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Cover Page Footnote
I would like to thank Professor James E. Fleming for his insights and comments on earlier drafts of this Note, which was originally written for his seminar on constitutional theory.
JUSTICES HARLAN AND BLACK REVISITED: THE EMERGING DISPUTE BETWEEN JUSTICE O'CONNOR AND JUSTICE SCALIA OVER UNENUMERATED FUNDAMENTAL RIGHTS

DAVID B. ANDERS*

INTRODUCTION

"Justice O'Connor's assertion . . . cannot be taken seriously."

1 Justice Scalia made this statement four years ago, criticizing Justice O'Connor's refusal to reconsider the Court's recognition of a fundamental right to abortion. Justice Scalia may equally apply this critique to Justice O'Connor's most recent theoretical statements on that fundamental rights issue. In Planned Parenthood v. Casey, 2 O'Connor surprised many observers 3 by joining an opinion upholding the fundamental right to abortion 4 that the Court first recognized in Roe v. Wade. 5 Five Justices wrote opinions in Casey. 6 The joint opinion of Justices O'Connor, Kennedy, and Souter and the opinion of Justice Scalia consider the theory behind the derivation of unenumerated fundamental rights. 7 These opinions enable analysis of the constitutional theories of Justices Scalia and O'Connor regarding unenumerated fundamental rights derived from the

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4. See Casey, 112 S. Ct. at 2804.
6. Justices O'Connor, Kennedy, and Souter issued a joint opinion that represented the holding of the Court. See Casey, 112 S. Ct. at 2803. Justices Stevens and Blackmun each issued opinions that agreed with the joint opinion's affirmation of Roe, but dissented to the restrictions allowed. See id. at 2838, 2843. Chief Justice Rehnquist and Justice Scalia authored opinions, joined by Justice White, Justice Thomas, and each other, which concurred with the restrictions allowed, but dissented to the affirmation of Roe. See id. at 2855, 2873.
7. An "unenumerated" fundamental right is a right that is not explicitly granted in the Constitution, but is so basic as to be "implicit in the concept of ordered liberty." Palko v. Connecticut, 302 U.S. 319, 325 (1937); see Griswold v. Connecticut, 381 U.S. 479, 488 (1965) (Goldberg, J., concurring). But see Ronald Dworkin, Unenumerated Rights: Whether and How Roe Should be Overruled, 59 U. Chi. L. Rev. 381, 390 (1992) [hereinafter Dworkin, Unenumerated Rights] (arguing that all rights are enumerated—but at different levels of abstraction). Examples of possible unenumerated fundamental rights are the right to abortion, the right to homosexual association, the right to die, and the right to privacy.
Due Process Clause of the Fourteenth Amendment.8

Constitutional scholars considered both Justices O'Connor and Scalia judicial conservatives at the time of their confirmations.9 Both Justices apparently supported an originalist approach10 to the derivation of unenumerated fundamental rights from the Due Process Clause of the Fourteenth Amendment.11 In Casey, however, Justice O'Connor12 recognized the fundamental right to abortion.

One of two events may have caused Justice O'Connor to recognize this fundamental right. Possibly, Justice O'Connor shifted constitutional theories, adopting the fundamental rights theory of constitutional interpretation. If so, then Justices O'Connor and Scalia, two Reagan appointees and political conservatives, may suddenly have become theoretical opposites in their approaches to fundamental rights issues. A second explanation for Justice O'Connor's ruling may be her attitude toward stare decisis. Justice O'Connor's dispute with Justice Scalia may not be based on competing theories, but on competing conceptions of the proper use of precedent. This Note will trace the theoretical evolution of Justices Scalia and O'Connor in the field of unenumerated fundamental rights derived from the Due Process Clause and will examine their contrasting attitudes toward precedent.

Part I of this Note briefly explains two major theories of constitutional interpretation: originalism and fundamental rights. Part II examines these Justices' past and current theoretical beliefs by analyzing their writ-

8. The Due Process Clause reads, "nor shall any State deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1.


10. Originalism is one of the major theories of constitutional interpretation. Its major tenets include reliance on the text of the Constitution, support of the Framers' intent, and deference to legislatures. See infra Part I.A.

11. This Note will focus on rights that are potentially derived from the Due Process Clause of the Fourteenth Amendment and not from other sources. See, e.g., Katz v. United States, 389 U.S. 347 (1967) (expansion of Fourth Amendment protection against unreasonable searches and seizures to include eavesdropping); NAACP v. Alabama, 357 U.S. 449 (1958) (extension of First Amendment to include a right of association). The constitutional theories described below, originalism and fundamental rights, also apply to enumerated but vague rights such as the Eighth Amendment's prohibition of cruel and unusual punishment.

ings and opinions. This section focuses on Justice O'Connor's possible shift from originalism to fundamental rights. Part III suggests the implications of these Justices' contrasting theories by analyzing the key differentiating factors that will likely guide their future fundamental rights decisions. This section compares the O'Connor/Scalia dispute with the Harlan/Black dispute of a generation ago and focuses on the role that precedent plays in each Justices' evaluation of fundamental rights cases. This Note concludes that, though they may diverge theoretically, these Justices remain politically conservative and, therefore, may not continue on opposite sides of the fundamental rights battleground. Justice O'Connor's views, as expressed in the *Casey* joint opinion, however, create speculation that her approach to fundamental rights issues may be changing.13

I. ORIGINALISM VERSUS FUNDAMENTAL RIGHTS

Two major theories of constitutional interpretation are "originalism" and "fundamental rights."14 Inasmuch as many Justices have adopted one of these two theories, the arguments each theory presents are crucial in the debate over potential unenumerated fundamental rights.15

A. Originalism

Generally, originalists believe that the Constitution protects only those rights specifically enumerated in the text of the Constitution or those rights that the Framers intended to protect.16 Specific supporters, however, have slightly different versions of originalism.17

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13. With the election of Bill Clinton, and his promise to appoint liberal judges to the Supreme Court, O'Connor's possible shift has even greater impact on the overall balance of the Court.
15. The theories of some current Supreme Court Justices are apparent. Clear originalists when interpreting the Due Process Clause of the Fourteenth Amendment include Chief Justice Rehnquist and Justices Scalia and White (for White, see Bowers v. Hardwick, 478 U.S. 186 (1986); Doe v. Bolton, 410 U.S. 179, 221 (1973) (White, J., dissenting)). Fundamental rights theorists include Justices Blackmun, see Planned Parenthood v. Casey, 112 S. Ct. 2791, 2843 (1992) (Blackmun, J., concurring in part, dissenting in part); Roe v. Wade, 410 U.S. 113 (1973), and Stevens, see Casey, 112 S. Ct. at 2839 (Stevens, J., concurring in part, dissenting in part). After the *Casey* opinion, Justices O'Connor, Kennedy, and Souter may have joined the fundamental rights theorists, but this is not yet clear. Justice Thomas's theory is still developing. Before joining the Court, he espoused natural law. See Clarence Thomas, *The Higher Law Background of the Privileges or Immunities Clause of the Fourteenth Amendment*, 12 Harv. J.L. & Pub. Pol'y 63 (1989). In his first term, however, he frequently sided with Scalia and supported an originalist view. See Greenhouse, *supra* note 3, at 1.
17. An example of the slight differences among originalists is Robert Bork and Chief Justice William Rehnquist's difference as to whose intentions matter. Bork believes that judges should seek the original meaning of the Constitution as the ratifiers understood it. See Bork, *supra* note 16, at 144-45. Bork holds this view because he sees law as a public
As a group, originalists do not oppose fundamental rights per se. Rather, they believe that the Constitution protects some fundamental rights and liberties, namely those specifically enumerated in the Constitution. For instance, while originalism forbids judges from creating rights, the theory also bars judges from destroying constitutionally or legislatively created rights. To do so would either violate the explicit words of the Constitution or encroach upon the power of legislatures and the people. Nor are originalists against individual or minority rights. In fact, originalists believe that the Court should defend individual or minority rights when there is explicit textual support. "A merely temporary majoritarian groundswell should not abrogate some individual liberty truly protected by the Constitution." In other words, shifts in public opinion should not change the meaning of the Constitution.

In addition to protecting enumerated rights, a second basic originalist tenet is that, in determining which rights it will protect, the Court must act as a legal, not a political, body. Originalists stress this limited role for the judiciary because the Court historically has made poor decisions when acting as a legislative, policy-creating branch. Accordingly, originalists view our governmental structure as a representative democracy. Therefore, when the Court "legislates," it ignores "the nature of political value judgments in a democratic society." Moral views should become law only through the legislative process or by constitutional amendment.

In order to achieve the originalist goal of acting as a legal, rather than a political, institution, the Court should neutrally derive and define legal
This neutral approach to decision-making forces judges to rely on the text of the Constitution as originally understood. Judges should not substitute personal values for the dictates of the text itself or the original understanding of the text.

Originalists recognize that some constitutional provisions were broadly framed. Where the text itself does not clearly indicate whether a fundamental right is protected, originalists take an historical approach, analyzing the Framers' or ratifiers' intent. Originalists look at the thoughts and practices of people at the time of the adoption of the constitutional section in question.

This reliance on history, however, can lead to politically unpalatable results. Therefore, some originalists, such as Justice Scalia, leave themselves an escape hatch by labeling themselves "faint-hearted" originalists. These faint-hearted originalists still favor an historical approach to interpreting vague constitutional provisions. However, they simply modify this element in cases involving potentially outrageous results. For example, according to Scalia, public flogging was not historically considered cruel and unusual punishment under the Eighth Amendment. Today, however, a decision that allowed such an activity would be considered a travesty of justice. Therefore, faint-hearted originalists can bar flogging, and other activities that society would consider outrageous, while claiming adherence to their doctrine.

Summarizing the originalist position, an adherence to the original understanding of the Constitution is the only method of interpretation that preserves the Constitution, separation of powers, and the liberties of the people because it deprives judges of unwarranted power.

B. Fundamental Rights

The major theory competing with originalism is the theory of fundamental rights. While many theorists argue different variations of the fundamental rights theory under various names, all variations have

27. See id. at 146-53.
28. See id. at 149; Rehnquist, supra note 17, at 697, 699-700. For example, Rehnquist notes that the Framers of the Fourteenth Amendment designed it to remedy past problems, not to solve future problems, so the Court should not use that amendment to create new rights. See id. at 700.
30. See id. at 861.
31. See id. at 861-62.
32. See Bork, supra note 16, at 159-60.
33. Rehnquist, supra note 17, at 706.
34. This theory has also been described by its detractors as nonconstructionism, nonoriginalism, and noninterpretivism. See John H. Ely, Democracy and Distrust 1 (1980); Grover Rees III, Questions for Supreme Court Nominees at Confirmation Hearings.
basically the same central premise: there are certain rights that are so fundamental to liberty and equality that they must constrain the legislative process. 35

This discussion will focus primarily on Ronald Dworkin's version of the fundamental rights theory. 36 Dworkin distinguishes his theory of constitutional interpretation from originalism by explaining that he does not ignore the Constitution, as originalists claim. 37 Rather, he simply holds a different view of what the text requires. 38

First, Dworkin rejects the originalist view that the text is a list of specific conceptions—that the Constitution is a list of rights, protecting only those rights specifically enumerated. 39 Instead, Dworkin believes that the text consists of general moral concepts. 40 Using the term "concepts," Dworkin believes that the Constitution's provisions contain broad language because the Framers' aim was to protect general principles, not specific rights. The Framers' true intent, therefore, was to use abstract terms in their abstract sense. 41 Applying his theory, Dworkin views Casey as the triumph of his conception of what the Constitution is over Rehnquist and Scalia's conception. 42

Second, Dworkin believes that judges must interpret the abstract clauses of the Constitution. Because the Bill of Rights consists of abstract principles, and our legal culture has designated judges as the interpreters of the Constitution, Dworkin argues that judges must have the

ings: Excluding the Constitution, 17 Ga. L. Rev. 913, 915 n. 6 (1983); Scalia, supra note 29, at 852.


