

NOTE

FOOTNOTE 6: JUSTICE SCALIA'S ATTEMPT TO IMPOSE A RULE OF LAW ON SUBSTANTIVE DUE PROCESS

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INTRODUCTION

Most commentators agree that the Supreme Court began the modern era of substantive due process with its famous footnote in *United States v. Carolene Products*.¹ Since *Carolene Products*, the Court has struggled to define the limits of modern substantive due process. Perhaps the most comprehensive attempt to define those limits occurred recently—again in a footnote—in *Michael H. v. Gerald D.*² In footnote 6 of *Michael H.*, Justice Scalia proposed a new test for substantive due process. In essence, Justice Scalia said that to decide whether a right is fundamental (and thus protected), courts should focus on the most specific level of tradition that can be identified.³

This Note does not address the normative legitimacy of substantive due process; it takes as given the Court's continued acceptance of substantive due process doctrine at least for the

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1. 304 U.S. 144, 152 n.4 (1938). See, e.g., Powell, *Carolene Products Revisited*, 82 COLUM. L. REV. 1087 (1982); Lusky, *Footnote Redux: A Carolene Products Reminiscence*, 82 COLUM. L. REV. 1093 (1982).

2. 491 U.S. 110 (1989).

3. See *Michael H.*, 491 U.S. at 127 n.6. Chief Justice Rehnquist joined Justice Scalia's plurality opinion in full. Justices O'Connor and Kennedy also joined Justice Scalia's opinion but refused to join in footnote 6, because of fears that its test is too rigid and possibly inconsistent with precedent.

Because they agreed with the application of the most specific tradition approach in *Michael H.*, Justices O'Connor and Kennedy apparently agree that the most specific tradition should at least be considered in substantive due process analysis. Justice Stevens does not seem to agree, however. He concurred on separate grounds to provide the fifth vote in *Michael H.* See *id.* at 132-36 (Stevens, J., concurring in judgment). Justice Souter, who was not yet on the Court when *Michael H.* was decided, seemed to agree with Justices O'Connor and Kennedy when questioned about the matter during his confirmation hearings. See *Nomination of David Souter to Be Associate Justice of the Supreme Court of the United States: Hearings Before the Senate Comm. on the Judiciary*, 101st Cong., 2d Sess. (1990). At this writing, the views of the justice who will replace Justice Marshall are unknown.

foreseeable future.⁴ Instead, the Note argues that Justice Scalia's formula will provide a discernable, constraining standard for evaluating substantive due process claims that the Court's emerging conservative majority has thus far lacked. Scalia's approach, while not overly rigid,⁵ is sufficiently binding so as to make substantive due process compatible with the rule of law.

The Note begins with a brief history of substantive due process. Part II discusses the holding in *Michael H.* and outlines the approach to substantive due process that Justice Scalia proposed in footnote 6. Part III addresses some theoretical issues that footnote 6 leaves unresolved, responds to some criticisms of Justice Scalia's approach, and discusses the use of the doctrine of equal protection to address many of the wrongs raised in substantive due process cases.

I. HISTORY OF SUBSTANTIVE DUE PROCESS

Although the Supreme Court in its early years occasionally invoked "natural law,"⁶ it never considered whether the Due Process Clause of either the Fifth or Fourteenth Amendment has substantive content until the *Slaughter-House Cases*⁷ in 1873. There, the Court refused to use the Privileges or Immunities Clause of the Fourteenth Amendment⁸ as a guarantor of common-law rights and dismissed, with little discussion, the concept of substantive due process.⁹

By the turn of the century, the Court's attitude had changed. It decided that the Due Process Clause of the Fourteenth

4. See R. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 240 (1990).

5. As will be shown below, Justice Scalia's approach is not inflexible, thus allaying the concerns of Justices O'Connor and Kennedy. See *supra* note 3. In fact, the approach has been criticized as being too open-ended or indeterminate, allowing the Court to assume "illegitimate power." See R. BORK, *supra* note 4, at 236-40. Bork is alleged to have inscribed Justice Scalia's copy of *The Tempting of America*, "Nino, tighten footnote 6."

6. See *Terrett v. Taylor*, 13 U.S. (9 Cranch) 43 (1815); *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87 (1810); *Calder v. Bull*, 3 U.S. (3 Dall.) 386 (1798). See generally Ely, *The Supreme Court, 1977 Term—Foreword: On Discovering Fundamental Values*, 92 HARV. L. REV. 5, 22 (1978) (pointing out that at the time of the drafting of the original United States Constitution and of the Fourteenth Amendment, there were many who believed that such natural law principles existed).

7. 83 U.S. (16 Wall.) 36 (1873).

8. U.S. CONST. amend. XIV, § 1 ("No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States . . .").

9. See *Slaughter-House Cases*, 83 U.S. (16 Wall.) at 80-81.

Amendment does have substantive content, at least where economic rights are at stake.¹⁰ This era cast the conservatives as judicial activists, striking down laws that protected workers because they were said to infringe on economic liberty.¹¹ Progressive critics at the time, however, debated the wisdom of the economic theories the Court had adopted,¹² rather than focusing on the then-novel use of the Due Process Clause to enforce those rights.¹³

The era of economic substantive due process lasted until 1937.¹⁴ When the Court renounced economic substantive due process, many of the justices wanted to retain the use of substantive due process for civil liberties.¹⁵ This concern led to the *Carolene Products* footnote.¹⁶

10. See, e.g., *Allgeyer v. Louisiana*, 165 U.S. 578 (1897). The most famous of these cases is *Lochner v. New York*, 198 U.S. 45 (1905).

11. See L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 8-4 (2d ed. 1988) (collecting cases).

12. See, e.g., Powell, *The Judiciality of Minimum Wage Legislation*, 37 HARV. L. REV. 545, 572 (1924).

13. See Cohen, *The Basis of Contract*, 46 HARV. L. REV. 553 (1933); Llewellyn, *The Constitution as an Institution*, 34 COLUM. L. REV. 1 (1934). This understanding of the debate during the *Lochner* era is undoubtedly correct. See *Moore v. East Cleveland*, 431 U.S. 494, 541 (1977) (White, J., dissenting); *Poe v. Ullman*, 367 U.S. 497, 517 (1961) (Douglas, J., dissenting). Nevertheless, the *Lochner* era forever became synonymous with substantive due process. See Craven, *Personhood: The Right to be Let Alone*, 1976 DUKE L.J. 699, 700 n.4.

14. See *Lincoln Fed. Labor Union v. Northwestern Iron & Metal Co.*, 335 U.S. 525 (1949) (explicitly repudiating economic substantive due process); *West Coast Hotel v. Parrish*, 300 U.S. 379 (1937) (implicitly abandoning economic substantive due process).

15. Indeed, the two major substantive due process cases of the *Lochner* era that have survived dealt with personal rather than economic liberties. See *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) (a state may not prevent parents from sending their children to private schools); *Meyer v. Nebraska*, 262 U.S. 390 (1923) (a state may not restrict parents' rights to teach their children a language other than English).

16. See Lusky, *supra* note 1, at 1095. Footnote 4 states in relevant part:

There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth. . . .

It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation. . . .

Nor need we enquire whether similar considerations enter into the review of statutes directed at particular religious . . . or national . . . or racial minorities . . . : whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.

United States v. Carolene Products, 304 U.S. 144, 152 n.4 (1938). The footnote was

Even if civil liberties were to be accorded special protection, as *Carolene Products* suggested, there remained the question of which civil liberties would be protected, and to what extent. In the *Carolene Products* era, the Court was divided on that question. For instance, Justice Black believed that civil rights needed protection, but he feared allowing the Court to make unguided value judgments.¹⁷ One commentator has stated that his fear sprang from the Court's virulent opposition to President Roosevelt's economic program.¹⁸ Therefore, Justice Black favored merely incorporating the Bill of Rights, making it both the ceiling and the floor of substantive due process.¹⁹

The Court's majority during that period preferred a less clear-cut definition of substantive due process, declaring that it would protect "principle[s] of justice so rooted in the tradition and conscience of our people as to be ranked as fundamental" and thus "implicit in the concept of ordered liberty."²⁰ In application, this definition sometimes protected fewer liberties than Justice Black's definition would have.²¹

Justices Murphy and Rutledge took yet a third view. They believed that the Bill of Rights sets a minimum standard for due process.²² Under this view, the Bill of Rights is seen as the floor, but not the ceiling, of substantive due process. Although full incorporation has not occurred, the law as it stands today is probably closest to the views of these two justices.²³

The tension among these three viewpoints persisted through the 1960s, as the Court incorporated most of the Bill of Rights. Until that time, the Court had never explicitly addressed

intended as a proposal rather than a formulated doctrine. As the text of the footnote indicates, it contains two divergent theories. One theory leads to the conclusion that the rights of process and the rights of "discrete and insular minorities" should be given special attention in reviewing laws, apparently resting on an equal protection theory. See J. ELY, *DEMOCRACY AND DISTRUST* 135-37 (1980). The other theory is that rights that are similar to those in the Constitution should be protected.

17. See Lusky, *supra* note 1, at 1097 (discussing Justice Black's refusal to join the footnote in *Carolene Products*).

18. See *id.*

19. See *Adamson v. California*, 332 U.S. 46, 74-75 (1947) (Black, J., dissenting). Justice Black never veered from this view of due process. See *Griswold v. Connecticut*, 381 U.S. 479, 507 (1965) (Black, J., dissenting).

20. *Palko v. Connecticut*, 302 U.S. 319, 325 (1937) (Cardozo, J.). See also *Adamson*, 332 U.S. at 60 (Frankfurter, J., concurring).

21. See, e.g., *Adamson*, 332 U.S. 46 (state action violated Bill of Rights but not Due Process Clause).

22. See *id.* at 124 (Murphy, J., dissenting).

23. See L. TRIBE, *supra* note 11, § 11-2, at 772, 773 (collecting cases showing the nearly complete incorporation of Bill of Rights).

whether due process provides constitutional protections beyond those explicitly provided in the Bill of Rights.²⁴ Finally, in *Griswold v. Connecticut*,²⁵ the Court explicitly recognized rights beyond the Bill of Rights. Although Justice Douglas's *Griswold* opinion attempts to avoid substantive due process, both commentators and the Court itself have ultimately seen *Griswold* as a substantive due process decision.²⁶ The first Court opinion openly to extend substantive due process beyond the Bill of Rights was *Roe v. Wade*.²⁷ Since *Roe*, the Court has continued to expand the use of substantive due process to new areas, including fathers' rights,²⁸ contraceptives,²⁹ and marriage of prisoners.³⁰

The expansion of substantive due process during the Warren and Burger Courts evoked criticism from conservative and moderate legal scholars.³¹ These critics face a difficult and complex task, however, because many of the substantive due process decisions reached popular results and have become entrenched by *stare decisis*. Certainly, the academic debate over the legitimacy of substantive due process continues,³² but the Court and society have marched onward, apparently accepting the doctrine. It is in this context that Justice Scalia formulated a new tool for judicial restraint in substantive due process cases.

24. *But see* *Ferguson v. Skrupa*, 372 U.S. 726 (1962) (indicating that substantive due process does not extend beyond Bill of Rights).

25. 381 U.S. 479 (1965).

26. *See* *Moore v. East Cleveland*, 431 U.S. 494, 503 (1977); Lupu, *Untangling the Strands of the Fourteenth Amendment*, 77 MICH. L. REV. 981, 994 (1979).

27. 410 U.S. 113 (1973).

28. *See* *Stanley v. Illinois*, 405 U.S. 645 (1972).

29. *See* *Carey v. Reproductive Health Servs.*, 431 U.S. 678 (1977).

30. *See* *Turner v. Safley*, 482 U.S. 78 (1987). *See also* *Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747 (1986) (abortion); *Moore*, 431 U.S. 494 (family rights); *Ingraham v. Wright*, 430 U.S. 651 (1977) (corporal punishment in schools); *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52 (1976) (abortion).

31. *See, e.g.*, R. BORK, *supra* note 4; Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971); Christie, *A Model of Judicial Review of Legislation*, 48 S. CAL. L. REV. 1306 (1975); Easterbrook, *Legal Interpretation and the Power of the Judiciary*, 7 HARV. J.L. & PUB. POL'Y 87 (1984); Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920 (1973); McConnell, *The Role of Democratic Politics in Transforming Moral Convictions into Law* (Book Review), 98 YALE L.J. 1501, 1524 (1989). These criticisms come from a wide variety of perspectives.

32. *Compare* sources cited *supra* note 31 (academic criticism of substantive due process) with, *e.g.*, Chemerinsky, *The Supreme Court, 1988 Term—Foreword: The Vanishing Constitution*, 103 HARV. L. REV. 43, 91 (1989) (criticizing each strand of constraints on substantive due process); Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U.L. REV. 204 (1980) [hereinafter Brest]; Brest, *The Fundamental Rights Controversy: The Essential Contradictions of Normative Constitutional Scholarship*, 90 YALE L.J. 1063, 1089 (1981) [hereinafter *Fundamental Rights*].

II. A NEW ERA FOR SUBSTANTIVE DUE PROCESS?

A. *The Michael H. Decision*

In *Michael H.*, the Court confronted a complex claim of parental rights. The plaintiff, Michael H., claimed to be the biological father of Victoria D., and sought to be declared her legal father and ultimately to be awarded visitation rights.³³ Victoria's mother, Carole, however, was married to Gerald D., and Victoria's birth certificate lists Gerald as her father. At various times after Victoria's birth, Gerald and Carole were separated. During some of these separations Carole and Victoria lived with Michael. Carole and Gerald eventually reconciled and refused Michael's requests for visitation rights.

