LIBERAL AND CONSERVATIVE JURISPRUDENCE ON THE CONTEMPORARY SUPREME COURT: AN ANALYSIS OF SUBSTANTIVE DUE PROCESS INTERPRETATION

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I. Introduction
   a. Methodology

II. Theoretical Background
   a. Basic Overview of the Constitutional Theories that Define Liberal and Conservative Jurisprudence
   b. A Closer Look at the Due Process Clause in the Fourteenth Amendment—What makes due process cases concerning personal rights so special in highlighting the need for a more coherent liberal jurisprudence?

III. Evidence—Analyses of the Cases Themselves
   a. Family Rights
      i. DeShaney v. Winnebago County (1989)
   b. Abortion Rights
      i. Roe v. Wade (1973)
   c. Gay Rights

IV. Methodological Patterns in Liberal Methodology—In conjunction, do these cases suggest an answer as to what level of generality should be standardized in liberal jurisprudence?

V. The Future of Liberal Jurisprudence—A speculation on the likelihood of the Court expanding the scope of protected liberty interests to include same-sex marriage
I. Introduction

Is liberal jurisprudence coherent? Liberal theorists often point to the hypocrisy of conservative Supreme Court decision-making in terms of the propensity to make politically favorable decisions under the guise of strict authority to the text, original intent, and the narrowest interpretation of history and tradition. Conservative justices commonly argue that the liberal members of the Court use too high a level of generality in their decisions, and deviate from acceptable legal methodologies to further the liberal political agenda. Yet neither of these commonly cited arguments are the root cause of the contention between liberal and conservative methods of interpretation. Rather, the fundamental problem is that liberals are making the same methodological mistakes as conservatives in the limits they impose on their approach. Liberal justices have been too specific in terms of deferring constitutional authority to the same overly narrow traditions—just like the conservatives do. Liberals draw upon these authorities too narrowly by selecting overly specific evidence to create an outcome-based approach. It appears both liberals and conservatives alike interpret the Constitution through the same mechanisms, yet arrive at different political outcomes.

The main contention of this thesis is that a critique of liberal jurisprudence cannot simply end with the conclusion that it is all politics. It superficially appears that liberal justices are only marginally more liberal than their conservative counterparts, and as such, embody similar methodological approaches derived from their shared conservative roots in constitutional theory. Yet there are significant problems with this narrative. None of the justices “write as if politics alone dictated their different legal conclusions. Rather, both write as though their understanding of ‘the Law,’ and their understanding of the appropriate scope of the judicial role, led them to
their divergent formulations.”¹ There must be a more appropriate explanation lurking within the opinions themselves that incorporates the justices’ political differences along with their jurisprudential visions. One main question in understanding liberal jurisprudence is:

Does “liberty” receive from even the liberal members of the Court at best a broad interpretation and a defense grounded in the conservative values of fidelity to the past, conformity to traditions…and respect for judicial precedent, rather than liberal commitments to autonomy or radical commitments to liberation?²

This question critiques liberal jurisprudence for its conservative roots, and hints at a solution to overcoming such conservatism by incorporating larger constitutional principles of autonomy and liberty into the underlying assumptions guiding liberal methodology. The way for liberals to avoid drawing upon a methodology that is rooted in conservatism is to subscribe to the tradition of American constitutional thought that argues that constitutional rights can exist outside the text or can be implied from the basic constitutional order, the fundamental narratives of American history and American identity, the common and honored traditions of the American people, or the deepest meanings of liberty and equality in a free and democratic republic.³

This methodology, calling for the Court to interpret the vague clauses of the text as instructional guides for how to look outside the text, is a major distinction between strict conservative methods of constitutional interpretation and more general liberal methods.

The Court is not a policymaker, nor is it an arbiter of moral or political disputes based on the justices’ personal value judgments. It is a legal interpreter of the Constitution—a document outlining not only rules, but also principles, written hundreds of years ago that still legally apply to the United States today. As such, the Court cannot act with political or moral interests, only

² West, 1381.
with the purpose of asserting the Constitution’s legal authority to resolve disputes in contemporary society in such a way that best remains consistent to the text’s codified rules and principles.

Why then do liberal justices generally reach politically liberal outcomes, and conservative justices reach politically conservative outcomes? How can this trend be legitimately explained on legal grounds?

The answer is not political—it is indeed legal. The explanation resides in the different methodologies employed by the liberal and conservative justices. And the key to understanding the legal basis for these differences can be found in the levels of generality underlying liberal and conservative interpretational techniques.

The differences between the respective liberal and conservative methodologies are embodied within the issue of how the Constitution’s vague language should be interpreted. This issue goes back to the first landmark cases in the Court’s history. In *McCulloch v. Maryland* (1819), Justice Marshall establishes a precedent regarding how to properly treat the Constitution’s guarantees of various broad principles. *McCulloch* looks at the Constitution as more than just a legal code. It is a document containing deliberately broad, and sometimes vague, principles, which indicates that the Framers intended for the Court to preserve these ambiguities. Justice Marshall contends that the Federal government can act within its constitutional right to create legislation that is not explicitly enumerated in its list of constitutional powers, as long as such laws further the inherent principles behind these powers. Justice Marshall writes the following in *McCulloch* to ground his opinion as being in accordance with the overall purpose of the Constitution:

> A Constitution, to contain an accurate detail of all the subdivisions of which its great powers will admit, and of all the means by which they may be carried into execution,
would partake of the prolixity of a legal code, and could scarcely be embraced by the human mind. It would probably never be understood by the public.\textsuperscript{4}

His eloquent discussion of the methodology in which the Court should interpret the Constitution creates an enduring precedent in terms of the expansive quality of the language. The text is not an exact code that should be followed in its most specific form. It is an outline of transcending principles that are to be preserved as best as possible throughout the course of the nation’s social and political evolution. This understanding of the Framers’ intent is compounded with the acknowledgement that there are also some very specific clauses. If the Framers intended for all parts of the text to be interpreted in the same way, why then does Article II Section I state that the President holds office for a term of four years, whereas Article XIV Section I says that no state can deprive any person of life, liberty, and property? It is simply nonsensical that one theory of interpretation could account for how to treat the entire Constitution. While the procedural method for protecting the executive power’s term limits is a concrete rule, the guarantee of liberty cannot be procedurally interpreted in the same straightforward manner.

Justice Marshall writes that he Constitution’s

\[ \text{nature, therefore, requires that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects be deduced from the nature of the objects themselves. That this idea was entertained by the framers of the American Constitution is not only to be inferred from the nature of the instrument, but from the language.}^{-5} \]

He makes this distinction between interpreting principles and concrete procedures to defend his proposed method of employing a high level of generality in interpreting the Constitution’s vague clauses.

Why else were some of the limitations found in the 9th section of the 1st article introduced? It is also in some degree warranted by their having omitted to use any

\begin{footnotesize}
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  \item[5] ibid.
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restrictive term which might prevent its receiving a fair and just interpretation. In considering this question, then, we must never forget that it is a Constitution we are expounding.  

Justice Marshall sets an important precedent in *McCulloch* in terms of how to interpret the language of the text with the correct level of generality. He sets the stage for the Court to justify decisions based on the assumption that the Constitution calls for an interpretation of principles, rather than for an exact adherence to a code of rules.

Justice Marshall also discusses the Constitution’s intent to extend liberties, rather than limit them. The Framers intentionally used such vague language precisely so that the Court could interpret the text in such a way that would expand rights to the utmost extent.

It must have been the intention of those who gave these powers to insure, so far as human prudence could insure, their beneficial execution. This could not be done by confiding the choice of means to such narrow limits as not to leave it in the power of Congress to adopt any which might be appropriate, and which were conducive to the end. This provision is made in a Constitution intended to endure for ages to come, and consequently to be adapted to the various crises of human affairs.

With this analytical framework, Justice Marshall interprets the Necessary and Proper Clause as being a tool to establish the extent of the powers of Congress, rather than to limit them. This Clause states: “The Congress shall have Power—To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution.”  

In *McCulloch*, Justice Marshall argues that the creation of a federal bank is constitutional because it falls under the scope of the implied power to do so, as demonstrated in the abstract language of the Clause. “Among the enumerated powers, we do not find that of establishing a bank or creating a corporation. But there is no phrase in the instrument which…excludes incidental or implied powers and which requires that everything granted shall

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6 ibid.
7 ibid.
8 U.S. Const., Art. 1, Sec. 8, Cl. 18.
be expressly and minutely described.’” While the Constitution may not explicitly permit the creation of a federal bank, the Necessary and Proper Clause dictates that such a creation is constitutional because it is for the purpose of furthering its taxation and spending powers.

Justice Marshall elaborates on the legal justification behind his methodology with a discussion of the meaning behind the Necessary and Proper Clause. He writes that it “is placed among the powers of Congress, not among the limitations on those powers.” This is the core of his argument. The vague language enables the Constitution to act as a guide to ensure certain principles are upheld, rather than a code of rules that serves to limit governmental powers.

Its terms purport to enlarge, not to diminish, the powers vested in the Government. It purports to be an additional power, not a restriction on those already granted. No reason has been or can be assigned for thus concealing an intention to narrow the discretion of the National Legislature under words which purport to enlarge it. The framers of the Constitution wished its adoption, and well knew that it would be endangered by its strength, not by its weakness.

The Framers phrased this Clause in such a way that would grant Congress the power to enact any and all laws that are “necessary and proper” to furthering the codified constitutional principles regarding governmental power. If their intention had been to restrict Congress’ powers, the language of the Clause would have been along the lines of “no laws shall be passed but such as are necessary and proper.” If the intention were for the Necessary and Proper Clause to be restrictive in nature, its language would have unambiguously taken on such a form. Yet,

the result of the most careful and attentive consideration bestowed upon this clause is that, if it does not enlarge, it cannot be construed to restrain, the powers of Congress, or to impair the right of the legislature to exercise its best judgment in the selection of measures to carry into execution the Constitutional powers of the Government.

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9 *McCulloch v. Maryland* 17 U.S. 316 (1819).
10 ibid.
11 ibid.
12 ibid.
13 ibid.
With Justice Marshall’s interpretation of the most constitutionally sound methodology to treat the Constitution’s vague language, the legal differences between liberal and conservative jurisprudence become more defined.

Conservative jurisprudence commonly has an agenda of limiting rights in cases concerning personal, familial, and sexual liberty interests in order to remain as loyal to the past as possible. This is justified by a methodology that only looks to the most specific traditions. By subscribing to this assumption behind constitutional interpretation that views the text as a rulebook to be followed as strictly as possible, conservatives are subsequently able to justify employing the narrowest level of generality in their analyses of tradition. This defends the political outcome of limiting rights on legal grounds because it interprets the Constitution as a guide for how to remain as loyal to the traditions of the past as possible. The most specific view of tradition provides a legal basis upon which to decide a case because it is the closest way to ensure that society continues to follow the Constitution in its most literal sense. With this methodology, conservative justices generally arrive at legal outcomes that are likely to conform with a conservative political agenda of limiting rights to the utmost legally valid extent. The conservative justices are obviously much more likely to rule against the legitimacy of the right in question with a methodology that only encompasses the most specific and narrow traditions associated with that right.

Liberal jurisprudence can be characterized as having the opposite legal agenda. Namely, liberal jurisprudence aligns itself with a constitutional theory that favors expanding personal rights in order to best uphold enduring constitutional principles in a contemporary context. “Law’s attitude is constructive: it aims…to lay principle over practice, to show the best route to a
better future, keeping the right faith with the past.”¹⁴ This agenda is grounded in legal theory because it advocates an understanding of the Constitution that emphasizes the abstract clauses as having the broad purpose of upholding underlying principles within an evolving political and social context. This allows the Court to use a higher level of interpretational freedom to apply these enduring principles to contemporary circumstances. In order to further this interpretation of the Constitution, liberal jurisprudence advocates the need for a more general view of tradition. By interpreting tradition through a wider and more general scope, the Court is able to provide legal justification in support of expanding rights in such a way that remains most loyal to larger constitutional ideals of liberty, privacy, and autonomy. The liberal methodology in personal rights cases interprets the text as a guidebook for the Court to make legal decisions that uphold certain values, rather than certain literal outdated laws, and to ensure these underlying values withstand any changes in the political and social structures of society. As such, the agenda of preserving the constitutional conception of liberty calls for a methodology that looks to a more general interpretation of tradition. The justification for this level of generality is based on the underlying values of past traditions, rather than the literal historical legality of the most specific tradition regardless of whether it may have served a different purpose in a historical time period characterized by different social and political structures.

With such fundamentally different interpretations of the most appropriate level of generality, it logically follows that liberal and conservative justices analyze tradition through contradictory scopes. Yet, there is an imbalance in terms of the consistency in the two approaches. In conservative jurisprudence, the rule of looking to the most specific tradition is a concrete guideline, and thus creates consistency and cohesiveness in conservative methodology.

There exists a lower and an upper limit on the scope of interpretation. In liberal jurisprudence, however, there is a basic consensus that a wider level of generality should be used, but no consistent approach to answering the question of what level of generality this should be. As such, a more coherent liberal methodology has not yet emerged. Conservatives confine their scope of analysis to the most specific end of the spectrum, but liberals have only gone as far as to establish that their methodology falls *somewhere* on the spectrum that is more general. This hinders the ultimate liberal agenda of rights expansion because there does not exist a means to accomplish such an agenda that is as consistent as the means the conservative have established.

**A. Methodology**

My goal is to look at four chosen cases to see how the differences in the levels of generality between liberal and conservative justices actually manifest themselves in their respective opinions. I focus on methodological patterns in the liberal opinions in search of a more coherent liberal jurisprudence. This stems from establishing more definitive guidelines for how best find the level of generality that will maximize the ability to legally justify rights expansion. I end my discussion by applying my conjecture of the most appropriate level of generality in liberal jurisprudence to the future of same-sex marriage. This practical application of how to further the liberal jurisprudential agenda is put to the test when viewed in light of one of the most timely rights-based issues today.

Part IIA begins by grounding my analysis within a theoretical discussion of the respective liberal and conservative assumptions behind their methodologies in due process cases involving substantive individual rights. I provide a basic overview of the fundamental constitutional theories that define liberal and conservative jurisprudence. These theories include originalism,
textualism, history and tradition, and the moral reading. Since the justices use these theories in different ways to derive both narrow and broad interpretations of the Constitution’s authority, it is necessary to understand what they entail at their cores.

Part IIB narrows the discussion to understanding these theories in relation to the Due Process Clause of the Fourteenth Amendment, as it is drawn upon in individual rights cases. I provide an overview of how the Court’s interpretation of the Due Process Clause is unique in nature with regard to its high level of ambiguity. As such, the conservatives are able to defend their overly narrow methodologies, and the liberals are able to defend their more general methodologies, both based upon the same brief fragment of language.

Part III places this theoretical framework within a case-based context to show how the aforementioned methods of interpretation are practically employed in liberal and conservative opinions. Part IIIA focuses on family rights in *DeShaney v. Winnebago County* (1989) and *Michael H. v. Gerald D.* (1989). Part IIIB focuses on abortion rights in *Roe v. Wade* (1973). Part IIIC focuses on gay rights in *Lawrence v. Texas* (2003). Through this case-based analysis, an image emerges of how the Court has (or has not) protected privacy rights in the context of family institutions, procreation choice, and sexual autonomy. The justices argue about how these rights can be derived from the text itself, and from its guidelines on how to interpret history and tradition. Through dissecting the language of the opinions in these cases, I evaluate when and where the liberal justices draw upon the same problematic methodologies as the conservative justices, and where they deviate and subsequently work towards establishing a more coherent liberal methodology.

Part IV looks at the methodological patterns in liberal jurisprudence in these rights cases to discover a solution as to what level of generality should be employed. The goal is not to focus
on a solution that does justice to my in-depth look at the problem. Rather, it is simply to briefly
discuss the avenues that should be explored to potentially resolve some of the issues of the
inconsistencies of liberal jurisprudence.

Part V concludes with a study of the future of liberal jurisprudence, focusing on the
future of same-sex marriage. The ultimate focus is on same-sex marriage because it is an issue
still being battled within the courts. This conclusion looks at the practical effects that will arise in
upcoming cases from the liberals’ inconsistent approaches.

II. Theoretical Background

A. Basic Overview of the Constitutional Theories that Define Liberal and Conservative
Jurisprudence

Where do the justices derive authority in the Constitution to justify their decision-making
methodologies? Are different interpretive methods more appropriate than others in different
cases? To what extent are these methods intertwined with political goals rather than being purely
legal analyses? Before viewing the major constitutional theories in practice, it is useful to strip
away the “messiness” and understand their core definitions and justifications. Both liberals and
conservatives seek to discover the scope of protected liberty interests in the Constitution through
some combination of the authority of the text, Framers’ intent, history and tradition, and the idea
of a conventional objective morality. In their most basic forms, originalism is the theory of
giving utmost authority to the original intent of the Framers. Proponents of originalism ground
their methodology with the view that the nature of the written Constitution is best understood by
what the Framers intended for the language to mean. Textualism is the theory of giving authority
strictly to the text of the Constitution itself. The theory of deferring authority to history and
tradition recognizes both case-based history through precedents and tradition-based history
through strongly entrenched social and political norms. By nature, the theory that the Constitution should be interpreted in light of history and tradition can leave either a lot or a little room for interpretive freedom.

This breakdown of constitutional theories is not simply a laundry list of the possible places to derive authority; they take on a co-dependent formation. Adherence to textualism is necessarily the starting point for all constitutional interpretation. The Court necessarily begins with the text of the original document itself as an authoritative guide to understanding its rules and principles. The difference between conservative and liberal methodologies is that conservatives tend to stop there. Conservative jurisprudence disproportionately places all legitimacy on textualism and originalism, without taking the contemporary context into account.

