally; this politicization is anathema to originalists.[78] Originalists believe that the greatest harm occurs when judges displace the law in favor of their own moral "predilections."[79] According to originalists, moral views can only become law through the political process or by constitutional amendment.[80]

Originalists believe that for judges to fulfill their limited role, they must make decisions according to "neutral principles."[81] Specifically, originalists feel that judicial decisions are illegitimate unless judges are "controlled by principles exterior to the will of the [judge]."[82] This neutral approach prevents judges from substituting their moral beliefs for the text of the Constitution and ensures that they will rely on the original understanding of the Constitution's text in making their decisions.[83]

Originalists do recognize, however, that some constitutional clauses are framed broadly and that it is difficult to determine the content of those clauses by relying on the text.[84] In such cases, originalists attempt to interpret the intentions of those who were alive at the time the open-ended clauses were put into effect.[85] They do this by looking

77. This is what Professor Alexander Bickel has termed "the counter-majoritarian difficulty." Alexander M. Bickel, The Least Dangerous Branch: The Supreme Court at the Bar of Politics 16 (1962). Bickel believes that judicial review is a "deviant institution in the American democracy" because overruling a legislative decision thwarts the will of those who elected the decision makers. *Id.* at 16-18.

78. *See* Anders, *supra* note 7, at 898.

79. *See* Scalia, *supra* note 68, at 863 ("[T]he main danger in judicial interpretation of the Constitution . . . is that the judges will mistake their own predilections for the law.").

80. *See* Rehnquist, *supra* note 72, at 705.

81. Bork, *supra* note 68, at 146 (stating that the Court can act "as a legal rather than a political institution only if it is neutral . . . in the way it derives and defines the principles it applies"). Bork's call for decisions made according to neutral principles is very similar to Professor Herbert Wechsler's theory. *See* Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 Harv. L. Rev. 1, 19 (1959) (defining neutral principles as "reasons that in their generality and their neutrality transcend any immediate result that is involved").

82. Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 Ind. L.J. 1, 6 (1971).

83. *See* Bork, *supra* note 68, at 146-53.

84. Examples of these broadly framed clauses are the Due Process Clause of the Fourteenth Amendment, the Privileges or Immunities Clause of the Fourteenth Amendment, the Equal Protection Clause of the Fourteenth Amendment, and the Ninth Amendment. *See* John H. Ely, Democracy and Distrust: A Theory of Judicial Review 14-41 (identifying these clauses as being open ended and thus frustrating an originalist method of constitutional interpretation).

85. *See* Bork, *supra* note 68, at 149-50.

at history to determine what the drafters intended the clauses to mean.[86]

Recognition of the problems presented by open-ended clauses in the Constitution drives Justice Scalia's substantive due process formulation. Justice Scalia recognizes that the Due Process Clause is open ended and thus seeks a legitimate means to flesh out the meaning of the clause.[87] As demonstrated below, Justice Scalia looks to history to substantiate the content of the Due Process Clause.[88]

B. *Justice Scalia's Substantive Due Process Formulation*

Although Justice Scalia applies his originalist theory to all aspects of constitutional law, his application has been most controversial in the area of substantive due process. Justice Scalia has written opinions in four major substantive due process cases,[89] and his substantive due process formulation becomes apparent from these cases. This section outlines Justice Scalia's substantive due process formulation by gleaning the critical elements of his formulation from his opinion in *Michael H. v. Gerald D.*,[90] Justice Scalia's clearest pronouncement of his substantive due process formulation. Each element will receive further support from other substantive due process cases that illustrate the consistency with which Justice Scalia has maintained his formulation throughout the years.

1. The *Michael H.* Case

Michael H. presents the foremost statement of Justice Scalia's substantive due process formulation. In *Michael H.*, the Court confronted the issue of whether substantive due process provides a natural father the right to have a relationship with his daughter if she was born while the mother was married to a different man.

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86. *See id.* at 149 (stating that a judge trying to determine the meaning of the Equal Protection Clause should look at what the drafters of the Fourteenth Amendment, the Congress that proposed the Fourteenth Amendment, and the ratifiers of the Fourteenth Amendment intended the clause to mean).

87. *See* Michael H. v. Gerald D., 491 U.S. 110, 121-22 (1989) (stating that interpreting the Due Process Clause has been "treacherous" at times for the Court and that he is "attempt[ing] to limit and guide interpretation of the [c]lause").

88. *Id.* at 122-27.

89. Three of these four cases will be used to extrapolate Justice Scalia's substantive due process formulation. *See infra* parts II.B.2.a-e. The other case, *Casey*, adds very little to Justice Scalia's views on substantive due process. Much of his dissent is a bitter attack on the joint opinion, not an outline of his due process formulation. *See* Planned Parenthood v. Casey, 505 U.S. 833, 979 (1992) (Scalia, J., concurring in the judgment in part and dissenting in part).

90. 491 U.S. 110 (1989). *See* Gregory C. Cook, Note, *Footnote 6: Justice Scalia's Attempt to Impose a Rule of Law on Substantive Due Process*, 14 Harv. J.L. & Pub. Pol'y 853, 853 (1991) (stating that Justice Scalia "proposed a new test for substantive due process" in his *Michael H.* opinion).

On May 11, 1981, Victoria D. was born to Carole D. The birth certificate listed her husband, Gerald D., as the father.[91] After the child's birth, however, Carole informed Gerald that she believed Michael H., with whom Carole had an adulterous affair, might be Victoria's biological father.[92] In October 1981, a series of blood tests showed a 98.07% probability that Michael was Victoria's biological father.[93] Between 1981 and June 1984, Carole and Victoria resided at times with both Michael and Gerald, but they resided exclusively with Gerald after June 1984.[94]

Michael filed an action to establish paternity and obtain visitation rights.[95] At the time, however, California law presumed that a child born to a married woman who lives with her husband is the child of that woman and her husband.[96] This presumption of legitimacy was rebuttable by blood tests, but only when a motion to compel the blood tests had been made within the first two years of the child's life.[97]

The central issue before the Court was whether the California statute violated the Due Process Clause of the Fourteenth Amendment. Michael claimed that he had a substantive due process right to have a relationship with his biological daughter and that the state's interest in protecting Carole and Gerald's marriage was insufficient to warrant infringement of that right.[98] Justice Scalia, in a plurality opinion, held that the California statute did not violate Michael's substantive due process rights.[99]

2. Justice Scalia's Approach to Substantive Due Process

More important than the result in *Michael H.* was the substantive due process formulation Justice Scalia unveiled in the plurality opinion. Throughout the course of the opinion, Justice Scalia displayed the characteristics of his substantive due process methodology: judicial restraint, reliance on tradition, identification of the proper sources of tradition, definition of the right in question at the most specific level, and reliance on precedent.

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91. *Michael H.*, 491 U.S. at 113.

92. *Id.* at 114.

93. *Id.*

94. *Id.* at 114-15.

95. *Id.* at 114.

96. *See* Cal. Evid. Code Ann. § 621 (West 1995) (repealed 1992). In 1989, when *Michael H.* was decided, section 621 of the California Evidence Code provided that "the issue of a wife cohabiting with her husband, who is not impotent or sterile, is conclusively presumed to be a child of the marriage." *Michael H.*, 491 U.S. at 115 (quoting Cal. Evid. Code § 621(a) (West Supp. 1989)).

97. *See id.* at 118 (quoting Cal. Evid. Code Ann. § 621 (b)-(d) (West Supp. 1989)).

98. *Id.* at 121.

99. *Id.* at 124.

a. *The Need for Judicial Restraint*

True to originalist form,[100] Justice Scalia called for judicial restraint in deciding whether an asserted right fell within the protection of the Due Process Clause. Justice Scalia began his opinion by warning against the temptation for Justices to impose their own values onto the Constitution.[101] Justice Scalia stated that "defining the scope of the Due Process Clause 'has at times been a treacherous field for this Court,' giving 'reason for concern lest the only limits to . . . judicial intervention become the predilections of those who happen at the time to be Members of this Court.' "[102] He supported this need for restraint by quoting Justice White in *Moore v. City of East Cleveland*: "The Judiciary . . . is the most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or even the design of the Constitution."[103]

Justice Scalia called for similar judicial restraint in *Burnham v. Superior Court*,[104] in which the Court addressed whether personal service of process violated a defendant's due process rights.[105] Justice Scalia believed that his decision would ensure judicial restraint in personal jurisdiction cases. Justice Scalia argued that the "traditional notions of fair play and substantial justice" standard that Justice Brennan adopted in his concurrence was improper,[106] because it

100. *See supra* part II.A.

101. *Michael H.*, 491 U.S. at 121-22.

102. *Id.* at 121 (quoting Moore v. City of E. Cleveland, 431 U.S. 494, 502 (1977)).

103. *Id.* at 121-22 (quoting Moore v. City of E. Cleveland, 431 U.S. 494, 544 (1977) (White, J., dissenting)).

104. 495 U.S. 604 (1990).

105. *Burnham*, 495 U.S. at 608. In *Burnham*, a married couple had separated in New Jersey with an agreement that Mrs. Burnham would file for divorce there on grounds of irreconcilable differences. *Id.* at 607. After Mrs. Burnham took their children to live in California, Mr. Burnham filed for divorce in New Jersey on grounds of desertion. *Id.* at 608. In response to Mr. Burnham's breach of their agreement, Mrs. Burnham filed for divorce in California, and while Mr. Burnham was in California on business and to visit his children, he was served with a California court summons. *Id.* at 607-08. Mr. Burnham claimed that because he lacked minimum contacts with California, requiring him to stand trial in California violated his due process rights. *Id.* The California Courts disagreed with Mr. Burnham, holding that personal jurisdiction was established because Mr. Burnham had been served with process while personally in California. *Id.* Justice Scalia, in a plurality opinion, agreed that California could assert personal jurisdiction in this case. *Id.* at 619.

106. Justice Brennan believed that the correct inquiry was not whether courts traditionally could exert personal jurisdiction in these situations, but whether requiring Mr. Burnham to appear was fair, based on the number of contacts he had with California. *Id.* at 629 (Brennan, J., concurring). The standard Justice Brennan championed came from International Shoe Co. v. Washington, 326 U.S. 310 (1945), where the Court held that a state court's assertion of personal jurisdiction does not violate the Due Process Clause if a defendant has "certain minimum contacts with [the forum state] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.' " *Id.* at 316 (quoting Milliken v. Meyer, 311 U.S. 457, 463 (1940)).

"measure[d] state-court jurisdiction not only against traditional doctrines in this country . . . but also against each Justice's subjective assessment of what is fair and just."[107] Implicit in this statement is that Justice Scalia's method does not allow judges' subjective assessments to enter into their decisions.

Justice Scalia's call for judicial restraint was particularly strong in his concurring opinion in *Cruzan v. Director, Missouri Department of Health*.[108] In fact, Justice Scalia began and ended his concurrence by warning the Court against unnecessary judicial intervention. He began by stressing that he would have preferred not to hear this case because "the federal courts have no business in this field."[109] At the end of his concurrence, Justice Scalia again warned the Court against deciding cases like *Cruzan* because "[t]his Court need not, and has no authority to, inject itself into every field of human activity where irrationality and oppression may theoretically occur."[110]

b. *Reliance on Tradition to Decide Whether a Right Merits Protection by the Due Process Clause*

Justice Scalia's substantive due process formulation exhibits a second characteristic: the requirement that a right enjoy traditional protection in American society to receive substantive due process protection. Justice Scalia stated that for an asserted right to fall within the protection of the Due Process Clause, it must "be an interest traditionally protected by our society."[111]

Justice Scalia's exclusive reliance on tradition is more stringent than the Court's analysis in prior substantive due process cases. Previously, the Court had generally applied a disjunctive test to determine whether a right was fundamental. To receive protection under the Due Process Clause, an asserted right had to be (1) "deeply rooted in this Nation's history and tradition,"[112] or (2) essential to "the concept of ordered liberty [such that] neither liberty nor justice would exist if [the right was] sacrificed."[113] Justice Scalia's substantive due process

107. *Burnham*, 495 U.S. at 623.