In response, Michael filed an action to establish his paternity and visitation rights. Although blood test showed a ninety-eight percent probability that Michael is Victoria's father, California's evidence law conclusively presumes that the husband of a child's mother is its father, provided the husband and wife are cohabiting and the husband is not impotent.³⁴ This presumption can only be rebutted by the husband or the wife.³⁵ Accordingly, the California courts dismissed Michael's suit.³⁶

A divided Supreme Court affirmed. Justice Scalia wrote the plurality opinion, in which only Justice Rehnquist fully joined.³⁷ In doing so, he both dismissed Michael's claims and announced a new rule of law establishing the manner in which fundamental rights are defined.³⁸ In dismissing Michael's substantive due process claim, Justice Scalia found it dispositive that there was no evidence that "the relationship between persons in the situation of Michael and Victoria has been treated

33. See *Michael H. v. Gerald D.*, 491 U.S. 110, 114 (1989). The facts are drawn from the Court's opinion, see *id.* at 113-15.

34. See CAL. EVID. CODE § 621 (West Supp. 1989).

35. See *id.*

36. Victoria, via a guardian *ad litem*, joined Michael's action requesting visitation, asserting the same claim and an equal protection claim. See *Michael H.*, 491 U.S. at 130-31. The state trial court rejected the claim that the evidence law violates the United States Constitution; the California Court of Appeals affirmed. See *Michael H. v. Gerald D.*, 191 Cal. App. 3d 995, 236 Cal. Rptr. 810 (Cal. Ct. App. 1987). The California Supreme Court denied petition for review on July 30, 1987. See *Michael H.*, 491 U.S. at 115.

37. The plurality included Justice Scalia, Chief Justice Rehnquist, Justice O'Connor, and Justice Kennedy. Justices O'Connor and Kennedy concurred in all of the opinion except the disputed footnote 6. Justice Stevens concurred only in the judgment.

38. Justice Scalia quickly dismissed the procedural due process claim, insisting that Section 621 is really a substantive rule. See *Michael H.*, 491 U.S. at 119.

as a protected family unit under the historic practices of our society.”³⁹ Indeed, he found just the opposite to be true.⁴⁰

More importantly, Justice Scalia outlined a rule of law for determining which historical practices and beliefs the Court should consider in due process analysis. He argued that the Court should examine the most specific level at which a relevant tradition can be identified protecting or denying protection to the asserted right.⁴¹

Justices O’Connor and Kennedy agreed with Justice Scalia’s analysis almost entirely. Most importantly, they agreed with his characterization of the issues in footnote 4,⁴² his use of tradition, and his *application* of the footnote 6 theory. They objected only to footnote 6 as a general rule of law for deciding substantive due process claims. Justice O’Connor wrote that Justice Scalia’s rule “may be somewhat inconsistent with our past decisions in this area,”⁴³ and argued that prior decisions had not

39. *Id.* at 124.

40. *See id.* Justice Scalia also rejected Victoria’s claims of a liberty interest in maintaining a relationship with her father, observing that there is no historical right to maintain a relationship with two fathers. *See id.* at 131. He refused her equal protection claims because this law meets the rational relationship test and does not discriminate against a suspect class. *See id.*

41. *See id.* at 127 n.6. The footnote, which is lengthy, states in part:

Justice Brennan criticizes our methodology in using historical traditions specifically relating to the rights of an adulterous natural father, rather than inquiring more generally “whether parenthood is an interest that historically received our attention and protection.” . . .

We do not understand why, having rejected our focus upon the societal tradition regarding the natural father’s rights vis-à-vis a child whose mother is married to another man, Justice Brennan would choose to focus instead upon “parenthood.” Why should the relevant category not be even more general—perhaps “family relationships”; or “personal relationships”; or even “emotional attachments in general”? Though the dissent has no basis for the level of generality it would select, we do: We refer to the most specific level at which a relevant tradition protecting, or denying protection to, the asserted right can be identified. If, for example, there were no societal tradition, either way, regarding the rights of the natural father of a child adulterously conceived, we would have to consult, and (if possible) reason from, the traditions regarding natural fathers in general. But there is a more specific tradition, and it unqualifiedly denies protection to such a parent.

. . . The need, if arbitrary decisionmaking is to be avoided, to adopt the most specific tradition as the point of reference . . . is well enough exemplified by the fact that in the present case Justice Brennan’s opinion and Justice O’Connor’s opinion . . . *both* appeal to tradition, but on the basis of the tradition they select reach opposite results. Although assuredly having the virtue (if it be that) of leaving judges free to decide as they think best when the unanticipated occurs, a rule of law that binds neither by text nor by any particular, identifiable tradition is no rule of law at all.

Id. (emphasis in original).

42. *See infra* note 68.

43. *Michael H.*, 491 U.S. at 132 (O’Connor, J., concurring in part and concurring in

necessarily characterized the issue at the most specific level in every case.⁴⁴

Justice Brennan dissented.⁴⁵ He spent most of his opinion passionately denouncing Justice Scalia's footnote 6. Justice Brennan did not present an alternative theory but instead emphasized that the Constitution should not become a "stagnant, archaic, hidebound document steeped in the prejudices and superstitions of a time long past."⁴⁶ Justice Brennan argued that the Due Process Clause's protection of liberty was "purposely left to gather meaning from experience."⁴⁷ He contended that liberty "must include the freedom not to conform," and that defining protected liberties by reference to tradition "squashes this freedom by requiring specific approval from history before protecting anything in the name of liberty."⁴⁸

More specifically, Justice Brennan argued that reasonable people can disagree about the content of traditions. He asserted that if a right has been traditionally protected by society, there is no need for the Supreme Court to protect it.⁴⁹ To prove his point that footnote 6 was a significant departure from precedent, Justice Brennan cited prior cases that he claimed would have come out differently under this rule of law.⁵⁰ Justice Brennan claimed that the Court should protect Michael's relationship with Victoria because the Court has determined that "certain interests and practices," including marriage, childbearing, and childrearing, "form the core of our definition of liberty."⁵¹ Because Michael's interest was thought "suffi-

judgment) (citing *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Griswold v. Connecticut*, 381 U.S. 479 (1965)).

44. *See id.* (O'Connor, J., concurring in part and concurring in judgment) (citing *United States v. Stanley*, 483 U.S. 669, 709 (1987) (O'Connor, J., concurring in part and dissenting in part); *Turner v. Safley*, 482 U.S. 78, 94 (1987); *Loving v. Virginia*, 388 U.S. 1, 12 (1967)).

45. Justices Marshall and Blackmun joined in Justice Brennan's dissent.

46. *Michael H.*, 491 U.S. at 141 (Brennan, J., dissenting).

47. *Id.* at 138 (Brennan, J., dissenting) (quoting *National Ins. Co. v. Tidewater Co.*, 337 U.S. 582, 646 (1949) (Frankfurter, J., dissenting)).

48. *Id.* (Brennan, J., dissenting).

49. *See id.* at 140-41 (Brennan, J., dissenting).

50. *See id.* at 139 (Brennan, J., dissenting) (citing *Vitek v. Jones*, 445 U.S. 480 (1980) (freedom from arbitrary transfer from a prison to a psychiatric facility); *Ingraham v. Wright*, 430 U.S. 651 (1977) (freedom from corporal punishment in schools); *Stanley v. Illinois*, 405 U.S. 645 (1972) (right to raise one's natural but illegitimate children); *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (use of contraceptives by unmarried couples); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (use of contraceptives by married couples)).

51. *Id.* (Brennan, J., dissenting).

ciently substantial to qualify as a liberty interest under . . . prior cases,"⁵² Justice Brennan would have found a liberty interest in Michael's relationship with Victoria.

A headcount of the justices does not make clear whether the views of *either* Justice Brennan or Justice Scalia, or some third view, will ultimately prevail in this debate. It is doubtful that a majority of the Court would agree with Justice Brennan's conclusion that the purpose of the Due Process Clause is to protect nonconforming acts or groups.⁵³ On the other hand, only one other justice (Chief Justice Rehnquist) has expressly endorsed Justice Scalia's theory of fundamental rights, though two others (Justices O'Connor and Kennedy) support the *application* of his theory in at least some cases. At the very least, Justice Scalia has the support of the majority of the present Court for the use of *tradition* in the aid of defining substantive due process.⁵⁴

B. *Justice Scalia's Approach*

Justice Scalia takes three steps in his quest to place a limit on substantive due process. First, he concedes the existence of the concept of substantive due process. Second, he emphasizes the Court's repeated use of tradition in substantive due process jurisprudence and in constitutional interpretation generally. Finally, he argues that the Court should use only the most specific level of tradition it can identify in order to determine whether a particular right or liberty is to be protected.

1. *Conceding the Existence of Substantive Due Process*

By accepting that substantive due process represents current legal doctrine, Justice Scalia loses nothing. It is clear that the advocates of judicial restraint, at least for now, have lost the debate over the existence of substantive due process.⁵⁵ Perhaps

52. *Id.* at 142 (Brennan, J., dissenting).

53. Justice White dissented on different grounds and did not comment on footnote 6. He has repeatedly voiced hesitancy about the use of substantive due process, meaning that the number of present justices holding Justice Brennan's views is *at most* four (even counting soon-to-depart Justice Marshall and assuming that Justice Souter shares Justice Brennan's views). See *Bowers v. Hardwick*, 478 U.S. 186 (1986); *Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747, 785 (1986) (White, J., dissenting); *Doe v. Bolton*, 410 U.S. 179, 221 (1973) (White, J., dissenting) (companion case to *Roe v. Wade*, 410 U.S. 113 (1973)).

54. See *infra* note 59.

55. *But see Moore v. East Cleveland*, 431 U.S. 494, 543 (1977) (White, J., dissenting); R. BORK, *supra* note 4, at 240.

the *Michael H.* case itself is the best example of that defeat. Justices O'Connor and Kennedy were hesitant even to limit the doctrine's flexibility, much less abolish it altogether.

2. *Arguing for Use of Tradition*

Justice Scalia avoids engaging in the futile debate over the existence of fundamental rights and substantive due process by invoking the views of Justices Cardozo, Frankfurter, Harlan, and Powell, who all tied the two concepts to tradition. He spends much of footnote 6 relating his rule to famous substantive due process cases that invoked tradition.⁵⁶

Justice Scalia is correct that the Supreme Court has almost invariably invoked tradition as a consideration in deciding whether a fundamental right exists.⁵⁷ Even so, it is unclear whether some justices would agree that tradition is a valid tool in defining substantive due process.⁵⁸ As a practical matter, however, a majority of the Court has adopted tradition as a tool in analyzing substantive due process claims; Justices Rehnquist,

56. Justice Scalia emphasized that in both *Roe v. Wade*, 410 U.S. 113 (1973), and *Bowers v. Hardwick*, 478 U.S. 186 (1986), the Court spent a substantial portion of its opinion exploring tradition. He quoted *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934), for the proposition that only rights "so rooted in the traditions and conscience of our people as to be ranked as fundamental [should be protected]."

57. See, e.g., *Penry v. Lynaugh*, 492 U.S. 302, 330-31 (1989); *Bowers v. Hardwick*, 478 U.S. 186, 192-94 (1986); *Tennessee v. Garner*, 471 U.S. 1, 12-19 (1985); *Marsh v. Chambers*, 463 U.S. 783, 787-92 (1983); *Richmond Newspaper, Inc. v. Virginia*, 448 U.S. 555, 565-80 (1980); *Moore v. East Cleveland*, 431 U.S. 494, 503 (1977); *Ingraham v. Wright*, 430 U.S. 651, 659-66 (1977) (using the most specific tradition); *Roe v. Wade*, 410 U.S. 113, 148 (1973); *Wisconsin v. Yoder*, 406 U.S. 205, 220-29 (1972); *Duncan v. Louisiana*, 391 U.S. 145, 151-56 (1968); *Griswold v. Connecticut*, 381 U.S. 479, 501 (1965) (Harlan, J., concurring); *Poe v. Ullman*, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting); *International Shoe Co. v. Washington*, 326 U.S. 310, 320 (1945); *Snyder v. Massachusetts*, 291 U.S. 97, 118 (1934); *Lochner v. New York*, 198 U.S. 45, 74, 76 (1905) (Holmes, J., dissenting); *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. 272, 277 (1855) (content of Due Process Clause defined by "those settled usages and modes of proceeding existing in the common and statute law of England"). See generally A. BICKEL, *THE LEAST DANGEROUS BRANCH* 236 (1962). But see *Rutan v. Republican Party of Ill.*, 110 S. Ct. 2729, 2741 (1990) (specifically repudiating the tradition of patronage because it violates the First Amendment, despite Justice Scalia's protests to the contrary).