The key to understanding liberal jurisprudence is that it starts at the same place, yet looks much further beyond a strict adherence to the narrowest interpretation of the text, intent, and tradition. This translates into viewing history and tradition in terms of the enduring underlying principles in the context of evolving social and political attitudes.

As it is lived across time in political life, the principles and meanings that the words of the text, as well as the social constructions that the Court has created to help define those words, inform the Court’s understanding of the meaning of constitutional principles. As such, the text and the world outside the text mutually construct each other in…the social construction process.\(^\text{15}\)

This general view of history and tradition explains “the degree to which the constitutional text is both inward- and outward-looking.”\(^\text{16}\)

Another liberal constitutional theory based upon looking at principles outside the text is known as the moral reading. The theory of the moral reading of the Constitution defers authority


\(^{16}\) ibid.
to the basic moral principles that pervade the American political and social climate. This theory, championed by constitutional scholar Ronald Dworkin, involves more than the rules concretely codified by legislatures and judges. It relies on “a system of adjudication that operates in accordance with moral principles regarding what is just and fair. These legal principles are what justify the various legal rules within the system.” The moral reading recognizes the existence of abstract, objective moral principles that defines society’s collective moral code, and incorporates them into the Court’s determination of the scope of protected rights and the limits on governmental power. In essence, the Bill of Rights intentionally consists of these moral principles in order to ensure that they encompass all “dimensions of political morality that in our political culture can ground an individual constitutional right. The key issue in applying these abstract principles to particular political controversies is not one of reference but of interpretation, which is very different.” Dworkin emphasizes the disciplined nature of this approach through the constraints of history and integrity, which prevent judges from utilizing moral principles to express particular moral judgment. The notion of integrity holds judges to a disciplined standard on both vertical and horizontal levels. Vertically, in order to claim a right as fundamental, a judge must demonstrate that it is consistent with precedent. Horizontally, the judge must give full weight to that principle in future cases he or she decides or endorses. These elements of integrity ensure that a moral reading of the Constitution utilizes morality as a principle rather than a political leaning.

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20 Dworkin (3), 394.
Specifically in terms of privacy rights, Dworkin takes the stance that the implied fundamental right to privacy exists when the right in question can be justified on the assumption that decisions affecting marriage and childbirth are so important, so intimate and personal, so crucial to the development of personality and sense of moral responsibility, and so closely tied to religious and ethical convictions protected by the First Amendment, that people must be allowed to make these decisions for themselves, consulting their own conscience, rather than allowing society to thrust its collective decision on them. \(^{21}\)

Dworkin advocates for the approach that an individual has the constitutional right to privacy when the circumstance in question holds such value to the individual that it would prove detrimental to his or her moral character to let the government determine the outcome. While this outwardly appears to encompass a great level of freedom on the part of the Court, the constraints of history and integrity still hold true. The assumption is that moral principles retain a certain degree of consistency within their very nature, as well as within the constraints outlined by Dworkin. The moral reading would be considerably less grounded if one assumes that the notion of morality itself is inherently unprincipled. Yet, as Dworkin’s interpretive framework is practically applied to judicial decision-making, it is evident that consistency within moral principles rings true.

While liberal applications of the textualist, originalist, and tradition-based interpretational techniques are made distinctly liberal with a principled outward looking focus on theories such as the moral reading, conservative justices stick to more narrow forms of textualism and originalism. Drawing upon Justice Scalia’s originalism as a basis to understand the agenda of conservative jurisprudence, its embodiment of conservatism becomes evident from where he derives his conception of the authority of the Constitution. His interpretive method relies on the Framers, the *Federalist Papers*, and various other historical sources to discern the original intent

\(^{21}\) Dworkin (4), 50-51.
of the Constitution. Justice Scalia defends this method through looking at the fundamental problems with nonoriginalism. He states that all forms of nonoriginalism de-legitimize judicial review. Furthermore, he claims that originalism is the only method of interpretation that offers consistency and predictability. Justice Scalia argues that another defect of nonoriginalism “lies in the apparent illusory benefit that this interpretive approach allows for an expansion of rights beyond the original Constitution and that some versions of nonoriginalism are able to keep the Constitution up to date to reflect current social values.”

Justice Scalia’s interpretation fundamentally falls short because his method is not ideologically neutral. This is demonstrated through his unwillingness to defer to the legislature in areas such as affirmative action, while he advocates doing so in areas such as abortion. His philosophy incorporates conspicuous views on how he believes the political process should operate.

The inconsistency of Justice Scalia’s originalist ideals on a theoretical level and his actual commentary on the Court’s opinions creates difficulties in determining his stance on the legitimacy of looking to implied fundamental rights as justification for deciding a case. “He has regarded some of the Court’s opinions about fundamental liberties of the body to be an example of the Court’s deference to the majority, while he has encouraged a back-door defense of fundamental rights to property.” This paradox in itself becomes a conservative moralizing force because it encompasses Justice Scalia’s conservative political leanings into his opinions.

It is ironic that Justice Scalia implicitly advocates a constitutional reading that draws upon the existence of implied fundamental rights when referring to the right to own and control

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23 Schultz, 56.
property (which he claims is justified by the Fifth Amendment provision of “just compensation”), yet he denies the legitimacy of these implied rights to privacy in terms of the right to abortion, the right to die, and the right to receive governmental assistance to preserve life. He holds that when the state acts in violation of these claims of fundamental liberty, the Court does not need to adopt a higher scrutiny doctrine in its reading of due process in the Fourteenth Amendment. If the Court were to always adhere to Justice Scalia’s narrow interpretation of tradition in cases where there exists the potential to arrive at politically liberal outcomes, many decisions regarding privacy rights would be overturned. For instance, consider that the consensual practice of sodomy between homosexual adults has been historically deemed “immoral” and “unacceptable”. With Justice Scalia’s reading of the Constitution, even the slightest tradition of prohibiting sodomy is reason enough for the Court to unwaveringly restrict it. On the other hand, Dworkin’s moral reading derives the polar opposite outcome in the sense that the moral principles at play constitute a stronger rationale than does Justice Scalia’s justification based upon an antiquated tradition that is largely irrelevant in the contemporary political climate.

In Justice Scalia’s so-called “faint-hearted” originalism, he addresses Dworkin’s moral framework for the right to privacy. He acknowledges the existence of degrees of moral reasoning embedded within the Court’s methodologies. Justice Scalia argues that it is unreasonable to view constitutional theory as simply a battle between nonoriginalists and pure originalists, in terms of the legitimacy of Court decisions made on the basis of the text’s application in light of current social and political values. While Justice Scalia fundamentally argues that the Court must look to the original meaning of the text, he also concedes that this original meaning can be read in light of its underlying principles. He makes this concession with the constraint that such principles
must be applied in the same ways they would have been when they were adopted.\textsuperscript{25} This form of originalism ties back to the moral reading because Justice Scalia advocates a textual interpretation that is rooted in the moral compass of the past. The main difference is that conservatives place value on society’s moral code as it existed at the time the Framers wrote the Constitution, whereas liberals place value on morality as an ever-evolving societal construct. Liberals argue that this notion of a changing collective morality must be taken into account when deciding how to best uphold constitutional principles that were written centuries ago, as they apply in a modern context.

   Overall, the various ways in which liberal and conservative theories of constitutional interpretation are intertwined demonstrate that it is impossible to define liberal and conservative jurisprudence as wholly separate entities in terms of their respective levels of adherence to specific theories. Rather, these theories are employed as tools to justify judicial opinions in accordance with the fundamentally opposing assumptions of liberals and conservatives about whether the Court’s role is to limit or expand liberty interests.

   **B. A Closer Look at the Due Process Clause in the Fourteenth Amendment—What makes due process cases concerning personal rights so special in highlighting the need for a more coherent liberal jurisprudence?**

   How do the aforementioned theories of constitutional interpretation manifest themselves in due process individual rights cases? As the Due Process Clause is so vague in nature, its language emphasizes the need for a more general scope of interpretation when dealing with such intentionally inconclusive and ambiguous language. The Clause has been narrowly interpreted to

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protect past traditions against short-run departures brought about by temporary majorities who do not act in accordance with long-standing practices in the nation’s history.\textsuperscript{26} This is in contrast with equal protection, which has been interpreted more progressively in its orientation towards challenging the status quo. The Equal Protection Clause has been regarded as a tool for the Court to invalidate practices that were considered normal at the time of ratification, yet now act as a disservice to disadvantaged minorities. In contrast, the history of due process “fairly clearly direct[s] the Court to traditional, historical sources for ascertainment of the content of the liberty they protect… [Due process] historically has been the tool of the conservative impulse to preserve the liberties defined by the past and to protect against overzealous, imprudent change.”\textsuperscript{27}

The nature of due process itself positions the Court to grapple with heightened contention between the different liberal and conservative notions of how to conform to the past.

As due process contains such general and ambiguous guarantees, the range of legally valid interpretations can be either quite large or quite small, depending on how the Court treats the vague language. The liberal justices draw upon a more general interpretation of due process in deciding personal rights cases through making the distinction between concepts and conceptions. Dworkin explores the type of legal reasoning that permits such a distinction, as an integral component of his larger view of law as integrity.

The contrast between concept and conception is here a contrast between levels of abstraction at which the interpretation of the practice can be studied. At the first level agreement collects around discrete ideas that are uncontroversially employed in all interpretations; at the second the controversy latent in this abstraction is identified and taken up.\textsuperscript{28}

\begin{itemize}
\item \textsuperscript{27} West, 1381-1382.
\item \textsuperscript{28} Dworkin (2), 71.
\end{itemize}
A concept is a concrete entity in which the Court can agree upon its existence and applicability. Yet, the key to correctly interpreting a concept in constitutional law is understanding what the concept actually means and how its meaning can best be applied to the case at hand.

Dworkin illustrates this theory with an example of the Court’s interpretation of the Constitution in an equal protection case. In this hypothetical case, the Court determines that the Equal Protection Clause refers to the concept of equality. With this determination, the Court must then decide what equality actually means. To do this, it determines “what conception of equality best fits and justifies our legal practices—narrowly, the equal protection clause cases but more broadly, the whole of American constitutional law.”^29 Dworkin uses this example to argue that equality is not a contested concept because it is impossible to establish definitive criteria for the meaning of concepts such as equality. “The law is full of contested concepts, and one of the jobs of legal theorists is to determine which conceptions of these concepts are the most defensible.”^30 As such, equality is a concept subject to interpretation.

While this example focuses on equal protection, the interpretive mechanisms involved in due process-based individual rights cases rely on the concept versus conception distinction as well. Liberty and justice are concepts, but for the Court to interpret what they actually mean, the justices must look at what conceptions of liberty and justice most accurately represent both the Due Process Clause and the field of constitutional law in general. It is impossible to develop a universally acceptable theory that establishes rules for the concepts of liberty and justice. However, the Court can


^30 ibid.
try to capture the plateau from which arguments about justice largely proceed, and try to
describe this in some abstract proposition taken to define the ‘concept’ of justice for their
community, so that arguments over justice can be understood as arguments about the best
conception of that concept.\textsuperscript{31}

Although this distinction is subject to criticism due to its propensity to enable a high level of
judicial subjectivity, its legitimacy lies in the understanding that the Court is an interpreter of the
most constitutionally accurate conceptions of these concepts, not an interpreter of the justices’
personal convictions relating to them. For this reason, the Court makes decisions on behalf of
society rather than itself. This claim is rooted in the idea that society

share[s] a preinterpretive sense of the rough boundaries of the practice on which our
imagination must be trained. We use this to distinguish conceptions of justice we reject,
even deplore, from positions we would not count as conceptions of justice at all even if
they were presented under that title.\textsuperscript{32}

The concept-conception distinction is a beneficial tool in resolving disagreements about what the
law actually is and what it should be.\textsuperscript{33}

To understand the inherent freedoms and limitations embedded within the Due Process
Clause, the theory of concepts and conceptions plays a meaningful role in defense of liberal
jurisprudence. The distinction between these two ideas allows the Court to employ a higher level
of generality in analyzing tradition on the grounds that “like any interpretation, it can condemn
some of its data as a mistake, as inconsistent with the justification it offers for the rest, and
perhaps propose that this mistake be abandoned.”\textsuperscript{34} This theory permits the Court to view
tradition in terms of the conception of liberty or justice, for example, with a scope broad enough
to reject any historical legal practices that are inconsistent with the conception in contemporary

\begin{footnotesize}
\textsuperscript{31} Dworkin (2), 74.
\textsuperscript{32} Dworkin (2), 75.
\textsuperscript{34} Dworkin (2), 99.
\end{footnotesize}
society. “A conception of law might try to show…that the explanation of legislation that provides the best justification of that institution requires, contrary to now-prevailing practice, that old and out-of-date statutes be treated as no longer law.”35 This has far-reaching implications for a more coherent liberal jurisprudence because it provides a leg to stand on for the liberal justices as they argue in favor of rejecting antiquated laws in favor of more contemporary applications of the conception of liberty.

III. Evidence—Analyses of the Cases Themselves

A. Family Rights

i. DeShaney v. Winnebago County (1989)

DeShaney v. Winnebago County (1989) is a controversial child abuse case that raises fundamental questions about the extent of the law’s reach to protect liberty rights within intimate family relations. In this case, the petitioner was a four-year-old child who was severely beaten by his father. The county social service agency received complaints about the abuse, yet took no action to remove the child from his father’s custody. When the child was abused so brutally that he suffered permanent brain damage, his mother sued the Department of Social Services on the grounds that the state violated the substantive component of the Due Process Clause by depriving the child’s liberty interest. The state argued that since it took no action to harm the child in question, it was not liable for any abuse within the privacy of the family home.

The Court opinion, written by Chief Justice Rehnquist, ruled in favor of Winnebago County on the grounds that a state social service agency does not have any affirmative obligation under the Due Process Clause of the Fourteenth Amendment to intervene in child abuse cases

35 ibid.
where the child in question is in parental custody, and the state has not increased the child’s endangerment. This decision implies that the state’s failure to protect a child from parental abuse does not constitute a violation of the child’s right to liberty. *DeShaney* sparked contentious debate about whether due process should be interpreted to protect individual freedom through limiting state involvement in the privacy of the family, or whether it is intended to protect citizens who cannot protect themselves from both other citizens and from the state.

The majority opinion relies on the notion that the text and history of due process do not provide adequate justification to protect citizens from infringement of liberties by private actors. In fact, Chief Justice Rehnquist argues that the Due Process Clause is intended as a negative liberty rather than as a positive obligation of the state. He writes:

> The Clause is phrased as a limitation on the State’s power to act, not as a guarantee of certain minimal levels of safety and security. It forbids the State itself to deprive individuals of life, liberty, or property without ‘due process of law,’ but its language cannot fairly be extended to impose an affirmative obligation on the State to ensure that those interests do not come to harm through other means.  

Chief Justice Rehnquist relies on an isolated textual interpretation of the Clause to support his opinion, rather than incorporating more contemporary, context-based arguments, and invoking an all-encompassing evaluation of history, tradition, morality, and evolving social structures. “Although on the surface this interpretation seems very powerful, it fundamentally distorts the meaning of the Due Process Clause by abstracting the language from its historical context. When the Clause is read in light of the contemporary legal understanding, a different meaning emerges.” Chief Justice Rehnquist ignores the contemporary values of social service institutions by failing to mention the hypocrisy embedded in the fact that social service agencies

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36 *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189 (1989).
have been put in place precisely for the purpose of establishing an obligation on the state to protect its citizens. This exemplifies the conservatism within his methodology because he interprets the text in the context of the era in which it was written, rather than applying a broader interpretation to the modern circumstances at hand. With his text-based approach, Chief Justice Rehnquist stays true to his conservatism by employing the narrowest type of interpretation. Such narrowness is indicative of the conservative theory of specificity. Namely, Chief Justice Rehnquist refers to the most specific tradition because he subscribes to the theory that this is the most constitutionally correct way to understand history. As the Clause prohibits the government from depriving persons of life, liberty, and property, his interpretation looks at due process as a duty of inaction rather than action. In DeShaney, the state did not actively deprive the child of his liberty; rather, the state knowingly did not protect the child’s liberty interests from infringement by a private actor. Therefore, Chief Justice Rehnquist holds that the text of the Clause does not extend to include an obligation to act.

The second element of the majority opinion concerns the intent of the Framers. Chief Justice Rehnquist subscribes to the view of negative liberties on the grounds that the Framers included the Due Process Clause for the purpose of preventing governmental abuse of power. He states that due process

was intended to prevent government “from abusing [its] power, or employing it as an instrument of oppression,” Davidson v. Cannon, “to secure the individual from the arbitrary exercise of the powers of government,” and “to prevent governmental power from being ‘used for purposes of oppression,’” Parratt v. Taylor, to prevent the “affirmative abuse of power.”

This can be characterized as originalist reasoning because he derives authority from the intent of the Framers at the time the Constitution was written. Chief Justice Rehnquist explains that the

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Due Process Clause was originally intended to limit government intervention in citizens’ private lives for the purpose of preventing abuse of power and oppression. This narrows the Court’s interpretational freedom of the Clause because it limits the guarantee of due process to the Framers’ intent, rather than treating its vague language as an affirmation of the general protection of life, liberty, and property. As such, Chief Justice Rehnquist clearly outlines that the Constitution intends to protect people from the state, not from each other. This treatment of tradition runs into trouble due to its high level of specificity. Chief Justice Rehnquist superficially satisfies the specificity requirement of conservative jurisprudence because he narrows his interpretation to such an extreme level. Yet, by regarding the societal structure of the 1700’s as the most specific tradition, he actually detracts from his proclamation of specificity in a roundabout way because he draws upon an antiquated tradition that was intended for an entirely different purpose. The Framers may have intended to protect individuals from government intervention in their private lives. Yet this intention has no bearing on their position regarding the correct level of government involvement in protecting vulnerable individuals from physical harm inflicted by more powerful individuals in the privacy of the family home.