108. 497 U.S. 261, 292-93 (1990) (Scalia, J., concurring). In *Cruzan*, the parents of Nancy Cruzan, a young woman in a vegetative state due to an accident, sought a court order directing the hospital to terminate the life support system that was keeping their daughter alive. *Id.* at 265. The Supreme Court of Missouri denied the parents' application, and the Court affirmed this denial in an opinion written by Chief Justice Rehnquist. *Id.*

109. *Id.* at 293.

110. *Id.* at 300-01.

111. Michael H. v. Gerald D., 491 U.S. 110, 122 (1989).

112. Moore v. City of E. Cleveland, 431 U.S. 494, 503 (1977) (plurality opinion).

113. Palko v. Connecticut, 302 U.S. 319, 325 (1937). This scheme of requiring a right to be based either in tradition or central to ordered liberty has been espoused by both "conservative" and "liberal" Justices. *See* Bowers v. Hardwick, 478 U.S. 186, 191-92 (1986) (White, J.) ("conservative"); Roe v. Wade, 410 U.S. 113, 152 (1973) (Blackmun, J.) ("liberal"). Thus, Justice Scalia's reliance on tradition is not new to

formulation, however, does not follow this disjunctive test. Justice Scalia's formulation discards protection for an asserted right based on "the concept of ordered liberty." Instead, the asserted right must have been traditionally protected by society to receive protection under the Due Process Clause.[114]

Once Justice Scalia has established that an asserted right is deeply ingrained in tradition, his next step is to evaluate how the nation has historically treated the asserted right. Justice Scalia stated that the Due Process Clause only protects those rights " 'so rooted in the traditions and conscience of our people as to be ranked as fundamental.' "[115] Justice Scalia framed the issue in *Michael H.* as "whether the relationship between persons in the situation of Michael and Victoria has been treated as a protected family unit under the historic practices of our society."[116] Justice Scalia concluded that, contrary to Michael's claims, "our traditions have protected the marital family (Gerald, Carole, and the child they acknowledge to be theirs) against the sort of claim Michael asserts."[117]

In *Burnham*,[118] Justice Scalia also relied heavily, if not solely, on tradition in deciding the appellant's substantive due process claim. Justice Scalia stated that "[a]mong the most firmly established principles of personal jurisdiction in American tradition is that the courts of a State have jurisdiction over nonresidents who are physically present in the State."[119] Justice Scalia then concluded that the "short of the matter is that jurisdiction based on physical presence alone constitutes due process because it is one of the continuing traditions of our legal system."[120]

Similarly, in *Cruzan*, Justice Scalia based his decision that the hospital should not cease providing life sustaining treatment solely on tradi-

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substantive due process jurisprudence. In fact, there are many substantive due process cases that have relied on tradition to decide whether an asserted right receives due process protection. *See, e.g.*, *Bowers*, 478 U.S. at 192-94 (relying on tradition to deny protection to a homosexual's right of privacy); *Moore*, 431 U.S. at 503 (relying on tradition to protect "the sanctity of the family"); Wisconsin v. Yoder, 406 U.S. 205, 220-29 (1972) (relying on tradition to support the right to control the education of one's child). The novel part of Justice Scalia's opinion is his use of history and tradition as an independent substantive due process methodology. *See Michael H.*, 491 U.S. at 137 (Brennan, J., dissenting) ("[T]he plurality opinion's exclusively historical analysis portends a significant and unfortunate departure from our prior cases . . . .").

114. *See* David A. Strauss, *Tradition, Precedent, and Justice Scalia*, 12 Cardozo L. Rev. 1699, 1705 (1991) (stating that under Justice Scalia's substantive due process formulation "the rule is that if a government practice is traditional, it is also constitutional").

115. *Michael H.*, 491 U.S. at 122 (quoting Snyder v. Massachusetts, 291 U.S. 97, 105 (1934)).

116. *Id.* at 124.

117. *Id.*

118. For the facts of *Burnham*, see *supra* note 105.

119. *Id.* at 610.

120. *Id.* at 619.

tion. Justice Scalia equated termination of the life-support system to suicide, and reasoned that because states have traditionally prohibited suicide, Nancy Cruzan had no right to the termination of her life support system.[121]

c. *The Relative Scarcity of Proper Sources of Tradition*

The next identifiable aspect of Justice Scalia's substantive due process formulation is his identification of the proper sources of tradition and how he uses these sources. According to Justice Scalia, the correct traditions to which a judge should look in examining an asserted due process right are the common law, historical practices, and statutes.[122] Moreover, Justice Scalia has a pattern for the evaluation of these valid traditional sources. Justice Scalia first analyzes the older traditions and then examines more recent traditions to determine if the asserted right has traditionally enjoyed protection. In *Michael H.*, Justice Scalia began this analysis by looking at old common law and concluding that the law traditionally offered no protection to people in Michael H.'s situation.[123] Then, Justice Scalia analyzed more modern sources of tradition, including state statutes and recent cases, to verify his conclusion that an "adulterous father" has no constitutional right to a relationship with his child.[124]

Justice Scalia also performed a thorough, lengthy analysis of the proper traditions and history that he consulted in concluding that California may exercise personal jurisdiction in *Burnham*.[125] As in *Michael H.*, Justice Scalia commenced his analysis by looking at the

121. Cruzan v. Director, Mo. Dep't of Health, 497 U.S. 261, 295-96, 300 (1990) (Scalia, J., concurring).

122. Michael H. v. Gerald D., 491 U.S. 110, 124-27 & n.6 (1989). For example, Justice Scalia states that "[t]he presumption of legitimacy was a fundamental principle of the common law," *id.* at 124 (common law); "the evidence shows that . . . the ability of a person in Michael's position to claim paternity has not been generally acknowledged," *id.* at 125 (historical practices); and "[w]hat counts is whether the States in fact award substantive parental rights." *Id.* at 127 (statutes).

123. *Id.* at 124-25.

124. *Id.* at 125-30. Justice Scalia's use of "adulterous father" in defining the right in question is a separate aspect of his substantive due process formulation and will be discussed separately. *See infra* part II.B.2.d. *Michael H.* provided an easy case for Justice Scalia because both older and more modern sources of tradition pointed towards denying protection to the asserted right. Whether Justice Scalia affords more deference to the old or modern sources of tradition is still an open question after *Michael H.* This question is ostensibly resolved in favor of the old sources of tradition in Planned Parenthood v. Casey, 505 U.S. 833, 979 (1992) (Scalia, J., concurring in the judgment in part and dissenting in part). In *Casey*, Justice Scalia does not examine the modern statutes that legalize abortion in making his decision that the right to abortion is not protected by the Due Process Clause. He instead merely states that "longstanding traditions of American society have permitted [abortion] to be legally proscribed." *Id.* at 980.

125. *See* Burnham v. Superior Court, 495 U.S. 604, 608-16 (1990).

old common law and then proceeded to analyze more modern sources of tradition.[126]

d. *Highly Specific Definition of Rights*

Perhaps the most controversial aspect of Justice Scalia's substantive due process formulation is his method for defining the right in question at the most specific level.[127] In *Michael H.*, Justice Scalia defined the right in question as whether "the natural father of a child conceived within, and born into, an extant marital union that wishes to embrace the child" has any rights to a relationship with that child.[128] Justice Scalia, in footnote six of the opinion,[129] explained why he chose to define the right in question in this manner. He inquired into "the rights of an adulterous natural father" because judges must "refer to the most specific level at which a relevant tradition protecting, or denying protection to, the asserted right can be identified."[130] Justice Scalia defended this specificity as the only means to prevent judges from making decisions according to their own values. He stated that because "general traditions provide such imprecise guidance, they permit judges to dictate rather than discern the society's views."[131] Finally, Justice Scalia indicated that if a tradition lacks identification at the most specific level, then a judge should "consult, and (if possible) reason from" the traditions at the next specific level of generality.[132]

126. *See supra* notes 122-24 and accompanying text. For a thorough analysis of Justice Scalia's historical analysis of the proper traditions in *Burnham*, see L. Benjamin Young, Jr., Note, *Justice Scalia's History and Tradition: The Chief Nightmare in Professor Tribe's Anxiety Closet*, 78 Va. L. Rev. 581, 598-602 (1992).

127. This practice, which was specifically defined in footnote six of the *Michael H.* opinion, has been the subject of extensive criticism by many commentators. *See* Laurence H. Tribe & Michael C. Dorf, *Levels of Generality in the Definition of Rights*, 57 U. Chi. L. Rev. 1057, 1086-87 (1990) (criticizing footnote six for being easily manipulable); *id.* at 1090-92 (criticizing footnote six for being imprecise and more ambiguous than Justice Scalia admits); *see also* Cass R. Sunstein, *Sexual Orientation and the Constitution: A Note on the Relationship Between Due Process and Equal Protection*, 55 U. Chi. L. Rev. 1161, 1173 (1988) (cautioning that "[t]raditions can be described at varying levels of generality").

128. *Michael H.*, 491 U.S. at 127. By contrast, Justice Brennan defines the right in question rather broadly, asking whether a parent has a right to a relationship with his child. *Id.* at 139 (Brennan, J., dissenting) (stating that the proper question is "whether parenthood is an interest that historically has received our attention and protection").

129. *See supra* note 127.

130. *Michael H.*, 491 U.S. at 128 n.6.

131. *Id.* Justice Scalia made these comments in response to Justice Brennan's dissent, which broadly defined the right. *See supra* note 128. Justice Scalia claims that Justice Brennan's definition of the right provides no guidelines for the proper level of generality to define a right. *Michael H.*, 491 U.S. at 127 n.6 ("Why should the relevant category not even be more general—perhaps 'family relationships'; or 'personal relationships'; or even 'emotional attachments in general'?").

132. *Michael H.*, 491 U.S. at 128 n.6. This provision has been especially criticized by Tribe and Dorf. *See* Tribe & Dorf, *supra* note 127, at 1090 (referring to this part of footnote six as a "pervasive problem" in Justice Scalia's methodology).

In *Cruzan*, Justice Scalia also defined the right in question rather narrowly as the right to commit suicide.[133] At least one commentator has claimed that this is not the most specific level of specificity.[134] The right to commit suicide, however, is much narrower than the right to bodily integrity, the right identified by Justice Stevens in dissent.[135]

e. *Reliance on Precedent*

Throughout the *Michael H.* plurality, Justice Scalia attempts to demonstrate that his reliance on tradition is well grounded in precedent.[136] For example, he relied on *Moore* for the proposition that the Constitution " 'protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition.' "[137] Justice Scalia also emphasized that the Court relied heavily on tradition in both *Bowers v. Hardwick*[138] and *Roe v. Wade*.[139]

A similar pattern can be found in *Burnham*. In *Burnham*, Justice Scalia relied heavily on precedent to establish that courts have traditionally been able to exercise "transient jurisdiction."[140] Not only did he cite numerous cases from the nineteenth and early twentieth centuries, but he also cited numerous cases from the 1970s and 1980s to support the proposition that tradition permits courts to exercise transient jurisdiction.[141]

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133. *See* Cruzan v. Director, Mo. Dep't of Health, 497 U.S. 261, 293 (1990) (Scalia, J., concurring).