58. Compare *Bowers*, 478 U.S. at 210 (Blackmun, J., dissenting) (apparently rejecting entirely the concept of tradition) and *Michael H.*, 491 U.S. at 138-41 (Brennan, J., dissenting) (apparently arguing that a tradition exists, but then arguing that tradition is not determinative) with *Moore*, 431 U.S. at 507-10 (Brennan, J., concurring) (indicating that a substantive due process right exists because of tradition) and *Richmond Newspaper, Inc. v. Virginia*, 448 U.S. 555, 589 (1980) (Brennan, J., concurring in judgment) ("[T]he case for a right of access has special force when drawn from an enduring and vital tradition . . . Such a tradition commands respect in part because the Constitution carries the gloss of history. More importantly, a tradition . . . implies the favorable judgment of experience.").

O'Connor, Kennedy, and White clearly share Justice Scalia's view that tradition should be used, at least to some extent, as a guide in substantive due process cases.⁵⁹

Though the Court frequently invokes tradition, it rarely acknowledges its inherent plasticity, leading critics to claim that the Court simply uses tradition to rationalize the result that it reaches.⁶⁰ To be sure, it is not clear exactly what qualifies as tradition. At one extreme, tradition could be defined only as that found in positive law. But would this include only laws at the national level, or at the state and local levels, too? Would longstanding social practices, customs, or beliefs in a majority of the country suffice? In a small community? In many situations, each party can find a tradition to support its argument, either by varying the level of generality or recharacterizing the issue.⁶¹ These concerns necessitate Justice Scalia's third step—limiting the Court's application of tradition.

3. *Identifying and Applying the Most Specific Level of Tradition*

Justice Scalia agrees with those critics who have argued that tradition is an extremely malleable concept.⁶² As he pointed out in *Michael H.*, both the dissenting and concurring justices relied on tradition but reached opposite results.⁶³ Justice O'Connor and Justice Brennan did not have a factual disagree-

59. Justice Rehnquist joined fully in Justice Scalia's *Michael H.* opinion. Justices O'Connor and Kennedy concurred in all of the opinion except footnote 6; the entire opinion repeatedly emphasized tradition. Justice White's opinion in *Bowers v. Hardwick*, 478 U.S. 186 (1986), in which Justice O'Connor joined, based its holding, at least in part, on tradition. *See id.* at 192-94. *See also* *Penry v. Lynaugh*, 492 U.S. 302, 330-31 (1989) (O'Connor, J.) (in construing the Eighth Amendment in a death penalty case, applying reasoning nearly *identical* to that suggested by this Note). Justice Kennedy specifically invoked tradition as a guide in an Establishment Clause case, *County of Allegheny v. American Civil Liberties Union*, 492 U.S. 573, 662 (1989) (Kennedy, J., concurring in part and dissenting in part), and in a procedural due process case, *Pacific Mutual Life Ins. Co. v. Haslip*, 111 S. Ct. 1032, 1054 (1991) (Kennedy, J., concurring in judgment) ("Justice Scalia's historical approach to questions of procedural due process has much to commend it.").

60. *See Moore*, 431 U.S. at 549 (White, J., dissenting); J. ELY, *supra* note 16, at 60-63; Ely, *supra* note 6, at 39; Kadish, *Methodology and Criteria in Due Process Adjudication—A Survey and Criticism*, 66 YALE L.J. 319, 327 (1957).

61. *See, e.g.*, L. TRIBE, *supra* note 11, § 15-21, at 1427-28.

62. *See, e.g. id.*; Bork, *The Constitution, Original Intent, and Economic Rights*, 23 SAN DIEGO L. REV. 823, 827 (1986); Chemerinsky, *supra* note 32, at 94; Ely, *supra* note 6, at 39-42 (noting the common "trick of varying the relevant tradition's level of abstraction to make it come out right"); Sunstein, *Sexual Orientation and the Constitution: A Note on the Relationship Between Due Process and Equal Protection*, 55 U. CHI. L. REV. 1161, 1173 (1988) ("Traditions can be described at varying levels of generality."); *The Supreme Court, 1988 Term—Leading Cases*, 103 HARV. L. REV. 137, 184-85 (1989).

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

ment; they agreed on the existence and content of various traditions. Their disagreement was on the level of generality at which tradition should be viewed.⁶⁴ Without confining that level of generality, this debate will reappear in nearly every substantive due process case.⁶⁵

To resolve the debate, Justice Scalia proposes a standard for determining the level of generality the Court should use in applying tradition.⁶⁶ He proposes that the Court "refer to the most specific level at which a relevant tradition protecting, or denying protection to, the asserted right can be identified."⁶⁷ Thus, in resolving *Michael H.*, the Court is to look to tradition relating to the rights of natural adulterous fathers, as opposed to tradition relating to the rights of all natural fathers.⁶⁸

64. See *id.* at 127 n.6 ("We do not understand why . . . Justice Brennan would choose to focus instead upon 'parenthood.' Why should the relevant categories not be even more general . . . ?").

65. For example, in *Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747, 777 (1986) (Stevens, J., concurring), Justice Stevens argued that there had traditionally been a protection of private decisions regarding childbearing. Justice White dissented, arguing that there was a tradition banning abortion. See *id.* at 792 (White, J., dissenting).

66. Justice Scalia's formulation may be seen as an outgrowth of that of Dean Wellington. See Wellington, *Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication*, 83 YALE L.J. 221, 265-311 (1973). Dean Wellington argues that constitutional adjudication resembles common-law adjudication in its reasoning from conventional morality. Wellington quotes H.L.A. Hart's definition of conventional morality as "standards of conduct which are widely shared in a particular society." *Id.* at 244. He argues that *Grissold v. Connecticut* was probably decided correctly, but that *Eisenstadt v. Baird* is problematic because he doubts the existence of a consensus favoring the sexual intimacy of unmarried couples. Finally, he finds *Roe v. Wade* indefensible, citing the American Law Institute's Model Penal Code as evidence of an opposing moral consensus. In contrast to Justice Scalia and Dean Wellington, Professor Michael Perry would also consult contemporary consensus, but would consult society's moral consensus at an abstract level. See Perry, *Abortion, The Public Morals, and the Police Power: The Ethical Function of Substantive Due Process*, 23 UCLA L. REV. 689 (1976).

67. *Michael H.*, 491 U.S. at 127-28 n.6.

68. Directly related to the question of how specific a level of tradition to consult is whether substantive due process involves a one-step or two-step test. Justice Brennan asserts that substantive due process is a two-step test: (1) From the perspective of the plaintiff, does a liberty interest exist and is that interest a fundamental one? (2) Does the state have a compelling justification for its limitation of this fundamental liberty interest? See *Michael H.*, 491 U.S. at 145-46 (Brennan, J., dissenting). By contrast, Justice Scalia treats substantive due process as a one-step test, asking only whether the plaintiff has a fundamental interest in the specific situation, thereby collapsing the two steps into one. See *id.* at 124 n.4.

Were this simply a matter of defining the terms of the debate, it might not affect the substantive outcome. In this case, however, changing the terms may change the substantive outcome, as well. See Tribe & Dorf, *Levels of Generality in the Definition of Rights*, 57 U. CHI. L. REV. 1057, 1090 (1990). Justice Brennan argues that his approach simply defines the liberty interest first, and then considers the competing factors. This is wrong for two reasons.

First, once a fundamental liberty interest exists, the Court virtually never finds the

Justice Scalia's methodology sidesteps most of the criticisms of tradition while capturing its advantages. By putting forth explicitly a rule requiring courts to look to the most specific level of tradition, he has created a rule of law and thus answered those critics who claim that the Court simply uses tradition as a tool for rationalization.⁶⁹ By creating a rule of law, Justice Scalia has given lower courts and litigants guidance in an area of law that has been muddled.⁷⁰ By choosing the most specific level of tradition, Justice Scalia has captured the major advantage of tradition: its inherently democratic nature. If such a tradition exists, society has made a conscious choice. As he stated in footnote 6: "Because . . . general traditions provide such imprecise guidance, they permit judges to dictate rather than dis-

state interests to be compelling. *See, e.g., Carey v. Population Servs. Int'l*, 431 U.S. 678 (1977); *Roe v. Wade*, 410 U.S. 113 (1973); *cf. Tribe & Dorf, supra*, at 1096 (arguing that, under a one-step test, the fundamental nature of abortion nearly vanishes; "it will render that liberty so specific as to seem insupportable"). In other words, Justice Brennan in actuality urges a *de facto* one-step liberty test in which state interests are ignored.

Second, and more importantly, Justice Brennan's method will *never* consider the existence of a longstanding and still extant tradition contrary to the allegedly fundamental liberty interest. *See, e.g., Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747, 776 n.4 (1986) (Stevens, J., concurring) ("Finally, I fail to see how the fact that 'men and women of good will and high commitment to constitutional government' are on both sides of the abortion issue helps to resolve the difficult constitutional question before us."). Justice Brennan admitted that his method is a balancing test to determine whether the state's interest is sufficiently compelling to overcome the fundamental liberty interest. If Justice Brennan wants the Court to balance interests, how can he justify leaving out even the *consideration* of a longstanding tradition in his balancing test?

Justice Brennan is also incorrect that his two-step characterization of the test of due process has been authoritatively adopted by the Court. Although it has sometimes used a two-step test in the past, the Court has been non-committal as to whether the liberty interest must be defined in isolation from the rest of society. This is simply Justice Brennan's judicial gloss. Why should the Court consider some facts in determining the liberty interest but not others?

In any event, even if Justice Brennan's account of the Court's test for substantive due process were completely correct, the Court has not hesitated in the past to overrule precedent when it was incorrectly decided. This is especially true for constitutional precedents. *See Thornburgh*, 476 U.S. at 787-88 (White, J., dissenting) (discussing the legion of cases in which the Court has overruled precedent or even whole lines of cases); *id.* at 777 (Stevens, J., concurring) (Court has not "hesitated to overrule decisions, or even whole lines of cases, where experience, scholarship, and reflection demonstrated that their fundamental premises were not to be found in the Constitution").

69. *See Michael H.*, 491 U.S. at 127 n.6 ("[A] rule of law that binds neither by text nor by any particular, identifiable tradition, is no rule of law at all."). It is important to note, however, that footnote 6 does not resolve all of the shortcomings of tradition. *See infra* notes 100-27 and accompanying text.

70. *See infra* notes 189-202 and accompanying text (discussing the absence of reasoning in prior substantive due process cases and the use of footnote 6 as a heuristic to litigants and lower courts).

cern the society's views."⁷¹ Thus, following specific tradition will force the Court to consult the nation's morality rather than its own, providing a more legitimate decision. It will also be a more informed and experienced decision, as well as one consistent with lay and legal understanding of the function of the Court.⁷² Furthermore, unless restricted to its most specific level, tradition cannot effectively confine the range of choices to the Court.

C. Justice Brennan's Counter-Vision

After offering his proposal in footnote 6, Justice Scalia proceeded to criticize Justice Brennan for failing to provide an alternative test for choosing the level of generality in determining tradition.⁷³ Indeed, Justice Brennan's *Michael H.* dissent seems to indicate that he believes that the Court should be able to select its level of generality ad hoc.⁷⁴ This belief appears to be rooted in his novel view of the role that the Due Process Clause plays in the Constitution. In *Michael H.*, he stated that the Due Process Clause would be a "redundancy" if it only protected "interests already protected by a majority of the States."⁷⁵ He would prefer that the Due Process Clause guarantee the freedom "not to conform."⁷⁶ He emphasized that our society is a "pluralistic one, in which we must be willing to abide someone else's unfamiliar or even repellant practice."⁷⁷

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

72. See Amar, *Philadelphia Revisited: Amending the Constitution Outside Article V*, 55 U. CHI. L. REV. 1043, 1074 (1988) (the authority of the Court itself must flow from the consent of the people). See also *infra* notes 85-99 and accompanying text.

73. See *Michael H.*, 491 U.S. at 128 n.6. This criticism also seems to apply to Justices O'Connor and Kennedy.

74. It is possible to argue that Justice Brennan did formulate a rule for the level of abstraction to use in evaluating tradition. He apparently would use the level of abstraction used in precedent. See *Michael H.*, 491 U.S. at 142 (Brennan, J., dissenting) ("The better approach . . . is to ask whether the specific parent-child relationship under consideration is close enough to the interest that we already have protected to be deemed an aspect of 'liberty' as well."); Tribe & Dorf, *supra* note 68, at 1068-71. Of course, it is no rule at all to follow precedent blindly without ever asking whether it was correctly decided.

75. *Michael H.*, 491 U.S. at 140-41 (Brennan, J., dissenting).

76. *Id.* at 141 (Brennan, J., dissenting). See generally West, *Progressive and Conservative Constitutionalism*, 88 MICH. L. REV. 641, 643 (1990) (discussing progressive constitutionalists, who view the Constitution as a mechanism for challenging entrenched social orders, and conservatives, who see those social orders as important sources of communitarian wisdom and legitimate authority).

77. *Michael H.*, 491 U.S. at 141 (Brennan, J., dissenting).

From this perspective, it is easy to see why Justice Brennan saw Justice Scalia's formula as a redundancy. Footnote 6 would indeed allow the majority to create laws that prohibit the practices of nonconformist groups, so long as the majority has a specific tradition on its side and so long as that law does not violate the specific enumerated rights of the Constitution. Justice Brennan is thus clearly correct that existing laws that are rooted in history, such as laws against adultery, could, at least for the present, be impervious to substantive due process challenges.