At the time of ratification, the Framers were not preoccupied with too little government involvement, but concerned that the government may have too much power. “The Fourteenth Amendment, adopted in 1868 at the height of laissez-faire thinking, sought to protect Americans from oppression by state government, not to secure them basic governmental service.” Chief Justice Rehnquist uses this originalist justification to extract the special relationship that may (or may not) exist between the state and certain individuals, namely those whom the state has promised to protect, from his interpretation. He writes that the Constitution’s “purpose was to

39 Heymen, 509.
protect the people from the State, not to ensure that the State protected them from each other. The Framers were content to leave the extent of governmental obligation in the latter area to the democratic political processes.” The idea of the Framers’ intent is valid in the sense that due process was born out of the notion of preventing government abuse. Yet such reasoning fails when placed within the context of the case itself. DeShaney calls into question the actions of a state agency that was put in place for the specific purpose of protecting people from each other. Thus, the argument that due process should be interpreted to protect people from government intrusion falls short in light of the fact that the social service agency’s purpose is to intrude in cases where citizens need protection.

Chief Justice Rehnquist’s high level of specificity in his interpretation of tradition strays from the overall intent of the Clause, which is to protect life, liberty, and property. He ignores the contemporary social and political context of the case as a relevant component of the Court’s analysis of the all-encompassing conception of liberty. He looks to the intent of the Framers at a time when the state social service institution did not exist in the way it does now. He interprets the text itself as a limit on state action rather than as a general guarantee. For Chief Justice Rehnquist, neither the vague text of the Due Process Clause or the intent of the Framers provides adequate evidence in support of the petitioners’ claim. Rather, his originalist and textualist methods narrow his scope of analysis in such a way that his outcome functions as a limit on the guarantees of due process to the most specific extent.

As well as deriving authority from the text and Framers’ intent, Chief Justice Rehnquist creates a historical narrative to justify his opinion that history does not “support such an

expansive reading of the constitutional text.”\textsuperscript{41} He looks at an array of precedent as a basis to argue that “our cases have recognized that the Due Process Clauses generally confer no affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty, or property interests of which the government itself may not deprive the individual.”\textsuperscript{42} Chief Justice Rehnquist cites \textit{Harris v. McRae} (1980): “Although the liberty protected by the Due Process Clause affords protection against unwarranted \textit{government} interference, . . . it does not confer an entitlement to such [governmental aid] as may be necessary to realize all the advantages of that freedom.”\textsuperscript{43} While this precedent certainly appears to validate Chief Justice Rehnquist’s opinion on a theoretical level, there are fundamental differences in substance between \textit{Harris} and \textit{DeShaney} that make its relevance as a precedent case somewhat murky. In \textit{Harris}, the Court ruled that the Medicaid program was not required to fund abortions, even those that were medically necessary. This case does not hold up as justification in \textit{DeShaney} because in \textit{Harris}, the policymakers did not implement the Medicaid program specifically for funding medically necessary abortions nor did they create policy stating that Medicaid was required to fund abortion, whereas in \textit{DeShaney} the social service agency was put in place with the specific purpose of preventing child abuse.

Chief Justice Rehnquist also cites \textit{Lindsey v. Normet} (1972) to argue that since “the Due Process Clause does not require the State to provide its citizens with particular protective services, it follows that the State cannot be held liable under the Clause for injuries that could have been averted had it chosen to provide them.”\textsuperscript{44} Yet, the facts of \textit{Lindsey} are so different than those of \textit{DeShaney} that the usage of \textit{Lindsey} as a precedent is not valid. In \textit{Lindsey}, the petitioner

\textsuperscript{41} ibid.
\textsuperscript{42} ibid.
\textsuperscript{43} \textit{Harris v. McRae}, 448 U.S. 297 (1980).
\textsuperscript{44} \textit{DeShaney v. Winnebago County Department of Social Services}, 489 U.S. 189 (1989).
refused to pay his monthly rent unless necessary repairs were made on his apartment. As a result, he was threatened with eviction. The complaint was that the Oregon Forcible Entry and Wrongful Detainer (FED) Statute violated the petitioner’s due process guarantee. The Court ruled that the eviction procedure did not violate due process because “rental payments are not suspended while the alleged wrongdoings of the landlord are litigated.” Furthermore, the Court stated that an assurance of adequate housing is a matter for the legislature to handle. In DeShaney, Chief Justice Rehnquist uses Lindsey as evidence to claim it is not the responsibility of the state to provide housing or social services, and as long as the state takes no action to worsen the situation, it is not responsible for protecting the liberty interests that may be denied as a result of the actions of social service employees. Similar to Chief Justice Rehnquist’s reliance on Harris as a precedent, his reliance on Lindsey encounters problems in the notion that it is the role of the legislature to create policy to address such issues. This is because the claim in DeShaney asks the Court to make a decision in a context where the legislature has already created the relevant policy.

Despite the fact that Chief Justice Rehnquist troublingly narrows his interpretation of the Court’s historical treatment of state intervention in liberty rights cases by citing Harris and Lindsey, he continues his opinion by acknowledging his faux pas in comparing these cases to DeShaney. To explain why Harris and Lindsey are so fundamentally different to DeShaney, Chief Justice Rehnquist discusses the “special relationship” that the petitioner claims exists in DeShaney that does not exist in Harris or Lindsey. He writes “even if the Due Process Clause imposes no affirmative obligation on the State to provide the general public with adequate protective services, such a duty may arise out of certain ‘special relationships’ created or

assumed by the State with respect to particular individuals.”\textsuperscript{46} The petitioner argues that there is a special relationship between the state and the child in DeShaney because

the State knew that Joshua faced a special danger of abuse at his father’s hands, and specifically proclaimed, by word and by deed, its intention to protect him against that danger. Having actually undertaken to protect Joshua from this danger -- which petitioners concede the State played no part in creating -- the State acquired an affirmative “duty,” enforceable through the Due Process Clause, to do so in a reasonably competent fashion.\textsuperscript{47}

Chief Justice Rehnquist categorically denies the notion of a “special relationship” assumed by the state to protect particular individuals in DeShaney. He argues that the relationship is not clear-cut because the state did not take the child into custody.

Chief Justice Rehnquist acknowledges the existence of precedents that can be construed to support the claim that the state \textit{did} have a responsibility to protect the child from abuse. He writes: “It is true that, in certain limited circumstances, the Constitution imposes upon the State affirmative duties of care and protection with respect to particular individuals.”\textsuperscript{48} In support of this affirmative obligation of the state to protect individuals who fall under the category of having a “special relationship,” he cites \textit{Estelle v. Gamble} (1976), which required the state to provide medical care to incarcerated prisoners. This case was decided on the grounds that since “the prisoner is unable ‘by reason of the deprivation of his liberty [to] care for himself,’ it is only ‘just’ that the State be required to care for him.”\textsuperscript{49} With \textit{Estelle} as a precedent, it reasonably follows that the state should be required to protect the child in DeShaney because of the “special relationship” that exists in which the child is unable to protect himself and is deprived of liberty, which confers an affirmative obligation on the state. Even though Chief Justice Rehnquist

\textsuperscript{46} \textit{DeShaney v. Winnebago County Department of Social Services}, 489 U.S. 189 (1989).
\textsuperscript{47} ibid.
\textsuperscript{48} ibid.
\textsuperscript{49} ibid.
presents the rationale behind the petitioners’ claim and validates it with the concept of the “special relationship,” as established in Estelle, he then rejects it altogether with the assertion that “these cases afford petitioners no help.” ⁵⁰ Although the state has an obligation to provide general protective services in prisons and psychiatric institutions, such obligation does not extend to DeShaney because the child was not in the state’s custody.

Overall, Chief Justice Rehnquist’s historical narrative is odd. While he advocates looking to the narrowest level of tradition, his specificity actually impedes on his ability to thoroughly examine the entire scope of tradition and precedent. He first refers to Harris and Lindsey to support his opinion, yet they are arguably too specific to be relevant in light of the facts of the case at hand. He then refers to cases, such as Estelle, that have a much more relevant scope to defining the affirmative obligation that arises out of the relationship that exists between the abused child and the state. Yet he claims Estelle is not applicable. He ends his discussion of the historical treatment of state involvement in liberty rights by justifying his rejection of the “special relationship” at play. He argues the Estelle precedent is irrelevant because “when the State takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general wellbeing.” ⁵¹ Chief Justice Rehnquist dismisses the notion that a “special relationship” exists in DeShaney because the types of relationships that confer an affirmative obligation on the state are those in which the state itself has restricted an individual’s liberty in such a way that the individual is unable to protect him or herself. He argues “the affirmative duty to protect arises not from the State's knowledge of the individual’s predicament or from its expressions of intent to help him, but from the limitation which it has imposed on his freedom to act on his own

⁵⁰ ibid.
⁵¹ ibid.
Throughout this section of his opinion, Chief Justice Rehnquist repeatedly makes concessions that would serve to undermine his opinion if he were to place any value on them. For instance, he writes: “It may well be that, by voluntarily undertaking to protect Joshua against a danger it concededly played no part in creating, the State acquired a duty under state tort law to provide him with adequate protection against that danger.” As such, his adherence to history and precedents does not achieve its desired outcome because it further complicates the Court’s historical treatment of similar issues.

Chief Justice Rehnquist’s methodology highlights the conservative propensity to subscribe to the doctrine of procedural due process, rather than substantive due process, as justification for employing such high levels of specificity. Until the relatively contemporary doctrine of substantive due process became a popular topic of analysis, the general understanding and applicability of procedural due process was largely straightforward and uncontroversial. “The phrase ‘life, liberty or property’ was read as a unit and given an open-ended, functional interpretation, which meant that the government couldn’t seriously hurt you without due process of law.” With the popularization of substantive due process, a new level of generality in interpreting the clause became legitimized. Rather than looking at due process from a procedural standpoint, substantive due process refers to the definition of liberty in terms of its outcomes. Namely, prior to determining if one is entitled to due process, the persons in question must prove they have been deprived of their liberty interests. This widens the scope of legitimate methodology in due process cases because it creates a new responsibility for the Court to look beyond written procedure through an assessment of the substantive components of the case at

52 ibid.
53 ibid.
hand. This assessment looks at liberty interests in light of the facts of the case and the contemporary political climate. Critics of substantive due process find fault in the role of the Court as a policymaker, rather than as a legal interpreter. They argue that the social construct of liberty belongs with an assessment of policy and morality by the legislative branch. Conservatives tend to reject substantive due process on the grounds that the judiciary is overstepping its role. With this background, the conservative majority opinion in *DeShaney* can be looked at as advocating procedural due process, whereas the dissent rejects a procedure-based outcome in favor of substance.

In *DeShaney*, the distinction between procedural and substantive due process analysis is convoluted. Chief Justice Rehnquist embarks on the difficult task of deciding a case where substantive due process is at stake, while simultaneously subscribing strictly to the theory of procedural due process. The case invokes the substantive due process doctrine because the claim is that “there exists a minimum level of protection against private wrongs that the government must provide, irrespective of the procedures the government affords.” If the case were one of procedural due process, the question at hand would be whether the government could constitutionally deny all protection against private wrongs. Yet, there was no such claim that the state withheld all protection from the child. Chief Justice Rehnquist’s decision overlooks crucial elements of due process as a result of his refusal to invoke substantive due process reasoning in a case that primarily relies on a substantive interpretation. Ironically, he begins his opinion by explicitly acknowledging the importance of substantive due process in *DeShaney*: “The claim is one invoking the substantive, rather than the procedural, component of the Due Process Clause; petitioners do not claim that the State denied Joshua protection without according him

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appropriate procedural safeguards.” Chief Justice Rehnquist belittles the legitimacy of the substantive nature of the claim through briefly stating its relevance, and then emphasizing that the petitioners themselves do not contest that they rightfully received their constitutional guarantee of procedural due process. Chief Justice Rehnquist miraculously manages to adhere to a procedural interpretation despite the fact that the case involves a substantive one. This is fundamentally misguided because, by looking at the case in terms of its procedural due process implications, Chief Justice Rehnquist does not address the core issue. Rather, his opinion contains broad language claiming that due process does not require the state to provide even “minimal levels of safety and security.” The Court completely rejects the relevance of substantive due process in *DeShaney* on the grounds that the clause was intended to “to protect the people from the State, not to ensure that the State protected them from each other.”

The Court also relied on the language of the Clause—the word “deprive,” it asserted, referred to government action, not to the government's failure to protect against private action—and on cases that asserted that the Due Process Clause creates “no affirmative right to governmental aid.”

Chief Justice Rehnquist ignores the substantive elements of the case by simply delving into a procedural due process analysis. He addresses the case as if the question is whether the Due Process Clause places any affirmative obligation on the state, rather than whether there are certain triggers that exist to place an affirmative obligation on the state in varying levels and circumstances. This methodology functions to outwardly validate his high level of specificity because it only looks at one aspect of the claim, rather than looking at the more general substantive questions at hand.

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56 *DeShaney* v. Winnebago County Department of Social Services, 489 U.S. 189 (1989).
57 ibid.
58 ibid.
59 Strauss, 72.
The problem here with the conservative criticism of substantive due process is that while conservatives argue that the legislative branch should carry out the assessment of policy, the assessment in DeShaney had already been carried out by the legislature. Specifically, the legislature created policy that established the social service agency for the exact purpose of protecting children from parental abuse. If the Court narrows its interpretation to a strictly procedural level, and subsequently ignores the actions of the legislative branch, the judicial decision can be looked at as overstepping its role in the sense that it is ruling on policy rather than legality. On the other hand, when the Court derives authority from the theory of substantive due process, it is not in fact assuming the role of a policymaker; it is making decisions based upon the preexisting policies implemented by the legislature. This is the catch-22 of the conservative procedural analysis in this case.

Overall, the conservative methodology in the majority opinion mainly encounters fundamental problems in terms of its narrowness. Chief Justice Rehnquist’s pure text and intent based focus, and adherence to procedural due process, fall short in their lack of attention paid to contemporary social and political structures. This creates an overly narrow, and subsequently flawed, methodology. Chief Justice Rehnquist’s “idea has a simple allure: the Due Process Clause only forbids the government from actively injuring people. It does not require the government to protect people from private wrongs. So long as the government is not acting, it cannot violate the Due Process Clause.”\footnote{Strauss, 57.} This interpretation is flawed both in its reasoning and its theoretical approach. On one level, the notion of government inaction in itself is somewhat nonsensical. The idea that the government is obligated to protect its citizens against deprivation of liberty caused by private actors is well established. The creation of social service agencies

\footnote{Strauss, 57.}
provides solid evidence that the government assumes the duty to protect those who cannot protect themselves. Thus, there are no theoretical difficulties embedded within the proposition that “the Constitution forbids the government from withdrawing all protection against private wrongdoing.” With such a program established to protect children, the Due Process Clause should logically ensure that social service officials do not abuse their power. Chief Justice Rehnquist claims that the Framers’ intent was to protect individuals against governmental abuse of power; and as such, the scope of due process is limited to actions of governmental abuse instead of inaction. Yet, his distinction between action and inaction is problematic because “wrongfully withholding protection—no less than ‘actively’ injuring a person—can constitute an abuse of power.” The Court fails to realize that the decision not to intervene actually blurs the line between action and inaction because the action of making such a decision arguably causes the action of injuring the child. On another level, the majority opinion’s exception for affirmatively protecting the rights of those in prisons and hospitals is not logically sound. The underlying principle for such exceptions suggests that the state does have affirmative obligations to protect those individuals placed in state custody. This principle logically should hold legitimacy in child abuse cases as well then because just as the state has taken the action of placing an individual in prison, it has also taken the action of establishing a social service agency with an affirmative obligation to protect.

Through his oppressively high level of specificity in analyzing history and tradition, Chief Justice Rehnquist actually contributes to a political agenda that “tends to keep power from

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61 Strauss, 54.
62 ibid.
the powerless and preserves political power in the hands of the few.”

He sets a precedent that allows government agencies the liberty to make decisions about which individuals to aid and protect however they see fit, without any judicial oversight to monitor whether they are fulfilling their obligations to carry out their intended purposes. “The Court's view that state inaction does not violate due process is both inconsistent with the responsibility that government bears for the welfare of citizens and outdated given the extensive role that administrative agencies play in our society.”

Basically, the political problems that arise from DeShaney demonstrate that Chief Justice Rehnquist’s conservative legal reasoning directly correlates to a politically conservative outcome. Although such a correlation appears obvious, it is actually quite useful to recognize. It shows the coherence of conservative jurisprudence because the conservatives have established a methodology that is both legal in its approach and politically favorable in its outcome. As such, it follows that liberal justices must subscribe to their own legal methodology in order to legitimately arrive at politically liberal outcomes. If both liberals and conservatives utilize the same methods of legal reasoning (ie. beginning with the text, analyzing precedent with the same level of specificity, and ending with a ruling on the current case), problems arise when the resulting political outcomes differ. This provokes the questions: do the liberal dissenters make the same methodological mistake as the conservatives in their quest to justify their agenda of rights expansion? If so, does this make the liberal opinions purely political? Or do the liberal dissenters draw upon distinctly liberal methodology, which allows them to achieve a valid legal justification for their agenda?