134. *See* Benjamin C. Zipursky, *The Pedigrees of Rights and Powers in Scalia's* Cruzan *Concurrence*, 56 U. Pitt. L. Rev. 283, 288 (1994) (stating that the most specific right would have been the right of "patients to refuse artificial hydration and nutrition through a gastrostomy tube [when] in a persistent vegetative state").

135. *Cruzan*, 497 U.S. at 342 (Stevens, J., dissenting).

136. This point may strike a reader as strange because Justice Scalia is commonly criticized for lacking respect for precedent in substantive due process. *See, e.g.*, Fleming, *supra* note 10, at 60 & n.352 (labeling Scalia a "counterrevolutionary conservative" and then defining that term as a judge that "seek[s] to purge constitutional law of precedents and principles manifesting liberal error at the earliest available opportunity"). This point will be discussed and analyzed further. *See infra* part III.B.3.

137. Michael H. v. Gerald D., 491 U.S. 110, 124 (1989) (quoting Moore v. City of E. Cleveland, 431 U.S. 494, 503 (1977)).

138. 478 U.S. 186 (1986).

139. 410 U.S. 113 (1973). Scalia notes that in *Bowers*, the Court relied on the nation's tradition of proscribing homosexual sodomy to conclude that there was no right to such intimate association. *Michael H.*, 491 U.S. at 127 n.6. In *Roe*, he points out that the Court "spent about a fifth of our opinion negating the proposition that there was a long standing tradition of laws proscribing abortion." *Id.*

140. Transient, or tag, jurisdiction refers to jurisdiction based on personal service of process on a defendant within the state where the defendant is being sued. *See* Steven R. Greenberger, *Justice Scalia's Due Process Traditionalism Applied to Territorial Jurisdiction: The Illusion of Adjudication Without Judgment*, 33 B.C. L. Rev. 981, 1002 n.101 (1992). Transient jurisdiction was at issue in *Burnham*. *See supra* notes 105-06.

141. *See* Burnham v. Superior Court, 495 U.S. 604, 612-13, 615-16 (1990).

C. *Summary of Justice Scalia's Substantive Due Process Formulation*

Justice Scalia is an originalist who attempts to adapt his originalist theory to the area of substantive due process.[142] Justice Scalia has developed a consistent method for evaluating substantive due process claims. The components of Justice Scalia's substantive due process formulation include: (1) the need for judicial restraint; (2) the requirement that the right in question enjoy traditional protection; (3) inspection of common law, statutes, and historical practices in evaluating the traditional protection of a right; (4) identification of the right in question at the most specific level of generality; and (5) reliance on precedent.

Although the above parts have outlined the substantive due process formulations of Justice Harlan and Justice Scalia, their striking similarity may not be immediately apparent. The next part compares the substantive due process formulations of Justice Harlan and Justice Scalia and demonstrates that the two formulations are indeed strikingly similar.

III. A Comparison Between the Due Process Formulations of Justice Scalia and Justice Harlan

This part compares Justice Harlan's and Justice Scalia's substantive due process formulations. First, it briefly discusses the readily apparent similarities of their formulations. Both Justice Harlan and Justice Scalia emphasize judicial restraint, rely on traditions, define the asserted right in question at a specific level, and look to the same sources to identify the proper traditions. Despite these similarities, Justice Harlan's and Justice Scalia's substantive due process formulations are not usually linked because of perceived differences in their jurisprudence. This part demonstrates that, upon closer examination, these apparent differences are either not differences at all or do not significantly distinguish the two formulations.

A. *Some Similarities Between Justice Harlan and Justice Scalia's Formulations Are Undeniable*

Four aspects of Justice Harlan's and Justice Scalia's formulations are undeniably similar: (1) their belief in judicial restraint; (2) their reliance on tradition; (3) their beliefs about the proper sources of tradition; and (4) their narrow definition of an asserted right. This subpart analyzes each of these similarities.

142. A true originalist does not have a substantive due process formulation at all because no due process rights are specifically enumerated in the Constitution. *See* Bork, *supra* note 68, at 235-40; *see also infra* note 165 (discussing how Justice Scalia has been criticized by Robert Bork for breaking from originalism in Justice Scalia's *Michael H.* opinion).

1. Both Formulations Call For Judicial Restraint in Substantive Due Process Cases

Both Justice Harlan and Justice Scalia stress the need for judicial restraint in their substantive due process formulations. Justice Harlan believed that judges cannot feel "free to roam where unguided speculation might take them," and instead must "exercise limited and sharply restrained judgment" in analyzing a due process case.[143] Similarly, Justice Scalia has stressed the need for judicial restraint, warning that due process interpretation is "a treacherous field" for the Court because of the real danger that the decision will be made according to "the predilections of those who happen at the time to be Members of this Court."[144]

2. Both Formulations Rely on Tradition to Determine Whether a Right Merits Protection Under the Due Process Clause

Both Justices rely on tradition as the basis for evaluating an asserted right under the Due Process Clause. Both Justice Scalia and Justice Harlan understand tradition to be embodied in historical practices.[145] Justice Harlan believed that the asserted right in each case involving the Due Process Clause "must be considered against a background of Constitutional purposes, as they have been rationally perceived and *historically developed*."[146] Justice Scalia's beliefs about the need to rely on tradition echo Justice Harlan's sentiments. Justice Scalia stated 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."[147]

3. Both Formulations Agree on the Proper Sources of Tradition

As demonstrated above, Justice Scalia believes that the proper sources of tradition are common law, historical practices, and statutes.[148] Furthermore, Justice Scalia believes that both old and modern sources of tradition should be consulted.[149] For example, in *Michael*

143. Poe v. Ullman, 367 U.S. 497, 542, 544 (1961) (Harlan, J., dissenting).

144. Michael H. v. Gerald D., 491 U.S. 110, 121 (1989) (quoting Moore v. City of E. Cleveland, 431 U.S. 494, 502 (1977)). Justice Scalia not only stresses judicial restraint in due process adjudication, but also warns that failure to adhere to this belief may be the destruction of the Court. *See* Cruzan v. Director, Mo. Dep't of Health, 497 U.S. 261, 300-01 (1990) (Scalia, J., concurring) ("This Court . . . has no authority to, inject itself into every field of human activity where irrationality and oppression may theoretically occur, *and if it tries to do so it will destroy itself.*" (emphasis added)).

145. This definition is in contrast to the conception of tradition as aspirational principles. *See supra* note 49.

146. *Poe*, 367 U.S. at 544 (Harlan, J., dissenting) (emphasis added).

147. *Cruzan*, 497 U.S. at 294 (Scalia, J., concurring); *see also Michael H.*, 491 U.S. at 122 (requiring that a right be "traditionally protected" to merit due process protection).

148. *See supra* notes 122-26 and accompanying text.

149. *See supra* notes 122-25 and accompanying text.

H., Justice Scalia examined both sources of ancient common law and modern statutes and decisions in evaluating whether the asserted right merited protection.[150]

Justice Harlan looked to the same sources in deciding a due process claim; he is not, however, as explicit as Justice Scalia in doing so. Justice Scalia tends to state his views on due process briefly and then go into an elaborate historical analysis; in contrast, Justice Harlan elaborately states his views on due process and then performs a quick, but binding analysis of the relevant traditions.[151] Although not as analytically rigorous as Justice Scalia, Justice Harlan also based his decisions on this analysis of tradition. For example, although most of Justice Harlan's dissent in *Poe* is spent elaborating his views on due process, he ultimately found the fact that no state ever had a law criminalizing the use of contraceptives dispositive.[152]

4. Both Formulations Define the Right at Issue in Highly Specific Terms

Justice Scalia is widely known, if not infamous,[153] for his belief that rights should be defined at the most specific level.[154] He has explicitly argued that rights must be defined at "the most specific level at which a relevant tradition protecting, or denying protection to, the asserted right can be identified."[155] Although Justice Harlan never made such a blanket statement about the proper level of generality, he defined rights at a very specific level as well.[156] In *Poe*, Justice Harlan did not define the asserted right as the right of privacy,[157] but instead narrowly defined it as the right of a married couple to have privacy in

150. *See Michael H.*, 491 U.S. at 123-27 & n.6.

151. *Compare Michael H.*, 491 U.S. at 121-27 (1989) (devoting one paragraph of the opinion to general substantive due process beliefs and then devoting four pages of the opinion to an in-depth historical analysis of the relevant traditions) *with* Poe v. Ullman, 367 U.S. 497, 540-53, 554-55 (1961) (Harlan, J., dissenting) (writing about due process for fourteen pages and then devoting only two paragraphs of the dissent to historical analysis).

152. *Poe*, 367 U.S. at 554-55 (Harlan, J., dissenting). Justice Harlan demonstrated the linchpin of his analysis by stating:

> [C]onclusive, in my view, is the utter novelty of this enactment. Although the Federal Government and many States have at one time or other had on their books statutes forbidding or regulating the distribution of contraceptives, none, so far as I can find, has made the use of contraceptives a crime.

Id. at 554.

153. *See* Tribe & Dorf, *supra* note 127, at 1090-93 (blasting Justice Scalia's specificity in defining rights).

154. *See Michael H.*, 491 U.S. at 127 n.6.

155. *Id.* at 128 n.6.

156. *See supra* notes 61-65 and accompanying text.

157. Many commentators cite *Poe* for the proposition that it created the right of privacy. *See, e.g.*, Fried, *supra* note 20, at 35 (calling Justice Harlan the "author of the constitutional right to privacy"); Kent Greenawalt, *Justice Harlan's Conservatism and Alternative Possibilities*, 36 N.Y.L. Sch. L. Rev. 53, 68 (1991) (noting that Justice Harlan's dissent in *Poe* is a "landmark" in the expansion of fundamental rights).

their marital relationship.[158] Justice Harlan also defined the asserted right in *Griswold v. Connecticut* in the same narrow manner.[159]

B. *Exposing the Myth That Justice Harlan and Justice Scalia's Formulations Have Irreconcilable Differences*

The above similarities between Justice Scalia's and Justice Harlan's substantive due process formulations are not likely to lead to a conclusion that the two formulations are strikingly similar because other aspects of Justice Scalia's and Justice Harlan's substantive due process formulations appear irreconcilable. Examples of these apparent differences in the two formulations are: (1) the possibility of evolution; (2) the restrictive nature of the formulations; (3) the respect each formulation has for precedent; and (4) the rule-like character of each formulation. This section will argue that deeper examination reveals that these apparent differences are actually similarities.

1. The Evolutionary Nature of the Formulations

Justice Harlan's substantive due process formulation expressly recognizes the possibility that rights may evolve over time. He stated that tradition "is a living thing," which suggests that traditions evolve over the course of time.[160] This evolutionary character seems to mean that new fundamental rights may be created as time passes.[161] Many commentators criticize Justice Scalia's substantive due process formulation because of its perceived rejection of the possibility for rights to evolve over time.[162] These commentators would likely claim that this is one significant difference that would preclude a conclusion that the two formulations are strikingly similar. A closer examination of Jus-

158. Poe v. Ullman, 367 U.S. 497, 552 (1961) (Harlan, J., dissenting). Justice Harlan's reason for this specific level of definition is because it fits in with the common law traditions of judicial restraint and slow evolution of principles. *See supra* notes 64-65 and accompanying text.