It is Justice Brennan's, rather than Justice Scalia's, vision of the Due Process Clause that is novel, however. The idea that due process was intended to protect nonconformist groups or acts against laws imposing accepted national norms is simply irreconcilable with a great body of precedent and the clear intent of the Framers of the Constitution and the Fourteenth Amendment. Rights do not become fundamental simply because they are asserted by nonconformist groups. If the text of the Constitution is silent on an issue and the entire country has a longstanding norm opposing the asserted right, by what standard can Justice Brennan claim that this asserted right is *fundamental*?

Moreover, Justice Brennan may have confused his constitutional provisions. His rhetoric appeals to the fear of persecution of minority groups, but such persecution is normally the focus of the Equal Protection Clause or other constitutional provisions—not the Due Process Clause.⁷⁸ Justice Brennan also failed to provide any reasons why or how the Due Process Clause should protect *all* nonconformist groups and *all* nonconformist acts, or why the majority should not be able to proscribe conduct absent compelling reasons or express constitutional prohibitions.⁷⁹

78. See *infra* notes 176-88 and accompanying text (discussing the use of the Equal Protection Clause to alter society's practices). Compare L. TRIBE, *supra* note 11, § 15-21, at 1428 (arguing for use of abstract level of generality when evaluating tradition because otherwise the majority will be able to discriminate *sub rosa* against the minority) with BORK, *supra* note 62, at 827 (reiterating the idea that the Court discriminates against the majority when overruling majoritarian laws without authority) and SUNSTEIN, *supra* note 62, at 1167 (constitutional entitlement must be evaluated separately).

79. It is also important to note the lack of connection between Justice Brennan's rhetoric and the facts of *Michael H. Michael H.* was not about nonconformity and the attempts of the majority to squash freedom, unless Justice Brennan meant that California's decision to favor marriage when declaring parentage was a decision to squash freedom. Certainly, the California legislature had no intention to "squash" freedom

Justice Scalia's approach embodies the view that due process is intended to protect established values and not to create new ones. Contrary to Justice Brennan's contention, Justice Scalia's theory would not reduce the Due Process Clause to a redundancy. For example, a community might pass a law that violates established traditional values, such as marital privacy. The Court would apply the most specific level of tradition and invalidate the law. In short, Justice Scalia's philosophy seems closer to precedent and to the Framers' intentions.⁸⁰

III. THEORETICAL ISSUES AND SOME APPLICATIONS OF FOOTNOTE 6

A. Introduction

As Justice Scalia would certainly acknowledge, the use of tradition as a guide in substantive due process cases does not provide a conclusive answer in every case. On the other hand, tradition is a useful mechanism to delimit the authority of the Court in deciding such cases. In this Part, I consider the justifications for the use of tradition in substantive due process and some special problems that arise in the use of tradition. I also discuss Justice O'Connor's criticisms of footnote 6 in her concurrence in *Michael H.*, as well as a more recent criticism of Justice Scalia's approach. Finally, I discuss the utility of the Equal

when it enacted such a law. The courts of California likewise had no intention to "squash" freedom when they decided the case. Rather, in enacting and enforcing the law, the California legislature and courts were focused entirely on the child's interest.

80. Justice Scalia correctly noted that Justice Brennan's vision would interject the Court into still more value-balancing, in addition to that that has already been done by other institutions. Were *Michael H.* given the "freedom" urged by Justice Brennan not to conform, Gerald D.'s freedom would be correspondingly reduced. As discussed *infra* notes 85-99 and accompanying text, the legislature is better equipped and a more legitimate institution to do such balancing. As Justice Scalia stated: "Our disposition does not choose between these two 'freedoms,' but leaves that to the people of California. Justice Brennan's approach chooses one of them as the constitutional imperative, on no apparent basis except that the unconventional is to be preferred." *Michael H.*, 491 U.S. at 130.

It is unlikely that such a corresponding counter-freedom will always be present. At least, in some contexts, the counter-freedom may be less tangible (for example, only a freedom of society as a whole). For example, in birth control cases, the only counter-freedom is the freedom of society at large to set a moral standard for all its people. In cases involving such an attenuated counter-freedom, this aspect of Justice Scalia's argument packs limited force. *See Roe v. Wade*, 410 U.S. 113, 159 (1973) ("The pregnant woman cannot be isolated in her privacy The situation therefore is inherently different from marital intimacy, or bedroom possession of obscene material, or marriage, or procreation or education . . .").

Protection Clause, as opposed to the Due Process Clause, in addressing broad societal inequities.

B. *Arguments for Tradition*

Despite its shortcomings, tradition must have *some* place in liberty analysis. Whether society has traditionally protected a particular right must be at least *relevant* in determining whether the Constitution protects that right.⁸¹

A number of arguments support the Supreme Court's repeated practice of consulting tradition.⁸² Tradition provides perspective and confines the range of acceptable solutions. One scholar has written that tradition thus allows the Court a "better understanding of the choices that must now be made and of the risks attendant upon alternate solutions."⁸³ Another has pointed to the socialization function that the Supreme Court's use of tradition performs, broadening public acceptance of the Court and its decisions.⁸⁴

Perhaps the strongest argument for the Supreme Court's use of tradition is its inherently democratic character.⁸⁵ When testing a particular law, it is more democratic for the Court to consult the laws, customs, and practices prevailing throughout the majority of the country than it is for the Court to decide solely by its members' own moral guidelines.⁸⁶ Because it is impossible to give content to the open-ended guarantees of the Due

81. Perhaps Justice Rehnquist put this argument most eloquently in his dissent in *Roe v. Wade*:

The fact that a majority of the States, reflecting, after all, the majority sentiment in those States, have had restrictions on abortions for at least a century is a strong indication, it seems to me, that the asserted right to an abortion is not "so rooted in the traditions and conscience of our people as to be ranked as fundamental."

Roe v. Wade, 410 U.S. 113, 174 (Rehnquist, J., dissenting) (quoting *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934)).

82. In this discussion of tradition, the term is used very broadly to include laws at the national, state, and local levels; societal practices; customs; common law; and current consensus. Each of the arguments for consulting tradition has relevance to each of these types of tradition, but obviously, the degree of relevance will vary with the argument.

83. Sandalow, *Constitutional Interpretation*, 79 MICH. L. REV. 1033, 1070 (1981).

84. See Blumoff, *The Third Best Choice: An Essay on Law and History*, 41 HASTINGS L.J. 537, 572-74 (arguing that the Court has a public education role to fill in justifying its decisions and that the use of history fulfills that function).

85. Because tradition is majoritarian, it fits neatly with the Court's recent jurisprudence, which has been more and more deferential to legislative choices. See West, *supra* note 76, at 667 (citing *Michael H.*). See also Chemerinsky, *supra* note 32, at 46.

86. As Justice Brennan has stated: "Justices are not platonic guardians appointed to wield authority according to their personal moral predilections." *Excerpts of Brennan's*

Process Clause without reference to *some* set of moral or ethical guidelines,⁸⁷ the question must be whether that set of moral guidelines will be merely those of the individual justices or whether the justices should seek *guidance* from the traditions established by the majority of Americans.⁸⁸

The traditions of the people represent a more legitimate source than solely the morality or politics of individual justices.⁸⁹ The authority of the Constitution, and thus the Supreme Court itself, must flow from the consent of the people.⁹⁰ Deference to the majority, except when the majority has made irrational or extreme decisions, is consistent with the framers' intentions and with the jurisprudence of generations of Supreme Court justices.⁹¹ In the words of Justice Holmes:

[T]he word liberty in the Fourteenth Amendment is perverted when it is held to prevent the natural outcome of a dominant opinion, unless it can be said that a fair and rational man necessarily would admit that the statute proposed would infringe fundamental principles as they have been understood by the *traditions* of our people and our law.⁹²

In addition to being a more legitimate source, the people collectively, by speaking through tradition, offer a more in-

Speech on Constitution, N.Y. Times, Oct. 13, 1985, at 36, col. 3 (quoting remarks by Justice Brennan at Georgetown University, October 12, 1985).

87. See, e.g., Chemerinsky, *supra* note 32, at 90 (arguing that the balancing process in substantive due process is a reflection of the justices' personal values); Grey, *The Constitution as Scripture*, 37 STAN. L. REV. 1, 5 (1984) ("[W]hile the broad language of the Constitution delegates to judges the power to make [substantive due process decisions], their major premises come from such extra-textual sources as judicial precedent and the practices and ideals of social life."). But see R. DWORKIN, *TAKING RIGHTS SERIOUSLY* 81-130 (1977) (arguing that judges can decide such cases based on a common-law adjudicative method without merely implementing personal morals); L. TRIBE, *supra* note 11, §§ 15-1 to 15-4 (arguing that a sort of natural law exists that establishes certain rights as fundamental).

88. Reasoning that yesterday's majority should not control today's populace, some scholars have charged that tradition is an undemocratic doctrine. See Ely, *supra* note 6, at 42. This criticism seems ill-founded. Court decisions unguided by tradition are inherently undemocratic. By contrast, because today's majority can more easily change a law than a constitutional ruling by the Court, tradition is necessarily more democratic.

89. See Wellington, *supra* note 66, at 311.

90. See Amar, *supra* note 72, at 1074.

91. See Rehnquist, *The Notion of a Living Constitution*, 54 TEX. L. REV. 693 (1976); Easterbrook, *Method, Result, and Authority*, 98 HARV. L. REV. 622, 627 (1985) ("Doubt and ambiguity about the authority granted by the Constitution and statutes should lead judges to let the decisions of private and political actors stand."). But see Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 YALE L.J. 1013 (1984) (arguing that representative democracies fail to represent the will of the people and that little deference should be paid to legislative judgment absent a strong popular mandate).

92. *Lochner v. New York*, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting) (emphasis added).

formed choice. Conservative scholars often argue that the wisdom culminated in legislation, often after extensive study, is superior to any that nine justices can fashion.⁹³ Professor Michael McConnell has written:

[J]udicial decisionmaking contains very little serious deliberation on moral issues. . . . [T]he discussion of gay rights in and around the Chicago City Council had more substance than the opinions in *Bowers v. Hardwick*. . . . In contrast to the months, even years, that are devoted to major legislative deliberation, the Justices devote one hour to oral argument and somewhat less than that to discussion at conference.⁹⁴

This institutional competence argument is even more compelling when the comparison is between the richness of tradition and the the limited deliberations of nine justices: on the one hand, the deliberation and consensus of countless individuals, courts, and legislatures over hundreds of years; on the other, a short oral argument and even shorter discussions in judicial conference.

The institutional competence argument for tradition is particularly powerful with respect to cases requiring balancing among a number of competing individual interests.⁹⁵ The Court cannot create subcommittees, take testimony, commission studies, or quickly revise incorrect rulings; numerous state courts and legislatures may have already done those things in the process of establishing a tradition. Moreover, parties often do not address broad social concerns in their arguments. For example, in *Michael H.*, the appellants were asking the Court to balance the best interests of Michael, Victoria, Gerald, Carole, and the general society in a situation in which any number of possible resolutions was possible.⁹⁶ Only Victoria extensively

93. Justice Frankfurter once observed, "Invalidating legislation is serious business . . ." *Morey v. Doud*, 354 U.S. 457, 474 (1957) (Frankfurter, J., dissenting). See Easterbrook, *supra* note 91, at 627.

94. McConnell, *supra* note 31, at 1536-37.

95. An instance of the difficulty and complexity of such balancing is provided by *Griffith v. Johnston*, 899 F.2d 1427 (5th Cir. 1990). The Fifth Circuit, after citing footnote 6, stated:

When does the "fundamental right to adopt" overcome the right of privacy of the birth parents? May the state decide that certain kinds of children, contrary to the wishes of particular prospective parents, may not be adopted? To assert that such an individualized "fundamental right" exists is sloganistic and oxymoronic, since society must balance the interests of at least three parties—birth parents, child, adoptive parents—when legitimating adoptions.

Id. at 1437.

96. For instance, the Court could have declared that Michael had a substantive due

addressed sociological studies.⁹⁷

The use of tradition can also help to avoid many of the perceived shortcomings of representative democracy.⁹⁸ Because a considerable number of communities will need to have adopted a law or practice in order for it to qualify as a tradition, the use of tradition permits a consensus of several communities, rather than a majority of a single one, to decide which rights are fundamental. The fact that many communities maintain a tradition reduces the chance of prejudice or mistake.⁹⁹ It also greatly increases the likelihood that the tradition reflects the collective will of the people rather than that of interest groups.

In sum, the Court invariably uses tradition as a tool in defining protected liberties. Tradition reflects the collective conscience of the people and provides a discernable standard to restrain judicial discretion. Tradition is easily reconcilable with judicial review to protect special classes and to protect against aberrant and irrational laws.

C. *Special Problems Associated With Use of Tradition*

1. *Whose Tradition?*

One special problem that must be addressed in the use of tradition in substantive due process cases is whose tradition the Court should use. Under Justice Scalia's new rule, the Court would need to choose among the individual state's tradition,¹⁰⁰ the tradition within the United States, or the tradition of the "English-speaking peoples."¹⁰¹ Under current law, the Court

process right, but Victoria did not, or vice versa. Alternatively, the Court could have decided that Michael had such a right, but Gerald's rights outweighed Michael's, or that Michael had such a right but only to visitation and not to custody.