36. This Note relies on Dworkin's theory because he is a prominent fundamental rights theorist, see Robin West, The Supreme Court 1989 Term: Foreword: Taking Freedom Seriously, 104 Harv. L. Rev. 43, 46 (1990), and he has forcefully criticized theories known as "originalism." See, e.g., Ronald Dworkin, Bork's Jurisprudence, 57 U. Chi. L. Rev. 657 (1990) [hereinafter Dworkin, Bork's Jurisprudence] (attacking Robert Bork's conception of originalism).


38. See Dworkin, Bork's Jurisprudence, supra note 36, at 659.

39. See Ronald Dworkin, Taking Rights Seriously 134 (1977) [hereinafter Dworkin, Taking Rights Seriously]; see also Planned Parenthood v. Casey, 112 S. Ct. 2791, 2853 (1992) (Blackmun, J., concurring) (accusing Chief Justice Rehnquist of construing personal liberty cases as establishing only a "laundry list" of rights); cf. id. at 2859 (Rehnquist, C.J., concurring in part, dissenting in part) (urging the Court to limit rights to those specific ones already recognized).

40. See Dworkin, Taking Rights Seriously, supra note 39, at 134.

41. See Dworkin, Unenumerated Rights, supra note 7, at 386. Building on this distinction, Dworkin considers whether the term "unenumerated" fundamental rights, as distinguished from "enumerated" rights, makes sense. He concludes that it is a "bogus" distinction, as all rights are derived from the text; they simply vary in their level of abstraction. See id. at 381, 390. Originalists, then, use the term "unenumerated" rights to "load the dice" against the fundamental rights theorists.

42. See Dworkin, Center Holds, supra note 3, at 29.
power to elaborate what these principles mean. Therefore, it is proper for judges to determine what specific rights exist within these general principles, such as what rights are embodied in the term “liberty” in the Due Process Clause.

Third, Dworkin establishes guidelines for judges to use in applying legal and moral principles to abstract clauses. He argues that, in deciphering the Constitution’s principles, judges must establish a moral and political philosophy. Further, judges should not vary their philosophies from case to case, randomly deciding which rights they wish to enforce. Rather, they must base their decisions on established principles, not on compromise or political accommodation. Also, judges should have some reasoned basis for their conclusions. Therefore, their decisions should conform to the bulk of precedent. Finally, a judge who adopts a legal or moral principle must consistently apply it in other cases he decides. Integrity is crucial in justifying results.

In summary, Dworkin does not believe that we are governed by lists, such as lists of constitutional rights or lists of historical statutes. Instead, we are governed by principles and ideals. Judges are not constrained merely by explicit textual barriers, but by reasoned argument, criticism, and example.

To combat Dworkin’s arguments, originalists maintain that judges would not have to use their own philosophy to interpret abstract clauses if they simply followed the original intention, for they could enforce the choices made long ago. But determining the Framers’ intent requires the very substantive choices originalists try to avoid. An originalist must make a substantive judgment as to what was the Framers’ intent.

As Dworkin aptly noted, “[t]he flight from substance must end in substance.”

C. Cases

The above dispute between originalists and fundamental rights theorists has taken place in numerous Supreme Court cases. An early fo-

43. See Dworkin, Unenumerated Rights, supra note 7, at 383.
44. See id. at 392.
45. See id. at 393.
46. See id.
47. See id. at 394.
48. See id.; see also Sullivan, Foreword, supra note 12, at 58 (defining “standards” as a legal directive that gives the decision-maker more discretion in reaching a conclusion).
50. See Dworkin, Bork’s Jurisprudence, supra note 36, at 666.
rum for the debate was the eighteenth century case of *Calder v. Bull.* Justice Chase, an early fundamental rights theorist, argued that the people created the Constitution "to establish justice, to promote the general welfare, to secure the blessings of liberty; and to protect the persons and property from violence." He further argued that "[t]here are certain vital principles in our free Republican governments, which will determine and over-rule an apparent and flagrant abuse of legislative power." Referring to "abuse[s] of legislative power" and "principles of Republican government," Chase foreshadowed the fundamental rights theory.

In contrast, Justice Iredell, an early originalist, condemned any use of value judgments or natural law. "If . . . Legislature[s] . . . shall pass a law, within the general scope of their constitutional power, the Court cannot pronounce it to be void, merely because it is, in their judgment, contrary to the principles of natural justice. The ideas of natural justice are regulated by no fixed standard . . . ." Many contemporary originalist arguments echo Iredell's above language. He preached deference to legislatures and the elimination of Justices' personal values in constitutional interpretation. Because Iredell's arguments are repeated by modern originalists, as are Chase's by contemporary fundamental rights theorists, *Calder* foreshadowed the current constitutional controversy.

While the originalist/fundamental rights debate began in *Calder, Griswold v. Connecticut* established the competing positions for our time. *Griswold* concerned a married couple's challenge to a Connecticut statute that barred the use of contraceptives. Concurring in *Griswold*, Justice Harlan best presented the fundamental rights position. He asserted that the existence of a right is not dependent on one of the express provisions of the Bill of Rights, for the Due Process Clause "stands . . . on its own bottom." In other words, courts can derive rights from the clause itself without relying on other specific constitutional provisions for support. Despite apparently inviting Justices to discover rights, Harlan favored judicial self-restraint. He believed that one key tool for such restraint was a "solid recognition of the basic values that underlie our society." Therefore, Harlan argued adamantly against "artificial" and "largely illusory" restrictions on the Due Process Clause—one of the goals he believed originalists sought to attain.

On the other side, Justice Black, as displayed in his *Griswold* dissent,
was a fervent originalist. He argued that the Court must uphold the Connecticut statute because there were no constitutional provisions that explicitly forbade a law that might abridge privacy rights. This view sprang from the belief that deriving rights from the Due Process Clause allowed Justices wrongfully to interpose their own views where the Constitution had not spoken and where therefore the legislature's views should control. Invoking the ghost of Lochner, Black warned that the proper way to keep the Constitution "in tune with the times" is through amendment or legislative process. Like his forerunner Iredell, Black urged judicial deference to legislatures and disregard of judges' personal values in interpreting constitutional provisions.

This brief description of the two competing theories sets the stage for a comparison of Justice Scalia's and Justice O'Connor's jurisprudence. Initially these Justices had similar theories of constitutional interpretation, but now they apparently have diverged into competing theoretical camps—at least temporarily.

II. JUSTICE SCALIA VERSUS JUSTICE O'CONNOR

A. Justice Scalia

It is not difficult to determine Justice Scalia's position in the originalist versus fundamental rights debate. Scalia is an originalist. He has remained faithful to this philosophy since his confirmation. In Planned Parenthood v. Casey, he reaffirmed the steadfastness of his beliefs. A

63. See id. at 508 (Black, J., dissenting).

64. See id. at 512.

65. Many scholars view the fear of substantive due process as a fear of repeating the mistakes of Lochner v. New York, 198 U.S. 45 (1905). In Lochner, the Court used substantive due process to protect economic rights. The Court struck down laws regulating maximum work hours as an unconstitutional restriction on the freedom of contract. It is among the most infamous decisions in the Court's history because the Court overstepped its bounds to invalidate an important statute. See Bork, supra note 16, at 44; Ely, supra note 34, at 14-15.


67. Antonin Scalia had a rapid assent to the highest echelon of the legal community. After graduating first in his class from Georgetown University, he graduated magna cum laude from Harvard Law School where he was Note Editor of the Law Review. He was an associate at the law firm of Jones, Day, Cockley & Reavis in Cleveland before joining the faculty of the University of Virginia in 1967. He worked in high level positions in the federal executive branch and at the Department of Justice and was a professor at the University of Chicago from 1977 until 1987. He later served for several years as editor of the American Institute's Regulation magazine. President Reagan appointed him to the D.C. Court of Appeals in 1982. For background information, see 13 Roy M. Mersky & J. Myron Jacobstein, The Supreme Court of the United States: Hearings and Reports on Successful and Unsuccessful Nominations of Supreme Court Justices by the Senate Judiciary Committee, 1916-1986, at 124 [hereinafter Scalia Hearings]; M. David Gelfand & Keith Werhan, Federalism and Separation of Powers on a "Conservative" Court: Currents and Cross-Currents from Justices O'Connor and Scalia, 64 Tul. L. Rev. 1443, 1446-47 n.10-13 (1990); David Boling, Comment, The Jurisprudential Approach of Justice Antonin Scalia: Methodology over Result?, 44 Ark. L. Rev. 1143, 1146 (1991).

brief analysis of Scalia's substantive due process theory, from his confirmation hearing testimony through his *Casey* opinion, will highlight the key distinctions from Justice O'Connor's theory.

1. Justice Scalia the Originalist

Justice Scalia's confirmation hearings did not reveal anything startling about his constitutional theory. Though he maintained that he did not have a "fully framed omnibus view of the Constitution," he admitted an inclination toward the "original meaning" interpretation as opposed to a living Constitution. This view arose from his belief that the original meaning offered protection "against the passions of the moment that may cause individual liberties to be disregarded." 

His writings have confirmed that he did indeed abide by a particular theory. In a frequently cited article, Scalia evaluated two competing theories: originalism and "nonoriginalism" (his name for the fundamental rights theory).

Discussing nonoriginalism, Justice Scalia initially noted that several "prominent and respected commentators reject the original meaning . . . as an authoritative guide." Scalia, however, rejected these commentators' arguments and attacked nonoriginalism. According to Scalia, the main theoretical defect with nonoriginalism is its incompatibility with the principles that justify judicial review. Central to this justification, first enunciated in *Marbury v. Madison*, is the idea that the Constitution is "an enactment that has a fixed meaning." In other words, Scalia argued, only under an originalist view does the Constitution have meaning. Without this meaning, Scalia believes that judges would not even have the power of judicial review, eliminating the need for theories of constitutional interpretation for the judiciary.