64 Beermann, 1080.
The first of the two dissenting opinions in *DeShaney*, written by Justice Brennan, uses an approach that emphasizes a larger picture of the nature of liberty interests, rather than only emphasizing the Constitution’s textual and intent based ideas on positive and negative liberties. This distinction between the liberal and conservative methodologies sheds light on the ways in which liberal and conservative justices can defend their respective politically liberal and conservative opinions on predominantly legal grounds. On this note, Justice Brennan commences his dissent by articulating the fundamental difference between his and Chief Justice Rehnquist’s interpretations of the issue at hand:

> It may well be, as the Court decides, that the Due Process Clause, as construed by our prior cases, creates no general right to basic governmental services. That, however, is not the question presented here…No one, in short, has asked the Court to proclaim that, as a general matter, the Constitution safeguards positive as well as negative liberties.65

Justice Brennan criticizes the majority opinion on the grounds that it misreads the main issue of the case. Rather than concerning how the Constitution regards an affirmative governmental duty to protect its citizens regardless of context, Justice Brennan argues that the context of the case does matter here. He writes: "When a State has—‘by word and by deed,’—announced an intention to protect a certain class of citizens, and has before it facts that would trigger that protection under the applicable state law, the Constitution imposes upon the State an affirmative duty of protection."66 This line of reasoning looks at the facts of the case with respect to the larger conception of liberty in contemporary society. Basically, the legislature decides to protect the liberty rights of different classes of citizens in different ways on an institutional level; and in this case, there is policy dictating that the state must assume an active role in protecting children from abuse within the family home.

66 ibid.
And from this perspective, holding these Wisconsin officials liable—where the only difference between this case and one involving a general claim to protective services is Wisconsin’s establishment and operation of a program to protect children—would seem to punish an effort that we should seek to promote.  

Justice Brennan criticizes the majority opinion by interjecting contextual arguments surrounding legislative decisions and contemporary social traditions into his dissent. Such elements overall serve to disprove Chief Justice Rehnquist’s narrow interpretation of positive and negative rights. Justice Brennan undermines the majority opinion by stating he “would begin from the opposite direction.” He starts by focusing on the action the state has taken in the case rather than the action it has not taken. Justice Brennan legitimizes such methodology by drawing upon Estelle v. Gamble (1976) and Youngberg v. Romeo (1982). These two cases begin with discussions of state action, and follow up by using such action to evaluate the manner in which the Constitution deals with inaction. In Estelle and Youngberg, the Court rules that when the state confines individuals to prison or a psychiatric hospital, it assumes the responsibility of caring for these individuals because their liberties are being deprived in such a way that they cannot care for themselves. Through these precedents, Justice Brennan methodically dismisses the idea of a clear line between action and inaction.

Justice Brennan devotes much of his opinion to dissecting Youngberg both with respect to the opinion itself and to its treatment by Chief Justice Rehnquist in the majority opinion. He criticizes the conservative interpretation of Youngberg in DeShaney on the grounds that Chief Justice Rehnquist strictly adheres to the idea that the Constitution does not establish positive rights, yet he does not recognize that such an idea does not hold true in all circumstances. Justice Brennan cites Chief Justice Rehnquist’s dismissal of Youngberg:

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67 ibid.
68 ibid.
In the substantive due process analysis, it is the State's affirmative act of restraining the individual's freedom to act on his own behalf -- through incarceration, institutionalization, or other similar restraint of personal liberty -- which is the 'deprivation of liberty' triggering the protections of the Due Process Clause, not its failure to act to protect his liberty interests against harms inflicted by other means.69

Chief Justice Rehnquist argues here that when the state affirmatively acts to restrain an individual’s freedom through institutionalization, there exists a trigger that allows the Court to determine that constitutional protection under due process does apply. Yet, he deems this ruling irrelevant in DeShaney because it concerns the constitutionality of state inaction when a third party causes the deprivation of liberty, rather than the state. Justice Brennan dedicates a fair amount of his decision to detailing Chief Justice Rehnquist’s interpretation of Youngberg with the intention of discrediting it. He attacks the logic of the majority opinion by claiming that the core issue in Youngberg is not to challenge the state’s affirmative action in circumstances of institutionalization; rather it is to establish the existence of a constitutionally protected liberty interest, which is violated in Youngberg when the state fails to provide services that meet the requirements of confinement. He argues in favor of the relevance of Youngberg on the grounds that “the state has somehow displaced private avenues of relief from child abuse, and therefore an abused child is in a position similar to a prisoner, stripped of alternative means of self-protection.”70

While Justice Brennan certainly makes a compelling argument in his quest to overturn the majority opinion, such methodology is problematic on a greater scale. By engaging in his lengthy argument over the correct interpretation of Youngberg, he does not achieve the more pressing liberal agenda of establishing a methodology characterized by an adherence to a more general scope of history and tradition. In fact, he does quite the opposite. His methodology

69 ibid.
70 Beermann, 1085.
mirrors that of the conservative majority by placing an ordinate amount of authority on Chief Justice Rehnquist’s interpretation of the scope of history, tradition, and precedent. The problem with this conservative methodology is that it ends at the first available stopping point. Chief Justice Rehnquist is satisfied with a level of specificity that uses the smallest possible scope of tradition as his entire analysis. Yet, in this level of specificity, he uses tradition as a guise for furthering his personal value judgment. The problem with Justice Brennan’s response is that he treats precedent in the same way as Chief Justice Rehnquist does. Both justices argue that the other deviates from the Court’s obligation to obey precedent, and each inserts his own personal values into the scope of due process rights. While Chief Justice Rehnquist claims to derive authority from the most specific traditions, Justice Brennan argues that Chief Justice Rehnquist does not treat precedent in a constitutionally correct way because he is not looking to the appropriate source of authority. Overall, this creates an interesting dynamic. While Chief Justice Rehnquist employs an overbroad view of precedent and the most specific view of tradition, Justice Brennan employs the opposite approach. Justice Brennan views precedent quite narrowly and applies such precedent to a more general view of tradition.

In order to combat this problem of specificity, Justice Brennan should place authority on the past, yet should use his historical analysis as a basis to legitimize the usage of a level of generality that accounts for the trajectory of the changing values of the past, and leads up to an all-encompassing vision of the past, present, and future. He criticizes the methodology of the majority opinion, but in doing so, crafts his own opinion with a similarly specific scope. Justice Brennan breaks the surface of a coherent substantive due process analysis by looking at liberty

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72 ibid.
interests in similar cases, yet still limits his interpretive approach to the most specific historically protected liberty interests. Instead, he should place value on the contemporary social and political climate to redefine the conception of liberty in a substantive sense.

The argument that the first section of Justice Brennan’s dissent does not truly and completely overcome the methodological problems of the conservative majority opinion provokes the question of what the alternative would be. Justice Brennan better answers this question as he continues his analysis. He finishes his attack on the majority opinion’s incorrect interpretation of Youngberg by explicitly advocating a wider scope of analysis:

To the Court, the only fact that seems to count as an “affirmative act of restraining the individual’s freedom to act on his own behalf” is direct physical control… I would not, however, give Youngberg and Estelle such a stingy scope. I would recognize, as the Court apparently cannot, that “the State’s knowledge of [an] individual’s predicament [and] its expressions of intent to help him” can amount to a “limitation of his freedom to act on his own behalf” or to obtain help from others.73

Justice Brennan discredits the majority opinion on the grounds that such a narrow reading of due process undermines the broad constitutional guarantee of liberty rights in DeShaney by failing to include a class of persons who cannot protect themselves. This remedies some of the problems that arise from Justice Brennan’s initial similarities to the conservative majority opinion. While he similarly looks to precedent and historical treatment of liberty interests, he ultimately, and correctly, widens his scope by arguing that these precedent cases must be interpreted in light of evolving social norms and traditions. He writes: “I would read Youngberg and Estelle to stand for the much more generous proposition that, if a State cuts off private sources of aid and then refuses aid itself, it cannot wash its hands of the harm that results from its inaction.”74 With this, Justice Brennan refocuses the opinion to embody a more general interpretation by concluding

74 ibid.
that *Youngberg* is in fact highly relevant when the underlying issues are viewed generally enough to reflect new circumstances. Overall, Justice Brennan skims the surface of a new liberal jurisprudence, yet does not take his opinion far enough to actually break through.

In looking at the overall disagreements between the justices in *DeShaney*, the part of Justice Brennan’s dissent pertaining to the weaknesses of the Chief Justice Rehnquist’s opinion has a stronger argument than does the majority opinion itself, and therefore arguably reaches a more constitutionally correct outcome. Yet, even so, Justice Brennan does not take his argument far enough. By stopping there, Justice Brennan takes a defensive stance instead of taking ownership of a methodology distinct from the conservative opinion. Through focusing on attacking Chief Justice Rehnquist’s narrow scope, Justice Brennan ironically confines this part of his opinion to the same narrowness. One way to avoid this mistake would be to criticize Chief Justice Rehnquist’s opinion for the parts it is missing, instead of only for the parts that are there. For example, instead of attacking Chief Justice Rehnquist’s interpretation of *Youngberg* on a relatively micro level, Justice Brennan could attack the majority opinion’s interpretation for its failure to extract the underlying issues in *Youngberg*, and then for its failure to apply them to the political and social context of *DeShaney*. Such an interpretation would address the broader substantive due process principles at stake through looking at how *Youngberg* defines the constitutional conception of liberty, and then deciding *DeShaney* by ensuring it implicitly adheres to this conception of liberty in a more contemporary circumstance. This would better embody a distinctly liberal methodology because Justice Brennan would advocate a higher level of generality to justify his opinion instead of justifying his opinion on the grounds that his view is correct because the plurality’s is wrong.
Justice Brennan finally arrives at his own unique argument—an argument that makes little mention of the majority opinion because it is a product of his uniquely liberal interpretational process. As expected, this section of his dissent provides the most insight into his personal brand of liberal jurisprudence because it reveals his legal ideology as its own separate entity instead of as a response to conservative methods. Justice Brennan widens his analysis to incorporate how the Constitution should treat liberty interests, with respect to the most appropriate level of generality. He pays much attention to the facts of the case as a means to claim there ultimately is no concrete difference between action and inaction. He begins with a general view of the state’s system of protecting children: “Wisconsin has established a child welfare system specifically designed to help children like Joshua…Wisconsin law invites—indeed, directs—citizens and other governmental entities to depend on local departments of social services such as respondent to protect children from abuse.”75 With this setup, Justice Brennan creates a framework that emphasizes both the specific purpose of the social service department, and the extent of its authority within the context of the government. His words create somewhat of a map of the inner workings of the system through pointing out that the legislature has established a structure in which citizens, governmental service agencies, and law enforcement officials, are all instructed to contact the department of social services to handle cases of child abuse.

Through its child welfare program…the State of Wisconsin has relieved ordinary citizens and governmental bodies other than the Department of any sense of obligation to do anything more than report their suspicions of child abuse to DSS. If DSS ignores or dismisses these suspicions, no one will step in to fill the gap. Wisconsin's child protection program thus effectively confined Joshua DeShaney within the walls of Randy DeShaney’s violent home until such time as DSS took action to remove him.

75 ibid.
Conceivably, then, children like Joshua are made worse off by the existence of this program when the persons and entities charged with carrying it out fail to do their jobs.\textsuperscript{76}

With such a chain of command, it logically follows that the department of social services has the specific responsibility of protecting children from abuse when it is reported. By implementing a system in which the department of social services bears the final authority to intervene in child abuse cases, the legislature entrusts this specific department to carry out its duty—especially considering it is the \textit{only} state department with such a duty.

Justice Brennan then applies the actions following the chain of command to the specific case:

Each time someone voiced a suspicion that Joshua was being abused, that information was relayed to the Department for investigation and possible action. When Randy DeShaney’s second wife told the police that he had “hit the boy causing marks and [was] a prime case for child abuse,” the police referred her complaint to DSS. When, on three separate occasions, emergency room personnel noticed suspicious injuries on Joshua’s body, they went to DSS with this information. When neighbors informed the police that they had seen or heard Joshua's father or his father’s lover beating or otherwise abusing Joshua, the police brought these reports to the attention of DSS.\textsuperscript{77}

This emphasis placed on the authority of the department of social services is crucial to Justice Brennan’s overall argument because it demonstrates both the petitioner’s and community’s adherence to the procedure put in place to stop child abuse, \textit{and} most importantly, the failure of the most important player to follow the procedure. Justice Brennan describes the failure of the department of social services:

And when respondent Kemmeter, through these reports and through her own observations in the course of nearly 20 visits to the DeShaney home, compiled growing evidence that Joshua was being abused, that information stayed within the Department—chronicled by the social worker in detail that seems almost eerie in light of her failure to act upon it.\textsuperscript{78}

\textsuperscript{76} ibid.
\textsuperscript{77} ibid.
\textsuperscript{78} ibid.
The lack of action taken by the state sheds light on the reason behind Justice Brennan’s discussion of the series of events that took place in *DeShaney*. He is embarking on a line of reasoning that leads to legitimizing his view of the relevant constitutional principles concerning when and how liberty must be protected. He makes his opinion more powerful by arguing in favor of a higher level of generality to account for the most constitutionally coherent analysis of tradition in light of the contemporary context of the case. He not only discusses the procedural failure, but also the lack of humanity that can result when tradition is interpreted so narrowly. He writes: “As to the extent of the social worker's involvement in, and knowledge of, Joshua's predicament, her reaction to the news of Joshua's last and most devastating injuries is illuminating: ‘I just knew the phone would ring some day and Joshua would be dead.’”

This attention to the specific facts of the case further justifies his opinion because it functions on both a methodological level and an emotional level. Justice Brennan details the horrific outcome of the situation as evidence that the plurality’s level of specificity is inconsistent with the constitutional conception of liberty because it is too narrow to analyze the underlying values behind the relevant legal traditions, and to adapt those values to best remain consistent in the context of *DeShaney*. Instead, employing a higher level of generality would remain true to the traditional conception of liberty by analyzing precedent based on its fidelity to constitutional values, not literal, antiquated rules. This is an effective tactic because it stays true to relevant legal principles while simultaneously connecting such principles to their actual result in society.

Justice Brennan uses the facts of the case to blur the line between what constitutes action and inaction. He argues that the very nature of the child protection program itself implies a duty

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79 ibid.
to act because the agency has the distinct role of intervening in cases where children need a third party to protect their liberty interests.

While many different people contributed information and advice to this decision, it was up to the people at DSS to make the ultimate decision (subject to the approval of the local government’s corporation counsel) whether to disturb the family’s current arrangements…Unfortunately for Joshua DeShaney, the buck effectively stopped with the Department.\textsuperscript{80}

By investigating, yet not acting, the service agency is intentionally choosing to neglect its duty, which subsequently denies adequate protection of liberty to the child.

It simply belies reality, therefore, to contend that the State “stood by and did nothing” with respect to Joshua. Through its child protection program, the State actively intervened in Joshua’s life and, by virtue of this intervention, acquired ever more certain knowledge that Joshua was in grave danger.\textsuperscript{81}

What makes the social service agency so uniquely at fault here is their exclusive control over the decision whether or not to take action to protect a child from alleged abuse.

After Justice Brennan proves that the child’s liberty interests were unconstitutionally denied, he ends his opinion with a jab at the originalist interpretation of the case. This is a fitting end because he has just advocated a more general interpretation of the past by refocusing his historical narrative of constitutionally protected liberty interests to apply to the contemporary role of social service agencies. The entire second half of his opinion relies on the purpose of the agency as an integral component to determine whether or not there exists a traditional constitutional duty to act. Justice Brennan’s interpretation almost entirely gives authority to the evolving societal role of governmental agencies as justification to interpret tradition through preserving a set of principles and values, instead of through literally preserving the most specific procedurally relevant, yet substantively antiquated, laws. This serves to encompass a more

\textsuperscript{80} ibid.  
\textsuperscript{81} ibid.
consistent tradition of liberty interests. Justice Brennan attacks the logic of the majority opinion’s interpretation on the grounds that it looks in the exact opposite direction. While Justice Brennan emphasizes the importance of expanding rights to apply traditional values and principles to contemporary societal structures, the plurality emphasizes limiting rights to remain most consistent with the political and legal agenda of the past.

By subscribing to the theory of originalism, Chief Justice Rehnquist legitimizes his methodological narrowness with the justification that he is giving authority to the intent of the Framers. Chief Justice Rehnquist interprets due process in accordance with originalist ideals through the assertion that the clause “was intended to prevent government from abusing [its] power, or employing it as an instrument of oppression.”82 Justice Brennan points out that such an interpretation is highly problematic when applied to the contemporary relationship between individuals and the state. The relationship has greatly evolved since the Framers crafted the Constitution, which creates a line of analysis that explores whether an originalist view protects the fundamental guarantee of liberty in this modern context. Justice Brennan writes: “My disagreement with the Court arises from its failure to see that inaction can be every bit as abusive of power as action, that oppression can result when a State undertakes a vital duty and then ignores it.”83 Justice Brennan ends his dissent on this note to connect his earlier section attacking the majority opinion’s use of precedent with his later section incorporating contemporary social and political ideals into his interpretation. He effectively complicates the action-inaction dichotomy that the majority opinion relies on so heavily by arguing that it is the inaction, rather than the action, that represents the real abuse of governmental power. Through an interpretation that focuses on the Framers’ original intent of minimizing government intervention in citizens’

82 ibid.
83 ibid.
private lives, the majority opinion’s adherence to the highest level of specificity causes it to overlook the contemporary role of government intervention by means of social services.