97. See Brief for Appellant Victoria D., Michael H. v. Gerald D., 491 U.S. 110 (1989) (No. 87-746).

98. Cf. Ackerman, *supra* note 91, at 1027-31. Professor Ackerman concentrates on the Congress and ignores state legislatures, the members of which represent smaller numbers of people and are thus presumably better representatives of "the people." In fact, state legislatures usually incorporate the traditions of which we speak. Relatively few laws enacted at the federal level are likely to become the subject of substantive due process attack.

99. Exceptions clearly exist. For example, traditions of prejudice are certainly not to be endorsed merely because they have been widely shared for a long time. As discussed *infra* notes 176-88 and accompanying text, however, the Equal Protection Clause is the appropriate tool for rectifying such misguided traditions.

100. It is unlikely that state tradition would apply because fundamental constitutional rights would normally be federal issues. *But see* Miller v. California, 413 U.S. 15, 30 (1973) (local standards for obscenity are permissible under the First Amendment).

101. See Wolf v. Colorado, 338 U.S. 25, 28-30 (1949).

focuses on the tradition within the United States.¹⁰²

The Court, however, has deliberately avoided the problem of choosing between competing traditions within the United States. When the social standards and laws are not uniform throughout the country but vary from state to state, the Court could count states (for example, thirty states have one tradition, ten have an opposing tradition, and ten have no tradition).¹⁰³ The Court could also examine whether states have a long historical tradition, have modified their tradition, or have had no history of a certain tradition until they enacted a new law. Although traditions may vary across the country, in most cases, a public consensus exists.¹⁰⁴

Thus, even if the Court adopted footnote 6, it would need to decide whether to focus on the traditions of a state or the nation, and how to choose between conflicting traditions. Obviously, the resolution of these questions would largely be determined by the nature of the case in dispute.

2. *Time Frame*

Footnote 6 also leaves unanswered the question whether the Court should focus on traditions that existed at the time of the ratification of the Fourteenth Amendment, or ones that exist today. Although he is unclear on the point, it appears that Justice Scalia believes that traditions develop and evolve and that the Due Process Clause does not only protect rights or traditions that existed at the framing of the Fourteenth Amendment in 1868. Other advocates of judicial restraint, such as Justices Frankfurter and Harlan, have also viewed tradition, for pur-

102. In *Duncan v. Louisiana*, 391 U.S. 145 (1968), the Court moved away from Justice Frankfurter's "English-speaking peoples" standard. The Court explained that it would no longer evaluate whether rules are fair to defendants in a hypothetical criminal justice system but whether they are fair in the context of the criminal justice system adopted in the United States.

103. Perhaps the only case in which the Court confronted this problem was *Tennessee v. Garner*, 471 U.S. 1 (1985). There, the Court considered the common-law doctrine allowing the use of deadly force against a non-dangerous felon and, among other things, counted the states that used the common-law rule and those that did not. See also *Stanford v. Kentucky*, 492 U.S. 361, 378 (1989); *Penry v. Lynaugh*, 492 U.S. 302, 330 (1989).

A similar idea has been proposed by some scholars for use in choice of law. See Trautman, *The Relation Between American Choice of Law and Federal Common Law*, *LAW & CONTEMP. PROBS.*, Spring 1977, at 105 (arguing that courts should determine the "normal" law in the nation and apply it in most conflict-of-law cases).

104. See Blumoff, *supra* note 84, at 539.

poses of Fourteenth Amendment analysis, as evolving.¹⁰⁵ In addition, the view that rights were fixed in 1868 seems exceptionally difficult to reconcile with numerous precedents, many of which Justice Scalia has not advocated overruling.¹⁰⁶

Justice Scalia hinted in *Michael H.* that footnote 6 refers to *extant* traditions. He repeatedly alluded to the fact that the tradition opposing Michael's interest exists "even in *modern* times."¹⁰⁷ He wrote that "we are not aware of a single case old or *new*, that has [recognized father's rights in Michael's situation]."¹⁰⁸ Later, in distinguishing previous cases, he asserted: "None of those cases acknowledged a longstanding and *still extant* societal tradition . . ."¹⁰⁹ Finally, he wrote that, "[i]n this case, the existence of . . . a tradition [denying Michael H.'s right], continuing to the *present day*, refutes any possible contention that the alleged right is . . . 'fundamental.'"¹¹⁰ Although none of these passages commits Justice Scalia to a framework using evolving rather than purely historical tradition, they suggest that Justice Scalia envisioned the implementation of footnote 6 in that way.¹¹¹

105. For example, Justice Frankfurter observed: "Great concepts like . . . 'liberty' . . . were purposely left to gather meaning from experience. . . . The statesmen who founded this nation knew too well that only a stagnant society remains unchanged." *National Mutual Ins. Co. v. Tidewater Transfer Co.*, 337 U.S. 582, 646 (1949) (Frankfurter, J., dissenting). Justice Harlan argued that the Court should consult tradition in evaluating substantive due process claims but that "tradition is a living thing." *Poe v. Ullman*, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting).

106. *See, e.g.*, *Turner v. Safley*, 482 U.S. 78 (1987); *Moore v. East Cleveland*, 431 U.S. 494 (1977); *Roe v. Wade*, 410 U.S. 113 (1973); *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Meyer v. Nebraska*, 262 U.S. 390 (1923). Although Justice Scalia has elsewhere advocated overruling *some* of these cases, *see, e.g.*, *Webster v. Reproductive Health Servs.*, 492 U.S. 490, 532 (Scalia, J., concurring in part and concurring in judgment), he has never advocated overruling all of them. In fact, he joined the Court's opinion in *Turner* only two terms before *Michael H.* Furthermore, he spent part of footnote 6 explaining how his method can be reconciled with *Griswold* and *Eisenstadt*. *See Michael H.*, 491 U.S. at 127 n.6.

107. *Michael H.*, 491 U.S. at 125 (emphasis added).

108. *Id.* at 127 (emphasis added).

109. *Id.* at 128 n.6 (emphasis added).

110. *Id.* (emphasis added) (quoting *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934)). Justice Brennan thought that Justice Scalia would allow traditions to evolve, writing that footnote 6 would require the Court "to identify the point at which a tradition becomes firm enough to be relevant to our definition of liberty and the moment at which it becomes too obsolete to be relevant any longer." *Id.* at 138 (Brennan, J., dissenting). *But cf. id.* at 141 (Brennan, J., dissenting) (emphasis in original) ("[Justice Scalia's Constitution is] a stagnant, archaic, hidebound document steeped in the prejudices and superstitions of a time long past. *This* Constitution does not recognize that times change . . .").

111. Another explanation is that Justice Scalia believes that the Due Process Clause protects or denies rights based on societal traditions that existed in 1868 and continue

If the Court decides to use evolving rather than static traditions, additional questions are raised during transition periods for a tradition. For example, several states have repealed sodomy laws and have enacted laws that protect homosexuals from discrimination.¹¹² By contrast, many states still have laws that criminalize sodomy.¹¹³ Footnote 6 leaves unclear how many states must repeal their sodomy laws, enact antidiscrimination laws, or do both, and how long these changes must be in place, before the Court will deem a new tradition to have been established regarding a right of homosexual intimacy.¹¹⁴

3. *Absence of Positive Law*

The above discussion suggests that in certain instances states may have passed no law respecting a certain "tradition." The question arises whether this constitutes an absence of tradition and what the Court should do to deal with such a situation.

The first question to ask is whether tradition can exist in the absence of codified laws. It seems clear that it can. Justice Scalia speaks of "societal tradition" and only examines laws to assist in determining what that "societal tradition" is.¹¹⁵ In *Moore*, Justice Powell examined the traditions of extended families living together,¹¹⁶ and in *Wisconsin v. Yoder*,¹¹⁷ the Court examined the traditions of the Amish. Presumably, however, Justice Scalia would normally look to positive laws before consulting less concrete societal traditions.¹¹⁸

to exist today. This test could produce either broader or narrower protection of rights than the purely historical test. On the one hand, the number of rights protected would be reduced by the fact that a tradition protecting the right must exist at both points in time. On the other hand, the number of rights denied under this test would be reduced, because relatively few traditions denying rights both existed historically and exist today.

112. See, e.g., MASS. GEN. L. ch. 151B, § 4 (1982) (employment discrimination).

113. See, e.g., GA. CODE ANN. § 16-6-2 (1988).

114. Advocates of the theory of legislative impairment might argue that the national tradition has actually changed, but that the legislatures of the states that have not changed their laws were impaired in some way, and that the majority of people really supported a change in the law. See Fiss, *The Supreme Court, 1978 Term—Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 5-17 (1979). To the extent that this argument is valid, this "slippage" must be taken into account by the Court when examining traditions in transition.

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

116. See *Moore v. East Cleveland*, 431 U.S. 494, 503-06 (1977).

117. 406 U.S. 205, 209-19 (1972). *Yoder* is often read as only a First Amendment case, but its implications for tradition are much broader.

118. An interesting problem could arise should societal *practices* contradict concrete laws. I have assumed for purposes of this Note that laws are the best evidence of tradition. They are clearly the easiest to test. Presumably, laws reflect the will of a majority

Determining societal traditions will present difficulties for the Court. Rather than simply counting state laws, the Court must consult religion, pop culture, conventional morality, the press, sociological studies, polls, and even politics. In some cases, these sources will yield conflicting answers as to whether a certain tradition exists. Generally speaking, however, they will provide probative information on the question.

To probe this problem in the context of a real-life example, suppose that a state enacts a law forbidding artificial insemination of unmarried women.¹¹⁹ Assuming that other states do not have laws that specifically authorize such insemination,¹²⁰ has the state violated a substantive due process right under the test of footnote 6?

a. *Societal Tradition*

Because there is no legal tradition protecting artificial insemination of unmarried women, the Court would examine the question whether there is any societal tradition. Although opposition exists in the medical community,¹²¹ some clinics do perform artificial insemination of unmarried women.¹²² Be-

of society. If not, society would change them—at least to the extent that our representative democracy functions. Were a specific societal tradition to be very strong and a legal tradition very weak, however, it could be argued that the societal practice should overcome the legal tradition. For instance, this may have been the case in *Griswold*. See *infra* notes 130-36 and accompanying text. Footnote 6 does not appear to address this possibility. For an interesting article addressing a particular clash between a societal tradition and the law, see Hartog, *Pigs and Positivism*, 1985 Wis. L. Rev. 899.

119. An Oklahoma statute has actually been so interpreted. See 15 Op. Okla. Att'y Gen. 277 (1983) (interpreting Artificial Insemination Statute, OKLA. STAT. tit. 10, §§ 551-553 (1981)).

120. Although for purposes of illustration I assume that no other states have laws authorizing or recognizing such insemination, six states currently have laws that apparently contemplate artificial insemination of unmarried women. See CAL. CIV. CODE § 7005(b) (Deering 1990); COLO. REV. STAT. § 19-4-106(2) (1986); N.J. STAT. ANN. § 9:17-44 (West 1983); OR. REV. STAT. § 109.239(1) (1987); WASH. REV. CODE ANN. § 26.26.050(2) (Supp. 1985); WYO. STAT. § 14-2-103(b) (1986). The laws of only six states, however, would almost certainly not qualify this privilege as a tradition of our country. Cf. Tribe & Dorf, *supra* note 68, at 1068 (using same example).

121. See Note, *Reproductive Technology and Procreating Rights of the Unmarried*, 98 HARV. L. REV. 669, 670 n.8 (1985) (only 10 percent of doctors practicing artificial insemination would perform artificial insemination for unmarried women). One basic medical text on artificial insemination states that "any display of interest in [artificial insemination] by an unmarried woman is indicative of psychological distress . . ." W. FINEGOLD, *ARTIFICIAL INSEMINATION* 101 (2d ed. 1976).

122. See, e.g., Kritchevsky, *The Unmarried Woman's Right to Artificial Insemination: A Call for an Expanded Definition of Family*, 4 HARV. WOMEN'S L.J. 1, 3-4 (1981). See also Lacey, *The Law of Artificial Insemination and Surrogate Parenthood in Oklahoma: Roadblocks to the Right to Procreate*, 22 TULSA L.J. 281 (1987) (discussing the growing number of single women who desire artificial insemination); Note, *supra* note 121, at 670 (same).

cause such practices, however, are isolated and have existed for only a short period of time, it is difficult to argue that this constitutes a tradition, although it is conceivable that the practice might become a tradition, recognized as fundamental, in the future.

b. *Traditions by Legislative Inaction*

If there are no laws regarding artificial insemination of unmarried women and no societal tradition exists, the Court might also ask whether the federal and various state legislatures had considered the issue. Justice Scalia proposed that the Court test whether there is a “relevant tradition *protecting or denying protection to*, the asserted right”¹²³ Assuming that a legislature addresses an activity at all, it can take four possible actions respecting the activity: (1) pass a law protecting the activity; (2) pass a law outlawing the activity; (3) decide not to pass a law protecting the activity; or (4) decide not to pass a law outlawing the activity.

Clearly, the enactment of a law would establish a tradition. If states have enacted laws protecting a right, the Court could decide that a tradition of *protecting* that right exists. By contrast, if many state legislatures have passed laws outlawing an activity, it seems clear that a tradition exists that *denies protection* of that right.

When the legislature takes no action, the existence of tradition is less clear. If a number of state legislatures have considered the matter and decided not to protect an activity, there might be a tradition *denying protection*, even though no laws prohibiting the activity existed. Analogously, in case (4), it can be argued that the legislature has established a tradition of *protecting* a right by not outlawing it.¹²⁴ In all four of these cases, the Court can still rely on society’s choices (inferred from legislative action or inaction), rather than creating or disallowing a tradition on its own.