Justice Scalia's other main critique of nonoriginalism is its lack of coherence in attempting to replace the original meaning:

If the law is to make any attempt at consistency and predictability, surely there must be general agreement not only that judges reject one exegetical approach (originalism), but that they adopt another. And it

70. The phrase "living Constitution" refers to the premise that the Constitution's meaning should evolve with time. See Rehnquist, *supra* note 17, at 693-94.
73. *Id.* at 853 (citing scholars such as Harvard Law professor Laurence Tribe, Stanford Law School's Dean Paul Brest, Yale professor Owen Fiss, and Oxford professor Ronald Dworkin).
74. See *id.* at 854.
75. 5 U.S. (1 Cranch) 137, 177 (1803).
77. In *Marbury*, Chief Justice Marshall opined that if a legislative enactment and the Constitution conflicted, then the Constitution must win. See *Marbury*, 5 U.S. (1 Cranch) at 177. For this to be true, the Constitution must have some independent meaning.
is hard to discern any emerging consensus among the nonoriginalists as to what this might be.\textsuperscript{79}

The tone of Scalia’s discussion almost implied that he may apply a fundamental rights theory that distinguished itself from others. That was not his intended message. Scalia’s real criticism is that nonoriginalists apply their own views in interpreting the Constitution. John Hart Ely similarly criticized nonoriginalist theories as inadequate because they supplant the judge’s personal views for the actual words of the Constitution.\textsuperscript{80}

Despite attacking nonoriginalism, Justice Scalia also faulted the application of originalism. One flaw, Scalia noted, is that true originalism requires an exhaustive analysis of ancient documents and transcripts that may be “better suited to the historian than the lawyer.”\textsuperscript{81} Scalia’s second critique of originalism is that “it is medicine that seems too strong to swallow.”\textsuperscript{82} In its pure form, originalism leads to decisions that simply are unacceptable. Scalia’s example involved the Eighth Amendment. While flogging may not have been “cruel and unusual” punishment in the eighteenth century, it surely is today. A statute allowing flogging would certainly be struck down, even by a Scalia-oriented, originalist Court.

Although Justice Scalia finds fault with originalism, he is able to justify it in the end. Scalia resolves the conflict between nonoriginalism and “strong-medicine” originalism by labeling himself a “faint-hearted” originalist.\textsuperscript{83} According to Scalia, the faint-hearted originalist posits an evolutionary intent to the text of the Constitution.\textsuperscript{84} Also, Scalia chooses originalism as his method of interpretation because it is most compatible with his notion of a democratic system.\textsuperscript{85} Elections, rather than judicial interpretation of a “living Constitution,” insure that the laws keep pace with current values.

\textsuperscript{79} Id. at 855.
\textsuperscript{80} See Ely, supra note 34, at 43-72.
\textsuperscript{81} Scalia, supra note 29, at 857.
\textsuperscript{82} Id. at 861.
\textsuperscript{83} See id. at 864.
\textsuperscript{84} See id.
\textsuperscript{85} See id. The Cincinnati Law Review article also reveals Scalia’s conception of democracy, which in turn affects his constitutional theory. He wrote that originalism is “more compatible with the nature and purpose of a Constitution in a democratic system.” Id. at 862. He does not explain his conception of democracy, but apparently believes our system is a representative democracy. See infra note 124 for a discussion of representative democracy. Under this theory, the will of the people is supreme. Therefore, deference to legislatures, an originalist mantra, is vital because it upholds this vision of democracy.

Contrast this view with the fundamental rights view of democracy. This view conceives our system as a constitutional democracy. See infra note 208 for a discussion of constitutional democracy. Under this theory, there are certain rights and liberties that are beyond the scope of the legislative process because they are so fundamental. Therefore, the Court may protect these certain rights despite a legislative enactment against them. Understanding this distinction is crucial to understanding the competing theories of constitutional interpretation.
Justice Scalia's final justification is that, between the two approaches, originalism would lead to more moderate results than nonoriginalism.\(^8\) He argues that it is "the lesser evil" for judges to err on the side of history than to create law based on personal predilection.\(^8\) Making this value judgment, Scalia believes that judges must choose originalism as their constitutional theory.

2. Justice Scalia's Originalism

Justice Scalia has expounded his originalism in several opinions. Particularly when discussing unenumerated fundamental rights derived from the Due Process Clause, Scalia passionately argues against expansion of recognized substantive due process rights. His theory has three main elements: tradition as historical practices, rights defined at their most specific identifiable levels, and deference to legislatures.

a. Tradition

The first element of Justice Scalia's theory is his use of tradition as historical practices. Scalia described this aspect of his theory in a footnote in *Michael H. v. Gerald D.*\(^8\) In *Michael H.*, an adulterous father based his claim of a right to visit his child on the Due Process Clause of the Fourteenth Amendment. Rejecting this claim, Scalia defined tradition. His source of tradition is history as it is recorded in law books; Scalia analyzed specific state law as it existed when the Fourteenth Amendment was ratified.\(^8\) His approach is positivistic or legal as opposed to normative or sociological—tradition is simply what laws existed, not what people thought about the substantive right, at the time of the amendment.\(^8\)

Justice Scalia's use of tradition as historical practices is not part of his originalism. Rather, attempting to deal with and limit previous substan-

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\(^8\) See Scalia, *supra* note 29, at 864.
\(^8\) See id.
\(^8\) 491 U.S. 110, 127 n.6 (1989). The issue in *Michael H.* was whether an unwed biological father had a constitutional right, under the Due Process Clause, to visit his child despite a California statute that legally presumed the mother's husband to be the biological father.


\(^8\) See *Michael H.*, 491 U.S. at 127 n.6.
\(^8\) See id. at 122 n.2; cf. James Bopp, Jr. & Richard E. Coleson, *Webster and the Future of Substantive Due Process*, 28 Duq. L. Rev. 271, 281-82 (1990) (discussing Scalia's reliance on an historical/traditional value test); Young, *supra* note 88, at 583 n.14 (arguing that Scalia's use of specific rather than general traditions derives from his espousal of originalism, and his belief that judges should not allow personal values intrude in law making); 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, 863-66 (1991) (suggesting that Scalia believes that the Court should look either to text or to evidence of specific traditions, as opposed to general traditions).
tive due process cases, he uses tradition as "damage control." If he could, Scalia likely would overrule past substantive due process decisions. Attempting to limit further recognition of substantive due process rights, Scalia demands that historical traditions exist before recognizing due process rights.

In Michael H., Justice Scalia supported his use of tradition by referring to two cases in the unenumerated rights field: Bowers v. Hardwick and Roe v. Wade. The Bowers Court justified its rejection of a right to homosexual sodomy by noting the great number of states that had criminal sodomy laws when the Fourteenth Amendment was ratified. Referring to past state laws, the Bowers Court added credibility to Scalia's subsequent use of tradition as history. Also in Bowers, the Court defined fundamental liberties as those rights "deeply rooted in this Nation's history and tradition." Equating tradition with history, this formulation greatly supported Scalia's use of tradition as historical practices. Scalia found further support for his use of tradition with language from Roe. There, the Court went to great lengths to negate the proposition that the nation had a historical tradition against abortion. Citing Roe, Scalia apparently argued that, by merely discussing history, the Court justified his approach.

Justice Scalia recently explained how he uses tradition in Planned Parenthood v. Casey. There, Scalia used both originalism and tradition to reject a fundamental right to abortion, noting that "(1) the Constitution says absolutely nothing about [abortion], and (2) the longstanding traditions of American society have permitted [abortion] to be legally proscribed." Additionally, Scalia attacked the joint opinion's interpretation that he limits rights to those historically recognized. He argued that liberty is not limited to its historical meaning, as the joint opinion charged. Rather, the Court simply must not ignore history when determining the existence of a right.

Justice Scalia's clarification actually reinforced the position that he

91. For this term I am indebted to Professor James E. Fleming, Fordham University School of Law.
92. See, e.g., Roe v. Wade, 410 U.S. 113 (1973) (granting the substantive due process right to abortion). For example, for Justice Scalia, precedents that grant substantive due process rights are not a source of tradition. See Sullivan, Foreword, supra note 12, at 114.
95. 410 U.S. 113 (1973).
96. See Michael H., 491 U.S. at 127 n.6 (citing Bowers v. Hardwick, 478 U.S. 186, 194 (1986)).
98. See Michael H., 491 U.S. at 127 n.6.
100. 112 S. Ct. 2791 (1992).
101. Id. at 2874 (Scalia, J., concurring in part, dissenting in part).
102. See id.
would recognize only those rights that states have previously protected. He reiterated that the Court "may not disregard" a specific relevant tradition concerning the right in question. For Scalia, this apparently means that the Court may not recognize a right if states have legislated against the specific right in the past. As this explanation suggests, Scalia wrongfully believes that his theory allows an evolution of rights. Once states have rejected a right, Scalia would bar it from ever being recognized. By logically following his theory, Scalia could only recognize a new right by manipulating his definition of the relevant history.

If Justice Scalia defines tradition as historical practices, then he could not justify decisions such as Griswold v. Connecticut or Eisenstadt v. Baird. Both cases dealt with a right to use contraceptives. Using the Connecticut statute at issue in Griswold as evidence, states historically did legislate against the use of contraceptives. In order to support these decisions, Scalia responded in Michael H. that those cases did not deal with a "still extant" tradition. Because the statute was no longer enforced, no relevant tradition still existed. Therefore, the Court could find a fundamental right to use contraceptives.

That explanation, however, may conflict with Justice Scalia's stance on homosexual sodomy. Though statutes criminalizing sodomy exist today, they are rarely enforced. Yet Scalia cites Bowers v. Hardwick to justify his theory. Scalia's position would be more consistent if he argued that Griswold was wrongly decided and asserted that all fundamental rights should be limited to historical practices that existed when the Fourteenth Amendment was ratified.

b. **Level of Generality**

The level of generality in which the Court frames the controverted right is the second major aspect of Justice Scalia's originalism. The level of generality determines how broadly or narrowly the Court frames a particular right. Scalia staunchly supports a narrow framing and

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103. See id.
104. In Michael H., Scalia noted that for a liberty to be fundamental, there must not have been laws enacted against the interest. See Michael H. v. Gerald D., 491 U.S. 110, 122 n.2 (1989). This definition excludes many, if not all, of the unenumerated fundamental rights most desired today, most notably abortion and homosexual sodomy.
105. See Scalia, supra note 29, at 864.
106. See Michael H., 491 U.S. at 122 n.2.
107. But see Cook, supra note 90, at 883-84.
108. 381 U.S. 479 (1965).
111. 478 U.S. 186 (1986) (using historical practices to deny a fundamental right to homosexual sodomy).
112. See Michael H., 491 U.S. at 127 n.6.
113. Bork, someone who does claim that Griswold was wrongly decided, rejects Scalia's use of tradition in Michael H. See Bork, supra note 16, at 235-40. Instead, Bork would adhere to the original understanding of the relevant amendment. See id.
114. For example, the right recognized in Griswold v. Connecticut, 381 U.S. 479
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claims that the Court should analyze a potential right at "the most specific level at which a relevant tradition protecting, or denying protection to, the asserted right can be identified." By analyzing the right at its most specific level, the Court avoids arbitrary decision making. For instance, in Michael H., both Justices O'Connor and Brennan appealed to tradition, but they reached different results because the Justices did not uniformly define the tradition on which they relied. To create uniformity, and a law of rules, the Court must identify the right at its most specific level.

Analyzing the most specific tradition in Michael H., Justice Scalia confronted Justice O'Connor's concurring opinion in Michael H. There, O'Connor rejected Scalia's reliance on the most specific tradition because she felt it conflicted with prior cases and she did not want to be constrained by such a narrow approach. Scalia rebutted O'Connor, noting that the cases which she cited as not being based on the most specific tradition, were distinguishable. In those cases, the Court did not reject a still existing tradition, but a dead one. Because the relevant tradition was no longer followed, the Court had no obligation to recognize it. Therefore, the cases were not inconsistent with the most specific tradition approach.