159. *See* Griswold v. Connecticut, 381 U.S. 479, 500 (1965) (Harlan, J., concurring) (basing his decision in *Griswold* on the same grounds he stated in *Poe*). *But see Michael H.*, 491 U.S. at 139-40 (Brennan, J., dissenting) (arguing that the asserted right in *Griswold* was not defined at the most specific level of generality).

160. *Poe*, 367 U.S. at 542 (Harlan, J., dissenting).

161. These rights would be known as "unenumerated fundamental rights." These are rights that are not expressly granted by the Constitution, but are deemed to be essential to the "liberty" guaranteed by the Due Process Clause. *See Griswold*, 381 U.S. at 492-93 (Goldberg, J., concurring). *But see* Dworkin, Dominion, *supra* note 47, at 129-44 (arguing that all rights are enumerated if the Constitution is regarded as a scheme of abstract principles).

162. *See, e.g., Michael H.*, 491 U.S. at 141 (Brennan, J., dissenting) (criticizing Scalia's method for turning the Constitution into a "stagnant, archaic, hidebound document"); Fleming, *Constructing*, *supra* note 47, at 266 (stating that Scalia's due process is flawed because it cannot "criticize historical practices"); *cf.* Young, *supra* note 70, at 665 ("Originalists . . . have long rejected the idea that the meaning of the Constitution can evolve in a manner similar to the common law.").

tice Scalia's formulation, however, uncovers a limited concept of evolution.

Justice Scalia's substantive due process formulation permits the Constitution to evolve and recognize "unenumerated" fundamental rights. His article *Originalism: The Lesser Evil* presents evidence of the evolutionary possibility inherent in his formulation.[163] Justice Scalia stated that his process for discovering tradition is very difficult to apply, and thus in practice, the result will be to "project[ ] upon the age of 1789 current, modern values—so that as applied . . . originalism will . . . end up as something of a compromise."[164] This acknowledgment shows that Justice Scalia's due process formulation would permit limited evolution in the law.

Justice Scalia's article is not the only example of evolution in his substantive due process beliefs. His opinion in *Michael H.* is evidence of Justice Scalia's break from strict originalist thought and recognition that the Constitution can evolve.[165] Thus, Justice Scalia's recognition of substantive due process as a legitimate constitutional doctrine in the *Michael H.* opinion shows that Justice Scalia recognizes that rights may evolve over time because the Due Process Clause has a history of protecting unenumerated fundamental rights.[166] Further, in another case he stated:

> Once a law-abiding society has revised its law and practices to comply with such an erroneous decision, the existence of a new 'consensus' can be appealed to—or at least the existence of the pre-existing consensus to the contrary will no longer be evident—thus enabling the error to triumph by our very failure promptly to correct it.[167]

"Revision" and "new consensus" are concepts that imply an evolution of the law.

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163. 57 U. Cin. L. Rev. 849 (1989). This article refers to originalism generally, but it can be used to demonstrate Scalia's views on due process because they generally stem from his espousal of originalism. *See supra* part II.

This article was published in the same year Justice Scalia handed down his *Michael H.* opinion. In fact, Justice Scalia's opinion in *Michael H.* is, in many ways, an example of the evolutionary potential of his due process formulation. *See infra* note 165.

164. *Id.* at 864. Justice Scalia then proceeded to state that this compromise is "[p]erhaps not a bad characteristic for a constitutional theory." *Id.*

165. *See* Bork, *supra* note 68, at 235-40 (criticizing Justice Scalia for his *Michael H.* opinion). Indeed, Robert Bork criticizes Justice Scalia for breaking from originalism by recognizing the legitimacy of substantive due process. He says that any recognition of substantive due process is illegitimate because it allows judges to discover rights not specifically enumerated in the Constitution. *See id.* If rights recognized by the Constitution are not specifically enumerated in the text, then the logical conclusion is that there is potential for evolution in the Constitution.

166. *See, e.g.*, Moore v. City of E. Cleveland, 431 U.S. 494 (1977) (recognizing the "unenumerated" right of nontraditional nuclear families to reside together); Loving v. Virginia, 388 U.S. 1 (1967) (recognizing the "unenumerated" right to marry); Griswold v. Connecticut, 381 U.S. 479 (1965) (recognizing the "unenumerated" right of privacy).

167. South Carolina v. Gathers, 490 U.S. 805, 824-25 (1989) (Scalia, J., dissenting).

Moreover, Justice Scalia recognizes "unenumerated" fundamental rights. He recognizes that these rights exist, but insists "that the new 'fundamental values' invoked to replace original meaning be clearly and objectively manifested in the laws of the society."[168] Also, by recognizing the legitimacy of substantive due process in his *Michael H.* opinion, Justice Scalia recognized the potential for discovery of "unenumerated" fundamental rights.[169]

Although Justice Scalia's formulation permits some evolution, it remains very limited. For example, he stated that "the content of evolving concepts is strictly limited by the actual practices of the society, as reflected in the laws enacted by its legislatures . . . [or] at least by current social practice as reflected in extant legislation."[170] Also, his opinion in *Michael H.*, and its stringent requirements for due process protection,[171] are evidence that, in practice, Justice Scalia's formulation will not allow for much evolution. Nonetheless, its classification as "hidebound" and "stagnant"[172] is not fully accurate.

2. The Highly Restrictive Nature of the Formulations

Justice Scalia's substantive due process formulation is definitely restrictive. For this reason, Justice Scalia's approach might not appear comparable to the formulation that Justice Harlan, the author of the right of privacy,[173] espouses. Many commentators perceive Justice Harlan, the quintessential conservative judge, as liberal in his interpretation of substantive due process.[174] This perception makes Justice Harlan's formulation appealing even to some liberal fundamental rights theorists.[175] A closer inspection, however, reveals Justice Harlan's substantive due process formulation as very restrictive.

Four main points discredit the view that Justice Harlan's substantive due process formulation is liberal or expansive. First, despite the fleeting liberal language at the beginning of Justice Harlan's dissent in

168. *See* Scalia, *supra* note 68, at 863.

169. *See* Cook, *supra* note 90, at 861-62; *see also supra* note 165 (discussing Bork's criticism of Justice Scalia's substantive due process formulation because it recognizes "unenumerated" fundamental rights).

170. Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. Chi. L. Rev. 1175, 1184-85 (1989).

171. *See supra* notes 111-17 and accompanying text.

172. *See* Michael H. v. Gerald D., 491 U.S. 110, 141 (1989) (Brennan, J., dissenting) (referring to the "stagnant" and "hidebound" Constitution that Justice Scalia's due process formulation provides for).

173. *See* Fried, *supra* note 20, at 35.

174. *See supra* note 22 and accompanying text. Laurence Tribe and Michael Dorf seem to believe that Justice Harlan's substantive due process formulation is middle of the road. *See* Laurence H. Tribe & Michael C. Dorf, On Reading the Constitution 76-79 (1991); Tribe & Dorf, *supra* note 127, at 1068-71.

175. *See* Charles Fried, Order and Law 72 (1991); Tribe & Dorf, *supra* note 174, at 76-79; *see also* Fleming, *Autonomy*, *supra* note 10, at 60 (stating that Justice Harlan's substantive due process formulation is praised by both liberal and conservative fundamental rights theorists).

Poe, the over-arching theme of that dissent is conservative,[176] and thus his due process formulation is quite limited. Concentrating solely on the liberal language in Justice Harlan's due process formulation ignores the full thrust of his argument.[177] Preoccupation with the expansive language would obscure the fact that Justice Harlan severely limited the scope of his due process protection by grounding it in tradition viewed as historical practices.[178]

Similarly, although Justice Harlan believed that the tradition he described "is a living thing,"[179] its potential for evolution is limited. For example, Justice Harlan qualified his idea of a living tradition by stating that "[t]he decision of an apparently novel claim must depend on . . . well-accepted principles and criteria."[180] Justice Harlan further qualified his living tradition in his assertion that "[a] decision of this Court which radically departs from [tradition] could not long survive."[181] Thus, Justice Harlan intended his living tradition to evolve in accordance with the slow, incremental growth that defines the common law approach.[182]

Under Justice Harlan's formulation, the tradition that "a novel claim" must build on, and not depart from, is protection of the "private realm of family life."[183] Any asserted right that diverged from this "private realm" of the family would be a break from tradition and Justice Harlan would not protect that right. Justice Harlan's substantive due process formulation would therefore have been unlikely to protect the asserted rights in some of the major "autonomy" cases that

176. *See supra* notes 48-53 and accompanying text.

177. For a prime example of this error, see West, *supra* note 22, at 442-44. Professor West, in discussing liberty, praises the "liberal concept of ordered liberty so eloquently spelled out by Justice Harlan" in his substantive due process formulation. *Id.* at 444. West, however, only quotes from the liberal language Justice Harlan includes in his dissent in *Poe*. *Id.* at 443. West ignores the import of Justice Harlan's dissent: that, despite the abstract nature of the Due Process Clause, the only rights that merit due process protection are those rights that have been historically protected in our society. *See* Poe v. Ullman, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting). This is a crucial mistake. Although many liberals might want to separate the liberal parts of Harlan's formulations from the restrictive parts, this bifurcation does not portray his real views. *See supra* part I.B.

178. *See supra* notes 48-53 and accompanying text.

179. *Poe*, 367 U.S. at 542 (Harlan, J., dissenting).

180. *Id.* at 544.

181. *Id.* at 542.

182. *See supra* notes 28-29 and accompanying text.

183. *Poe*, 367 U.S. at 552 (Harlan, J., dissenting).

followed *Griswold*,[184] such as *Roe v. Wade*,[185] *Planned Parenthood v. Casey*,[186] *Moore v. City of East Cleveland*,[187] and *Bowers v. Hardwick*.[188]

Justice Harlan would not have protected the right to abortion in *Roe* or *Casey* because he would not likely have viewed the right to abortion as building on the tradition of protecting the private realm of the family.[189] Justice Harlan would also be unlikely to accept the prohibition of abortion as a tradition that the United States had abandoned.[190]

Justice Harlan would also have been skeptical of the extension of due process protection to the plaintiffs in *Moore*.[191] Although Justice Harlan protected "family life," he probably meant traditional, nuclear family life, and thus would not have extended due process protection in *Moore*.[192]

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184. *See* Michael J. Sandel, *Moral Argument and Liberal Toleration: Abortion and Homosexuality*, 77 Cal. L. Rev. 521, 525-31 (1989). Sandel draws a distinction between "old privacy" and "new privacy." Old privacy is the right to keep "intimate affairs from public view," *id.* at 526, and new privacy is the right to "make certain sorts of choices, free of interference by the state." *Id.* at 528. Sandel argues that Justice Harlan based his dissent in *Poe* "on grounds that distinguish the old privacy from the new." *Id.* at 526. Justice Harlan did not object to the Connecticut law banning contraceptives because he believed that married couples should be free to make their own decisions. Instead, Justice Harlan objected to the "obnoxiously intrusive means" Connecticut had chosen to effectuate their law. *Id.* (quoting Poe v. Ullman, 367 U.S. 497, 554 (Harlan, J., dissenting)). Justice Harlan was not on the Court when it made its first "new" privacy decision in Eisenstadt v. Baird, 405 U.S. 438 (1972), so nobody knows for sure how Justice Harlan would have voted in these cases. Arguably, however, Justice Harlan would only secure basic liberties asserted in the "old" privacy cases.