In the artificial insemination example, if most other states had considered and rejected legislation authorizing artificial in-

123. *Michael H.*, 491 U.S. at 128 n.6 (emphasis added).

124. This is a relatively weak argument, however. When a legislature specifically rejects a law protecting an activity, it has denied protection. When a legislature simply decides not to outlaw an activity, on the other hand, it is not clear that it has protected that activity. This is made clear by the observation that the same legislature can take both actions, by rejecting legislation protecting *and* legislation outlawing an activity.

semination of unmarried women, a state's action forbidding the activity would be consistent with this tradition. If most other states had considered and rejected laws forbidding artificial insemination of unmarried women, the state's action in question would break from tradition.

c. *The Next Level of Abstraction*

Assuming that no societal tradition can be identified at the most specific level of abstraction, Justice Scalia's answer is to refer to the next, more general level of tradition. Unfortunately, this is sometimes easier said than done.¹²⁵ In *Michael H.*, Justice Scalia suggested that had there been no tradition regarding the rights of natural fathers of a child adulterously conceived, the Court should "consult, and (if possible) reason from, the traditions regarding natural fathers in general."¹²⁶ Applying this rule in the artificial insemination example, it would appear that the next level of generality would be artificial insemination laws generally,¹²⁷ though it might be argued that the next level of generality would be societal traditions of nuclear families or the developing tradition of single-parent homes. Although footnote 6 does not resolve with certainty which tradition to choose in this case, it leaves the Court with a framework within which to operate: which tradition is more specific, that is, which tradition best reflects the consensus of the country's population on the issue. In this example, the legal treatment of artificial insemination generally seems more specific to the matter at hand than general childbearing and child-rearing practices.

D. *Response to Justice O'Connor's Concurrence*

In her concurrence, in which Justice Kennedy joined, Justice O'Connor cited a number of cases, the holdings of which she found inconsistent with footnote 6's "most specific level of tradition" test.¹²⁸ Although the reasoning in those cases was at times inconsistent with the footnote 6 test, often the end result was the same as it would have been, had the Court applied

125. See, e.g., Tribe & Dorf, *supra* note 68, at 1090. See also *infra* notes 166-75 and accompanying text (discussing Tribe and Dorf's criticisms).

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

127. See UNIF. PARENTAGE ACT, § 5(b), 9B U.L.A. 301 (1987).

128. See *Michael H.*, 491 U.S. at 132 (O'Connor, J., concurring in part and concurring in judgment).

footnote 6. In other cases, the footnote 6 methodology would have prevented the Court from reaching erroneous or premature decisions to establish fundamental rights.¹²⁹

1. *General Consistency with Past Decisions*

The first case that Justice O'Connor cited as possibly "inconsistent" with footnote 6 is *Griswold v. Connecticut*.¹³⁰ It is relatively simple, however, to reconcile Justice Douglas's majority opinion in *Griswold* with Justice Scalia's reasoning in footnote 6. First, Justice Douglas represented that *Griswold* was not a substantive due process case. He went to great lengths to identify specific references in the Bill of Rights that the Connecticut law violated. He never mentioned the concept of substantive due process except to dismiss it, nor did he mention the fundamental nature of sexual rights.¹³¹ Today, however, the Court and most scholars agree that Justice Harlan's concurrence, using substantive due process reasoning, best represents the proper understanding of *Griswold*.¹³²

Even seen as a substantive due process decision, though, the result in *Griswold* would be the same using footnote 6. The Connecticut law that the Court invalidated was unique in the country. Because no tradition existed at the most specific level—that is, prohibiting the use of contraceptives—the Court would have been left to examine traditions at a more general level. The strong tradition of marital privacy, and the fact that no other state or country had ever enacted such a law,¹³³ suggest a tradition protecting childbearing decisions within a marriage.¹³⁴

In addition, Justice White argued in his concurrence to *Griswold* that this law lacked minimum rationality.¹³⁵ To support

129. Justice O'Connor's criticisms are ironic in that she has used reasoning in other contexts that closely parallels the footnote 6 approach. She has applied reasoning nearly identical to that used in footnote 6 in the Eighth Amendment context, see *Penry v. Lynaugh*, 492 U.S. 302, 330 (1989), and joined Justice Scalia's opinion in another Eighth Amendment decision that used the footnote 6 approach. See *Stanford v. Kentucky*, 492 U.S. 361, 378 (1989).

130. 381 U.S. 479 (1965).

131. See *Griswold*, 381 U.S. at 481-96.

132. See *id.* at 499 (Harlan, J., concurring). See also *Moore v. East Cleveland*, 431 U.S. 494, 503 (1977); *Lupu*, *supra* note 26, at 994.

133. See *Poe v. Ullman*, 367 U.S. 497, 554 (1961) (Harlan, J., dissenting).

134. See *Michael H.*, 491 U.S. at 128 n.6 (Justice Scalia arguing that footnote 6 is consistent with *Griswold*).

135. See *Griswold*, 381 U.S. at 502 (White, J., concurring).

this conclusion, he asserted that no possible reason could support this law and that Connecticut had not even enforced the law. Justice Scalia did not claim that footnote 6 would foreclose the minimum rationality test for substantive due process; indeed, Justice Scalia has argued repeatedly for its use.¹³⁶ In sum, even as a pure substantive due process case, the result in *Griswold* would be the same using footnote 6.

The second decision that Justice O'Connor claimed reached a result inconsistent with footnote 6 is *Eisenstadt v. Baird*.¹³⁷ In *Eisenstadt*, the Court decided that a Massachusetts law prohibiting the sale or distribution of contraceptives to unmarried individuals was unconstitutional. Justice Brennan specifically used the Equal Protection Clause as the basis for his decision.¹³⁸ Therefore, the footnote 6 approach would not necessarily have been used in *Eisenstadt*. Justice Brennan's opinion, however, did also raise the question whether the Massachusetts law would pass the minimum rationality test of due process, and concluded that it would not.¹³⁹ As mentioned above, footnote 6 would allow this test, as well.

If treated as a substantive due process case¹⁴⁰ under footnote 6, the result may have changed. Many, perhaps even most, scholars have read *Griswold* and *Eisenstadt* as establishing a right of access to contraceptives. The Court later agreed with this reading.¹⁴¹ *Eisenstadt* contains some language that indicates that Justice Brennan intended such a result.¹⁴² It is unlikely that the Court agreed that an absolute right to contraceptives existed

136. See, e.g., *Stanford v. Kentucky*, 492 U.S. 361, 378 (1989); *United States v. Cohen*, 733 F.2d 128, 133 (D.C. Cir. 1984).

137. 405 U.S. 438 (1972).

138. See *Eisenstadt*, 405 U.S. at 443 ("And we hold that the statute, viewed as a prohibition on contraception *per se*, violates the rights of single persons under the Equal Protection Clause of the Fourteenth Amendment.").

139. See *id.* at 443, 448, 454-55. In discussing the rationality requirement under the Equal Protection Clause, Justice Brennan concluded that "the goals of deterring premarital sex and regulating the distribution of potentially harmful articles cannot reasonably be regarded as legislative aims . . ." *Id.* at 443.

140. The *Eisenstadt* Court twice stated that it was holding that the regulation violated the Equal Protection Clause, and never that it violated the Due Process Clause. See *id.* at 443, 454. By the time of *Carey v. Reproductive Health Servs.*, 431 U.S. 678 (1977), however, Justice Brennan apparently decided that his opinion in *Eisenstadt* had indeed been based on substantive due process. See *Carey*, 431 U.S. at 684-86.

141. See *Carey v. Reproductive Health Servs.*, 431 U.S. 678 (1977).

142. See *Eisenstadt*, 405 U.S. at 453 (emphasis in original) ("If the right of privacy means anything, it is the right of an *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."). It also seems that by the time of *Eisenstadt* the Court had decided that the holding in *Griswold* that a prohibition on the use of

when it decided *Griswold* in 1965. All of the opinions in that case avoided such sweeping language. The Court did not establish this absolute right until 1972 at the earliest, in *Eisenstadt*, and possibly not until 1977 in *Carey*. The traditions that existed in 1965 concerning sexual conduct changed radically by 1972. In 1965, a number of states had laws barring the distribution of contraceptives, especially to unmarried individuals.¹⁴³ Under footnote 6, the Court could not have found such a sweeping right in 1965. By 1972, however, many of these state laws had been repealed; such a drastic change of so many laws might imply that the nation had come to a consensus that such a right existed.¹⁴⁴ The case thus involves an instance of a tradition in transition. In view of the limited longevity of the tradition of granting a right to unmarried individuals to purchase contraceptives, the Court, using footnote 6, would likely have reached the opposite result.

2. *Different Levels of Generality*

Justice O'Connor also argued that several prior decisions of the Court had characterized rights at levels of generality that were not the most specific available. The first case she cited in this regard is *Loving v. Virginia*,¹⁴⁵ which held that a Virginia law banning interracial marriage violated both the Equal Protection Clause and the Due Process Clause.

Loving, of course, need not be reconciled at all with footnote 6, because the Equal Protection Clause is clearly applicable to the case. It is important to note in this regard the firm historical basis that *Loving* has in the Fourteenth Amendment. That amendment was specifically directed at racial prejudice.¹⁴⁶ Accordingly, the due process language in *Loving* could be dismissed as dictum. Raising a question respecting substantive due process jurisprudence based upon the *Loving* decision ap-

contraceptives by married couples was unconstitutional also meant that a prohibition on the *distribution* of contraceptives to married couples was unconstitutional. *See id.*

143. *See* NAT'L CENTER FOR FAMILY PLANNING SERVS., FAMILY PLANNING, CONTRACEPTION AND VOLUNTARY STERILIZATION: AN ANALYSIS OF LAWS AND POLICIES IN THE UNITED STATES, EACH STATE AND JURISDICTION 58-60 (U.S. Dep't of Health, Educ., & Welfare, Pub. No. (HSA) 74-16001, 1972) (approximately one-third of the states permitted only physicians or pharmacists to dispense contraceptives, and more than half the states prohibited their advertisement).

144. *See id.* at 58 (approximately 13 states repealed or substantially liberalized birth control laws between 1965 and 1972).

145. 388 U.S. 1 (1967).

146. *See, e.g.,* R. BORK, *supra* note 4, at 180.

pears to misplace the import of that case.¹⁴⁷

Justice O'Connor also raised *Turner v. Safley*¹⁴⁸ as an example of a case in which a more general level of tradition was applied. In *Turner*, the Court ruled unanimously¹⁴⁹ that a Missouri regulation prohibiting marriage of prisoners violates the Constitution. In so ruling, the Court held that the right to marry is a fundamental right, citing *Zablocki v. Redhail*¹⁵⁰ and *Loving v. Virginia*.¹⁵¹ The Court did not inquire whether the right to marry in the circumstances (prison) was fundamental; thus, it did not characterize the right at the most specific level.

Had the Court examined the most specific level of tradition, however, the result would have been the same. The rule in question restricting prison marriage—a government regulation, not a statute—was contrary to longstanding practice.¹⁵² Besides marking a departure from Missouri tradition, this regulation was inconsistent with federal regulations.¹⁵³ Accordingly, the Missouri regulation violated an interest that had been traditionally protected. At the very least, the tradition of protecting marriage in prison is unclear because of this conflict in rules. Such a conflict, under Justice Scalia's framework, would lead the Court to examine tradition at a more general level (the right to marry in general). Alternatively, the Court could have relied on the rational relationship test of due process or the Equal Protection Clause to invalidate this regulation.¹⁵⁴

In conclusion, although the Court in *Turner* did not characterize the right at the most specific level, the results would have been the same had they done so, because they would eventually have arrived at the same level of abstraction that was actually employed.¹⁵⁵

147. *Loving* also illustrates a tradition in transition. During the 15 years before *Loving* was decided, 14 states had repealed their antimiscegenation statutes. When *Loving* came down, such statutes remained on the books in only 16 states. See *Loving*, 388 U.S. at 6 n.5.

148. 482 U.S. 78 (1987).

149. This unanimous Court included Justice Scalia, who did not even write a concurring opinion. *Turner* was decided in Justice Scalia's second term on the Court.

150. 434 U.S. 374 (1978).

151. 338 U.S. 1 (1967).

152. See *Turner*, 482 U.S. at 82.

153. See *id.* at 97-98 (citing 28 C.F.R. § 551.10 (1986) (marriage by inmates in federal prisons permitted)).

154. See *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985) (discrimination against mental patients struck down on equal protection grounds, merely on the rational relationship test).