In Casey, Justice Scalia continued analyzing issues at the most specific level possible. He framed the issue as whether "the power of a woman to abort her unborn child . . . is a liberty protected by the Constitution . . ." Applying this element of his theory, Scalia did not even address a general right to privacy.

The level of generality element of Justice Scalia's theory enables him to address rights that can be easily dismissed through an originalist interpretation. By defining the right at issue narrowly, Scalia can reject the right for lack of specific constitutional support, without dealing with broader, more difficult, issues.

(1965), can be framed broadly as a general right to privacy or narrowly as the right to use contraception in the marital relationship in the marital bedroom.

115. Michael H., 491 U.S. at 128 n.6. For example, in Michael H., Scalia argues that the most specific tradition is not the rights of fathers generally, as Justice Brennan asserts in dissent, but the rights of an adulterous natural father. See id.

116. See id.

117. See id.

118. For a critique of Scalia's position, see Laurence H. Tribe & Michael C. Dorf, Levels of Generality in the Definition of Rights, 57 U. Chi. L. Rev. 1057 (1990). For a discussion of Scalia's desire for rules of law, see infra Part III.C.


120. See id. at 128 n.6 (citing Eisenstadt v. Baird, 405 U.S. 438 (1972), and Griswold v. Connecticut, 381 U.S. 479 (1965)).

121. See id.

122. See id.

c. **Deference to Legislatures**

The final element of Justice Scalia's theory is deference to legislatures. This deference derives from his conception of our democracy as a representative democracy and is part of classic originalism.

Justice Scalia revealed his conception of democracy in *Webster v. Reproductive Health Services*. Scalia believed that *Webster* was a failure because the Court did not extricate itself from an area—abortion—in which it did not belong. He argued that abortion was a political, not a judicial, issue so the Court had no business resolving it. Therefore, the *Webster* Court should have overruled *Roe v. Wade* because the *Roe* decision represented a judicially created fundamental right in a political area. If a fundamental right, defined at its most specific level, did not historically exist as a state law, or is not enumerated elsewhere in the Constitution, then legislatures, not the Court, must determine whether to recognize the right.

Likewise in *Casey*, Justice Scalia sternly argued that it was not the Court's role to determine the outcome of the abortion debate. There, his primary complaint with the joint opinion was its discussion and application of "reasoned judgment." The joint opinion used the term to capture Justice Harlan's approach to substantive due process. To Harlan, reasoned judgment is the required process necessary to reach lasting and sound decisions. To Scalia, reasoned judgment is nothing more than a means to ignore the text and tradition of the Constitution by deciding cases based on "philosophical predilection and moral intuition."

Use of reasoned judgment conflicts with Justice Scalia's belief that "the text of the Constitution, and our traditions, say what they say and there is no fiddling with them." This quotation illustrates the originalist view that directly contradicts both Dworkin's view and Justice

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124. A representative democrat believes that all power is vested in the people and conveyed through their votes to the legislatures. See Walter F. Murphy et al., *American Constitutional Interpretation* 30-31 (1986). Unless legislation contradicts a specific constitutional provision, a representative democrat will validate it.


127. See *Webster*, 492 U.S. at 532; see also *Cruzan v. Director, Missouri Dep't of Health*, 497 U.S. 261, 293 (1990) (Scalia, J., concurring) (arguing that the Court should not recognize a constitutional right to refuse medical treatment, as it is a legislative issue).


129. See *Webster*, 492 U.S. at 532.

130. See *Boling*, *supra* note 67, at 1176.

131. For a discussion of O'Connor's use of reasoned judgment, see *infra* Part II.B.4.


134. *Id.* at 2883; see also Alex Kozinski, *My Pizza With Nino*, 12 Cardozo L. Rev. 1583, 1586 (1991) (describing Scalia's desire to defend the plain meaning of the Constitution: "Just as sure as AV's pizza means AV's pizza, confront [in the Sixth Amendment] means confront.")
O'Connor's position in the joint opinion in *Casey*. Scalia combatted claims by fundamental rights theorists and O'Connor that ambiguous portions of the Constitution demand that judges use value judgments, arguing that ambiguous text should be clarified by "long and clear tradition." The proper place for value judgments is in the legislative process, not in the Court or the confirmation process.

Justice Scalia's opinion urged the Court to "get out of this area, where [it has] no right to be." That urging epitomizes Scalia's theory in the substantive due process realm. As an originalist, Scalia maintains that if a right is not enumerated in the text, then the Court should not recognize it as a protected liberty interest.

He further claimed that if the joint opinion were correct in stating that protected liberties are unbounded, then the people, not the Justices, should implement their values to determine which liberties exist. "Value judgments . . . should be voted on, not dictated . . . ."

To bolster his view, Scalia invoked the specter of *Dred Scott*. Recalling a portrait of Chief Justice Taney, he noted the Chief Justice's somber, disillusioned look. He attributed this sorrow to the Court's attempt to legislate away the slavery dispute. Though Scalia cannot believe that the *Casey* decision may lead to as drastic a conclusion as *Dred Scott* (the Civil War), he does believe that the Court's error is equally menacing. The struggle will end, asserted Scalia, only when the Court withdraws from the abortion issue, permitting legislatures to enact the people's will.

Justice Scalia's stance exemplifies the representative democratic view of our governmental system. Scalia insists that the Justices' personal views should not replace the will of the people. Our system does not grant judges the power to instill their values in law, but only the power to protect specifically enumerated constitutional rights. To receive additional protections, citizens can create other enforceable liberties through the legislative process.

In sum, since his confirmation, Justice Scalia has consistently preached the originalist gospel: reverence for the text and traditions, deference to legislatures, and avoidance of judicial value judgments. An analysis of his application of this theory, however, especially compared to Justice

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136. See *Casey*, 112 S. Ct. at 2885 (Scalia, J., concurring in part, dissenting in part). But see Dworkin, *Unenumerated Rights*, supra note 7, at 392 (arguing that value judgments should be part of the confirmation process).
137. *Casey*, 112 S. Ct. at 2885 (Scalia, J., concurring in part, dissenting in part).
138. *Id*.
140. Taney presided over the infamous *Dred Scott* case which struck down the Missouri Compromise, and ordered Scott returned to slavery.
141. See *Casey*, 112 S. Ct. at 2885 (Scalia J., concurring in part, dissenting in part).
142. See *id*.
143. As previously noted, Bork does not include traditions in his originalism. See *supra* note 113.
O'Connor, creates a different overall impression of this supposedly "conservative" jurist. As Part III will explain, although politically conservative in his philosophy, his technique is activist.

B. Justice O'Connor

Unlike Justice Scalia's, Justice O'Connor's constitutional theory has evolved during her tenure on the Court. Although O'Connor began her career as an originalist, her Casey opinion suggested a fundamental rights element to her jurisprudence. Her opinions that address fundamental rights derived from the Due Process Clause insinuate this shift. Her future decisions, which will be discussed in Part III, will be affected not only by this possible shift, but also by her approach to stare decisis and her politically conservative nature.

1. Confirmation Hearings

Justice O'Connor's state court opinions and early writings were not highly theoretical. Thus, the first public discussion of her constitutional theory occurred during her confirmation hearings. This lack of history led some commentators to believe that she came to the bench as an open-minded jurist, without adherence to any particular theory, making her a possible swing vote. Recognizing that O'Connor's theory was unknown, the senators on the Judiciary Committee asked her many questions that tried to pin down her theory. O'Connor's responses revealed a leaning toward judicial restraint and originalism. During her confirmation hearings, Justice O'Connor made several statements regarding the Framers' intent. "In analyzing a [constitutional] question the intent of the framers . . . is vitally important." She further claimed that judges should overrule cases only when they have a different interpretation of the Framers' intent. Similarly, she proclaimed that proper Fourteenth Amendment analysis revolved around the drafters' intent. When pressed on her position on abortion, O'Connor labeled herself a strict constructionist. Consistent with her definition of strict constructionism, she claimed that the proper role of a judge is to interpret the law, not to make law. Therefore, her personal view on abortion had no

145. This analysis is limited to her substantive due process jurisprudence.
146. See O'Connor Hearings, supra note 144, at 196-97, 220.
148. O'Connor Hearings, supra note 144, at 196.
149. See id.
150. See id. at 197.
place in the resolution of the legal issue. Also, she declared that her judicial philosophy was one of judicial restraint. She believed that Justices should decide cases on the most narrow grounds possible, and should apply rational relationship scrutiny to most legislative actions unless dealing with a "special" right or discriminatory legislation. Additionally, she revealed her deference to legislatures, proclaiming that abortion is a "valid subject for legislative action" because abortion is a public policy issue, and it is not the Court's role to create public policy.

Justice O'Connor did not claim that unenumerated fundamental rights were nonexistent. O'Connor recognized a right to privacy as established in Griswold v. Connecticut. She stated that people "have certain other rights that are not enumerated." This recognition was not inconsistent with her apparent slant toward originalism. Rather, she accepted these rights more as precedent than as personal belief. Moreover, all current Justices recognize the existence of some unenumerated rights, making it difficult to align O'Connor's recognition with a particular theory.

2. Early Years on the Court

Justice O'Connor's early years on the Court generally proceeded according to expectations. Her opinions stressed the facts of each case while avoiding policy arguments, and she was reluctant to invalidate legislative measures. Not surprisingly, the Justice with whom she most frequently agreed was Rehnquist. In addition to restraint, her early fundamental rights opinions encompassed all the elements of originalism.

The opinion that most clearly revealed Justice O'Connor's early preference for originalism was her dissent in Akron v. Akron Center for Reproductive Health. That opinion demonstrated O'Connor's theoretical approach toward fundamental rights claims at that stage of her career.

151. See id. at 210.
152. See id. at 220.
153. Applying rational relationship scrutiny, a Justice will uphold a statute if the government has any legitimate basis for enacting the statute, and if there is a rational connection between the legislative act and the desired end. See Murphy et al., supra note 124, at 836-37. Compare this test to strict scrutiny which requires a compelling governmental interest and a narrowly tailored connection between the legislative measure and the desired governmental end. Further there must be no other way for the government to protect the compelling interest. See id. at 689.
154. See O'Connor Hearings, supra note 144, at 232.
155. Id. at 218.
156. 381 U.S. 479 (1965).
158. See Riggs, supra note 9, at 43.
159. See id. at 33, 43.
160. See id. at 15.
162. 462 U.S. 416 (1983) (O'Connor, J., dissenting). In this opinion, O'Connor, joined
In the first paragraph of the dissent, Justice O'Connor stated that the majority failed to use sound constitutional theory and failed to decide the case "based on the application of neutral principles." O'Connor discussed neutral principles as an originalist, arguing that such principles should be both grounded in the community and consistent over time. She maintained that, by applying neutral principles, Justices avoid allowing their own view to color their decisions.

O'Connor continued this theme in the second paragraph of the dissent, displaying another originalist notion: Justices should not allow their personal views to affect their interpretation. "Irrespective of what we may believe is wise or prudent policy . . . 'the Constitution does not constitute us as "Platonic Guardians" nor does it vest in this Court the authority to strike down laws because they do not meet our standards of desirable social policy' . . ." This quotation reaffirmed O'Connor's statements during her confirmation hearings. She did not believe that Justices should have any role in creating social policy. Such a role rests solely with legislatures.