Justice Brennan concludes by highlighting the injustice that arises from the practical outcome of the majority opinion’s insurmountable methodological flaw. He makes an emotional appeal about the sorry state of affairs brought about by this decision:

Today’s opinion construes the Due Process Clause to permit a State to displace private sources of protection and then, at the critical moment, to shrug its shoulders and turn away from the harm that it has promised to try to prevent. Because I cannot agree that our Constitution is indifferent to such indifference, I respectfully dissent.  

This argument especially holds strong ground against the facts of the case. The father beat and abused the petitioner, Joshua, constantly and severely. The state was notified of the situation, yet did not take Joshua out of his father’s custody. After these beatings went on for an extended period of time, Joshua’s father beat him so badly that he suffered permanent brain damage and became profoundly retarded. Joshua and his mother sued the county on the grounds that Joshua’s substantive due process rights were violated because the state did not protect his liberty interests. With these facts, it is impossible to separate the current moral and political institutions in place from the meaning behind the text of the Due Process Clause. The text calls for some level of generality by providing an abstract guarantee of liberty, regardless of the difference between the societal structure that existed in the 1700’s and the one existing today. The most constitutionally correct outcome, according to the implications of the Clause, is the one that remains consistent with this guaranteed right to liberty. This interpretation takes the constitutional conception of liberty in light of the interest in protecting individuals against state abuses of power. In contrast to Chief Justice Rehnquist’s argument that the state does not have an affirmative obligation to intervene in private family matters, the Court must account for the legislative aspect of the

84 ibid.
situation—the social service agency was created by the people and for the people to prevent the exact tragedy that occurred. With this consideration, the Court does not act as a policymaker. It respects existing policy decisions.

Justice Brennan’s dissent represents the legal capabilities of a new liberal methodology, yet leaves room for much more progress. While he is successful in shifting toward a higher level of generality, he still largely succumbs to the trap of playing defense against the narrow conservative position. The conservative method of analyzing the most specific level of tradition is a concrete guideline, whereas the liberals have not yet established a uniform approach to determining the most constitutionally correct level of generality. This is further explored in the second dissent in DeShaney, written by Justice Blackmun. His dissent can be characterized as embodying a more definitive methodological precedent for the level of generality that liberal jurisprudence should employ. Rather than attacking the majority opinion by methodically and chronologically refuting Chief Justice Rehnquist’s claims, Justice Blackmun plays upon the idea that the strength of his dissent relies on a practical application of his liberal theory of generality.

It is also important to point out that perhaps Justice Blackmun does not delve into a categorical critique of the narrow conservative opinion because Justice Brennan already has done so. By assuming a defensive position, Justice Blackmun would essentially be making the same methodological mistakes as the conservatives because he would be paralleling their exact method he is criticizing, and he would also be restating Justice Brennan’s exact arguments. Instead, Justice Blackmun dismisses the conservative interpretation with one strike. This allows him to bypass a discussion of its inconsistencies, and delve straight into his view of how to interpret DeShaney in the right way. He commences with the statement: “The Court itself retreats into a sterile formalism which prevents it from recognizing either the facts of the case before it or the
legal norms that should apply to those facts.”

This opening is indicative of the tone of the rest of the opinion because it is brief and direct. Justice Blackmun makes it clear that he has no intention of plowing through the ‘sterile formalism’ of the majority opinion. He finds it sufficient to note that this formalism clouds Chief Justice Rehnquist’s ability to thoroughly interpret the case with the appropriate legal framework. And with that, he moves on to the core of his dissent.

Justice Blackmun refers to the fundamental nature of due process itself. He states, “formalistic reasoning has no place in the interpretation of the broad and stirring Clauses of the Fourteenth Amendment.”

Due process interpretation cannot be confined to the most specific tradition because the Clause itself is so fundamentally vague. This provides a legal framework to justify a more general view of the past. Justice Blackmun’s dissent relies upon the inherent ambiguities in most appropriately interpreting the Clause. He scoffs at the Court’s “attempts to draw a sharp and rigid line between action and inaction” on the grounds that such restriction aims to convert due process interpretation into an exact science. It is ridiculous to get caught up in the action-inaction terminology because it causes the Court to overlook the obviousness of the state’s fundamental duty to protect the child from abuse. With this theoretical framework, Justice Blackmun derives authority from an entirely different school of interpretation than does his conservative counterparts. He refocuses the case back to its core issues through advocating the use of a level of generality that best allows the Court to remain loyal to the conception of liberty:

The question presented by this case is an open one, and our Fourteenth Amendment precedents may be read more broadly or narrowly depending upon how one chooses to read them. Faced with the choice, I would adopt a ‘sympathetic’ reading, one which comports with dictates of fundamental justice and recognizes that compassion need not be exiled from the province of judging.

85 ibid.
86 ibid.
87 ibid.
88 ibid.
This type of interpretation exemplifies a shift towards concretely establishing a new liberal methodology. Justice Blackmun looks at due process as a guide for interpretation instead of as a limit on the scope of protected liberties. The vagueness of the clause invites the Court to choose how to read it in light of the issues of the case at hand. And in DeShaney, Justice Blackmun believes the appropriate interpretation should be broad because the case deals with issues of justice in a circumstance that could not have been anticipated in the political climates of the past. This line of reasoning grapples head-on with the fundamental problems of the conservative methodology. Justice Blackmun openly acknowledges the validity of different levels of generality and claims that, ultimately, the constitutionally sound decision is the one that applies principles from the text, intent, and precedent, to the relevant context. The key is that it is the principles that must conform to legitimate constitutional protections of liberty, not the literal, and often outdated, most specific legal norms of the past. Justice Blackmun does not read anything into the text that is not there, nor does he deviate from the intent of the Framers. He simply views their intent in terms of the deliberate vagueness of the Clause in order to provide interpretive leeway, not to instruct the Court to be as consistent as possible with the norms of the 1700’s. He uses the intentional ambiguity of the Clause to justify drawing upon a timely conception of justice and liberty in the modern context of the case.

The legal framework of Justice Blackmun’s dissent raises pressing questions about how the Court could possibly determine what is the conception of justice. There is not just one singular conception, and it is apparent in the differences between the majority opinion and the two dissents that different conceptions of justice are at play even in this one case. How can Justice Blackmun possibly interpret the Due Process Clause in terms of “dictates of fundamental justice”? Chief Justice Rehnquist places moral value on the idea of limited government
intervention, whereas Justice Brennan and Justice Blackmun both place moral value on the safety and protection of the abused child. The notions of justice and morality should not reflect the personal judgments of the Court. They should reflect those of society. In *DeShaney*, the people of Wisconsin had already made the moral decision simply by the fact that they established the child welfare system. This demonstrates that the collective morality supports the protection of abused children. The Court must incorporate this sense of morality into the decision-making process. This line of reasoning is relevant to the process of institutionalizing a new liberal methodology because it stays true to the past, and applies the values of the past to the values that form the contemporary collective morality. Deferring authority to society’s collective sense of morality holds true in all cases. In *Roe*, it holds true because abortion is a more generally accepted practice that it historically was (as shown through both legislative decisions and medical advances), and as such, the Court does not act as a policymaker; it simply rules in favor of a policy that society has already largely incorporated into its collective morality. The same goes for *Lawrence* because its ruling is based on a notion of morality constructed by both societal and legislative attitudes toward sodomy practices. The idea of a collective conception of justice and morality is also relevant in *Michael H.* because the Court incorporates an analysis of the current social and political view of the family structure, and rules in accordance with these moral values.

In order to decide the case in light of the inherent broadness of a principled due process decision, it is necessary to integrate the morality-based social and political norms of modern society. This includes the structure of governmental institutions, which inherently reflect the moral trends of society in general.\(^89\) The notion that the intent of the Framers was to incorporate

\(^89\) Beermann, 1087.
the due process doctrine for the purpose of protecting the people against the power of state
government does not provide adequate support for the majority opinion in *DeShaney*. It implies
that the state has no obligation to protect the more vulnerable individuals from endangerment in
the privacy of the family home. This establishes groundwork for the plurality’s narrowness. Yet
taking into account the role of contemporary social service institutions brings in the moral
argument that since their purpose is to protect those who do not have the resources or abilities to
protect themselves against infringements of liberty interests, it follows that the state has the
obligation to intervene since the social service agency in question was created with exactly that
function. This ideology is not just that of Justice Blackmun’s; it is representative of society at
large. There is evidence to support such ideology within the legislative policy decisions that
established the social service agencies. While it is likely the case that Justice Blackmun
personally subscribes to his proposed political outcome, and Chief Justice Rehnquist subscribes
to his, the moral argument here works on a legal level that supports Justice Blackmun’s values
because they are the values that reflect those of the legislature and society at large. Justice
Blackmun provides adequate evidence to explain the conception of liberty and justice in
contemporary society. This is the foundation of Justice Blackmun’s view of the level of
generality upon which to analyze the case. He interprets tradition with the most specificity
possible that will preserve society’s conception of liberty.

Justice Blackmun ends his opinion with exactly this sentiment. He combines an
emotional appeal based on the collective morality urging the Court to make decisions with
humanity and compassion, with a legal framework emphasizing the importance of the conception
of justice. He writes:

Poor Joshua! Victim of repeated attacks by an irresponsible, bullying, cowardly, and
intemperate father, and abandoned by respondents, who placed him in a dangerous
predicament and who knew or learned what was going on, and yet did essentially nothing except, as the Court revealingly observes, “dutifully recorded these incidents in [their] files.”

Justice Blackmun explicitly interjects a sense of morality into his legal opinion. Yet, this is arguably an appropriate tool. There is an interesting balance between having a formal command of language that allows the Court to interpret the legal principles outlined in the Constitution and having an emotional appeal towards sympathy and justice in a particularly horrific situation. This balance can only function legitimately if the emotional appeal is grounded in society’s conception of liberty, not in the personal view of the justice. Emotionally driven rhetoric has a special place in judicial opinions. While striving to create a purely legal methodology, the Court is naturally comprised of human beings with different conceptions of humanity and compassion. This baseline of morality is an omnipresent component underlying all judicial opinions. To ignore this fact is to deny its existence. To claim to rule on purely legal grounds is a farce.

“Adjudication is an act of interpretation, whereby a judge decides a novel case by fitting his decision to the existing body of legal materials, while invoking principles to give the best possible meaning to those materials.” The inevitability of injecting even the most miniscule hint of the justices’ personal values within the process of giving substantial meaning to legal doctrine must be acknowledged. Yet this inevitability is not a detriment to the goal of remaining purely legal, as long as any emotional language is representative of society’s collective standards of morality.

In Justice Blackmun’s conclusion, he seamlessly achieves an effective balance between law and humanity. He follows up his proclamation of “Poor Joshua!” with an explanation of why

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he so adamantly advocates in favor of Joshua on a legal level. This is an effective structure because he first appeals to the Court on an emotional level, and then provides legal justification for such emotions.

It is a sad commentary upon American life, and constitutional principles—so full of late of patriotic fervor and proud proclamations about “liberty and justice for all,” that this child, Joshua DeShaney, now is assigned to live out the remainder of his life profoundly retarded. Joshua and his mother, as petitioners here, deserve—but now are denied by this Court—-the opportunity to have the facts of their case considered in the light of the constitutional protection that 42 U.S.C. § 1983 is meant to provide.\textsuperscript{92}

Justice Blackmun criticizes the Court for supposedly basing its decision on constitutional principles of liberty and justice, which he says is immensely flawed because the decision, in effect, confirms that Joshua will neither receive the right to liberty nor to justice. How can Chief Justice Rehnquist claim to adhere to the due process guarantee of liberty when his decision does not hold the state responsible for failing to intervene, and subsequently, allowing a healthy child to procure permanent brain damage? Justice Blackmun proves that the Constitution must be interpreted with a level of generality that encompasses modern circumstances, as they relate to the Constitution’s protected concepts. The conservative interpretation perhaps functions in accordance with a theory designed to protect liberty over two centuries ago. Yet when applying such an antiquated interpretation to a modern circumstance, the opposite outcome occurs in terms of trying to preserve liberty principles; the Court actually deprives the child of his liberties.

In conclusion, \textit{DeShaney} covers considerable ground in the establishment of a more coherent liberal jurisprudence. Since the majority opinion encounters the fundamental problems with employing too high a level of specificity, the liberal dissenting opinions have an abundance of material to work with. Both Justice Brennan and Justice Blackmun successfully adhere to the basic foundations of liberal methodology. They still view the Constitution as a rulebook

\textsuperscript{92} \textit{DeShaney v. Winnebago County Department of Social Services}, 489 U.S. 189 (1989).
containing a set of rules and principles that must be followed. Yet they understand that the text of such a vague Clause is a guideline to interpret fundamental constitutional principles in a timely and appropriate manner in the context of the specific case.

If the criticism of conservative jurisprudence is that it relies on the most specific level of tradition, then conservative jurisprudence is coherent as it is. It may not appeal to the more liberal view of how the Court should interpret the Clause, but its conservatism does rest on legitimate legal grounds. Liberal jurisprudence is defined by a greater level of generality because liberals derive authority from the principles underlying the relevant traditions, and then apply those principles to the changing social and political climate in such a way that best upholds the conception of liberty. Liberal jurisprudence does not embody the same level of coherence as does its conservative counterpart because the liberal methodology deals with integrating less straightforward notions of morality and contemporary societal norms. But DeShaney at the very least demonstrates the liberals’ potential. DeShaney hints at the avenues upon which liberal jurisprudence can be more consistent, and can establish more concrete guidelines to determine the most valid level of generality. Yet, it is not a landmark of liberal jurisprudence mainly because both Justice Brennan’s and Justice Blackmun’s dissents do not establish strong enough methodological precedents to redirect the Court down a path toward a more liberal judicial era.


Michael H. v. Gerald D. (1989) questions the expansiveness of due process rights under the Fourteenth Amendment in terms of the state’s involvement in the family structure. In this case, Gerald D. and Carole D. were married and bore a child. Yet, Carole D. had an extramarital affair with Michael H., who had a paternity test revealing he was the biological father. When
Michael attempted to claim visitation rights, Gerald argued that his claim was invalid because under California law, when a child is presumed to be a child of marriage, a third party can only challenge this belief within the first two years of the child’s birth. Michael claimed that this law violated his due process rights, both substantively, by denying him the constitutionally protected liberty to have a parent-child relationship with his biological child, and procedurally, by excluding him from being able to seek visitation rights in family court because he is not the child’s father by law. The Supreme Court upheld the California law and granted sole paternity to Gerald. Because the case questions the degree to which liberty interests are protected by due process, the contention surrounding the specificity of the majority opinion did not end after the case was decided.

Justice Scalia, writing for the majority, examines common-law tradition to determine which parent, Gerald or Michael, has the more historically protected liberty interest. He claims Michael does not sufficiently prove that his liberty interest is a fundamental right because it is not as “deeply imbedded within society's traditions” as is Gerald’s liberty interest. Justice Scalia begins his opinion on this note: “the California statute that is the subject of this litigation is, in substance, more than a century old.” This immediately sets the stage for a line of reasoning based on the constitutional authority held by the notion of tradition.

Justice Scalia employs a slippery slope argument to justify the claim that a ruling in favor of granting Michael the right would encourage the development of a family situation that is inconsistent with the historical constitutional protection of traditional family structures. If Michael were to be declared the biological father of the child, the immediate change in the family would be an allowance of visitation rights. Justice Scalia argues there exists a slippery

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94 ibid.
slopes here because other rights would necessarily follow, “most importantly, the right to be
considered as the parent who should have custody.” If Michael were to attain such parental
status, he would also assume

the right to the child’s services and earnings; the right to direct the child’s activities; the
right to make decisions regarding the control, education, and health of the child; and the
right, as well as the duty, to prepare the child for additional obligations, which includes
the teaching of moral standards, religious beliefs, and elements of good citizenship.

This slippery slope details the extent to which Justice Scalia believes the traditional family
structure would be broken in such a circumstance. However, his reasoning runs into trouble in
the sense that he “tried to write 1950s white middle class theories into the Constitution.” The
Constitution does not extend in such a way that allows the Court to read definitive guidelines on
any specific type of protected family institution into its language. Justice Scalia fails to
incorporate the idea that “there are, of course, other traditions of family life in this country.
There are traditions of extended families, of spousal separations, of common law marriage and
unmarried cohabitation—but apparently they don’t count, since we didn’t see them on ‘I Love
Lucy.’” Justice Scalia’s methodology is flawed because it places constitutional legitimacy on
basing the level of protection that individuals should be accorded upon his personal value
judgment of the family tradition. His slippery slope establishes a very narrow scope of analysis
because it does not stop to consider that the rights that could follow from granting Michael
parental status may in fact be more in accordance with the principles behind familial traditions,
such as stability and love, than denying the biological father-child relationship would be. Justice
Scalia takes issue with the possibility that Michael will assume more rights if he is given the


95 ibid.
96 ibid.
97 Balkin (1), 8.
98 ibid.
right to claim parental status, yet the majority opinion forgets that, on a procedural level, such rights would be determined in an entirely separate judicial proceeding, and it is yet to be known whether or not they would be granted. He also does not engage in a constitutional argument about why Michael receiving more rights would be a bad thing, except that they would disrupt the “traditional family” Justice Scalia favors—one whose traditions hardly derive directly from the time of the founding.