155. Justice O'Connor also cited *United States v. Stanley*, 483 U.S. 669 (1987), for

3. *Limiting the Court to One Mode of Analysis*

Finally, Justice O'Connor worried that footnote 6 would foreclose the unanticipated by imposing a single mode of historical analysis. She cited Justice Harlan's famous dissent in *Poe v. Ullman*¹⁵⁶ for the proposition that such a formula is unattainable. A close reading of Justice Harlan's dissent, however, confirms that he might well have agreed with Justice Scalia. Justice Harlan did argue that "there is no 'mechanical yardstick,' no 'mechanical answer'"¹⁵⁷ to whether a right is protected by substantive due process. Furthermore, he contended that "[due process]'s content cannot be determined by reference to any code."¹⁵⁸ Justice Harlan, however, had an eye on tradition at all times in exercising the Court's "limited and sharply restrained judgment":¹⁵⁹

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 individual, has *struck* between that liberty and the demands of organized society. If the supplying of content to this Constitutional concept has of necessity been a rational process, it certainly has *not* been one where *judges have felt free to roam* where unguided speculation might take them. 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.¹⁶⁰

Justice Harlan believed that the traditions that the country had established, through its people, were the key to determining the existence of a substantive due process right. He also commented that "[w]e may not draw on our merely personal and private notions and disregard the limits that bind judges in

the point that the Court had not always defined rights at the most specific level. The relevance of *Stanley* in this context is not immediately obvious, because it dealt with claims for clear constitutional deprivations, rather than substantive due process claims. The portion of the opinion in *Stanley*, which Justice Scalia authored, to which Justice O'Connor referred appears to be that discussing the level of generality that the Court should choose when applying the "special factors" test of *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), respecting the immunity for federal employees. The level of generality to be used in this substantive law test appears to be simply irrelevant to the substantive due process context.

156. 367 U.S. 497 (1961).

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

158. *Id.* at 542 (Harlan, J., dissenting).

159. *Id.* at 544 (Harlan, J., dissenting).

160. *Id.* at 542 (Harlan, J., dissenting) (emphasis added).

their judicial function.”¹⁶¹ He believed that the Court should “hesitate long”¹⁶² before striking down a law that simply chose among a number of moral viewpoints that the nation had accepted. From Justice Harlan’s opinions, it is clear that he respected tradition and consulted it often.

The only question is whether he would have accepted Justice Scalia’s invitation to consult the most specific level of tradition. In his *Poe* dissent, Harlan spoke of the generality of liberty, but then applied tradition at the *most specific* level. He found that “conclusive, in my view, is the utter novelty of this enactment [in regulating the use of contraceptives].”¹⁶³ Justice Scalia seems on firm footing in basing his substantive due process jurisprudence on Harlan’s *Poe* dissent, often characterized as the fountainhead of modern privacy doctrine.

Justice O’Connor’s concerns about the limiting effect of one mode of analysis are not warranted. The footnote 6 approach would leave the Court with flexibility when considering evolving traditions and identifying the most specific level of tradition, and would not affect the broad applicability of the Equal Protection Clause.¹⁶⁴ Her concerns stand in stark contrast to those expressed by others; no other commentator has criticized footnote 6’s inflexibility. Rather, those who have criticized the footnote have emphasized—incorrectly, I believe—its indeterminacy.¹⁶⁵

E. *Response to One Recent Criticism of Footnote 6*

In a comprehensive article, Professor Laurence Tribe and Michael Dorf harshly criticize footnote 6.¹⁶⁶ Although Tribe

161. *Id.* at 544 (Harlan, J., dissenting).

162. *Id.* at 547 (Harlan, J., dissenting). Justice Harlan also stated:

If we had a case before us which required us to decide simply, and in the abstraction, whether the moral judgment implicit in the application of the present statute to married couples was a sound one, *the very controversial nature* of these questions would, I think, require us to hesitate long before concluding that the Constitution precluded Connecticut from choosing as it has among these various views.

Id. (Harlan, J., dissenting) (emphasis added).

163. *Id.* at 554 (Harlan, J., dissenting).

164. See *supra* notes 105-14 and accompanying text (evolving traditions); *supra* notes 125-27 and accompanying text (levels of abstraction); *infra* notes 176-88 and accompanying text (Equal Protection Clause).

165. See R. BORK, *supra* note 4, at 236-40; Chemerinsky, *supra* note 32, at 90-93; Tribe & Dorf, *supra* note 68, at 1087-95.

166. A complete response to Tribe and Dorf is beyond the scope of this Note; however, two points are important to mention. First, Tribe and Dorf argue that it is incor-

and Dorf provide insight on a variety of constitutional law topics, they reach a flawed conclusion about footnote 6. The two major components of Tribe and Dorf's criticism are discussed in turn below.

The first aspect of Tribe and Dorf's argument contends that footnote 6 represents faulty policy and faulty constitutional law. I have addressed most of these arguments in earlier sections of this Note.¹⁶⁷ None of these constitutional or policy ar-

rect to characterize precedent at the most specific level possible. See Tribe & Dorf, *supra* note 68, at 1059-71. This argument is important and interesting but is *not directly relevant* to footnote 6, which argues for the most specific level of *tradition*. As discussed later, there are important differences between tradition and precedent. This argument is simply a repeat of the *stare decisis* argument. In other words, limiting a case to its facts is a method of overruling it, and abstracting a case to new situations is a way of *extending* its holding to new situations not originally part of the holding. Because the substantive due process debate is currently centered on rulings by a "liberal" Court, advocates of that "liberal" set of rulings would naturally wish to characterize the holdings more broadly than would the rulings' opponents. The reverse might be true for other cases. See, e.g., *United States v. Stanley*, 483 U.S. 669 (1987); *Sherbert v. Verner*, 374 U.S. 398 (1963) (Brennan, J.) (limiting *Braunfeld v. Brown*, 366 U.S. 599 (1961), to its facts).

Second, Tribe and Dorf fail to distinguish the task of interpreting textual provisions of the Bill of Rights from the task of interpreting the open-ended Due Process Clause. Even given their broadest interpretation, the specific commands of the Bill of Rights have limited scope. For instance, no one would argue that the right to a speedy trial in the Sixth Amendment also guarantees the right to an abortion. By sharp contrast, an activist Court could read the word "liberty" (and arguably has) to supply the constitutional right to virtually anything. *But see* Tribe & Dorf, *supra* note 68, at 1063-65 (precedent and internal limits of Constitution bind liberty). In both cases, the Court must abstract beyond the literal language and should use care before ruling a law unconstitutional. Precedents dealing with provisions of the Bill of Rights, however, have a circumscribed impact, while precedents dealing with due process may have almost limitless impact. The prospect of such a powerful and often unforeseen impact suggests that the Court should take greater care in substantive due process analysis than in analysis of specific constitutional provisions. It also suggests the propriety of attention to tradition as a source of guidance.

167. Tribe and Dorf first note the lack of agreement on the content of tradition. See Tribe & Dorf, *supra* note 68, at 1087. This criticism is accurate in *some* but not all instances. When an undisputed tradition does exist, the criticism is inapplicable; moreover, as illustrated below, even when there is disagreement, footnote 6 remains useful as a tool of analysis. See *supra* notes 125-27 and accompanying text (discussing the indeterminate content of tradition); *infra* notes 193-97 and accompanying text (discussing the cases where tradition is determinate); *infra* notes 198-202 and accompanying text (discussing footnote 6 as a heuristic).

Second, citing the emergence of minimum wage laws, they argue that the absence of a positive law encroaching on a right does not prove that a right is fundamental. See Tribe & Dorf, *supra* note 68, at 1087-88. This is true, but it does not diminish footnote 6's validity when a positive tradition exists. See *supra* notes 123-24 and accompanying text (discussing legislative inaction). This also seems to be an extremely ironic criticism for a proponent of judicial activism to be making of an opponent of judicial activism.

Third, they argue that a government does not gain a vested right to continue violations of the Constitution. See Tribe & Dorf, *supra* note 68, at 1088. This is also true, but it begs the question. The existence of a widely held and still extant tradition makes it *extremely unlikely that there is actually any violation* of the Constitution, at least when it comes to the Due Process Clause. Justice Scalia has specifically confined footnote 6 to

guments forecloses footnote 6 nor diminishes its usefulness.

Tribe and Dorf's argument that footnote 6 is illogical also fails. They begin with the correct premise that *no single dimension of specificity exists*.¹⁶⁸ They argue that when a tradition does not exist for the most specific characterization of a purported right, the next level of abstraction of the right is indeterminate.¹⁶⁹ Next, they argue that Justice Scalia has failed to identify the most specific characterization of the right in *Michael H.* To be most specific we would need to add all of the details of this case (for example, hair color, age of the parties, and so forth).¹⁷⁰ Many of these additional details are arguably relevant, such as the fact that Michael H. had established a relationship with Victoria (a detail that Justice Scalia omitted in defining the right at issue).¹⁷¹ Therefore, because Justice Scalia had not defined the right as specifically as possible, other equally plausible candidates exist for the next most specific tradition, such as a tradition protecting fathers who have established relationships with children.

This reasoning confuses essential details with nonessential details. The best example of this mistake is to examine the *Michael H.* case itself. In fact, the tradition that Justice Scalia examined was the most specific available. The reason the tradition did not refer to the existing relationship was because this

"ambiguous" constitutional provisions. See *Rutan v. Republican Party of Ill.*, 110 S. Ct. 2729, 2748 n.1 (Scalia, J., dissenting). These traditions are the guideposts for determining the constitutionality of laws, not vice versa. See *id.* at 2748 (Scalia, J., dissenting).

Finally, Tribe and Dorf ask "how do we know when to reject an historical pattern or understanding?" Tribe & Dorf, *supra* note 68, at 1090. If, however, Justice Scalia intends footnote 6 to apply only to *extant* traditions, it seems unlikely that the Court would ever need to reject an outmoded tradition—for example, flogging—especially if it does not violate a textual command of the Constitution (including the Equal Protection Clause). Flogging would violate the Eighth Amendment's prohibition of cruel and unusual punishment. Furthermore, if we regard tradition as evolving, it seems even less likely that the Court should need to act. See *supra* notes 105-14 and accompanying text. See also J. ELX, *supra* note 16, at 183 (noting that "it can only deform our constitutional jurisprudence to tailor it to laws that couldn't be enacted, since constitutional law appropriately exists for those situations where representative government cannot be trusted, not those where we know that it can").

168. See Tribe & Dorf, *supra* note 68, at 1090.

169. See *id.* at 1091 ("In other words, when we find that there is no relevant tradition concerning asserted right X under conditions 1 and 2, do we consult traditions concerning right X under condition 1 in general, or do we consult traditions concerning right X under condition 2 in general?"). See also *supra* notes 125-27 and accompanying text (discussing this failure of footnote 6).

170. See Tribe & Dorf, *supra* note 68, at 1091-92.

171. See *id.* at 1092.

detail was nonessential. The tradition existed regardless of an existing relationship. The California law presumed legitimacy regardless of whether such a relationship existed (and regardless of the hair color of the litigants or the age of the parties). Tribe and Dorf could rephrase the tradition in their own terms, and the decision would still be the same.¹⁷²

Tribe and Dorf confront this essential-versus-nonessential debate later in their article. They argue that in determining *precedent*, it is debatable as to which facts are essential and which facts are nonessential. Were this also true for *tradition*, Tribe and Dorf would save their argument. In other words, if the existing relationship between a father and his children were essential, Tribe and Dorf would be correct that Justice Scalia had not found the most specific level of tradition, because his tradition would not have addressed that detail.

Traditions, however, *differ* from *precedent* in this regard. Traditions often define which of their elements are essential. Precedents rarely do.¹⁷³ Using the California law addressed in *Michael H.* as an example, the law explicitly stated the conditions that were required to invoke the presumption (that is, the husband and wife must cohabit, and he must not be impotent or sterile). All other facts are irrelevant. Laws define their own essential elements, often at a very high level of abstraction,¹⁷⁴ whereas cases adjudicate controversies with very specific facts. Tribe and Dorf have therefore made a logical error in arguing that the most specific level of tradition is unattainable.¹⁷⁵

172. See *id.* at 1092 (emphasis in original) (“What are the rights of the natural father of a child conceived in an adulterous but longstanding relationship, where the father has played a major, if sporadic, role in the child’s early development?”). The answer to this question is that California’s evidence law presumes legitimacy in this situation *also*, as do the laws of virtually all other states. See CAL. EVID. CODE ANN. § 621 (West Supp. 1989).

173. When statutes embody the most specific tradition, it is not possible to argue that a statute has “gravitational” force as a precedent might. Cf. R. DWORKIN, *supra* note 87, at 111 (“Judges and lawyers do not think that the force of precedents is exhausted, as a statute would be, by the linguistic limits of some particular phrase.”). Societal traditions spell out their essential elements less clearly than do statutes. Admittedly, some of the time, the most specific level of societal tradition will be unattainable because the tradition is ambiguous regarding whether an element is essential or not. For instance, returning to the example of societal traditions, see *supra* notes 121-22 and accompanying text, no one would argue that the hair color of a unmarried woman seeking artificial insemination is a relevant factor in societal tradition. Whether the woman intended to raise the child in a same-sex household might be essential to the societal tradition, however.

174. Legislatures often define laws at too high a level of abstraction. See, e.g., Board of Airport Comm’rs for Los Angeles v. Jews for Jesus, Inc., 482 U.S. 569 (1987) (law prohibiting all First Amendment activity in airport overboard).