Justice O'Connor expanded on the legislature's role in fundamental rights issues later in her opinion when she defined the undue burden test. O'Connor stated that a democratic society demands that legislatures resolve controversies over extremely sensitive issues. "We should not forget that 'legislatures are ultimate guardians of the liberties and welfare of the people' . . ." Deference to legislatures is a major tenet of originalist theory. In Akron, O'Connor preached and practiced this deference. For the above reasons, Justice O'Connor's Akron dissent by Justices White and Rehnquist (the two Roe dissenters), attacked the majority opinion that reaffirmed Roe v. Wade, 410 U.S. 113 (1973).

163. Akron, 462 U.S. at 452.

164. Though Bork uses this term to support originalism, see Bork, supra note 16, at 146, John Hart Ely has associated the term with the fundamental rights theory. See Ely, supra note 34, at 54-55.

165. See Akron, 462 U.S. at 458.


167. See O'Connor Hearings, supra note 144, at 206, 210, 218.

168. The undue burden test determines when a state statute impermissibly hinders a woman's right to abortion. See Planned Parenthood v. Casey, 112 S. Ct. 2791, 2820 (1992); Akron, 462 U.S. at 463. Courts have not uniformly applied the test and other Justices have heavily criticized it. See, e.g., Casey, 112 S. Ct. at 2876-80 (Scalia, J., concurring in part, dissenting in part) (criticizing undue burden test).


170. See supra notes 22-25 and accompanying text.

171. See Akron, 462 U.S. at 465. Elaborating on her fundamental rights jurisprudence, O'Connor argued that the Court should apply rational basis scrutiny to state statutes unless they unduly burden the fundamental right. See Thornburgh v. American College of Obst. & Gyn., 476 U.S. 747, 828 (1986). Also noteworthy is O'Connor's discussion of stare decisis. She states that the doctrine is not as rigidly enforced in constitutional cases. When the Court is convinced of previous error, it is not constrained to follow precedent.
showed her tendency toward originalism in the substantive due process area.

Joining the majority opinion in Bowers v. Hardwick, O'Connor maintained her narrow view of due process rights under the Fourteenth Amendment. While the Bowers Court accepted other substantive due process holdings which did not derive from specific enumerations in the Constitution, it saw no justification for extending these holdings to protect homosexual sodomy. One basis for its holding was that, when the Fourteenth Amendment was ratified, all but five of the thirty-seven states in the Union outlawed sodomy. By using this reference, the Court followed both the originalist goal of finding the drafters' intent, and accorded with Justice Scalia's use of tradition as historical practices. The Court also adopted an originalist stance toward the establishment of substantive rights using the Due Process Clause:

[W]e are not inclined to take a more expansive view of our authority to discover new fundamental rights imbedded in the Due Process Clause. The Court is 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 design of the Constitution.

By joining this opinion, instead of distancing herself from originalist reasoning in a concurring opinion, Justice O'Connor accepted the Court's use of tradition and the drafters' intent.

3. Evolution

Akron and Bowers displayed Justice O'Connor's early jurisprudence, as she fervently stuck to the originalist view of Fourteenth Amendment. As her years on the Court advanced, however, she created her own position on substantive due process issues. Though she primarily remained an originalist, frequently deferring to legislatures, she often wrote concurring opinions, noting her theoretical differences with other originalist views.

In Michael H. v. Gerald D., Justice O'Connor distinguished her Fourteenth Amendment jurisprudence from Justice Scalia by focusing on Scalia's practice of identifying rights at their most specific level. In his

See Akron, 462 U.S. at 458. Contrast this discussion with O'Connor's lengthy discussion of stare decisis in Casey, 112 S. Ct. at 2808-16.

172. 478 U.S. 186 (1986). The Court in Bowers refused to recognize a fundamental right to engage in consensual homosexual sodomy.


175. See id. at 192-93 & n.6.

176. See supra note 28 and accompanying text.

177. See supra notes 88-90 and accompanying text.


plurality opinion, Scalia inserted footnote six, describing his constitutional theory for analyzing fundamental rights claims. O'Connor concurred in all of the opinion except footnote six. She disagreed with Scalia’s approach because it “sketch[e]d] a mode of historical analysis to be used when identifying liberty interests protected by the Due Process Clause . . . that may be somewhat inconsistent with our past decisions . . . .” O'Connor reached this conclusion because the Court had previously protected rights not framed at their most specific levels. Furthermore, limiting analysis to an examination of history would improperly limit future results. Citing Justice Harlan’s dissent in Poe v. Ullman, she then stated that she would not “foreclose the unanticipated” by limiting interpretation of the Due Process Clause to a particular historical analysis. Though she did not offer her own mode of interpretation, she possibly foreshadowed Casey, where she again cited Harlan’s dissent in Poe.

The rift between Justice O'Connor and Justice Scalia widened with O'Connor's concurrence in Webster v. Reproductive Health Services. O'Connor's concurrence is consistent with her characterization as an “individualized” decision-maker or a “contextualist.” Ruling like a contextualist, O'Connor based her conclusion on the facts of the case, and thus made no mention of any underlying constitutional theory concerning a right to abortion. She supported her narrow opinion with the traditional principle that Justices should avoid answering constitutional questions unless it is absolutely necessary.

Consistent with that principle, Justice O'Connor argued that reconsideration of Roe should occur only “[w]hen the constitutional invalidity of a State's abortion statute actually turns on the constitutional validity of Roe v. Wade.” In refusing to reexamine Roe, O'Connor did not forgo originalist theory; her decision ultimately validated the abortion regulations at issue. She simply emphasized one particular element of originalism—deference to legislatures. It seems that O'Connor's individ-

180. See id. at 127 n.6; for discussion of Scalia's jurisprudence, see supra Part II.A.
183. See id.
188. See Gelfand & Werhan, supra note 67, at 1468; Suzanna Sherry, Civic Virtue and the Feminine Voice in Constitutional Adjudication, 72 Va. L. Rev. 543, 604 (1986). In fact, most commentators have not labeled O'Connor as either an originalist or a fundamental rights theorist precisely because of her individualized decision making. However, analyzing her decisions in a specific area, such as unenumerated fundamental rights derived from the Due Process Clause, enables such a categorization.
189. See Webster, 492 U.S. at 525-26.
190. Id. at 526. But see Casey, 112 S. Ct. at 2803-04 (reviewing the Roe decision).
191. See Webster, 492 U.S. at 522-23.
ualized decision-making method is simply a means to uphold legislative enactments.

Although she generally agreed with Justice Scalia, in that she consistently upheld statutes that denied recognition of fundamental rights, her break with Scalia was over how aggressively to apply originalism. While Scalia addressed the broad constitutional issue, attempting to align it with originalism, O'Connor avoided analysis of constitutional issues and simply deferred to legislatures until it was absolutely necessary to determine if a fundamental right existed under the Due Process Clause.\(^\text{192}\)

Justice O'Connor's rift with Justice Scalia over substantive due process was further illustrated in *Cruzan v. Director, Missouri Department of Health.*\(^\text{193}\) In a concurring opinion, O'Connor argued that if the liberty guaranteed by the Due Process Clause protected anything, it must protect the "deeply personal decision to reject medical treatment."\(^\text{194}\) There, O'Connor supported her view by discussing past Court decisions that used the Due Process Clause to bar "state incursions into the body."\(^\text{195}\) This holding differed sharply from Scalia's. He urged that the Court had no business determining whether a person has a right to die because this was a legislative issue.\(^\text{196}\)

There are two possible explanations for Justice O'Connor's concurrence. One possibility is that, specifically discussing the liberty interest at stake, her concurrence may have foreshadowed her break from originalism in *Casey.* Alternatively, her recognition of a right to refuse medical treatment perhaps exemplified faint-hearted originalism.\(^\text{197}\) The latter explanation seems more probable in light of a speech O'Connor delivered near the time of the *Cruzan* decision.\(^\text{198}\) In the speech, she argued that Supreme Court Justices must avoid unjustified constitutional decision making.\(^\text{199}\) To emphasize her point she conjured up memories of *Dred Scott,*\(^\text{200}\) noting the dire ramifications when the Court interferes with political issues that deeply divide the nation.\(^\text{201}\) Thus, as of *Cruzan,*

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\(^{193}\) 497 U.S. 261 (1990). The fundamental rights issue addressed in *Cruzan,* broadly stated, was whether there is a fundamental right to die. A narrower possible conception of the right is the right to refuse unwanted medical treatment.

\(^{194}\) *Id.* at 289 (O'Connor, J., concurring).

\(^{195}\) *Id.* at 287 (citing Rochin v. California, 342 U.S. 165, 172 (1952)).

\(^{196}\) See *id.* at 293 (Scalia, J., concurring).

\(^{197}\) See supra notes 83-84 and accompanying text.


\(^{199}\) *See id.* at 9. By "unjustified" O'Connor means imposition of personal values.

\(^{200}\) *See id.* at 5 (citing Scott v. Sandford, 60 U.S. (19 How.) 393 (1856)).

\(^{201}\) *See id.* at 9.
O'Connor may still have held originalist beliefs in the area of substantive due process.

4. Planned Parenthood v. Casey

In Planned Parenthood v. Casey, Justice O'Connor apparently shifted from the originalist approach that both she and Justice Scalia advocated. Instead, O'Connor applied a fundamental rights approach to substantive due process, arguing that the word "liberty" protected certain rights despite the absence of a specific constitutional reference to that right.

In section II of the Casey joint opinion, Justice O'Connor rejected two factors crucial to Justice Scalia: deference to legislatures and tradition as historical practices. Disagreeing with Scalia, O'Connor noted that a potential right to abortion derived from the word liberty in the Due Process Clause of the Fourteenth Amendment. She dismissed a pure originalist interpretation of the clause, noting that a purely textual reading suggested only a procedural meaning. The Court, however, had long interpreted the clause to have a substantive component as well. This rejection of originalism signaled O'Connor's apparent shift toward a fundamental rights approach and away from the judicial restraint she had previously preached.

The Casey opinion contradicted Justice O'Connor's prior statements on fundamental rights issues. In her opinions over the last ten years, despite growing conflict with Justice Scalia, O'Connor had consistently deferred to legislatures in substantive due process cases. In Casey, however, O'Connor adopted a radically different position. Arguing that legislatures cannot deny fundamental rights, O'Connor urged that the "guaranties of due process . . . have in this country become bulwarks

204. See Casey, 112 S. Ct. at 2804.
205. See id.
206. See Akron v. Akron Ctr. for Reprod. Health, 462 U.S. 416, 465 (1983) (O'Connor, J., dissenting); O'Connor Hearings, supra note 144, at 220. Of course, deference to precedent, which is another factor in her Casey opinion, is a form of judicial restraint. This conflict is explored in Part III.
208. Justice O'Connor approached legislative decisions like a constitutional democrat. A constitutional democrat believes that some rights are so fundamental that they restrain legislatures. Though a government has power to make laws affecting most realms, certain liberties are so fundamental that a government cannot interfere with them. See Murphy et al., supra note 124, at 27. Unlike a court in a representative democracy, a court in a constitutional democracy should not automatically defer to legislatures. Instead, a court must determine if a fundamental right is at stake. If it is, then courts must prevent the legislature from depriving that liberty. The interests of the majority cannot suppress the rights of the individual. See id. It is not dispositive that the fundamental right at issue is not specifically enumerated in the Constitution. See id. at 30-31.
This statement contradicted both Justice Scalia's current view of democracy and O'Connor's previous view. Instead of deferring to legislative judgment, O'Connor held that the Court must stop overzealous legislatures from infringing on unenumerated fundamental rights that are protected by the word "liberty" in the Due Process Clause.