Justice Scalia’s conception of tradition encounters fundamental problems on a substantive level as well. Michael H. necessitates that the Court search for an objective constitutional ideal regarding the level of protection that should be afforded to the traditional family institution. Such an endeavor must begin with the core question: how is tradition defined and with what level of specificity should it be evaluated? Not only does Justice Scalia ignore this entire search for the most constitutionally justifiable interpretation of tradition, he also skips the step of defending what scope of familial tradition he is even looking for. Why, and on what constitutional grounds, does he limit his scope to the liberty interest of the marital unit instead of the liberty interest of the biological father-child relationship? With this methodological error, he dives into his opinion with a treatment of the family unit resembling the 1950s nuclear family. This is problematic because

a tradition is often, in an uncanny way, a betrayal of itself. For Scalia’s vision of the unitary family, as exemplified by television situation comedies of the 1950s, portrays a theory of the family that was hypocritical even in its own time since even what white middle class families in the 1950s said one should do and not do sexually was not in fact what they always did, as we all found out later on.\(^99\)

Regardless of whether he chooses this type of family unit or another type from another era, the core of the mistake is that he claims there is a compelling interest to remain true to the most

\(^99\) Balkin (1), 8.
specific traditions of the familial unit. He views the most specific tradition in terms of an actual family structure, rather than the underlying principles of stability and love, among others, that the familial unit is designed to facilitate. He does not elaborate on how his conception of this nuclear family, and its emphasis on protecting the marital unit, is the most valid tradition upon which to base his analysis.

To establish and enshrine a tradition is thus at the same time to establish a countertradition—a seamy underside consisting of what society also does and perhaps cannot help but do, but will not admit to doing. The overt, respectable tradition depends upon the forgetting of its submerged, less respectable opposite, even as it thrives and depends on its existence in unexpected ways.¹⁰⁰

Justice Scalia does not account for the aspect of the familial tradition that emphasizes protecting individuals’ autonomy to define their own families. He bases his conception on a combination of outdated media ideals, religious values, and other underlying prejudices, rather than on the principles central to the familial tradition that have remained most consistent throughout legislative and social evolution. Namely, the enduring values that society preserves, as individuals navigate the norms of the family structure, constitute the most accurate view of tradition. For instance, the legislative policies dictating divorce procedure or same-sex adoption, among the many other examples of the perhaps “unconventional” circumstances that define the modern family, provide insight into the scope of familial relationships that are preserved in contemporary society. Not only does Justice Scalia ignore such essential elements of the definition of tradition, he actually draws upon a historical narrative of a family structure that has since been largely exposed as unrealistic as evidence of the strength of the institution of marriage.

For example, in the television and movies of the 1950s, one sees Rock Hudson and other homosexual or bisexual males playing the parts of monogamous heterosexual males, and

¹⁰⁰ ibid.
implicitly endorsing a heterosexual lifestyle. These roles served to support and define the very tradition of sexual practices of which Justice Scalia speaks. They furthered and reinforced a tradition of values that the persons playing these roles owed no fealty to—a tradition that required of each of them a particular form of self-betrayal. 101

Such a substantive analysis of Justice Scalia’s conception of the family undermines the legitimacy of the authority he places on the tradition of the family unit as primarily being a product of marriage. The process of deriving constitutional legitimacy from an interpretation of tradition, and then concretely applying this authority to the substance of the case, is certainly a necessary part of the Court’s methodology. Yet, Justice Scalia does not carry out such a process legitimately because he skips the critical step of defending his rationale behind deferring to such specific tradition. As such, his loyalty to the traditional nuclear family is an extremely limiting force in his analysis.

Justice Scalia discusses the tension between procedural and substantive applications of the due process doctrine to argue in favor of employing a methodology that necessitates a substantive analysis of familial tradition. This is an interesting move because he is a vocal proponent of denying the legitimacy of substantive due process in individual rights cases on the grounds that such decisions should be left to the legislature. Yet, in Michael H., a procedural analysis has no legal ground to stand on that would support his ruling. He writes that Michael’s claim is procedural in nature because the state did not grant him his procedural due process right to be provided a judicial avenue to prove his paternity. He argues that the statute calls for the substantive rule of law because, as the Court of Appeals ruled:

The conclusive presumption is actually a substantive rule of law based upon a determination by the Legislature, as a matter of overriding social policy, that given a certain relationship between the husband and wife, the husband is to be held responsible for the child, and that the integrity of the family unit should not be impugned. 102

101 Balkin (1), 1385.
With this language, Justice Scalia insists that the statute itself relies on the subjective concept of maintaining integrity in the traditional family unit. This allows the Court the freedom to evaluate the set of criteria that defines “integrity.” Such judicial freedom justifies the line of reasoning leading to the conclusion that “inquiries into the child’s paternity…would be destructive of family integrity and privacy.”[103] This reasoning blurs the distinction between procedural and substantive analyses because Justice Scalia prematurely embarks down a substantive analytical route in regard to what constitutes “integrity” in the familial tradition before he even rules on whether Michael has the procedural right to claim parental status.

Justice Scalia looks to precedent to justify his claim that Michael H. does indeed necessitate a substantive due process interpretation. He cites Stanley v. Illinois (1972), Vlandis v. Kline (1973), and Cleveland Board of Education v. LaFleur (1974) as precedents of a similar nature that do not rely on procedural due process. These cases strike down claims challenging “irrebuttable presumptions” under the law. They deal with laws affording protection only to certain groups of individuals who fall under certain classifications. Stanley looks at whether an unmarried biological father can file for custody of his children upon their mother’s death. In this case, the Court does not rely on a procedural due process analysis to protect the process of the father’s right to a judicial hearing. Instead, the Court looks to history and tradition to understand whether such a right is “traditionally accorded to the relationships that develop within the unitary family.”[104] The Court in Stanley rules that the biological father’s claim is indeed protected by familial tradition. This methodology provides a precedent upon which to carry out a substantive due process analysis in Michael H. in order to determine whether Michael’s claim is consistent

[103] ibid.
[104] ibid.
with the tradition of the unitary family. Justice Scalia argues that the Court rules in favor of the biological father’s claim in *Stanley* because, although the traditional family unit values the marital unit above most other interests, the claim has no bearing on disrupting anyone else’s marriage. Justice Scalia’s argument that disrupting marriage is unconstitutional runs into problems because he does not provide any legal grounds for such claim. In *Stanley*, the Court’s analysis of tradition can also be expanded to include households with unmarried parents because the tradition of a single father and his children is valued more in society than those being children in the foster care system. Justice Scalia accepts the Court’s decision in *Stanley* but criticizes it on the grounds that it if the Court continues to expand the definition of the traditional family, it will get to the point where it “will bear no resemblance to traditionally respected relationships—and will thus cease to have any constitutional significance—if it is stretched so far as to include the relationship established between a married woman, her lover, and their child,” as is the circumstance in *Michael H*.

In *Michael H*, the married couple can be viewed as a class of citizens that is protected under the “irrebuttable presumption” that any child bore within this marital unit is the biological child of both parents. Justice Scalia writes that the “irrebuttable presumption” cases must ultimately be analyzed as calling into question not the adequacy of procedures, but…the adequacy of the ‘fit’ between the classification and the policy that the classification serves. Essentially, the notion of “irrebuttable presumptions” repositions ostensibly procedural claims into the substantive sphere on the grounds that these procedural claims are unconstitutional because they interfere with more compelling state interests of protecting indisputably stronger traditions, such as the tradition of marriage. As the *Stanley* precedent invokes the substantive due

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105 ibid.
106 ibid.
process doctrine, Justice Scalia rejects Michael’s procedural claim on such grounds. But does “protecting the tradition of marriage” necessarily mean “not disrupting a person’s marriage,” that, by the way, has already been disrupted in that the wife bore a child with another man? Even if it does mean that, is protecting this tradition a compelling enough state interest to justify denying a man the right to be a father to his biological child?

This sets the stage for the rest of his opinion because Justice Scalia limits his analysis to a response to the substantive component of Michael’s claim—that because he has a biological parental relationship with the child, Michael claims that the protection of Gerald’s and Carole’s marriage is an insufficient state interest to justify criminalizing Michael’s relationship with his child. This aspect of Michael’s argument is substantive in nature because it raises the issue of whether he has a constitutionally protected liberty interest in a relationship with his biological child, or whether Gerald and Carole have a more pressing liberty interest in raising the child in a traditional family home with two married parents.

Justice Scalia does not embark on his substantive analysis until he has theoretically justified his methodology. He writes that the Court must use great caution in relation to substantive due process. Although there exists precedent allowing the Court to create new constitutional rights, this does not mean that the Court should act upon such precedent again. Justice Scalia believes the Court “is the most vulnerable, and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or even the design of the Constitution.”107 This rationale narrows the scope of interpretation because it categorically rejects any possibility of rights expansion because it would be unfaithful to the text. Justice Scalia defines “new constitutional rights” as rights that are not specifically outlined

in the Constitution, and subsequently, are a product of the Court’s creation. Yet, his black-and-white view of the Court’s history of protecting (or creating) rights does not account for the whole picture. He does not look at the Due Process Clause in terms of its vague language. He fails to consider that perhaps the Court is not creating new rights; but is looking to the conceptions of liberty and privacy within the Constitution, and interpreting these guarantees with respect to the overarching principles preserved through common law, history, tradition, and contemporary political norms. These criticisms of Justice Scalia’s narrowness are a result of the unduly broad conservatism within his sweeping rejection of all implied fundamental rights that are not in accordance with his personal moral convictions. This is evident in the fact that he ironically rejects the legitimacy of implied fundamental rights in liberty and privacy individual rights cases, but not in property rights cases.

Justice Scalia advocates the narrowest treatment of substantive rights claims because “in an attempt to limit and guide interpretation of the Clause, we have insisted not merely that the interest denominated as a ‘liberty’ be ‘fundamental’ (a concept that, in isolation, is hard to objectify), but also that it be an interest traditionally protected by our society.”\textsuperscript{108} To defend this view, he cites \textit{Snyder v. Massachusetts} (1934) as evidence that the Due Process Clause only affords protections that are “so rooted in the traditions and conscience of our people as to be ranked as fundamental,”\textsuperscript{109} and \textit{Griswold v. Connecticut} (1965) to prove that precedent dictates a “continual insistence upon respect for the teachings of history [and] solid recognition of the basic values that underlie our society.”\textsuperscript{110} Justice Scalia’s analysis of the scope of substantive due


\textsuperscript{109} \textit{Snyder v. Massachusetts}, 291 U.S. 97 (1934).

process is so limited in nature because it places an overwhelming amount of authority on the most specific history and tradition.

Justice Scalia’s opinion invites the question: why would it be so detrimental to loosen the restrictions imposed by this strict conservative view of tradition? Why is Justice Scalia so adamantly opposed to viewing tradition in terms of more general principles? He writes that the “purpose is to prevent future generations from lightly casting aside important traditional values— not to enable this Court to invent new ones.” He treats tradition as a test for whether a right has been unswervingly historically protected. Justice Scalia downplays the possibility that traditions change, and that sometimes these changes can be for the better because they better embody the fundamental principles of liberty in a changing society. He does not incorporate any interpretive mechanisms that would place value on preserving principles instead of concrete legal traditions. This criticism of Justice Scalia does not advocate a system in which the Court creates rights to further the evolution of societal tradition. Rather, the criticism is that Justice Scalia does not accept the notion that the Court should incorporate tradition based upon changes that have already occurred. With this, the Court does not act as a policymaker; it simply keeps up with contemporary society instead of confining its rulings to an antiquated vision.

By invoking a substantive interpretation of due process that claims the Court can only act in ways most specifically protected by tradition, Justice Scalia narrows his interpretation to the utmost extent:

The legal issue in the present case reduces to whether the relationship between persons in the situation of Michael and Victoria has been treated as a protected family unit under the historic practices of our society, or whether, on any other basis, it has been accorded special protection. We think it impossible to find that it has. In fact, quite to the contrary,

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our traditions have protected the marital family (Gerald, Carole, and the child they acknowledge to be theirs) against the sort of claim Michael asserts.\textsuperscript{112}

Justice Scalia continues this line of reasoning with the argument that there are no traditionally protected liberties for adulterous fathers. His distinction here is that while there may exist protected rights for unmarried fathers, traditional protection does not extend to circumstances where the mother is married because, in this case, the father is adulterous. Although the Constitution protects parental liberties, Justice Scalia claims that tradition and nature do not protect paternal rights of two fathers, one by marriage and one by adultery. This stringent adherence to tradition necessarily limits the constitutionality of due process claims because he defines the family in such strict historically conventional terms. Furthermore, he treats the familial tradition in terms of its values regarding the role of adulterous fathers. Yet why not look to the tradition of protecting biological father-child relationships? The answer is that this interpretation would undermine Justice Scalia’s conservative agenda to limit the establishment of new rights.

Justice Scalia chronicles the legal history of the family structure in his discussion of ancient common law traditions. He writes: “the presumption of legitimacy was a fundamental principle of the common law. Traditionally, that presumption could be rebutted only by proof that a husband was incapable of procreation or had had no access to his wife during the relevant period.”\textsuperscript{113} This historical narrative is a favorable attestation to Justice Scalia’s claim that the legal rights of the marital unit have traditionally been treated as the most compelling state interest. It is notable that Justice Scalia relies on evidence from the English legal system of the 1500s to defend his view of the family structure of the United States five centuries later. He

\textsuperscript{112} ibid.
\textsuperscript{113} ibid.
explains that such laws were based upon the societal aversion to classifying children as illegitimate. He also concedes that more recent laws in the United States and England have loosened such strict constraints, yet are still strongly biased against determining a child of a married woman to be illegitimate. Justice Scalia does not find any historical evidence specifically addressing the rights of a biological father to reclaim parental rights over a child whose mother is married to another man. He takes this lack of evidence to mean that Michael has the affirmative burden to prove the existence of this right in a context that has historically favored the sanctity of marriage. This burden rests upon precarious constitutional grounds because it calls for the Court to interpret rights cases from the vantage point of needing to prove a right exists, rather than assuming the burden of needing to prove a right does not exist as a basis to deny it.

This positions Michael in a hopeless battle. If Justice Scalia places heavy emphasis on the most specific tradition, and Michael’s claim has not been unrelentingly historically protected, he ultimately has no grounds to stand on. This methodology encounters major theoretical problems because it implies that the Court cannot legitimately rule in favor of protecting any rights or liberties that have not been historically protected beyond the shadow of a doubt. If this is the case, how can the Court take into account any societal evolution whatsoever? For example, what about women’s rights? And what’s more, how can the Court protect individual rights in cases where some form of oppression has come about with new technologies that simply did not exist throughout history?

Justice Scalia elaborates on his justification with a discussion of the levels of generality that the Court should use for interpreting tradition. His theory of specificity is the core of his analysis. “The level of generality at which the Supreme Court defines liberty interests is
important because it, along with the Court’s definition of tradition, wholly determines whether the due process clause protects an asserted liberty interest.”

The basis of his argument is that implied fundamental rights—namely rights that are not specifically referred to in the Constitution, but are protected within the scope of broader enumerated rights—cannot be determined by the recognition of a general tradition because this would leave “judges free to decide as they think best when the unanticipated occurs,” and would undermine the entire notion of a rule of law. Instead, he limits the scope of substantive due process by stating “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.” This demonstrates Justice Scalia’s narrow interpretation of the illegitimacy of implied fundamental rights. “Because any general tradition might arguably protect a multitude of asserted liberty interests, such a method would allow for the proliferation of rights. To limit the proliferation, Justice Scalia utilizes a notion of levels of generality.”

He claims that when the Court goes about determining the most constitutionally correct level of generality at which to define a liberty interest, it should 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 such a more specific tradition, and it unqualifiedly denies protection to such a parent.

The notion of looking to tradition in a manner that emphasizes specificity makes sense in the

116 ibid.
118 Spitko, 1338.
context of conservative jurisprudence because it stays true to the jurisprudential agenda of limiting rights as much as possible to remain most consistent with the scope of rights that existed when the Framers drafted the Constitution. A low level of generality is simply unable, and unwilling, to account for the manifestation of enduring societal values in a more contemporary context.

Justice Scalia defends his methodology with the claim that “general traditions provide such imprecise guidance, they permit judges to dictate, rather than discern, the society's views.”\(^{120}\) The attack on a more general view of tradition is valid for those who subscribe to the view that a proliferation of rights would be a constitutionally unsound outcome. Since generality widens the scope of protected rights not specifically referred to in the Constitution, it follows that a theory of specificity would narrow this scope in the opposite direction. As Justice Scalia employs such a specific methodology, he concludes that society has traditionally denied paternity rights to unwed fathers in circumstances where the child was conceived through adultery. He arrives at this conclusion because he finds that it refers to the most specific tradition.

Under Justice Scalia’s approach, this supposed societal tradition defines the class of constitutionally protected parent-child relationships narrowly and excludes those relationships in which the parent was an unwed father of a child adulterously conceived. When the scope of substantive due process protection is defined at this level of generality, Michael’s relationship with Victoria is unprotected.\(^{121}\)

Although Justice Scalia’s opinion remains faithful to his self-proclaimed legal conservatism, there is still much room for criticism on the grounds that his level of generality is inconsistent with basic principles of substantive due process. His methodology encounters problems in terms of the more liberal idea that the Constitution is intentionally vague in order to retain the ability to

\(^{120}\) Ibid.
\(^{121}\) Spitko, 1338-1339.
remain relevant over centuries as a living document. If the language is read as an intentionally
general and abstract guarantee of life, liberty, and property, Justice Scalia’s stubborn devotion to
specificity becomes nonsensical. Such specificity excludes the possibility of looking to more
general principles of liberty that society has traditionally valued as a guide to determine the most
constitutionally correct scope of rights protection in modern circumstances. If the Court looks to
a more general view of tradition based upon the historical protection of biological father-child
relationships, the evidence would cause the case to be decided very differently.