185. 410 U.S. 113 (1973) (holding that a woman has a right to choose whether to terminate her pregnancy).

186. 505 U.S. 833 (1992) (reaffirming the holding of *Roe*).

187. 431 U.S. 494 (1977) (holding that members of nontraditional nuclear families have a fundamental right to live together).

188. 478 U.S. 186 (1986) (refusing to extend due process protection to homosexuals).

189. *See* Fried, *supra* note 20, at 52 n.121 (expressing "little doubt that [Harlan] would have held with the dissenters in *Roe*").

190. Numerous states still had laws prohibiting abortion in 1972. *See* Roe v. Wade, 410 U.S. 113, 118 n.2 (1973).

191. Moore v. City of E. Cleveland, 431 U.S. 494 (1977). In *Moore*, East Cleveland had passed an ordinance that allowed only members of the same family to reside in an occupancy together. The ordinance permitted grandparents to live with their grandchildren if the grandchildren were siblings. A grandmother who shared her home with two grandsons, who were cousins rather than brothers, was convicted for violating the ordinance. She appealed her conviction to the Supreme Court. *Id.* at 495-98.

192. *See* Ackerman, *supra* note 15, at 25 ("[I]t seems a big step for [Justice Harlan] to move from conventional marriage . . . to other forms of intimate relationship."); Tribe & Dorf, *supra* note 174, at 78. *But see* Ackerman, *supra* note 15, at 23 (noting the possibility that Justice Harlan would have extended due process protection past the "limited scope" of *Poe*).

Furthermore, Justice Harlan wrote that "laws forbidding . . . homosexual practices . . . form a pattern so deeply pressed into the substance of our social life that any Constitutional doctrine in this area [of due process] must build upon that basis."[193] This statement demonstrates that Justice Harlan's "living" tradition is not alive enough to encompass the right asserted in *Bowers*.[194]

Another reason that a liberal interpretation of Justice Harlan's substantive due process formulation is incorrect is that Justice Harlan *dissented* in every major case that protected personal liberties through equal protection while he was on the Court.[195] Justice Harlan rejected the results as well as the reasoning in these cases.[196] This voting record proves that not only was Justice Harlan against protecting the basic liberties in those cases through equal protection, he was also against protecting those rights through due process. Thus, Justice Harlan's vision of due process would not extend to protect the right to a vote of equal weight[197] or the right to unrestricted travel throughout the nation.[198] Also, Justice Harlan's due process would not extend to protect welfare rights, because he concurred, rather than dissented on due process grounds, in *Dandridge v. Williams*.[199]

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193. Poe v. Ullman, 367 U.S. 497, 546 (1961) (Harlan, J., dissenting).

194. *See* Ackerman, *supra* note 15, at 23 (stating that Justice Harlan was "prepared to guarantee privacy only to conventional folk who satisfy the politically dominant view of an acceptable intimate partner"); Fried, *supra* note 20, at 52 n.121 (stating that Justice Harlan would not condemn laws proscribing "homosexuality").

195. This Note will discuss Justice Harlan's views on equal protection in detail later. Justice Harlan wrote opinions in five cases where the Court based its decision on the grounds that there either was or was not a fundamental right asserted based on the Equal Protection Clause. Justice Harlan dissented in every one of these cases that granted a fundamental right under equal protection and concurred in the one case that denied a fundamental right under equal protection. *See infra* note 211 and accompanying text.

196. This is in contrast to Justice Harlan's approach in Griswold v. Connecticut, 381 U.S. 479, 499 (1965) (Harlan, J., concurring).

197. *See* Harper v. Virginia Bd. of Elections, 383 U.S. 663, 680 (1966) (Harlan, J., dissenting); Reynolds v. Sims, 377 U.S. 533, 589 (1964) (Harlan, J., dissenting); Baker v. Carr, 369 U.S. 186, 330 (1962) (Harlan, J., dissenting).

198. *See* Shapiro v. Thompson, 394 U.S. 618, 655 (1969) (Harlan, J., dissenting). Justice Harlan may have believed that the right to travel was one of the basic liberties. In his dissent in *Shapiro*, Justice Harlan proclaimed that "the right to travel interstate is a 'fundamental' right . . . having its source in the Due Process Clause." *Id.* at 671. Justice Harlan, however, concluded that the one-year residency requirement at issue in *Shapiro* did not impermissibly infringe upon this "fundamental" right. *Id.* at 677. Although Justice Harlan claimed that the right to travel is a fundamental right, he clearly did not apply strict scrutiny to the residency requirements. Justice Harlan employed a two-step analysis to conclude that the residency requirements were constitutional. First, he identified four "legitimate" government interests for the requirements. *Id.* at 672-74. Then Justice Harlan determined that because the requirements only infringed the right to travel incidentally, the governmental interests outweighed the burden on interstate travel. *Id.* at 676-77. Thus, Justice Harlan's conception of due process did not protect the right to travel throughout the nation.

199. 397 U.S. 471, 489 (1970) (Harlan, J., concurring) (denying due process protection for a right to minimum welfare entitlements).

In sum, Justice Harlan's substantive due process beliefs are neither liberal nor even moderate. Instead, Justice Harlan's approach is restrictive; in fact, it is comparable to the restrictiveness of Justice Scalia's "hidebound" substantive due process. Justice Harlan did make some liberal statements, but then reined in those statements by grounding his due process formulation in tradition conceived as historical practices.[200] Justice Harlan's concept of evolution is also very limited because he intended the evolution to proceed in a slow, plodding, common law way. Thus, despite all of Justice Harlan's language about breaking from tradition and rational continuums,[201] when closely scrutinized, his model of substantive due process does not protect many rights at all.[202] Justice Harlan's scope of due process may very well be limited to protecting the traditional, nuclear family.[203]

3. The Respect Both Formulations Have for Precedent

Respect for precedent is one aspect of Justice Harlan's and Justice Scalia's substantive due process formulations that may appear to be utterly irreconcilable. Commentators regard Justice Harlan, the epitome of the common law jurist, as tremendously respectful of precedent.[204] Another common perception is that Justice Scalia has little or no respect for precedent.[205] This dichotomy would seemingly make a difference in the application of the Justices' due process formulations. The elimination of certain misperceptions, however, uncovers certain common threads in their views on precedent. Thus, the Justices would apply their substantive due process formulations in the same general manner.

a. *Respect for "Traditional" Precedents*

The first misperception is that Justice Harlan was respectful of precedent per se; he was not. Actually, Justice Harlan was respectful only

200. *See supra* notes 46-59 and accompanying text.

201. *See* Poe v. Ullman, 367 U.S. 497, 542-43 (1961) (Harlan, J., dissenting).

202. *See supra* notes 182-202 and accompanying text; *see also* Ackerman, *supra* note 15, at 23 (concluding that "the libertarian growth potential of [Harlan's dissent in] *Poe* seems modest").

203. *See id.* at 25 ("Given Harlan's particularizing style, it seems a big step for him to move from conventional marriage, hallowed by time immemorial, to other forms of intimate relationship.").

204. *See, e.g., id.* at 7, 9 (characterizing Justice Harlan as a common law jurist and stating that a common law jurist relies primarily on precedent in deciding a case); Fleming, *Autonomy*, *supra* note 10, at 60 & n.352 (labeling Justice Harlan a "preservative conservative" and defining preservative conservatives as judges who "mostly attempt to preserve precedents").

205. *See, e.g.,* Robert A. Burt, *Precedent and Authority in Antonin Scalia's Jurisprudence*, 12 Cardozo L. Rev. 1685, 1685 (1991) ("More openly than any other Justice sitting today, Antonin Scalia is ready to reverse prior Supreme Court precedent."); Strauss, *supra* note 114, at 1699 ("We knew from the start that Justice Scalia was not a great fan of stare decisis.").

of those precedents that were part of what he held to be tradition ("traditional precedents"). Professor David Strauss sums this point up by saying, "Precedent overlaps tradition; it is not subsumed by it. Some precedents may form a part of tradition. But not all do. Some are simply the decisions of a group of judges rendered a few years ago."[206] This dichotomy explains many of Justice Harlan's decisions. He would overturn precedent if he believed it was outside the scope of tradition. For example, in *Moragne v. States Marine Lines*,[207] Justice Harlan overruled a maritime decision that was eighty-four years old.[208] He based his decision to overturn the case because the "common-law rule indicates that it was based on a particular set of factors that had . . . never existed in this country at all."[209] Justice Harlan's language in *Poe* also reflects this view. He wrote about the "traditions," rather than the precedents, that society has abandoned.[210]

A prime example of Justice Harlan's reverence for tradition rather than precedent is his view of equal protection. During his time on the Court, Justice Harlan dissented in every major equal protection case concerning fundamental rights decided by the Court.[211] Justice Harlan dissented in these equal protection cases because protection of basic liberties in this way was a "radical departure" from the traditional use of the Equal Protection Clause.[212] In *Harper v. Virginia*

206. Strauss, *supra* note 114, at 1706.

207. 398 U.S. 375 (1970).

208. *Id.* at 409.

209. *Id.* at 381.

210. *See* Poe v. Ullman, 367 U.S. 497, 542-43 (1961) (Harlan, J., dissenting) (stating that due process analysis should take into account "the traditions from which [the country] broke").

211. The rights Harlan rejected under equal protection analyses are striking. In *Reynolds v. Sims* and *Harper v. Virginia State Board of Elections*, the Court, relying on equal protection, held that a fundamental right to a vote of equal weight exists. Reynolds v. Sims, 377 U.S. 533, 554-55 (1964); Harper v. Virginia Bd. of Elections, 383 U.S. 663, 666 (1966). Harlan dissented in both of these cases, refusing to recognize a fundamental right to vote. *See Reynolds*, 377 U.S. at 590 (Harlan, J., dissenting); *Harper*, 383 U.S. at 681 (Harlan, J., dissenting). In *Reynolds*, Harlan would not have established a fundamental right to vote because "the Equal Protection Clause was never intended to inhibit the States in choosing any democratic method they pleased for the apportionment of their legislatures." 377 U.S. at 590-91 (Harlan, J., dissenting).

In *Shapiro v. Thompson*, the Court relied on equal protection to recognize a fundamental right to travel, and again Harlan dissented. 394 U.S. 618, 661 (1969) (Harlan, J., dissenting). Harlan wrote that "I know of nothing which entitles this Court to pick out particular human activities, characterize them as 'fundamental,' and give them added protection under an unusually stringent equal protection test." *Id.* at 662. Also, Harlan concurred in *Dandridge v. Williams*, which rejected a fundamental right to welfare benefits under equal protection. 397 U.S. 471, 489 (1970) (Harlan, J., concurring).

212. Before these cases, the Court had traditionally used equal protection to protect "suspect classifications." A suspect classification refers to laws that discriminate against a class of people that have been "saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian

Board of Elections,[213] Justice Harlan dissented from the Court's decision because "in holding the Virginia poll tax violative of the Equal Protection Clause the Court has departed from long-established standards governing the application of that clause."[214] Similarly, in *Shapiro v. Thompson*,[215] Justice Harlan accused the majority of "appl[ying] an equal protection doctrine of relatively recent vintage," and dissented.[216] The Court did not overturn any precedents in these cases; it simply departed from traditions. Justice Harlan, however, revered tradition over precedent.