After discussing the legislature's role, Justice O'Connor attacked the originalist view of incorporation and Justice Scalia's use of tradition. O'Connor admitted that it was "tempting" to limit the protections encompassed by the Due Process Clause to those protected in the first eight amendments, but "of course this Court [had] never accepted that view." Addressing Scalia, she posited that the protections of the Due Process Clause could be limited to those that existed at the time of the Fourteenth Amendment's adoption. This limitation, however, would also be "inconsistent with our law."

After dismissing Justice Scalia, Justice O'Connor discussed her own analysis of the Due Process Clause. O'Connor's view of substantive due process emphasized principles, not discrete rights. She argued that the Constitution protects a realm of personal liberty from government intrusion. For example, many other rights are protected under this principle, despite no explicit mention in the Constitution.

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210. See id. at 2804 (citing Whitney v. California, 274 U.S. 357 (1927) (Brandeis, J., concurring)). Restricting legislatures this way epitomizes constitutional democracy. Individuals have rights that legislatures cannot invade. See supra note 208.

211. Incorporation is the determination of which rights in the Bill of Rights are protected by the Fourteenth Amendment and hence, applicable to the states. See Murphy et al., supra note 124, at 98-100.

212. See Casey, 112 S. Ct. at 2804-05 (citing Adamson v. California, 332 U.S. 46, 68-92 (1947) (Black, J., dissenting)).

213. Id. at 2805.


215. Casey, 112 S. Ct. at 2805; see also Michael H., 491 U.S. at 132 (O'Connor, J., concurring) (rejecting Scalia's reliance on past state laws and his narrow definition of the relevant tradition).

216. As support, O'Connor cites the Ninth Amendment. She denies that Due Process Clause protections are limited to the Bill of Rights or to specific practices in place at the time of the adoption of the Fourteenth Amendment. See Casey, 112 S. Ct. at 2805. For arguments that the Ninth Amendment allows judicial recognition of unenumerated rights through the Due Process Clause, see Griswold v. Connecticut, 381 U.S. 479, 488 (1965) (Goldberg, J., concurring); The Rights Retained by the People (Randy E. Barnett ed., 1989); Laurence H. Tribe, Contrasting Constitutional Visions: Of Real and Unreal Differences, 22 Harv. C.R.-C.L. L. Rev. 95 (1987). For arguments that judges should not derive rights from the Ninth Amendment, see Thomas B. McAffee, The Original Meaning of the Ninth Amendment, 90 Colum. L. Rev. 1215 (1990); Bork, supra note 16, at 178-85.

217. See Casey, 112 S. Ct. at 2805. O'Connor noted the Court's recognition of a right to marriage, see Loving v. Virginia, 388 U.S. 1, 12 (1967), contraception, see Carey v. Population Servs. Int'l, 431 U.S. 678, 684-86 (1977), and general privacy, see Griswold v. Connecticut, 381 U.S. 479, 481-82 (1965). Scalia would not similarly frame the rights recognized in these cases. For example, he might argue that the right protected in Gris-
O'Connor's principled approach is Justice Harlan's dissent in *Poe v. Ullman.* 218 O'Connor quoted Harlan's discussion of tradition:

Due process has not been reduced to any formula; its content cannot be determined by reference to any code. The best that can be said is that through the course of this Court's decisions it has represented the balance which our Nation, built upon postulates of respect for the liberty of the individual, has struck between that liberty and the demands of organized society. . . . The balance of which I speak is the balance struck by this country, having regard to what history teaches are the traditions from which it developed as well as the traditions from which it broke. *That tradition is a living thing.* 219

Again quoting Justice Harlan, Justice O'Connor emphasized a flexible, principled understanding of due process which is associated with fundamental rights theorists. "'[L]iberty is not a series of isolated points . . . . It is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints.' "220 Applying Harlan's theory, O'Connor argued that "'[a]t the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life.'"221 To resolve fundamental rights questions, O'Connor held, the Court must "exercise that same capacity which by tradition courts always have exercised: reasoned judgment."222 O'Connor's use of tradition and interpretation of the Due Process Clause, as adopted from Harlan, radically differs from Justice Scalia's approach. Scalia's historical use of tradition is narrow and limiting. In contrast, O'Connor's principled use of tradition is broad and open-ended.

Like Justice O'Connor and Justice Harlan, other Justices have adopted a principled approach to tradition. For instance, Justice Cardozo discussed rights "so rooted in the traditions and conscience of our people as to be ranked as fundamental."223 Chief Justice Warren held to higher scrutiny classifications based on race because they were "contrary to our traditions and hence constitutionally suspect."224 Justice Powell protected the sanctity of the family because the institution of family "is deeply rooted in this Nation's history and tradition."225 None of these uses of tradition relied on historical practices. If one did, then its use would contradict the decision of the case. For example, our nation had a

wold is the right to use contraception in the marital relationship, not a more general right to privacy. See Michael H. v. Gerald D., 491 U.S. 110, 127 n.6 (1989).


220. *Id.* at 2805 (quoting *Poe,* 367 U.S. at 543 (Harlan, J., dissenting)).

221. *Id.* at 2807.

222. *Id.* at 2806.


history of the practice of slavery, yet Warren used "tradition" to mean the ideal of racial equality. Contrasting Scalia's use of tradition as historical practices, these Justices used the word "tradition" as aspirational principles. The crucial inquiry, therefore, is not historical, but principled. Relying on moral principle instead of historical practices, Justices must analyze what our tradition should have been, not what it was.

Justice O'Connor's argument is notable for its use of Justice Harlan's language and its adoption of a fundamental rights theory. The terms she used contradict originalist theory—a theory she previously supported. In place of the text, the Framers' intent, or deference to legislatures, O'Connor emphasized liberty on a rational continuum, tradition as a living thing, and reasoned judgment. O'Connor's use of tradition allows Justices flexibility in recognizing rights. By acknowledging the use of reasoned judgment when interpreting the Due Process Clause, O'Connor invoked the fundamental rights approach to constitutional interpretation.

Thus, *Casey* marks an important shift in Justice O'Connor's jurisprudence with respect to substantive due process. She has apparently abandoned her originalist approach to Fourteenth Amendment rights and replaced it with a fundamental rights theory. She remains, however, a politically conservative jurist. For this reason, her recognition of a fundamental right to abortion may have resulted merely from a strict application of *stare decisis*. The next section will compare how Justices Scalia and O'Connor apply their theories, analyzing the role of precedent and suggesting the implications of their split.

### III. Theory versus Precedent

Before *Casey*, commentators noted "subtle" differences between Justices Scalia and O'Connor, yet both were considered strong members of the Court's conservative bloc. The *Casey* decision "astounded many observers" as it evidenced a dramatic and unexpected theoretical shift by the three authors of the joint opinion. One can no longer describe the

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226. For this comparison I am indebted to Professor James E. Fleming, Fordham University School of Law.

227. Commenting on *Casey*, Ronald Dworkin noted that the joint opinion authors, in adopting Harlan's view, have understood the Constitution not to be a list of discrete rules but a "charter of principle." See Dworkin, *Center Holds*, supra note 3, at 31. But this conception of the nature of the Constitution does not entail a particular substantive theory. This fact explains how Harlan, O'Connor, Souter, and Kennedy—political conservatives—can adopt this general constitutional theory, at the same time that Brennan, Blackmun, and Stevens can hold another version of it. See *id.* at 32.

228. *See infra* Part III.

229. There is no evidence that O'Connor's *Casey* opinion represents a change in her political beliefs against abortion. *See* Planned Parenthood v. Casey, 112 S. Ct. 2791, 2806 (1992) ("Some of us as individuals find abortion offensive to our basic principles of morality, but that cannot control our decision.").


difference between Scalia and O'Connor as "subtle." It is not clear, however, whether their differences primarily resulted from different uses of theory or different uses of precedent.

Part II discussed the theoretical break between the Justices. Part III will focus on the Justices' contrasting approaches to precedent and decision-making, suggesting the practical implications of their differences. First, this Section will compare Justices Scalia and O'Connor to two Justices who similarly conflicted in the past, Black and Harlan. Second, this Section will analyze two distinctions between Scalia and O'Connor: their use of precedent and their formulas for case analysis. While the previous Section described the theories themselves, these comparisons suggest how each Justice will apply their theories to actual cases. Finally, this Section will examine the implications of the Justices' theories by forecasting how each Justice may rule on upcoming fundamental rights issues.

A. Restraint and Activism Through Justices Harlan and Black

Justices Harlan and Black vigorously debated the derivation of unenumerated rights from the Due Process Clause. The current constitutional conflict between Justices O'Connor and Scalia harks back to this debate. The similarities between these debates shed light on the potential results of future fundamental rights disputes.

1. Justices Scalia and Black

Justice Scalia's position parallels Justice Black's stance in the latter's ongoing debate with Justice Harlan. Though Black fervently abided by the conservative theory of originalism, he is famous as a political liberal, while Scalia is an ardent political conservative. Aside from their political differences, Black and Scalia have some similar traits. Like

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232. A third notable distinction between these Justices involves the masculine and feminine perspectives of constitutional interpretation. Suzanna Sherry describes the competing characteristics of these approaches. Feminine jurisprudence emphasizes connection, subjectivity, and responsibility. See Sherry, supra note 188, at 580. Conversely, the masculine perspective emphasizes autonomy, objectivity, and rights. See id.

After describing these perspectives, Sherry analyzes O'Connor's jurisprudence, arguing that it contains feminine characteristics, most notably contextualism. See id. at 592-613. O'Connor's jurisprudence, on the whole, does reveal feminine, communal aspects. Focusing solely on unenumerated fundamental rights, however, O'Connor's theory may drive her decision more than communal aspects. Constitutional theory better explains her apparent shift on abortion and other individual rights than does feminist theory.


234. Originalism is a conservative theory in the way it limits interpretation of the Constitution to the text and original intent.

Black, Scalia adopted a conservative theory. Also like Black, Scalia is activist in the way he attacks precedent. Despite their contrasting political ideologies, these similarities intimate how Scalia may treat future fundamental rights issues.

2. Justices O'Connor and Harlan

Justice O'Connor's stance parallels Justice Harlan's position in his ongoing debate with Justice Black over substantive due process. Though Harlan adopted a theory based on general principles, he is a legendary political conservative. O'Connor has explicitly adopted Harlan's principled approach toward protecting fundamental rights through the Due Process Clause. Also, like Harlan, she is traditionally known as a political conservative.

The importance of this comparison is in its predictive value—it indicates how Justice O'Connor may apply her principled theory. The fundamental rights theory allows judges to use their own principles in interpreting the Constitution. Thus, judges can reach both liberal and conservative results, depending on their personal philosophy. Justice Harlan used this theory to support politically conservative conclusions. Likewise O'Connor, because she holds conservative principles, will likely use the principled theory of fundamental rights, normally associated with liberal causes, to reach politically conservative results. This conclusion was illustrated when, despite recognizing the fundamental right to abortion in Casey, the joint opinion upheld several politically conservative restrictions upon the fundamental right. Placing these restrictions indicates that, even if she recognizes other fundamental rights, she may allow conservative restrictions to stand.