175. Having satisfied themselves that footnote 6 is theoretically incoherent, Tribe

F. *Redressing Societal Inequities Through the Equal Protection Clause*

In addition to substantive due process, the Equal Protection Clause provides the Court an affirmative tool to redress broad societal inequities.¹⁷⁶ As discussed earlier, Justice Scalia reasoned from the Supreme Court's repeated use of tradition that the purpose of due process is to protect the traditional values of society and to "prevent future generations from lightly casting aside important traditional values—not to enable this Court to invent new ones."¹⁷⁷ This is in stark contrast to the assertion of Justice Brennan that "'liberty' must include the freedom not to conform."¹⁷⁸

A number of scholars, including many of whom Justice Brennan might have expected to agree with him, have begun to articulate the same vision for the Due Process Clause as Justice Scalia, while arguing that the Equal Protection Clause was intended to require alterations in societal practices.¹⁷⁹ For instance, Professor Sunstein has written:

The Due Process Clause often looks backward; it is highly relevant to the Due Process issue whether an existing or time-honored convention, described at the appropriate level of generality, is violated by the practice under attack. By contrast, the Equal Protection Clause looks forward, serving to invalidate practices that were widespread at the time of its ratification and that were expected to endure.¹⁸⁰

He observes further that "the Equal Protection Clause is a self-

and Dorf then criticize any use of it as a valuable heuristic. See Tribe & Dorf, *supra* note 68, at 1095. They argue that, although they support methodologies that might control the biases of judges, footnote 6 would allow the importation of "values surreptitiously." *Id.* at 1096. Unfortunately, Tribe and Dorf fail to explain what values footnote 6 imports, other than democracy.

176. See *Cruzan v. Director, Mo. Dep't of Health*, 110 S. Ct. 2841, 2863 (Scalia, J., concurring) ("Our salvation is the Equal Protection Clause, which requires the democratic majority to accept for themselves and their loved ones what they impose on you and me.").

177. *Michael H.*, 491 U.S. at 122 n.2.

178. *Id.* at 141 (Brennan, J., dissenting).

179. But see Tribe & Dorf, *supra* note 68, at 1093-95. Tribe and Dorf find the Equal Protection Clause to be a "manifestly inadequate means of protecting many individual rights." *Id.* at 1094.

180. Sunstein, *supra* note 62, at 1163; see also *id.* at 1171 ("The Due Process Clause is thus closely associated with the view that the role of the Supreme Court is to limit dramatic and insufficiently reasoned change, to protect tradition against passionate majorities, and to bring a more balanced and disinterested perspective to bear on legislation."). Professor Sunstein does not believe, however, that tradition can control in close cases. See *id.* at 1173.

conscious repudiation of history and tradition as defining constitutional principles.”¹⁸¹ Judge Easterbrook agrees, arguing that the Fifth Amendment and the Bill of Rights generally were understood as a “nondegradation principle” designed to ensure that things would not “get worse.”¹⁸²

The vision of the Equal Protection Clause protecting rights that the Due Process Clause fails to protect is consistent with precedent. For instance, the Equal Protection Clause prohibits “discrimination with respect to the right to vote and the right to appeal . . . even though the states may eliminate both rights”¹⁸³ without violating due process. “The Court has [also] barred distinctions affecting the right to marry and the right to procreate while assuming that those rights are substantively unprotected by the Due Process Clause.”¹⁸⁴ Professor Sunstein, who would advocate a more active role for the Supreme Court, does not worry about relying primarily on the Equal Protection Clause. He asserts that “[i]t may be that the Equal Protection Clause will ultimately prove to be a preferable source of decision, though in order to defend the outcome in *Roe*, the argument would have to be quite elaborate.”¹⁸⁵

From a perspective advocating judicial restraint, using the Equal Protection Clause rather than the Due Process Clause to effect broad changes in societal practices might not be seen as much of an improvement.¹⁸⁶ However, using the Equal Protection Clause is inherently more democratic than using the Due Process Clause. For the Court to find a right to engage in such activities as birth control, abortion, and marriage, it would first need to identify some comparable right given to others. There would need to have been some *legislative* decision to grant such a right to some group or person before the Court could decide

181. *Id.* at 1168.

182. Easterbrook, *supra* note 31, at 95.

183. Sunstein, *supra* note 62, at 1169 (citing *Harper v. Virginia Bd. of Elections*, 383 U.S. 663 (1966); *Griffin v. Illinois*, 351 U.S. 12 (1956)).

184. *Id.* (citing *Zablocki v. Redhail*, 434 U.S. 374 (1978); *Skinner v. Oklahoma*, 316 U.S. 535 (1942)).

185. *Id.* at 1175 (citing a number of authorities that have made cogent arguments that the Equal Protection Clause holds great potential for shattering traditions). *See, e.g.*, C. MACKINNON, *FEMINISM UNMODIFIED* 93-102 (1987); L. TRIBE, *supra* note 11, § 15-10, at 1353-56; Ginsburg, *Some Thought on Autonomy and Equality in Relation to Roe v. Wade*, 63 N.C.L. REV. 375 (1985); Karst, *Foreword: Equal Citizenship Under the Fourteenth Amendment*, 91 HARV. L. REV. 1, 53-59 (1977).

186. *See, e.g.*, Bork, *supra* note 31, at 12 (suggesting that Equal Protection Clause is overused).

that another group or person deserved that right.¹⁸⁷ Advocates of judicial restraint should much prefer a tool that imposes standards on the Court's actions to one that does not.¹⁸⁸

G. Footnote 6—A Useful Tool for Judicial Restraint

Although not providing fully determinate results in all cases, footnote 6 would still provide considerable guidance to the Court. There are many constitutional scholars, however, who argue against any constitutional theory, such as that suggested by footnote 6, that purports to provide "objective standards."¹⁸⁹ These scholars posit that because the Constitution is written in such broad terms, it is inevitable that judges will interject their personal values when interpreting the broad terms, when discerning the intentions of the Framers, or, as in this case, when determining the existence and content of historical traditions.¹⁹⁰ "The Court has discretion in most constitutional cases and the exercise of discretion is inescapably influenced by a Justice's views."¹⁹¹ These scholars reason that any attempt to provide an objective constitutional theory is doomed and futile.¹⁹²

This argument is flawed when applied to the footnote 6 approach for two reasons. First, although footnote 6 would not always yield a dispositive answer, it often would. Second, even if footnote 6 were not dispositive, it would provide a tool to

187. As Justice Jackson once wrote: "Invalidation of a statute or an ordinance on due process grounds leaves ungoverned and ungovernable conduct which many people find objectionable. Invocation of the Equal Protection Clause, on the other hand, does not disable any governmental body from dealing with the subject at hand." *Railway Express Agency, Inc. v. New York*, 336 U.S. 106, 112 (1949). See also L. TRIBE, *supra* note 11, § 16-1, at 1436; Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 41-43 (1972).

188. This argument is a simplification. In fact, an overly aggressive Court could find that rights were dictated by the Equal Protection Clause when there had been no such explicit legislative action granting the right to another group. Such a situation would occur where the Court decided that the Equal Protection Clause dictated a certain result even though the corresponding groups were not similarly situated. Abortion is an excellent example of such a case. See C. MACKINNON, *supra* note 185, at 93-102 (arguing that the Equal Protection Clause would invalidate anti-abortion laws). Current equal protection jurisprudence cannot be read so broadly, however. See Sunstein, *supra* note 62, at 1175.

189. See, e.g., Chemerinsky, *supra* note 32, at 90-93; Ely, *supra* note 6, at 42; Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781, 784-85, 802 (1983); *The Supreme Court, 1988 Term—Leading Cases*, *supra* note 62, at 186.

190. See Chemerinsky, *supra* note 32, at 90.

191. *Id.*

192. See generally *id.* at 94-95.

structure the inquiry.¹⁹³

In many situations, Justice Scalia's new test would determine the outcome of a case. The tradition at the most specific level may be so overwhelmingly clear that no amount of manipulation can distort that tradition. One clear example of such a situation is the *Michael H.* case itself. Justice Scalia presented a devastating historical case for the relevant tradition in that case. Not only had the presumption of legitimacy been the law for 500 years, but California had repeatedly amended the law without changing the general rule, thus implicitly giving it the stamp of approval of current citizens.¹⁹⁴

Another example of a case involving an overwhelming societal tradition is *Roe v. Wade*. Before *Roe* was decided, there were only four jurisdictions that could be said to have legalized abortion, and most abortions were illegal under the American Law Institute's Model Penal Code.¹⁹⁵ Under no set of circumstances could four states be said to have changed the longstanding tradition of the country prohibiting abortion.¹⁹⁶ Accordingly, using Justice Scalia's footnote 6 approach, the Court in *Roe v. Wade* would have likely reached the opposite result.

It is overly simplistic, therefore, for constitutional scholars to assert that a constitutional theory is indeterminate because the justices can interject personal values into *some* cases.¹⁹⁷ Foot-

193. See Easterbrook, *supra* note 31, at 92 ("That these tools of interpretation do not answer all questions does not mean that they are useless."). Cf. Fried, *Sonnet LXV and the "Black Ink" of the Framers' Intention*, 100 HARV. L. REV. 751, 757-59 (1987) (arguing that the words of the Constitution do have meaning and can often control concrete cases).

194. See *Michael H.*, 491 U.S. at 117-18, 124-25.

195. See Note, *Abortion: The Five-Year Revolution and Its Impact*, 3 ECOLOGY L.Q. 311, 313-18, 345 (1973). The four jurisdictions legalizing abortion before *Roe* were Alaska, Hawaii, New York, and Washington.

196. Advocates of the theory of legislative impairment would argue, of course, that it is likely that national views on abortion had actually changed and that the legislatures of the other 47 jurisdictions were impaired from implementing this change. See Fiss, *supra* note 114, at 5-17. Had a more sizable number of states changed their laws, this argument might gain plausibility. When 47 of 51 jurisdictions retain abortion prohibitions on the books, however, the argument has limited force.

197. As Justice White has stated:

These distillations of the possible approaches to the identification of unenumerated fundamental rights are not and *do not purport to be precise legal tests* Their utility lies in their effort to *identify some source* of constitutional value that reflects not the philosophical predilections of individual judges, but *basic choices made by the people* themselves in constituting their system of government

Thornburgh v. American College of Obstetricians & Gynecologists, 476 U.S. 747, 791 (1986) (White, J., dissenting) (citations omitted) (emphasis added). He went on to ar-

note 6 is significant in that, in many cases, it would require that *someone* other than five justices of the United States Supreme Court decide that a right is fundamental *before the Court does so*.

The second reason that footnote 6 does not represent an empty gesture is that it provides guidance to the Court and the rest of the American court system (not to mention state and local governments) by structuring the inquiry to be made, even when providing no conclusive answer. In many past substantive due process cases, the Court has simply declared that a right was fundamental by fiat, providing virtually no reasoning.¹⁹⁸ *Roe* provides a good example of such jurisprudence.¹⁹⁹ Many substantive due process cases use tradition to support their result but avoid any in-depth discussion of the existence, level of generality, or content of those traditions.²⁰⁰

The Court has carefully avoided creating a definable jurisprudence in the substantive due process area.²⁰¹ A review of the majority and dissenting opinions in these cases reveals a virtual lack of reasoned discussion. Lower courts, which in aggregate encounter a far greater number of substantive due process claims than the Supreme Court, have been left with nothing but the individual results of substantive due process cases from which to reason.²⁰² State and local governments

gue that such sources of constitutional values can be found in "traditions and consensus of our society." *Id.* (White, J., dissenting).

198. Christie states:

[T]his discretionary authority is broadened by the fact that it is often difficult to determine what these cases stand for, either collectively or individually, and therefore to determine what their precedential value is over and above the proposition that it is proper to carve out new rights whenever it seems necessary.

Christie, *supra* note 31, at 1325-26. He goes on to write that "[t]hus, on its face, each of these landmark decisions provides little more than an assertion of its result." *Id.* at 1334. See also Loewy, *Abortive Reasons and Obscene Standards: A Comment on the Abortion and Obscenity Cases*, 52 N.C.L. REV. 223 (1973).

199. See Ely, *supra* note 31 (criticizing *Roe* as an unprincipled decision).

200. See, e.g., Moore v. East Cleveland, 431 U.S. 494 (1977); *Roe v. Wade*, 410 U.S. 113, 148 (1973); Griswold v. Connecticut, 381 U.S. 479, 501 (1965) (Harlan, J., concurring).

201. Even Professor Chemerinsky recognizes this void, although he seems to argue, inexplicably and ironically, that advocates of judicial restraint who have proposed constitutional theories are to blame for the Court's failure to develop a coherent theory. See Chemerinsky, *supra* note 31, at 95 ("First, the Court's insistence on constitutional principles that exist entirely apart from the preferences of the Justices will prevent the development of a theory of interpretation.")

202. See, e.g., Griffith v. Johnston, 899 F.2d 1427, 1438 (5th Cir. 1990) ("The Supreme Court's decisions regarding 'fundamental interests' are more easily enumerated than analyzed.")

have often had no idea whether the ordinances they have enacted or enforced are constitutional.

The need for an analytical framework for the Court is now the problem of the new "conservative" wing of the Court. No longer does this wing have the luxury of criticizing Court decisions; it must now justify its criticisms in a consistent fashion. In the substantive due process context, footnote 6 provides this consistency.

CONCLUSION

Justice Scalia may have initiated a new era of substantive due process in footnote 6. His test would provide much-needed guidance for lower courts and will provide a structure for future debates in the Court. Most importantly, footnote 6 would prevent the Court from reaching decisions that completely contradict society's views. The Court has no authority or standard for changing society's practices except through the text of the Constitution. Balancing competing interests should be the privilege of society and not the Court. This approach is reconcilable with precedent, but more importantly, it is reconcilable with our most cherished of democratic principles: the rule of law. The Court should therefore adopt it explicitly.