Justice Scalia draws upon precedent to justify his strict approach to interpreting tradition.
He references *Bowers v. Hardwick* (1986) to argue the Court historically denies protection in
claims where the right in question has been criminalized by any state legislature at any time in
history. In *Bowers*, the Court rules against expanding sexual autonomy and privacy rights to
include sodomy practices. As one aspect of its justification, the Court looks to the historical
criminalization of sodomy in the United States: “At the time the Fourteenth Amendment was
ratified, all but 5 of the 37 States had criminal sodomy laws, that all 50 of the States had such
laws prior to 1961, and that 24 States and the District of Columbia continued to have them.”122
This historical criminalization of sodomy practices (although these laws were steadily being
abolished state-by-state) creates a historical narrative that is valid enough evidence for the Court
to determine that sodomy is not to be included in the scope of rights associated with sexual
autonomy. With this precedent, Justice Scalia writes: “we concluded from that record, regarding
that very specific aspect of sexual conduct, that to claim that a right to engage in such conduct is
‘deeply rooted in this Nation’s history and tradition’ or ‘implicit in the concept of ordered

liberty’ is, at best, facetious.”123 Ironically, *Bowers* is later overturned because this justification is determined to be constitutionally invalid in its exceedingly rigid specificity.

This justification regarding the validity of drawing upon the most specific tradition is faulty at best and catastrophic at worst. The claim that *Bowers* provides a precedent for the theory of specificity sets up an interpretive method of looking to family and social values from the time of ratification on which to base contemporary decisions. With this logic, due process in itself becomes null because it only serves to protect historical liberties in their narrowest, most conservative sense, disregarding the notion of protecting principles to account for social evolution.

Justice Scalia does address some criticisms of his argument that are articulated in Justice Brennan’s interpretation of the conception of liberty in his dissent in *Michael H*. Justice Brennan argues that Justice Scalia’s opinion suppresses the liberty rights that individuals are allowed within “the freedom not to conform.”124 Justice Scalia argues against this view because it looks at the situation from a singular vantage point. He does not agree with the idea that “one disposition can expand a ‘liberty’ of sorts without contracting an equivalent ‘liberty’ on the other side.”125 Justice Scalia criticizes Justice Brennan not only for having a bias towards Michael, but also for advocating this bias at the expense of Gerald’s liberties. Justice Scalia believes that “to *provide* protection to an adulterous natural father is to *deny* protection to a marital father, and vice versa.”126 This argument is fundamentally backwards because Justice Scalia approaches the case in terms of the liberties of other individuals that may be denied if the petitioner’s claim is granted. The constitutionally correct approach is to begin with the petitioner’s claim by

123 ibid.
124 ibid.
125 ibid.
126 ibid.
analyzing the liberties that he is being denied. This is not considered a “bias” in favor of Michael. It is simply the most appropriate procedure. Michael brings the case to the Court because he believes that his liberty interests are being deprived. That is the core issue; it is not about the impact on Gerald’s liberties.

Justice Scalia argues that the judiciary is not the right vehicle to settle this lose-lose situation; the legislature should have the authority to make policy decisions dictating the nature of parental rights. He discusses the roles of the legislature and the judiciary: “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.”127 While Justice Scalia argues that Justice Brennan only sees one side of the controversy, he makes the same mistake by only seeing the other side of it. He justifies his side with the claim that this issue should be left to the legislature, but he fails to prove that the legislature has adequately addressed it. The statute in question does indeed play a crucial role in determining the outcome of the case; but if it is to be used as justification, the legislature’s rationale behind implementing this law must be thoroughly analyzed and explicated. Justice Scalia quotes the text of the statute: “the issue [child] of a wife cohabiting with her husband, who is not impotent or sterile, is conclusively presumed to be a child of the marriage.”128 This language can certainly be construed to prove Justice Scalia’s interpretation, yet it is not conclusive enough to end his argument there. For instance, it can be argued that the statute alone is not sufficient to determine the case because the child is no longer presumed to be a child of marriage in light of new medical technology allowing paternity to be tested through DNA. Thus, Justice Scalia’s dismissal of Justice Brennan’s opinion ironically

127 ibid.
128 ibid.
does exactly what he is criticizing. Justice Scalia attacks Justice Brennan for favoring one side, yet by failing to convincingly prove that the legislature acted in accordance with constitutional ideals, Justice Scalia favors the other. Justice Scalia’s view of the relationship between the Court and the legislature is illogical because if all decisions pertaining to the scope of individual rights are left to the legislature, there is no check on power. The legislature becomes free to only protect majority interests at the expense of oppressing the liberty interests of minority classes. This is precisely what the Court is supposed to protect against.

Overall, Justice Scalia’s opinion uses an approach that exacerbates the existing problems of how generally the Court should interpret tradition. He employs a methodology that fits into the larger vision of overly narrow conservative jurisprudence. Yet, he lacks a clear working definition of tradition. He is uncertain in his effort to thoroughly reconstruct the past. He demonstrates a clear bias by applying his own constructed notions of beliefs and customs to the case.129 “And as a result, his theory becomes both unworkable and unsound.”130

Justice Scalia’s opinion evokes contentious responses both in the concurrences written by Justice O’Connor and Justice Stevens, and in the dissents written by Justice Brennan and Justice White. While Justice O’Connor and Justice Stevens concur with the majority opinion, they are careful to broaden their interpretations to combat the potential dangers embedded in the limits Justice Scalia establishes. Justice O’Connor takes issue with the inconsistencies of Justice Scalia’s historical analysis. She argues that his high level of specificity causes him to be inconsistent with precedent. She writes: “On occasion the Court has characterized relevant traditions protecting asserted rights at levels of generality that might not be ‘the most specific level’ available. I would not foreclose the unanticipated by the prior imposition of a single mode

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129 Spitko, 1340.
130 ibid.
of historical analysis.”131 With such a strict adherence to specificity, the Court is unable to adapt to unanticipated circumstances. Justice O’Connor widens the scope of historical analysis in such a way that it legitimizes different levels of generality, and thus, allows the Court to view history in terms of more general underlying principles.

Justice Stevens’ concurring opinion fundamentally agrees with the outcome of the case, yet takes issue with the methods used to arrive at this outcome. He disapproves of Justice Scalia’s sweeping rejection of the idea that “a natural father might ever have a constitutionally protected interest in his relationship with a child whose mother was married to, and cohabiting with, another man at the time of the child's conception and birth.”132 Such a sweeping rejection creates too broad a precedent. Justice Scalia invalidates the possibility that “enduring ‘family’ relationships may develop in unconventional settings.”133 Justice Stevens finds such a holding too restrictive. His argument relieves some of the narrowness of the majority opinion because it allows for the future possibility of a constitutionally protected parent-child relationship in another case of this nature, or in another case involving an unconventional family relationship in general. For this reason, Justice Stevens’ opinion corrects one aspect of the flaws of Justice Scalia’s methodology. While Justice Stevens does discuss the root of his argument, he does not delve into the concept of the unconventional family relationship with respect to the most legitimate scope of historical narrative. If Justice Stevens were to chronicle historically the traditions of the family, he would possibly find that so-called unconventional family structures are becoming more and more common on both a social level and a policy-based level. As such, Justice Stevens rightfully criticizes the narrowness of Justice Scalia’s opinion, but does not go

132 ibid.
133 ibid.
into enough detail to place his claim (that enduring family relationships can develop in unconventional settings) into a historical framework.

Justice Brennan’s dissent takes the complete opposite stance of the majority opinion. Justice Brennan views tradition as a means to interpret societal values and morals throughout history, and apply these enduring principles to modern circumstances. He argues that the Court has historically interpreted due process in terms of whether the limitation on the liberty in question “impermissibly infringed upon one of the more generalized interests—such as freedom from physical restraint, marriage, childbearing, and childrearing—that ‘form the core of our definition of ‘liberty.’”[134] This directly undermines the theory of specificity Justice Scalia has set forth. Justice Scalia interprets the issue in its most specific form to be whether society traditionally protects the rights of adulterous fathers. Justice Brennan rejects such specificity through interpreting the core issue to be “whether the specific parent-child relationship under consideration is close enough to the interests that we already have protected to be deemed an aspect of ‘liberty’ as well.”[135] Justice Brennan’s conception of tradition is fundamentally more liberal in nature because it looks to an all-encompassing vision based on the general principles underlying the liberties that have been traditionally protected. Through this analytical framework, he concludes that precedent supports Michael’s liberty interest in his relationship with his daughter. Justice Brennan looks at the tradition of biological parent-child relations, combined with the tradition of substantial parent-child relations in the family setting, in order to discover the level of generality that provides the best evidence in favor of Michael’s liberty interest.

Justice Brennan begins his dissent by attacking the majority opinion’s definition and

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[134] Spitko, 1342.
application of tradition. He eloquently highlights the fundamental misconceptions embedded in Justice Scalia’s evaluation of tradition:

Apparently oblivious to the fact that this concept can be as malleable and as elusive as “liberty” itself, the plurality pretends that tradition places a discernible border around the Constitution. The pretense is seductive; it would be comforting to believe that a search for “tradition” involves nothing more idiosyncratic or complicated than poring through dusty volumes on American history.  

These criticisms of Justice Scalia’s methodology create the framework of Justice Brennan’s analysis. By looking at the theoretical problems that arise from the Court’s adherence to the most specific tradition, Justice Brennan sets up a lens in which the case should be analyzed. He reasons that if the Court cannot even agree on which traditions shed most light on the liberty interests at stake in *Michael H.*, the majority opinion thus fails to establish and implement the necessary objective standards upon which to evaluate tradition. To the majority opinion, he comments, “It is ironic that an approach so utterly dependent on tradition is so indifferent to our precedents.” This sums up the inconsistencies in Justice Scalia’s methodology because it explains that the majority opinion relies so heavily on the authority of tradition in a literal sense, but does not adequately adhere to preserving the principles behind these traditions in a substantive sense.

Justice Brennan further highlights the extent of Justice Scalia’s methodological blunders through a discussion of the practical effects of his ruling on precedents. Justice Brennan states that if the Court interprets tradition with such a high level of specificity, a multitude of past decisions will be overturned. He elaborates with a list of cases that fall under this category:

Surely the use of contraceptives by unmarried couples, *Eisenstadt v. Baird*, (1972), or even by married couples, *Griswold v. Connecticut*, (1965); the freedom from corporal punishment in schools, *Ingraham v. Wright*, (1977); the freedom from an arbitrary

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136 ibid.
137 ibid.
transfer from a prison to a psychiatric institution, *Vitek v. Jones*, (1980); and even the right to raise one's natural but illegitimate children, *Stanley v. Illinois*, (1972), were not “interest[s] traditionally protected by our society,” at the time of their consideration by this Court.  

These cases exemplify circumstances in which the Court rules in favor of protecting the liberty interests at stake, in a context where such liberty interests were once prohibited. Justice Brennan deduces that “if we had asked, therefore, in *Eisenstadt, Griswold, Ingraham, Vitek*, or *Stanley* itself whether the specific interest under consideration had been traditionally protected, the answer would have been a resounding ‘no.’” Seeing as such a high level of specificity was not applied in these cases, Justice Scalia’s interpretive method in *Michael H.* is not supported by precedent.

Justice Brennan does not stop the criticism there. He states that not only is Justice Scalia’s interpretive method novel, it is misguided. The misguided nature of the opinion stems from the fact that Justice Scalia ignores the guidelines for interpreting tradition that are implied by the Constitution’s deliberately broad language. Justice Brennan writes:

> In the plurality’s constitutional universe, we may not take notice of the fact that the original reasons for the conclusive presumption of paternity are out of place in a world in which blood tests can prove virtually beyond a shadow of a doubt who sired a particular child and in which the fact of illegitimacy no longer plays the burdensome and stigmatizing role it once did.

This critique is based upon the notion that the vague language of the Constitution necessitates a broader view of relevant principles. Justice Brennan points out that tradition does not account for current technology allowing blood tests to determine paternity, and furthermore, illegitimacy does not carry the same stigma that it used to. This aspect of Justice Brennan’s interpretation relies on an analysis of contemporary societal structures to demonstrate that the most specific

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138 ibid.
139 ibid.
140 ibid.
tradition can actually contradict the underlying liberty principles at stake when applied to a modern circumstance. Justice Brennan claims the Court should identify codified rules relating to liberty interests in terms of their principles. Such identification provides key insight into the underlying societal values being preserved.

Justice Brennan describes the difference between Justice Scalia’s approach and his own, respectively, as a choice between asking whether the liberty interest is protected by the most specific law or whether the liberty interest is traditionally protected by the principles underlying the moral and political trajectory of a more general set of laws. The former option implies that the Court must find evidence within the literal laws of the past, and apply it today as it was exactly applied throughout history. This methodology “ignores the kind of society in which our Constitution exists.”

On the other hand, the latter option accounts for a more realistic and complex view of society. Justice Brennan does so by looking for evidence in the principles preserved throughout society’s changing laws and policies. Justice Brennan’s method acknowledges, “we are not an assimilative, homogeneous society, but a facilitative, pluralistic one in which we must be willing to abide someone else’s unfamiliar or even repellant practice because the same tolerant impulse protects our own idiosyncrasies.”

If society can agree that institutions of “family” and “parenthood” are highly valued, it is irrational and destructive to attempt to agree on the substantive qualities of those values. Such attempts, as made by Justice Scalia, diminish the freedom not to conform because they establish a system in which liberty interests require specific permission from history. The opposite approaches by the liberal and conservative justices are also indicative of the challenges of establishing a coherent liberal jurisprudence. Since conservatives draw upon a much narrower scope of analysis, their

\[^[141] ibid.\]
\[^[142] ibid.\]
methodology is much less complicated. Conservatives give authority to concrete legal traditions, while liberals give authority to the principles behind these legal traditions. It is only natural that the liberals’ large body of evidence is more abstract and intricate, and thus, it is more difficult to maintain coherence and consistency.

Justice Brennan argues that the majority does not interpret the Constitution in a manner consistent with the nature of the document itself. While Justice Brennan regards the Constitution as a living charter, the majority opinion views it as “a stagnant, archaic, hidebound document steeped in the prejudices and superstitions of a time long past.”\(^\text{143}\) This view is fundamentally backward because Justice Scalia fails to recognize that times change and that a traditional rule is prone to evolve from its original foundation in order to remain loyal to its underlying traditional principles.

The differences between Justice Brennan’s and Justice Scalia’s approaches stem from the fact that they are grounded in entirely different theories of constitutional interpretation. Justice Brennan does not agree with Justice Scalia’s theory of specificity because he “cannot accept an interpretive method that does such violence to the charter.”\(^\text{144}\) Since both justices have opposing views on the nature of the Constitution itself, their methodologies are undoubtedly rooted in differing assumptions as well. Justice Scalia interprets his role as a justice to be that of ensuring the rules of the past continue to prevail in modern times. Whereas, Justice Brennan sees his role to be that of interpreting values of the past, and then reinterpreting them in modern circumstances to ensure they remain consistent with the general guarantees of the original document. Such a distinction is indicative of the divide between liberal and conservative jurisprudence in family rights cases. Both types of jurisprudence begin with the same goal of

\(^{143}\) ibid.
\(^{144}\) ibid.
recognizing the most relevant constitutional principle that must be drawn upon to decide the
case. This is done through looking at the text itself and interpreting the exact language. The next
step from both standpoints is to find precedent that sheds light on the way the Court has
historically treated similar liberty interests. This process provides the necessary evidence to
analyze the case in terms of history and tradition. Up to this point, the liberal and conservative
methodologies continue to follow the same trajectory. The justices necessarily carry out such
methodology because the entire basis of constitutional law primarily relies on the Constitution
itself, and on the Court’s past treatment of the document. It is at this juncture that the liberal and
conservative methodologies diverge. The conservative methodology stops here because
conservatives believe this is the point where the Court fulfills its requirement of seeing that the
values of the past continue to be upheld. The liberal methodology requires another step because
the Court has not yet reinterpreted the values of the past to most consistently apply to the new
constitutional questions that arise in contemporary society. This next step embodies the defining
methodology in the quest for a new and coherent liberal jurisprudence. As such a process does
not yet embrace consistent standards in the same way that the conservative process does, it is up
to the liberal justices to establish guidelines that best apply constitutional ideals of the past to
more contemporary contexts. This is easier said than done. By giving authority to principles,
instead of rules, the liberal methodology is inherently much less cleaner and tidier than the
conservative methodology. This is because the liberal members of the Court cannot just open a
history textbook to locate the most specific traditional legal rules. The liberal justices must look
outward to a combination of various norms of the past and the present, and ultimately, piece
them to create a conception of the tradition at hand. Thus, the establishment of a coherent liberal
jurisprudence is undeniably characterized by a much more chaotic process.
Justice Brennan embarks on a mission to apply historically protected liberty interests to the application of the law in *Michael H.*’s particular circumstance. He explores whether the parent-child relationship is sufficiently established through precedent. Is the relationship close enough to the interests the Court has previously protected within the constitutional guarantee of liberty? Unlike Justice Scalia, who only looks at whether *Michael H.* is consistent with evidence of legal norms relating to the historically protected family unit, Justice Brennan’s methodology incorporates the next step of analyzing the overall constitutional conception of liberty in the context of parent-child relationships. He then applies this conception of liberty to the modern family unit. Justice Brennan explores four precedents that rule on whether unwed fathers have protected liberty interests in their relationships with their children:

Though different in factual and legal circumstances, these cases have produced a unifying theme: although an unwed father’s biological link to his child does not, in and of itself, guarantee him a constitutional stake in his relationship with that child, such a link, combined with a substantial parent-child relationship, will do so.\(^{145}\)

This adherence to precedent is important because he looks at the principles behind the cases instead of deriving authority from their actual facts. Such methodology avoids the conservative mistake of narrowing the ruling to only giving authority to concrete historical rules and procedures. Rather, Justice Brennan derives authority from the underlying values in the precedents. He regards the unifying values as the true indicators of history and tradition because they demonstrate the principles that society deems worthy of protecting. This gives him leeway to defend his dissent on the grounds that he is adhering to these principles translated into a novel circumstance.