B. Counter-Revolutionary Conservative v. Preservative Conservative

The most important difference between Justices Scalia and O'Connor is their contrasting attitudes toward precedent and the application of

236. See Boling, supra note 67, at 1197-99.
240. See Cordray & Vradelis, supra note 161, at 458.
241. See, e.g., Poe v. Ullman, 367 U.S. 497, 552-53 (1961) (Harlan, J., dissenting) (claiming that a state can properly prohibit homosexuality, "however privately practiced").
242. See Casey, 112 S. Ct. at 2804.
243. See id. at 2822, 2826, 2832.
244. For this formulation I thank Professor James E. Fleming, Fordham University School of Law.
their theories. While Scalia, like Justice Black, aggressively tries to revamp the case law to reflect his originalist theory, O'Connor often subordinates her theory to *stare decisis*. Scalia ignores precedent to further his goal of reversing the "Warren Court revolution"245 and past substantive due process decisions.246 O'Connor, though maintaining her conservative views, judges within the framework her predecessors established; her goal is to reach conservative results, but not at the expense of precedent. These differing attitudes toward *stare decisis* suggest how they will apply their theories in future cases.

1. Justice Scalia the Counter-Revolutionary

Describing Justice Scalia as a counter-revolutionary Justice seems contrary to his originalist philosophy. How can he be counter-revolutionary when he bases his theory on historical practices? The answer is that Scalia consistently attacks established law, attempting to implement his originalist objectives. While he respects the history that state statutes and the Constitution created, precedent is history that is framed merely by another judge, thereby not worthy of the same respect.247 The term counter-revolutionary, then, describes his attitude toward precedent which he interprets as revolting against originalism. While it is true that his theory relies on history, prior decisions are not the positivistic history to which he refers. Scalia's relevant history is embodied in the text of the Constitution or state law, so he reverses precedent to reach his originalist goal of limiting rights to these positivistic traditions.

Though Justice Scalia attacks precedent in several fields,248 his counter-revolutionary attitude may be strongest in the substantive due process area. This area is particularly anathema to Scalia because the rights involved do not derive from an explicit law of rules.249 He is not content to rule within the judicial framework established in past

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245. The "Warren revolution" is the judicial activism and liberal decision-making that occurred during Earl Warren's tenure as Chief Justice. Ironically, the case that most concerns current conservative Justices, Roe v. Wade, 410 U.S. 113 (1973), was decided by the Burger Court.


249. See Michael H. v. Gerald D., 491 U.S. 110, 128 n.6 (1989), for evidence of Scalia's desire for a solid law of rules as opposed to balancing tests.
unenumerated fundamental rights cases. Therefore, he uses his theory to attack precedents as wrongly decided.

During his confirmation hearings, Justice Scalia hinted at his eagerness to correct precedent that he thought wrong. Discussing his view of precedent, Scalia revealed that his decision whether to overrule precedent would be based in part on how woven the “mistake” was into the fabric of the law. A key factor in making this determination would be how long the precedent has existed. For example, he noted that almost no revelation could induce him to overrule Marbury v. Madison, but he would be more willing to overrule a less established case, such as Roe v. Wade. While one would expect a nominee to show the utmost respect for past Court decisions, Scalia was rather bold in distinguishing precedents he would respect from those he would overrule. Though he claimed not to have his “mind made up either way,” it appears that he had.

Justice Scalia’s attitude toward precedent while on the Court confirms these observations. He has aggressively attempted to alter the law by weaving his theory into opinions wherever possible. Webster best displayed this aggressiveness. There, Justice O’Connor refused to overrule expressly Roe because the statute did not directly contradict that holding. Attempting to seize the opportunity, Scalia mocked the majority’s concurrence for avoiding the issue. Scalia did not have the patience to wait for the proper case to attack a precedent with which he disagreed. Rather, he urged the Court to deal with the underlying issue to clarify the law. This urgency to paint the law with broad originalist strokes exemplifies his counter-revolutionary style of adjudication.

2. Justice O’Connor as Preservative Conservative

Unlike Justice Scalia, Justice O’Connor has abided by the long-standing doctrine of stare decisis without compromising her values.

250. Scalia Hearings, supra note 67, at 132.
251. 5 U.S. (1 Cranch) 137 (1803).
252. 410 U.S. 113 (1973); see Scalia Hearings, supra note 67, at 132.
253. See Scalia Hearings, supra note 67, at 131-32, 139.
254. Id. at 132.
256. See Webster, 492 U.S. at 532 (Scalia, J., concurring) (stating that O’Connor’s assertion “cannot be taken seriously”).
257. Some commentators supported Scalia’s approach, despite the fact that it seems to contradict the valid judicial policy, stated by O’Connor, that the Court should resolve disputes in the narrowest terms possible. See Bopp & Coleson, supra note 90, at 272; Crain, supra note 192, at 295-96.
O'Connor's theory works within the system, instead of attacking it. Even while espousing originalist theory, she did not aggressively apply it. For example, in Akron, she did not argue that the Court should overrule Roe. Instead, she simply noted that her theory could not support a portion of the decision, the trimester framework.\(^{258}\) Despite showing her most fervent support of originalism, she stopped short of outright dismissal of Roe that Scalia surely would have supported. Webster is another example of her preservative nature; she refused to analyze the statute involved on constitutional grounds when it was not necessary.\(^{259}\)

This support for precedent culminated in Casey, where she squarely upheld the essential holding of Roe.\(^{260}\) She did this despite discarding the trimester framework\(^ {261}\) and allowing several limitations on the fundamental right to abortion.\(^ {262}\) Thus, regardless of O'Connor's possible theoretical shift, she carefully used precedent to support her position.

Further displaying a preservative attitude toward precedent, Justice O'Connor rarely addresses theory by itself; she carefully grounds each belief in a prior opinion.\(^ {263}\) O'Connor's goal is to reach her conservative objectives while simultaneously preserving prior Court decisions.

These competing attitudes toward precedent will affect how these Justices rule in future fundamental rights cases. Applying his counter-revolutionary style, Justice Scalia will ignore or distinguish precedent that inhibits his goals of originalism. He is determined to remove the Court's influence from unenumerated fundamental rights issues. Conversely, Justice O'Connor will preserve precedent. Though she will generally follow her conservative roots, she will uphold prior decisions in reaching her conclusions. Thus, although they have similar political goals, they have conflicting approaches to achieving them.

### C. Balancing versus Law of Rules

Another difference between the Justices that suggests how they may rule on fundamental rights issues is found in their divergent analytical styles in particular cases. While Justice O'Connor prefers a balancing approach,\(^ {264}\) Justice Scalia demands that the Court establish a law of

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\(^{259}\) See Webster, 492 U.S. at 525-26 (O'Connor, J., concurring).


\(^{261}\) See id. at 2818.

\(^{262}\) See id. at 2822, 2826, 2832 (medical emergency definition, informed consent requirement, parental notification).


1. Justice Scalia's Law of Rules

Unlike Justice O'Connor, Justice Scalia believes that there are several reasons for the Court to reject a balancing approach for a law of rules. First, Justices must give the appearance of equal treatment. The best way to accomplish this goal is to establish general rules that can be applied in many situations. Second, a law of rules serves the goals of uniformity and predictability. Reaching uniform decisions creates an appearance of justice and fairness in Court decisions. Third, uniform decisions allow people to predict how the Court will rule, enabling people to adapt their behavior accordingly. Balancing cannot achieve either of these two goals. Fourth, the law of rules approach may give judges the courage to protect individual liberties. Scalia reasons that judges may have to confront a majority when protecting rights, such as the rights of criminal defendants. The existence of an established rule can embolden the judge, supporting his decision to protect unpopular rights. Finally, the rule approach avoids judge-made law. As discussed, judge-made law is anathema to Scalia. He carefully forms his jurisprudence to avoid this insupportable occurrence. General rules inhibit judges from arbitrarily creating new rights. Conversely, balancing allows judges to rule haphazardly, relying on personal predilection.

Justice Scalia's scorn for balancing is consistent with his constitutional theory and intimates how he will rule in fundamental rights cases. He will not recognize rights that are not enumerated in the Constitution, no matter what the merits of the individual case. Originalism is Scalia's law of rules for analyzing unenumerated fundamental rights.

2. Justice O'Connor's Balancing

Opposing Justice Scalia's law of rules approach, Justice O'Connor primarily has favored a balancing approach, deciding cases on their individual merits rather than with hard and fast rules. Though traditionally balancing usually resulted in a finding against rights, this is not neces-

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266. See id. at 1178.
267. See id. at 1179.
268. See id. at 1179-80.
269. See id. at 1180. Scalia is not referring to unenumerated rights.
270. See id. at 1179.
271. See id. at 1179-80.
272. See Sherry, supra note 188, at 604. For a case example of O'Connor rejecting a law of rules approach in favor of balancing, see Employment Div., Dep't of Human Resources v. Smith, 494 U.S. 872, 892 (1990) (O'Connor, J., concurring) (rejecting the majority's use of a "single categorical rule" in interpreting free exercise precedents).
According to Kathleen Sullivan, a given Justice's substantive political theory will affect how the Justice uses balancing. A liberal political theory will balance and find in favor of individual rights, while a conservative political theory will balance and deny individual rights.

Before *Casey*, because Justice O'Connor's political and constitutional theories were conservative, it followed that she used her balancing approach mostly to deny rights. Her possible adoption of a principled constitutional theory may confuse her jurisprudence. By adopting and refining the undue burden standard, O'Connor remained a balancer in *Casey*. Her recognition of a fundamental right to abortion, however, suggests that she may balance in favor of rights in the future. Applying her balancing approach, O'Connor will likely allow limits on constitutional rights derived from the Due Process Clause. Her possible shift will depend on the fundamental right involved. Instead of ignoring the underlying right, as she did in *Akron*, she may recognize the right and allow only limited restrictions, as she arguably did in *Casey*. Her theory, then, affects her jurisprudence in the substantive due process area by increasing the possibility that she will recognize underlying individual rights.

Thus, while Justice Scalia's law of rules approach will lead him uniformly to deny unenumerated fundamental rights, Justice O'Connor's balancing enables her to find rights, at least in part.

D. Application

Applying these distinctions to pending unenumerated fundamental rights cases provides context for the Justices' competing theories and their implications for future decisions. Recent abortion rulings and potential homosexual rights cases provide the examples for this discussion.

1. The Abortion Issue

In a recently decided case, *Bray v. Alexandria Women's Health Clinic*, the Court held that Federal judges cannot use the Civil Rights Act of 1871, also known as the Ku Klux Klan Act, to prohibit protestors from blocking abortion clinics. Justice Scalia wrote the majority opinion, while Justice O'Connor was one of three dissenters.

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While the case focused on an equal protection question—whether opposition to abortion in effect discriminates against women—Scalia briefly discussed the right to abortion. A proper section 1985(3) action bars conspiracies that deprive rights which are protected against both private and public interference. While the Court has stated that the right to travel is such a right, Scalia argues that the right to abortion is not. Deriving either from a general right to privacy or as a protected liberty in the Due Process Clause of the Fourteenth Amendment, the right to abortion is "obviously not protected against private infringement."