Justice Scalia takes a similar view. If Justice Scalia thinks that a precedent is part of tradition, he will respect it and build upon that tradition.[217] His opinion in *Michael H.* demonstrates this approach. Justice Scalia cites precedents that demonstrate a tradition supporting the substantive due process formulation he proposes.[218] Justice Scalia's *Burnham* opinion similarly relies upon precedents that are part of a tradition. Justice Scalia goes to great lengths to establish that transient jurisdiction is part of a longstanding tradition by relying on numerous precedents that established that rule.[219] Precedent is thus a means to an end rather than an end in itself.

This view of Justice Scalia is not surprising in light of the fact that, in the substantive due process area, Justice Scalia only calls for the overturning of one precedent, *Roe v. Wade*.[220] Justice Scalia has accepted every other major substantive due process case as rightly decided. For example, in his opinion in *Michael H.*, he relied on *Moore v. City of E. Cleveland*.[221] He also indicated that his substantive due process formulation would have upheld the decisions in *Griswold v.*

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political processes." *See* Murphy et al., *supra* note 2, at 971-72 (quoting San Antonio v. Rodriguez, 411 U.S. 1, 28 (1973)). By 1960, the only suspect classifications were race, *see* Brown v. Board of Ed., 347 U.S. 483 (1954), and national origin. *See* Yick Wo v. Hopkins, 118 U.S. 356 (1886).

213. 383 U.S. 663 (1966).

214. *Id.* at 681 (Harlan, J., dissenting); *see supra* note 212.

215. 394 U.S. 618 (1969).

216. *Id.* at 658 (Harlan, J., dissenting).

217. *See* Strauss, *supra* note 114, at 1708 (asserting that, in principle, one could view Justice Scalia as a traditionalist).

218. *See* Michael H. v. Gerald D., 491 U.S. 110, 123-27 & n.6 (1989) (citing cases such as Bowers v. Hardwick, 478 U.S. 186 (1986), Roe v. Wade, 410 U.S. 113 (1973), and Griswold v. Connecticut, 381 U.S. 479 (1965) to support his substantive due process formulation). This is not to say that Justice Scalia selects which precedents are tradition and which precedents are not by any coherent method. *See* Strauss, *supra* note 114, at 1708-10 (criticizing Justice Scalia for not being consistent with his "traditionalism"); Zipursky, *supra* note 134, at 315-16 (accusing Justice Scalia of pre-deciding cases according to his *a priori* political reasoning).

219. *See* Burnham v. Superior Court, 495 U.S. 604, 610-16 (1990) (citing 43 cases that supported his holding that transient jurisdiction is part of our nation's tradition).

220. 410 U.S. 113 (1973).

221. *See Michael H.*, 491 U.S. at 121-24.

Connecticut and *Eisenstadt v. Baird*.[222] Lastly, Justice Scalia voted with the majority of *Michael H.* and *Cruzan*.[223]

b. *Justice Harlan the Counterrevolutionary Conservative*

Another misperception is that Justice Scalia is a "counterrevolutionary conservative" while Justice Harlan is a "preservative conservative."[224] A preservative conservative attempts to preserve precedents even if she would have decided the precedent differently if she had been sitting on the Court when the case was originally decided.[225] A counterrevolutionary conservative seeks "to purge constitutional law of precedents and principles manifesting liberal error at the earliest available opportunity or . . . to reinterpret decisions so as to extirpate any generative force from them."[226] Justice Scalia is a counterrevolutionary conservative; he tries to eliminate or limit almost all of the liberal decisions of the Warren Court.[227]

Justice Harlan can also be seen as a counterrevolutionary conservative. When Justice Harlan was appointed to the Court he was faced with the disintegration of the common law method because of the "constitutional revolution of 1937."[228] Instead of adhering to the precedents of the New Deal Justices, he sought to revitalize "common law constitutionalism."[229] In fact, contemporary commentators criticized him for ignoring these precedents; they thought he was "ignoring the verdict of history."[230]

Another example of Justice Harlan as a counterrevolutionary conservative is his dissent in *Poe*. What Justice Harlan did in 1961 was revive the concept of liberty in constitutional law.[231] Substantive due process had been dead since the Court overruled *Lochner v. New*

222. *Id.* at 128 n.6.

223. *Michael H.*, 491 U.S. at 110 (Scalia, J.) (plurality opinion); Cruzan v. Director, Mo. Dep't of Health, 497 U.S. 261, 292 (1990) (Scalia, J., concurring).

224. *See* Fleming, *Autonomy*, *supra* note 10, at 60.

225. *Id.* at 60 n.352. Justice O'Connor is an example of a preservative conservative. *See, e.g.*, Planned Parenthood v. Casey, 505 U.S. 833, 854-69 (1992) (using respect for precedent as a reason for not overruling *Roe*); *see also* Anders, *supra* note 7, at 925-26 (characterizing Justice O'Connor as a "preservative conservative").

226. Fleming, *Autonomy*, *supra* note 10, at 60 n.352.

227. *See id.* at 60 (identifying Justice Scalia as a "counterrevolutionary conservative"); Strauss, *supra* note 114, at 1714-15 (stating that the "target" of Justice Scalia's counterrevolution is the Warren Court).

228. *See* Ackerman, *supra* note 15, at 7. The "revolution of 1937" refers to the revolutionary policies of the New Deal Court. *See supra* notes 39-40 and accompanying text.

229. Ackerman, *supra* note 15, at 7.

230. *Id.*

231. *See id.* at 21. This is not meant to imply that Justice Harlan brought back a liberal or expansive version of liberty in 1961. In fact, his concept of liberty was very narrow and restrictive. *See supra* part III.B.2.

York[232] in *West Coast Hotel v. Parrish* in 1937.[233] *Lochner* is one of the most infamous cases in constitutional law.[234] In *Lochner*, the Court, under a due process analysis, invalidated a state maximum hours law for bakers because it violated the right of liberty to contract.[235] In *West Coast Hotel*, the Court effectively held that the era of discovering substantive rights in the word "liberty" in the Due Process Clause was over.[236] Thus, when Justice Harlan wrote his dissent in *Poe* he was calling for the overruling of twenty-four years of precedent that had denied substantive due process claims. Even more radically, he was bringing back *Lochner*.[237]

c. *Summary*

Although Justice Harlan and Justice Scalia may appear diametrically opposed in their beliefs about respect for precedent, a closer examination discloses common ground in their approaches. First, neither Justice respects precedent per se, but both respect precedent that fits within their vision of tradition. Also, both are counterrevolutionary to a certain extent. Their substantive due process formulations owe more to these similarities than to any distinctions in their views of precedent.

4. The Standard-Like Nature of the Formulations

In her article, *The Justices of Rules and Standards*,[238] Professor Kathleen Sullivan distinguishes between Justices who make decisions according to rules and Justices who make decisions according to standards. To Sullivan, rules "bind[ ] a decision-maker to respond in a determinate way to the presence of delimited triggering facts."[239] Once a rule is proclaimed, then it serves as a bright line for all else to

232. 198 U.S. 45 (1905).

233. 300 U.S. 379 (1937). *See* Fleming, *Constructing*, *supra* note 47, at 212 ("*West Coast Hotel v. Parrish* officially repudiated the *Lochner* era, marking the first death of substantive due process." (footnote omitted)).

234. *See* Fleming, *Constructing*, *supra* note 47, at 211 n.1.

235. *Lochner*, 198 U.S. at 53. *Lochner* is now regarded as a deplorable decision and has been the thorn in many fundamental rights theorists' side. *See* Fleming, *Constructing*, *supra* note 47, at 211-12. Every time a liberal judge or fundamental rights theorist argues for protecting a right not enumerated in the Constitution, they face accusations of "*Lochnering*." This phrase was coined by John Hart Ely in response to the Court's decision in Roe v. Wade, 410 U.S. 113 (1973). *See* John H. Ely, *The Wages of Crying Wolf: A Comment on* Roe v. Wade, 82 Yale L.J. 920, 943-44 (1973).

236. *See supra* note 233 and accompanying text.

237. This is not saying that Justice Harlan was bringing back *Lochner* in the literal sense; he was not arguing for the liberty of contract. *See* Ackerman, *supra* note 15, at 20-21 (noting that Justice Harlan actually took an anti-*Lochner* stance in this respect). What he was doing was bringing back the spirit of *Lochner*, giving meaning to the word "liberty" in the Due Process Clause.

238. Kathleen M. Sullivan, *Foreward: The Justices of Rules and Standards*, 106 Harv. L. Rev. 24 (1992).

239. *Id.* at 58.

follow.[240] Standards, on the other hand, "collapse decisionmaking back into the direct application of the background principle or policy to a fact situation."[241] Standards allow the decision maker more flexibility by permitting the decision maker to take the totality of circumstances in a fact pattern into account.[242] According to these definitions, Justice Scalia might appear to be a Justice of rules and Justice Harlan a Justice of standards.

Justice Harlan's substantive due process formulation is an application of standards. Justice Harlan's formulation seeks the necessary "balance" between liberty and organized society.[243] He believed that "Due Process has not been reduced to any formula."[244] These statements definitely suggest the flexibility of a standard-like legal directive. Professor Sullivan herself calls Justice Harlan standard oriented.[245]

Justice Scalia's overall jurisprudence, on the other hand, is rule-like. Indeed, Justice Scalia has expressly professed to adhere to rule-like jurisprudence.[246] Professor Sullivan points to the cases *Lucas v. South Carolina Coastal Council*[247] and *R.A.V. v. City of St. Paul*[248] to show that Justice Scalia's jurisprudence is rule-like. In *Lucas*, the Court, in an opinion written by Justice Scalia, held that any total economic deprivation in the value of an individual's land caused by a state regulation violated the Takings Clause of the Fifth Amendment.[249] In *R.A.V.*, the Court, again per Justice Scalia, held that the First Amendment guaranteed content neutrality.[250] Both of these holdings suggest bright-line rules.

Professor Sullivan also asserts that Justice Scalia's *Michael H.* opinion is rule-like. This, however, is not accurate. Indeed, despite Justice Scalia's intention to create a bright-line rule in the substantive due process area, his formulation is actually quite standard-like. Justice Scalia states two apparently categorical rules in his *Michael H.* opinion: (1) no right merits due process protection unless it is a right traditionally protected by our society, and (2) these rights should be defined at the most specific level.[251] As Professors Tribe and Dorf correctly point out, however, Justice Scalia's substantive due process formulation is not nearly as clear-cut as these statements make it

240. *Id.* at 62.
241. *Id.* at 58.
242. *Id.* at 59.
243. Poe v. Ullman, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting).
244. *Id.*
245. *See* Sullivan, *supra* note 238, at 79.
246. *See* Scalia, *supra* note 170, at 1178.
247. 505 U.S. 1003 (1992).
248. 505 U.S. 377 (1992).
249. *Lucas*, 505 U.S. at 1030.
250. *R.A.V.*, 505 U.S. at 396.
251. Michael H. v. Gerald D., 491 U.S. 110, 122, 127 n.6 (1989).

seem.[252] Two reasons support this conclusion. First, because no guidance exists in selecting the proper social tradition, judges must make value judgments in making this selection.[253] Justice Brennan criticized Justice Scalia for the same reason, stating that "reasonable people can disagree about the content of particular traditions."[254] Such value judgments are standard-like, not rule-like.