Justice O'Connor did not use this case as an opportunity to discuss her abortion theory. In fact, she explicitly stated that "[t]his case is not about abortion." Some thought it possible that since O'Connor banned the government from depriving women of the fundamental right to abortion, then she may also ban private parties from denying the same right. Instead, she ruled on an equal protection basis, claiming women were an affected class.

O'Connor's lasting view on abortion may have been revealed, however, when she voted with the majority in denying certiorari for a case that involved a stringent abortion statute. This act implies that O'Connor will keep her fundamental rights theory intact, at least for abortion.

2. Homosexual Rights

Aside from abortion, homosexual rights is another unenumerated fundamental right that is receiving public attention. In light of recent legislation against homosexuals, the Court is likely to hear a homosexual rights case soon. The current theories of Justices Scalia and O'Connor hint at the likely outcome of such a case.

The Court has issued a written opinion once before on whether a fundamental right to homosexual sodomy exists. In Bowers, the Court

279. See Bray, 1993 WL 3819, at * 5.
280. See id. at *7.
283. Id.
284. Id. at *43.
286. See Bray, 1993 WL 3819, at *40.
288. The November 1992 election included two states, Oregon and Colorado, that had ordinances that dealt with homosexuality on the ballot. The Oregon ordinance, which was more explicitly anti-homosexual, failed to pass. In Colorado, Amendment 2, which repealed laws in Aspen, Denver, and Boulder that prohibited discrimination to homosexuals, passed. Gay rights activists have sued the state, challenging the amendment's constitutionality. See Court Challenge Begins on Colorado Anti-Gay Referendum, Reuters, Jan. 11, 1993, available in LEXIS, Nexis Library, Wires File. Gay rights groups feel that Amendment 2's passage may spur similar voter initiatives in other states. See id.
rejected its existence as a fundamental right, thereby upholding a Georgia statute that criminalized consensual sodomy.\textsuperscript{290} In reaching its decision, the Court applied originalist logic, claiming that neither the text of the Constitution, nor our nation's historical practices regarding homosexual sodomy, permit a finding of such a fundamental right derived from the Due Process Clause.\textsuperscript{291} The Court recognized past substantive due process decisions\textsuperscript{292} but rejected any extension from those precedents.\textsuperscript{293} Though Scalia was not on the \textit{Bowers} Court, it is clear how he would vote if the Court revisits the issue. Although O'Connor was a member of the \textit{Bowers} majority, she may analyze a similar case differently today.

Justice Scalia's originalist theory would lead him to reject a fundamental right to homosexual association or homosexual sodomy. Viewing tradition as historical practices, Scalia would argue that a specific identifiable tradition exists in regard to homosexuality; namely, states outlawed it throughout the eighteenth, nineteenth, and twentieth centuries. Therefore, Scalia would not derive such a right from the Due Process Clause. Critics of Scalia would point to the more recent tradition of states dropping their homosexual sodomy statutes.\textsuperscript{294} Scalia would likely counter that this shift is not a reason to recognize a constitutional right, but is simply the legislative process functioning properly.

Furthermore, Justice Scalia would define the right as narrowly as possible. The right would not be a general right to decisional or spacial privacy.\textsuperscript{295} It would be a right to homosexual association or a right to engage in homosexual sodomy. Narrowing the definition, Scalia could more easily dismiss the potential right.

Justice Scalia's deference to legislatures would further inhibit him from finding a fundamental right to homosexual association. If a state passed a statute that limited homosexual's rights, like the Colorado statute\textsuperscript{296} arguably does, he would uphold it as exclusively within the legislature's power to pass such an act. In a representative democracy, the will of the majority is supreme. As a representative democrat, Scalia will not recognize a constitutional right which invalidates a statute where the right did not historically exist.

Conversely, Justice O'Connor may reach different conclusions if a homosexual association case came to the Court. Though O'Connor joined

\begin{itemize}
\item \textsuperscript{290} See id. at 192.
\item \textsuperscript{291} See id. at 191-93.
\item \textsuperscript{293} See \textit{Bowers}, 478 U.S. at 190-91.
\item \textsuperscript{294} See id. at 193-94.
\item \textsuperscript{295} See id. at 199-200 (Blackmun, J., dissenting).
\item \textsuperscript{296} See supra note 288.
\end{itemize}
the Bowers majority, further reflection is necessary in light of her possible jurisprudential shift. The Bowers majority interpreted the word "tradition" to mean historical practices. In Casey, O'Connor rejects that use of tradition.\textsuperscript{297} She would likely reject tradition's use as historical practices in a homosexual association case as well. Using tradition as a "living thing," O'Connor may recognize a right to homosexual association or homosexual sodomy. Anti-sodomy statutes do not reflect current national principles and our nation's attitude toward homosexuality has certainly changed since the eighteenth and nineteenth centuries.\textsuperscript{298} It is vital to remember, however, that O'Connor remains a political conservative. She adopted her theory from Harlan, and Harlan explicitly rejected recognition of a fundamental right to homosexual association.\textsuperscript{299} Therefore, her notion of a living tradition may be limited to Harlan's boundaries.

On the one hand, recognition of such a right would fit with what may be Justice O'Connor's current view of democracy. A constitutional democrat\textsuperscript{300} would not simply defer to the legislature's judgment, as the Bowers Court did, but would challenge the statute for impinging on a fundamental right. Constitutional democrats are not limited to the text in recognizing fundamental rights.\textsuperscript{301} On the other hand, while she recognized a fundamental right to abortion in Casey,\textsuperscript{302} this does not necessarily mean she would find a right to homosexual association. This does mean that she will not eliminate the possibility simply because no such right is explicitly enumerated in the text. If she has become a constitutional democrat, she may recognize such a right.

Justice O'Connor's preservative attitude toward precedent also causes conflict in determining whether she would recognize a fundamental right to homosexual association. If she defines the right broadly, she could justify it as part of the line of privacy cases.\textsuperscript{303} Conversely, Bowers established a precedent that denied a fundamental right to homosexual sodomy. Applying \textit{stare decisis} strictly, as she did in Casey,\textsuperscript{304} O'Connor may reject the right as failing to meet the factors established in Casey.\textsuperscript{305}

\textsuperscript{298} See Bowers, 478 U.S. at 193-94.
\textsuperscript{300} See supra note 208.
\textsuperscript{301} See Murphy et al., supra note 124, at 29.
\textsuperscript{304} See Casey, 112 S. Ct. at 2808-16.
\textsuperscript{305} In Casey, the joint opinion discussed four factors to consider as part of its \textit{stare decisis} analysis: whether the rule of the past case has been unworkable; whether there has been substantial reliance on the rule; whether the law's growth has caused society to discount the rule; and whether facts have sufficiently changed to leave the rule irrelevant or unjustifiable. See id. at 2809. Applying Bowers to these factors, there has been a lack of societal reliance on that decision. An argument can also be made that, with increased awareness about homosexuality, facts have sufficiently changed to make the Bowers ruling
While Scalia certainly would not recognize a fundamental right to homosexual sodomy, it is difficult to determine which way O'Connor would go when faced with such a decision today.

There are three possible options as to how Justice O'Connor will apply her *Casey* arguments in future fundamental rights cases, such as a homosexual rights case.  

One option is that Justice O'Connor's ruling in *Casey* was strictly illustrative of her preservative conservative nature. Perhaps she did not want to be "the vote" that overruled *Roe*. As the only woman Justice, Justice O'Connor may have been uncomfortable depriving women of the right to abortion. Following this logic, she quoted theoretical language as a fundamental rights theorist only to support her decision, not to adopt the theory as her own. This option would also explain her rigid application of *stare decisis* in *Casey*. Under this scenario, she would reject a fundamental right to homosexual association, and reject a due process challenge to the Colorado statute.

A second option is that Justice O'Connor has adopted Harlan's substantive due process jurisprudence. This theory, however, has a strong politically conservative bias. Harlan explicitly rejected homosexual rights.  

If this is O'Connor's goal, then she would also reject a right to homosexual association and a due process attack to the Colorado statute.  

A final option is that Justice O'Connor has adopted Harlan's jurisprudence, but will apply it with her own guidelines. Much has changed since Harlan wrote in his *Poe* dissent in 1961. It is possible that even he would apply his theory differently today. Adopting this option, Justice O'Connor would likely recognize additional fundamental rights, with limitations. Under this scenario, she may recognize a fundamental right to homosexual association, thereby holding that the Colorado statute violates homosexuals' due process rights.  

Any of the aforementioned options would rationally follow from her *Casey* opinion. Future decisions will reveal which path Justice O'Connor takes.

unjustifiable. However, as a preservative conservative, if O'Connor accepts *Bowers* at all, then she would uphold it.

306. These options assume that O'Connor analyzes such a case under the Due Process Clause of the Fourteenth Amendment. There are other options as to how O'Connor could analyze Colorado's Amendment 2. For example, she could reject a due process argument, thereby upholding *Bowers*, but strike down the ordinance on equal protection grounds, stating that Amendment 2 violates homosexuals right to equal treatment under the law. See U.S. Const. amend. XIV, § 1.

O'Connor's inclination to protect the independent mechanisms of state government may also affect her decision. See Cordray & Vradelis, *supra* note 161, at 423. As the amendment was enacted through an election, and appears to be the will of the majority, O'Connor may simply assert that this is a state issue. Thus, absent a constitutional violation, she would argue that the Court should not interfere. See Washington v. Seattle Sch. Dist. No. 1, 458 U.S. 457, 488 (1982) (Powell, J., dissenting, O'Connor, J., joining).

CONCLUSION

Though Justices Scalia and O'Connor have evolved into competing theoretical camps, their positions on specific issues may not conflict forever. Apparently, by explicitly recognizing the fundamental right to abortion in *Casey*, Justice O'Connor has made a theoretical shift. However, the joint opinion in *Casey* severely curtailed that right by permitting many state restrictions. Her use of the fundamental rights theory in a conservative manner leaves the future murky. It is also unclear how Justice Scalia's aggressive application of his theory, and his attack on precedent will affect the rest of the Court.308

While Justice Scalia will probably forever limit fundamental rights to those explicitly found in the text of the Constitution or the historical practices of our nation, Justice O'Connor's position is unclear. The theory of fundamental rights allows her to interpret the abstract clauses of the Constitution, such as the Due Process Clause, according to principles she recognizes as worthy of constitutional protection. It is likely, however, that she will apply the theory to recognize rights, albeit with limitations. Whatever her decision, this Note has suggested the key factors to watch in interpreting how Justice O'Connor and Justice Scalia reach their conclusions and how these factors are likely to affect future fundamental rights cases.

308. One commentator has compared Justice Scalia's self-aggrandizing attitude to former Justice Frankfurter. *See* Jeffrey Rosen, *The Leader of the Opposition*, New Republic, Jan. 18, 1993, at 20, 27. In noting his own intellectual abilities (Scalia reportedly has asked law clerks "What's a smart guy like me doing in a place like this?" *Id.*), Scalia may be unaware of his displacement as the intellectual leader of the Court. This may isolate him from the rest of the Court, leaving him to disseminate increasingly bitter dissents. *See id.*