The second criticism of Justice Scalia's apparently rule-like formulation is that no rules govern the selection of the appropriate level of specificity.[255] Two problems complicate this analysis. First, no objective yardstick exists to measure the most specific level of generality.[256] The other problem is that Justice Scalia states that in the absence of an identifiable tradition either protecting or denying protection to a certain right at the most specific level, a judge must identify and analyze the next most specific level.[257] This is problematic because, as with identifying the most specific level, the process necessarily involves value judgments.[258]

Thus, although Justice Scalia may profess to be a rule-like judge in principle,[259] his substantive due process formulation is actually standard-like because it allows for judicial discretion and does not provide truly bright-line rules. In this sense, Justice Scalia follows standards comparable to those that Justice Harlan's due process formulation sets forth. Judges under Justice Harlan's formulation must determine which traditions the United States has built upon and which ones it has abandoned.[260] Judges under Justice Scalia's formulation must make similar value judgments about which traditions are persuasive and also must determine the most specific level of right definition.[261] The only difference is that Justice Harlan's formulation explicitly states that judges are to make value judgments, while Justice Scalia's formulation leaves judges no choice but to do so in practice.

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252. *See* Tribe & Dorf, *supra* note 127, at 1085-98.

253. *Id.* at 1086.

254. *Michael H.*, 491 U.S. at 137 (Brennan, J., dissenting).

255. *See* Tribe & Dorf, *supra* note 127, at 1090-92.

256. *Id.* at 1090 (stating that asking how to define the most specific level of generality is like asking " 'whether a particular line is longer than a rock is heavy' " (quoting Bendix Autolite Corp. v. Midwest Enter., 468 U.S. 888, 897 (1988) (Scalia, J., concurring))).

257. *Michael H.*, 491 U.S. at 128 n.6.

258. *See* Tribe & Dorf, *supra* note 127, at 1090-92; *see also* Timothy L. Raschke Shattuck, Note, *Justice Scalia's Due Process Methodology: Examining Specific Traditions*, 65 S. Cal. L. Rev. 2743, 2770-71 (1992) (stating that judicial discretion becomes involved when judges are forced to identify the next specific level of generality).

259. *See supra* note 246.

260. Poe v. Ullman, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting).

261. *See supra* notes 252-59 and accompanying text.

C. *Summary*

The substantive due process formulations of Justice Harlan and Justice Scalia are strikingly similar. Both formulations call for judicial restraint, rely on tradition to evaluate the legitimacy of a claim, define rights narrowly, and look to positive laws to identify traditions. Surprisingly, both formulations allow for the evolution of rights, but both are restrictive formulations that will not allow rights to evolve much. Also, both formulations accord roughly the same amount of respect to precedent, and both formulations are standard-like, requiring judges to exercise some discretion in decision making. Thus, despite the differing jurisprudences of Justice Scalia and Justice Harlan, in the area of substantive due process their formulations are strikingly similar.

IV. The Puzzling, Dangerous Acceptance of Justice Harlan's Substantive Due Process Formulation By Liberals

As mentioned above,[262] *Planned Parenthood v. Casey* is perhaps the most significant substantive due process case decided by the Rehnquist Court.[263] The joint opinion adopted Justice Harlan's substantive due process formulation,[264] thus making Justice Harlan's formulation the model to guide future substantive due process claims. Part III of this Note established that Justice Harlan's substantive due process formulation has striking similarities to Justice Scalia's formulation.[265] Many liberal commentators correctly realize that Justice Scalia's formulation would seriously curtail the rights protected under the Due Process Clause.[266] An observer would therefore expect liberal commentators to criticize the joint opinion for adopting a similarly limiting substantive due process formulation. This, however, is not the case. Many liberal commentators have instead accepted Justice Harlan's substantive due process formulation and actually applauded the joint opinion for adopting it.[267]

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262. *See supra* notes 1-6.

263. *See* Dworkin, *supra* note 6, at 29 ("[*Casey*] may prove to be one of the most important Court decisions of this generation.").

264. Casey v. Planned Parenthood, 505 U.S. 833, 848-50 (1992).

265. *See supra* part III.

266. *See, e.g.*, Fleming, *Autonomy*, *supra* note 10, at 58-59 (comparing Scalia's formulation to the legendary Scylla); Tribe & Dorf, *supra* note 127, at 1098 (stating that adoption of Justice Scalia's *Michael H.* formulation would be "frightening"); Zipursky, *supra* note 134, at 321 (stating that Justice Scalia's substantive due process formulation rejects even a narrow conception of a "living Constitution").

267. *See, e.g.*, Tribe & Dorf, *supra* note 127, at 1068-71 (approving of Justice Harlan's substantive due process formulation); West, *supra* note 22, at 442-44 (same); Dworkin, *supra* note 6, at 29 & n.7 (accepting the joint opinion's adoption of Justice Harlan's formulation). *But see, e.g.*, Fleming, *supra* note 10, at 59-63 (criticizing Justice Harlan's substantive due process formulation).

This part explains why many liberals have accepted Justice Harlan's substantive due process formulation and why these reasons are unsatisfactory. This part then proceeds to demonstrate the implications of the *Casey* joint opinion's adoption of Justice Harlan's formulation.

A. *Reasons Why Liberals Have Accepted Justice Harlan's Substantive Due Process Formulation*

Four possible reasons may explain why liberals have generally accepted Justice Harlan's substantive due process formulation and the joint opinion's adoption of it in *Casey*: (1) they believe that Justice Harlan's formulation is liberal; (2) they believe that Justice Harlan's formulation is an acceptable middle-of-the-road approach; (3) they will accept any formulation that does not overrule substantive due process precedents; or (4) they believe that the Due Process Clause is an insufficient source of protection for individual liberties and are therefore apathetic towards Justice Harlan's formulation.

1. The Myth That Justice Harlan's Approach is Liberal

Some commentators believe that Justice Harlan's substantive due process formulation is liberal, and accept his formulation on that ground. For example, Professor Robin West states that Justice Harlan's substantive due process formulation is a "generally liberal concept."[268] Professor Nadine Strossen, the former President of the American Civil Liberties Union, shares similar sentiments. Although acknowledging that Justice Harlan was a conservative, she characterizes Justice Harlan's formulation in this area as quite liberal.[269] She believes that "Justice Harlan was willing to give broad scope to the Constitution's protection of individual liberties."[270]

Such beliefs are unfounded. As demonstrated above, although his formulation is couched in liberal terms, Justice Harlan's substantive due process formulation is actually quite restrictive.[271]

2. The Myth That Justice Harlan's Approach is Middle of the Road

Other commentators believe that although Justice Harlan's substantive due process formulation is not liberal, it represents a safe harbor

268. West, *supra* note 22, at 444. Professor West, however, was not praising Justice Harlan's formulation for its liberalness. To West, although Justice Harlan's formulation is liberal, Justice Harlan's formulation, and all "the liberty-expanding cases of the Warren Court era [are] unduly cramped and ungenerous." *Id.* Thus, Professor West accepts Justice Harlan's formulation as liberal, but then argues that it is still not liberal enough. This Note agrees that Justice Harlan's formulation is not sufficiently liberal, but is not willing to accept it as anything short of narrowly conservative.

269. *See* Strossen, *supra* note 21, at 134, 143-44.

270. *Id.* at 144.

271. *See supra* part III.B.2.

from the formulation of Justice Scalia. The most prominent of these commentators are Professors Laurence Tribe and Michael Dorf. Tribe and Dorf believe that Justice Scalia's formulation is so narrow that it "would severely curtail the Supreme Court's role in protecting individual liberties."[272] On the other hand, they believe that Justice Harlan "inferred unifying principles at a higher level of abstraction," because he perceived rights on a rational continuum.[273] Thus, they find solace in his formulation.

Tribe and Dorf's commentary overlooks the fact that Justice Harlan grounded his substantive due process formulation in tradition embodied by historical practices.[274] Tribe and Dorf do not recognize that although Justice Harlan believed that due process is a "rational continuum," he also believed that this "continuum" was defined according to how the nation's traditions have "historically developed."[275] Also, Justice Harlan did not infer principles at a more general level; instead, he defined rights in a typically narrow, common law way.[276]

The purpose of this Note is to demonstrate that the substantive due process formulations of Justice Scalia and Justice Harlan are strikingly similar. Thus, Justice Harlan's formulation is not a safe harbor compared to Justice Scalia's formulation, but indeed poses precisely the same dangers as Justice Scalia's formulation.

3. The Acceptance of Any Substantive Due Process Approach That Does Not Openly Advocate Overruling Liberal Precedent

A disturbing trend appears to have developed among liberal constitutional theorists. They are so fearful that the conservative Court will overrule many of the liberal Warren Court decisions that they will accept any conservative theory that does not advocate overruling these precedents.[277] Thus, Justice Harlan's formulation is very attractive to them.

This phenomenon may explain the reaction of some commentators to the joint opinion's decision in *Casey*. Both Professors Ronald Dworkin and Kathleen Sullivan expressed approval of the joint opin-

272. *See* Tribe & Dorf, *supra* note 127, at 1093; *see also* Young, *supra* note 126, at 584-85 (stating that Tribe was concerned that Justice Scalia's formulation would eliminate the right to abortion).

273. *See* Tribe & Dorf, *supra* note 127, at 1068-69.

274. *See supra* notes 48-53 and accompanying text.

275. *See* Poe v. Ullman, 367 U.S. 497, 542-43 (1961) (Harlan, J., dissenting).

276. One of the linchpins of the common law method is to derive general principles from prior cases, but a common law jurist never draws grand, abstract principles from these precedents. Instead, a common law jurist moves the law forward in a slow, plodding way. *See* Ackerman, *supra* note 15, at 9 (stating that a common law judge is "concerned with a practice's gradual evolution through long periods of time").

277. *Cf.* Fleming, *Autonomy*, *supra* note 10, at 60 ("[Justice Harlan], the most conservative member of the Warren Court, has become the last best hope of liberal theorists . . . .").

ion's endorsement of a woman's right to choose whether to terminate a pregnancy.[278] Their approvals, however, focus on the result of the case rather than the adoption of Justice Harlan's restrictive formulation. Both commentators were relieved that the Court did not overrule *Roe v. Wade*.[279] Thus, although the Court adopted Justice Harlan's restrictive formulation in *Casey*, liberal commentators accepted it because the Court could have overruled *Roe* but did not.

The preservation of liberal precedents is not sufficient. Although the Court may be conservative, liberal commentators must advocate for a due process approach committed to the protection of fundamental rights.[280] Furthermore, the joint opinion represents the views of a trio of Justices who are not hard-line conservatives in the substantive due process area.[281] Thus, the powerful theories of scholars like Dworkin and Sullivan may have substantial influence on their substantive due process views.[282]

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278. *See* Dworkin, *supra* note 6, at 29 (approving of the joint opinion in *Casey* "because it reaffirmed and strengthened the reasoning behind . . . *Roe v. Wade*"); Sullivan, *supra* note 238, at 24-25 (stating that the Court "spectacularly failed to overrule *Roe v. Wade*" in *Casey*).

279. *See* Dworkin, *supra* note 6, at 29 (stating that *Casey* "may prove to be one of the most important Court decisions of this generation, not only because it reaffirmed . . . *Roe v. Wade* . . . but because three key justices also reaffirmed a more general view of the nature of the Constitution which they had been appointed to help destroy"); Sullivan, *supra* note 6, at A23 (stating that the crucial part of the joint opinion was that it "ringingly reaffirmed the core of Roe").

280. This statement is not meant to suggest that Professors Dworkin and Sullivan have completely stopped arguing for the protection of fundamental rights. For example, Professor Dworkin wrote a very strong argument for the protection of abortion and euthanasia in 1994. *See* Dworkin, Dominion, *supra* note 47.

Some may argue that liberal commentators are not giving up the fight for protection of individual liberties. Instead, they would say that these commentators are being realistic (because the Court is conservative) and learning to play according to conservative rules. *See* Young, *supra* note 126, at 618 (calling for liberals to "identify, analyze, and adapt the methods used by the Rehnquist Court to their own devices"). Although Young may have a point when he calls for litigators to adapt these methods, *id.* at 587-88, academics should not do the same. In fact, one of the three reasons Young lists in favor of liberals adopting conservative methods is that it will "prepare the way for the eventual reversal of substantive decisions through the use of the same methodologies by the next liberal Court." *Id.* at 618. This shows that Young misunderstands what the next liberal Court should do. It should not be constrained to using conservative methods. Instead, it should take its guidance from liberal theories of constitutional interpretation, and then implement these liberal theories when a substantive due process case is before the Court.

281. These three Justices are Justice O'Connor, Justice Souter, and Justice Kennedy. *See* Planned Parenthood v. Casey, 505 U.S. 833, 843 (1992) (joint opinion).

282. An example of the possibility for a significant turnaround is Justice Blackmun. Justice Blackmun was considered a conservative when President Nixon appointed him to the Court in 1969. As the years progressed, however, he became one of the last bastions of liberalism on the Rehnquist Court. He is best known for writing the majority opinion in Roe v. Wade, 410 U.S. 113, 116 (1973).

4. Many Commentators Are Apathetic Towards the Due Process Clause

Another possible explanation for liberal commentators' apparent acceptance of Justice Harlan's substantive due process formulation is that they believe that the Due Process Clause is an inadequate source of protection for fundamental rights. Recently, many theorists have been calling for protection of fundamental rights through the Equal Protection Clause.[283] These commentators believe that due process is destined to be restrictive of fundamental rights, and thus they have looked to the Equal Protection Clause for expansive protection of fundamental rights.[284] Thus, the Court's issuance of a decision like *Casey* would not arouse great concern, but would only deepen their conviction that the Due Process Clause was "backward looking." This view argues that due process jurisprudence serves to protect all historical traditions indiscriminately and is powerless to criticize and remedy regrettable traditions such as persecution of homosexuals.[285]

These commentators should not concede due process to the conservatives so easily. First, due process provides more absolute protection of basic liberties than equal protection. Under the due process analysis, once a right is identified as fundamental, the government cannot infringe upon that right unless it has a compelling interest and the statute in question is narrowly tailored to achieve that interest. Under an equal protection analysis, courts merely hold that if a state decides to afford this right to some people, then it must do so for all people.[286] At bottom, equal protection is merely a nondiscrimination principle. Thus, even if the Court were willing to protect a right under the Equal Protection Clause, and not the Due Process Clause, the right would not receive as much protection as it deserves if it is truly

283. *See, e.g.*, John H. Ely, *supra* note 84, at 162-64 (arguing that the Equal Protection Clause, not the Due Process Clause, would protect homosexuals' rights); Sunstein, *supra* note 39, at 270-85 (making an equal protection argument for protecting a woman's right to choose whether to terminate her pregnancy); Andrew Koppelman, *Why Discrimination Against Lesbians and Gay Men is Sex Discrimination*, 69 N.Y.U. L. Rev. 197, 208-19 (1994) (making an argument for protection of homosexuals through the Equal Protection Clause); Catharine A. MacKinnon, *Reflections on Sex Equality Under the Law*, 100 Yale L.J. 1281 (1991) (making an equal protection argument for protecting women's rights); Sunstein, *supra* note 127, at 1170-78 (arguing that due process offers insufficient protection to homosexuals but equal protection offers adequate protection).

284. *See* Catharine A. MacKinnon, *Privacy v. Equality: Beyond* Roe v. Wade, *in* Feminism Unmodified: Discourses on Life and Law 100-02 (1987); Sunstein, *supra* note 127, at 1171, 1174-75.

285. *See* Sunstein, *supra* note 127, at 1171; *see also* Fleming, *Constructing*, *supra* note 47, at 267 (analyzing Sunstein's approach to due process and equal protection). *But see* Sunstein, *supra* note 127, at 1173 (conceding that due process can at times be aspirational rather than backward-looking).

286. *See* Railway Express Agency v. New York, 336 U.S. 106, 112 (1949) (Jackson, J., concurring).

fundamental.[287] Also, by promoting equality at the expense of liberty, these commentators are allowing a necessary baseline to erode.[288] Without a baseline that defines liberty, the definition of equality is of little significance.[289] People who are "equally" oppressed will not regard the Constitution as a great source of protection. Thus, commentators should be wary about dismissing the relevance of the Due Process Clause.

B. *The Implications of the Joint Opinion's Adoption of Justice Harlan's Substantive Due Process Formulation*

The word "liberty" in the Due Process Clause is a very important word for protection of individual freedom in the Constitution. No other phrase potentially guarantees more protection for rights than the Due Process Clause. As demonstrated, the Equal Protection Clause's capacity for protection of rights is limited to a nondiscrimination principle.[290] The Privileges or Immunities Clause of the Fourteenth Amendment is a potentially valid source of protecting fundamental rights.[291] The Court, however, rendered this clause useless in the *Slaughter-House* Cases,[292] and it has remained stunted ever since.[293] The Ninth Amendment is another potentially fruitful source

287. Under due process jurisprudence, any law that infringes on a fundamental right must meet the "strict scrutiny" test. This means that the government must prove that: (1) a compelling governmental interest is at stake; (2) the government action in question is "narrowly tailored" to meet this compelling governmental interest; and (3) the government could not secure the compelling interest by any less restrictive alternative. *See* Murphy et al., *supra* note 2, at 892-93. This test is very stringent, thus fundamental rights are very secure.

288. *See* Fleming, *Constructing*, *supra* note 47, at 268; *see also* Tribe & Dorf, *supra* note 127, at 1095 ("It is hard to imagine a defensible approach to the two clauses that does not take greater account of the inseparability of liberty and equality.").

289. *See* Fleming, *Constructing*, *supra* note 47, at 268. As Professor Fleming states, these commentators, without a conception of liberty, "cannot satisfactorily answer the question, 'Equality with respect to what?' " *Id.*

290. *See supra* notes 283-89 and accompanying text.

291. The Privileges or Immunities Clause of the Fourteenth Amendment reads, "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." U.S. Const. amend. XIV, § 1.

292. 83 U.S. (16 Wall.) 36 (1872). In *Slaughter-House*, a group of butchers in Louisiana challenged the legitimacy of a monopoly on the slaughter-house business awarded by the state legislature. *Id.* at 57-66. The butchers challenged the monopoly on privileges or immunities, equal protection, and due process grounds. *Id.* at 66. The Court rejected all these Fourteenth Amendment claims. Additionally, the Court limited the thrust of the Privileges or Immunities Clause to protect only those rights that were already guaranteed by the Constitution or implicit in citizens' relationship with the government. *Id.* at 78-79. This interpretation made the privileges or Immunities Clause "a vain and idle enactment." *Id.* at 96 (Field, J., dissenting).

293. *See* Ira C. Lupu, *Untangling the Strands of the Fourteenth Amendment*, 77 Mich. L. Rev. 981, 982 n.1. (1979). Some sentiment exists that the Privileges or Immunities Clause is a firmer ground than the Due Process Clause for protecting rights. *See* Robert J. Kaczorowski, *Revolutionary Constitutionalism in the Era of the Civil War and Reconstruction*, 61 N.Y.U. L. Rev. 863, 925-28 (1986).

for protection of rights.[294] This amendment, unfortunately, has never been seriously utilized in a Court decision; judges and commentators generally consider it a meaningless provision.[295]

The Due Process Clause, and its promise of liberty, thus is a very important source of protection for rights. Commentators and judges who advocate stringent protection for a wide array of rights must argue for an expansive vision of due process to achieve their goals.

Casey will have implications on the development of liberty embodied in the Due Process Clause.[296] The joint opinion's adoption of Justice Harlan's substantive due process formulation in *Casey* is potentially very dangerous to an expansive concept of liberty in the coming decades. The joint opinion relied on a substantive due process formulation that is strikingly similar to Justice Scalia's highly restrictive substantive due process formulation. Thus, the joint opinion's model for substantive due process is one that will restrict and constrain the concept of liberty in the Due Process Clause. The saving grace is that the joint opinion is not an official statement of the Court.[297] Consequently, the Court is not bound to adopt Justice Harlan's substantive due process formulation and liberal commentators and judges should argue strenuously to avoid this eventuality.

CONCLUSION

In *Planned Parenthood v. Casey*, the Supreme Court's joint opinion reaffirmed the vitality of substantive due process by relying on Justice Harlan's substantive due process formulation. Commentators have generally perceived this formulation as being liberal or middle of the road. A closer examination reveals, however, that Justice Harlan's substantive due process formulation is actually restrictive and conservative. In fact, it is strikingly similar to Justice Scalia's "hidebound" substantive due process formulation.

294. The Ninth Amendment reads, "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." U.S. Const. amend. IX. The Ninth Amendment is such a potentially fruitful source of rights because its words suggest that there are certain rights that had not been specifically enumerated in the text of the Constitution or the first eight amendments. *See* Charles L. Black, Jr., *The Unfinished Business of the Warren Court*, 46 Wash. L. Rev. 3, 36-37 (1970); Ely, *supra* note 84, at 38.

295. *See* Bork, *supra* note 68, at 166 (likening the Ninth Amendment to an inkblot because it is so hopelessly vague that its meaning cannot be deciphered); Ely, *supra* note 84, at 34 (stating that the Ninth Amendment is regarded as somewhat of a joke in "legal circles"). The Ninth Amendment, however, should not be regarded this way. In fact, the language of the Ninth Amendment is perhaps the best evidence that the Constitution protects certain "unenumerated" fundamental rights. *See supra* note 293.

296. *See* Dworkin, *supra* note 6, at 29.

297. The joint opinion only had three supporters, Justices O'Connor, Kennedy, and Souter. Justices Blackmun and Stevens, concurred in the judgment, but did not join the joint opinion's reasoning. *See* Planned Parenthood v. Casey, 505 U.S. 833, 911 (1992) (Stevens, J., concurring in part and dissenting in part); *id.* at 922 (Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting in part).

What drives Justice Harlan's substantive due process formulation similarly drives Justice Scalia's formulation. Both formulations are restrictive; they exclusively rely upon tradition in deciding whether a right merits due process protection, they allow for only a narrow conception of evolution, and both stress the need for judicial restraint. Moreover, both Justice Harlan and Justice Scalia define rights narrowly and have analogous views about respecting precedent.

Despite the general jurisprudential differences that exist between Justice Harlan and Justice Scalia, their substantive due process formulations are strikingly similar. Thus, liberal commentators or judges embracing Justice Harlan's substantive due process formulation because they believe it is either expansive or a safe alternative to Justice Scalia's restrictive formulation misconstrue the nature of Justice Harlan's formulation.

Professors Laurence Tribe and Michael Dorf once wrote that if Justice Scalia's substantive due process formulation was ever adopted by the Supreme Court, the prospects for liberty in this nation would be "frightening."[298] This Note demonstrates that the adoption of Justice Harlan's substantive due process formulation offers similarly "frightening" prospects for liberty.

298. Tribe & Dorf, *supra* note 127, at 1098.