Justice Brennan criticizes the majority’s dismissal of the most relevant precedents because this dismissal reflects a value judgment on the part of Justice Scalia. The plurality denies

\(^{145}\) ibid.
the relevance of these cases on the grounds that they all protect the “unitary family”—namely, the family consisting of married parents and their children. In placing such value on his conception of the “unitary family,” Justice Scalia disregards the view that the historical protection of the father-child relationship in the unitary family can be reinterpreted to embody the same set of values surrounding familial relations in the context of the modern conception of the family structure. The contention between the plurality and the dissent is whether the Court has a duty to uphold historical legal definitions of the structure of the family unit, or has a duty to uphold the underlying values that dictate the extent of protected liberty interests in family relations. Justice Brennan disagrees with the level of importance that the plurality places on the definition of the family:

The plurality’s exclusive, rather than inclusive, definition of the “unitary family” is out of step with other decisions as well. This pinched conception of “the family,” crucial as it is in rejecting Michael’s and Victoria’s claims of a liberty interest, is jarring in light of our many cases preventing the States from denying important interests or statuses to those whose situations do not fit the government's narrow view of the family.\textsuperscript{146}

If the Court only affords the guarantee of liberty to those who fit the conservative definition of the “unitary family,” every family structure that does not fit into their mold will be forever doomed to a systemic denial of these same liberties. With such a precedent, the conservative Court sees no room for any family structures that are out of sync with its ideas on what the family unit should consist of. This negates the Court’s role to impartially protect liberty interests from instances of oppression by the majority rule because the conservative justices enforce a legal vision of the family that excludes certain minority classes. Justice Brennan believes such a denial of liberty interests creates the real inconsistency in terms of the general guarantees of due process because it ignores the underlying themes and values associated with the status of the

\textsuperscript{146} ibid.
family in society.

Justice Brennan also casts doubt on the legitimacy of Justice Scalia’s methodology on a procedural level. Justice Brennan reasons that there is a good explanation as to why the Court has never looked at the relationship unwed fathers seek to disturb while ruling on whether the unwed father has a liberty interest in the biological father-child relationship. The conservative methodology prohibits one individual’s liberty interests because it may possibly infringe on another’s. This is inconsistent with the Constitution because it shifts the focus from determining whether a liberty interest exists to determining how it can be terminated.

According to our established framework under the Due Process Clause, however, we first ask whether the person claiming constitutional protection has an interest that the Constitution recognizes; if we find that she does, we next consider the State’s interest in limiting the extent of the procedures that will attend the deprivation of that interest. 147

Justice Scalia’s fundamental misinterpretation of the Due Process Clause resides in the fact that he ignores the Clause’s allowance for a high enough level of interpretational freedom to substantively determine if a liberty interest falls within the scope of protection. Yet the Clause does not provide the same interpretational freedom for the Court to go on a fishing expedition for the disruptions such a liberty interest may cause. In searching for the disruptions that may occur if the biological father is to be granted the right to have a relationship with his child, the Court ignores the process of first evaluating the biological father’s affirmative claim itself. Justice Brennan writes: “Michael’s challenge in this Court does not depend on his ability ultimately to obtain visitation rights; it would be strange indeed if, before one could be granted a hearing, one were required to prove that one would prevail on the merits.” 148 Justice Brennan criticizes Justice Scalia for jumping directly into a discussion of the repercussions of the biological father’s

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147 ibid.
148 ibid.
substantive parental role if he is given the right to a relationship with his child. Instead, Justice Scalia should start with a procedural analysis of the initial claim.

Justice Scalia’s methodology is grossly inappropriate when analyzed against the biological father’s claim itself. The statute in question determines that the husband of the biological mother is legally considered to be the child’s father despite DNA evidence showing that another man has a 98 percent probability of being the biological father. In Michael H., the biological father asks the Court for a hearing to grant him legal parental status. Procedurally, if he cannot legally establish his paternity, he cannot petition for any further substantive rights. Justice Scalia requires that Michael prove that his potential father-child relationship is in the best interest of the family unit as a whole. This is premature because he overlooks the main question of whether Michael even has the procedural right to a hearing to determine his parental status.

“The point of procedural due process is to give the litigant a fair chance at prevailing, not to ensure a particular substantive outcome.” Justice Scalia wastes time conjecturing about the possible scenarios that can arise if the biological father plays a role in the child’s life. Such conjectures are irrelevant because Michael cannot even file for custody if he is not recognized as the child’s father by law. “The State has declared a certain fact relevant, indeed controlling, yet has denied a particular class of litigants a hearing to establish that fact.” Justice Scalia approaches procedural due process from the wrong vantage point because he analyzes the possible negative outcomes associated with granting the liberty interest, before he looks at the constitutionality of the liberty interest itself. Furthermore, his substantive analysis is arbitrary.

Why does he choose to value the traditional interests of the marital family unit instead of value the interests of the child, or the interests of the biological father for that matter? Michael does not

\[149\] ibid.

\[150\] ibid.
seek to change the relationship between the mother and her husband; he only seeks to have a relationship with his daughter. If Justice Scalia insists on analyzing the interests of parties other than the actual petitioner, it is completely arbitrary for him to choose the marital interest over any of the other interests at stake.

Ultimately, Justice Brennan interprets the question before the Court to be “whether California has an interest so powerful that it justifies granting Michael no hearing before terminating his parental rights.” Such phrasing emphasizes that the state interest must be exceedingly compelling if it is actually sufficient enough to deprive the biological father of his right to procedural due process. Justice Brennan suggests that the possibility that the state interest is more powerful than the guarantees of due process is unlikely at best. He employs precedent to support the view that the biological father should be permitted to retain his procedural due process right to a hearing to decide whether he is to be recognized as the father. This procedure must be granted before the Court can legitimately terminate his right to a substantive relationship with the child based upon a justification composed of speculations as to what will occur after the hearing. Justice Brennan cites *Mullane v. Central Hanover Bank & Trust Co.* (1950) to support his view:

> Many controversies have raged about the cryptic and abstract words of the Due Process Clause, but there can be no doubt that, at a minimum, they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case.  

This precedent functions as evidence that the state cannot limit procedure simply because it does not support the substantive outcome. When there arises a claim that an individual’s liberty interests are being denied by the state, the minimum due process guarantee is that of a procedural hearing specifically addressing the claim. Justice Brennan writes that “it would be strange indeed

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if a State could curtail procedures with the explanation that it was hostile to the underlying, constitutionally protected interest.”\textsuperscript{152} In \textit{Michael H.}, this so-called “strange” procedure is precisely the problem. The Court wrongly looks to the best-interest principle to argue in favor of protecting the stable family unit consisting of the married parents, and subsequently, the relationship between the child and presumed father.

The liberty interests associated with protecting the traditional family unit are determined by who gets custody, not determined by who is the father. Justice Brennan writes: “Family finances and family dynamics are relevant, not to paternity, but to the best interests of the child— and the child’s best interests are not, as I have stressed, in issue at the hearing that Michael seeks.”\textsuperscript{153} In the claim of the biological father, custody and general lifestyle decisions are not the issue. Michael only seeks to be granted a legal status that recognizes him as the child’s father. “In order to change the current situation among these people, Michael first must convince a court that he is Victoria’s father, and even if he is able to do this, he will be denied visitation rights if that would be in Victoria’s best interests.”\textsuperscript{154} The fact that Justice Scalia blatantly ignores the procedural aspect of the case is fundamentally inconsistent with the most basic constitutional principles. Justice Brennan writes, “It is elementary that a determination that a State must afford procedures before it terminates a given right is not a prediction about the end result of those procedures.”\textsuperscript{155} By employing a methodology entirely dependent on an end result that will possibly come about \textit{if} the Court rules in favor of granting the procedural right, the basics of constitutional law are forgotten by the Court, or at least by the majority.

Justice White also writes a dissent in \textit{Michael H.}, in which the premise of his argument is

\textsuperscript{152} \textit{Michael H. v Gerald D.}, 491 U.S. 110 (1989).
\textsuperscript{153} ibid.
\textsuperscript{154} ibid.
\textsuperscript{155} ibid.
that since the biological father demonstrates a sufficient interest in having a relationship with the child, constitutional protection of this liberty interest should follow suit. His approach is similar to that of Justice Brennan in the sense that he relies largely on tradition, but does not look to the most specific tradition that Justice Scalia advocates. Justice White focuses on the traditions associated with the legal status of unwed fathers, rather than on the status of adulterous fathers. The core of his analysis of tradition is that “the basic principal enunciated in the Court’s unwed father cases is that an unwed father who has demonstrated a sufficient commitment to his paternity by way of personal, financial, or custodial responsibilities has a protected liberty interest in a relationship with his child.” He provides evidence through drawing on precedent involving unwed fathers to support his claim that the existence of a substantial father-child relation, combined with the father’s willingness to take on the responsibilities of parenthood, is traditionally treated by the Court as a sufficient interest to grant parental legal status. Justice White also makes arguments about the relevance of new medical technology—specifically the advances of DNA testing that make the statute in question even more outdated. He goes one step further and debunks the plurality’s argument about the stigmatization that existed in ancient common law on the grounds that the social and political associations with such stigma are no longer relevant in the modern context. Overall, Justice White’s dissent concisely touches upon the problems with Justice Scalia’s interpretation. In conjunction with Justice Brennan’s dissent, it reinforces the standard approach for liberal justices to treat tradition with a more consistent level of generality, and subsequently embodies a more coherent liberal jurisprudential vision.

Outwardly, Justice Brennan’s dissent can be characterized as a good liberal opinion in the sense that it effectively criticizes the inconsistencies of the conservative majority opinion. Justice

156 Spitko, 1342-1343.
Brennan makes one compelling argument after another about why Justice Scalia’s opinion is not constitutionally sound. When Justice Brennan turns his dissent from attacking the majority opinion to stating his own opinion, the validity of his interpretation of tradition falls short. By looking at the value system behind the relevant historical liberty interests, Justice Brennan certainly employs a methodology much improved from that of the majority opinion because he eases up from Justice Scalia’s high level of specificity. Justice Brennan, as expected, claims it is overly narrow to view tradition in its most specific form because such specificity results in an inability to account for any modern circumstances that may alter the preservation of the underlying values. He alternatively subscribes to a more general view of tradition that asks how the underlying value system can best translate into a new, more modern context. This is certainly a more liberal methodology because it places importance on the trajectory of a tradition from its history up until its manifestation in contemporary society.

Yet, the dissent takes on a conservative slant in its propensity to conform and obey past tradition, rather than defining liberty as an individualistic concept.\(^{158}\) To an extent, Justice Brennan falls into the same trap as Justice Scalia does through attempting to validate his decision based upon laws rather than principles. He questions the liberty interests of unwed fathers to have relationships with their biological children in terms of historical legal protection, rather than the principles that invariably underlie the evolution of the legal norms. While Justice Scalia looks to the tradition of the unitary family through the lens of the requirement of the marital unit, Justice Brennan looks to the involvement Michael already has with his biological child. This provides the framework for him to argue that legal tradition does indeed recognize a constitutionally protected relationship.

\(^{158}\) West, 1378.
What contribution does Justice Brennan make to the liberal jurisprudential agenda by interpreting tradition with more of an emphasis on the traditional legal rights of unwed fathers, instead of on the state interest in preserving the unitary family? One reason Justice Brennan’s interpretation is more liberal is that he gains historical insight on the level of rights affirmatively afforded to individuals in similar circumstances, rather than seeking out the disruption of third parties’ liberty interests before even analyzing the petitioner’s claim. The former methodology is inherently more liberal in nature because it begins with an exploration of the general liberty interest being denied. The latter is distinctly more conservative because it functions from the bottom up—it begins with an analysis of the inconsistencies of tradition that may occur if a series of events take place after the initial right is granted, rather than beginning with the exploration of whether the right should be granted in the first place. In this way, Justice Brennan arguably arrives at the constitutionally correct outcome. Yet there is another way to answer this question of which interpretation of tradition is more liberal. In this next approach, neither methodology is more liberal. Justice Brennan makes the same methodological mistake as Justice Scalia in viewing the case as a categorization of traditionally acceptable family structures. Although both justices differ in their perceived narrowness of tradition, they still confine the outcome of the case to what the law traditionally deems to be acceptable.

Both Justices Brennan and Scalia prove to be traditionalists of the first order. Justice Scalia seeks to enforce his view of “tradition,” establishing the hegemony of his vision of culture, thus betraying other values and other traditions in the process. But Justice Brennan is equally a betrayer. For he seeks to use a general concept of tradition to subvert tradition, thus betraying it. If Scalia’s use of tradition is a betrayal, Brennan’s use of tradition against itself is a betrayal of a betrayal. And in so doing Brennan attempts to elevate a countertradition—which rejects Justice Scalia’s views of socially appropriate behavior—to constitutional importance.159

With this reasoning, Justice Brennan’s methodology is deceivingly conservative. “Both justices

159 Balkin (1), 14.
seek to protect and conserve the traditions of the past against contemporaneous or future change...they protect not the individual’s right to be different, idiosyncratic, iconoclastic, or rebellious, but rather the individual’s right to conform to tradition and obey its dictates.”

Justice Brennan looks to legal traditions of the biological father-child relationship in order to define the liberty interests at stake. Justice Brennan still values a historical legal conception of familial institutions and individual relations above all else, just as Justice Scalia does. This is only truly overcome if he looks to the principles guiding the historical legal protection of the family unit, and bases his analysis on the best way to remain consistent to such principles in a contemporary setting.

In criticizing Justice Brennan’s adherence to historical conceptions of liberty for having underlying roots in conservatism, the next question is: if methodology that seeks to preserve the most specific history and tradition is jurisprudentially conservative in nature, what is the alternative for liberal jurisprudence? How can liberal jurisprudence be consistent with established constitutional principles if it does not provide interpretations based on specific legal traditions of the past? What other legitimate basis is there upon which liberal justices can make decisions? The entire field of constitutional law is based upon an adherence to a document of the past, and upon the precedents that have been established in accordance with the rules and principles of this document. The interpretational tools at hand are necessarily based on the past. As such, it may outwardly appear counterintuitive to criticize Justice Brennan for looking to remain consistent with legal traditions as a basis to decide the case. Yet the heart of the criticism of Justice Brennan’s methodology is not that he looks to the past to ground his interpretation. It is that he does not look to the past in light of the larger conception of liberty. “The Justices’

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160 West, 1378.
collective need to constrain interpretation by the ethical demands of the adjudicative virtues has cramped our understanding of liberty, as well as of the Constitution’s other general phrases.”\footnote{161}{West, 1373-1374.} By strictly placing value on past tradition and precedent, the Court fails to consider the actual principles underlying past traditions. Thus, it does not acknowledge whether those principles will continue to hold strong in the conception of liberty interests in contemporary society.

**B. Abortion Rights**

i. *Roe v. Wade* (1973)

*Roe v. Wade* (1973) is a quintessential case in establishing a more coherent liberal jurisprudence because the controversial decision is “the clearest example of noninterpretivist ‘reasoning’ on the part of the Court in four decades.”\footnote{162}{Ely (2), 2.} With a basic understanding of the different schools of constitutional interpretation, another category comes about in which these theories can be further broken down: interpretivism and noninterpretivism. Interpretivism refers to a reliance on both the implicit and explicit content of the written text, whereas noninterpretivism validates looking beyond the written content and relying on norms that cannot be discovered through the text alone.\footnote{163}{Ely (2), 1.} The idea behind interpretivism is appealing on a theoretical level because it functions within the realm of the known. The two significant attractions of an interpretivist approach are that “it better fits our usual conceptions of what law is and the way it works”\footnote{164}{Ely (2), 3.} and it better “reconcile[s] itself with the underlying democratic theory of our government”\footnote{165}{Ely (2), 4.} than does the alternative. The prospect of noninterpretivism is an easy
target for criticism because it deals with taking the unwritten, and thus unknown, into account. On a practical level, the theory of noninterpretivism plays a big role in the normative evaluation of liberal jurisprudence because it allows for the decision-making process to be intertwined with moral values, as well as with changes in American social and political norms. The novel adherence to noninterpretivist reasoning in *Roe* represents the beginning of a phenomenon in which the liberal justices push the boundaries of how generally they can possibly interpret tradition.

Not only does *Roe* break ground in defining a new methodology of liberal jurisprudence, it also incorporates larger issues concerning the role of the Court in politics. *Roe* necessarily forces the Court to mediate between opposing politicized views within a national controversy, and attempts to end the controversy by deferring to a solution rooted in the Constitution. The legal reasoning in *Roe* is guided by the notion that the Court should look beyond the actual text; it should look to current social and political norms as an integral part of the decision-making process. This high level of noninterpretivism makes *Roe* a contentious case because the decision brought about largely unprecedented issues of the political nature of substantive due process, building upon those disputes that originally articulated in *Griswold*, which had previously been discredited by the *Lochner* era. *Roe* is an instrumental case in testing the appropriate levels of restraint versus activism.

In *Roe*, the Court determines that the decision to terminate a pregnancy is constitutionally protected on the grounds of the existence and applicability of a fundamental right to privacy. Justice Blackmun’s majority opinion claims that this right is embedded within the Fourteenth

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167 Griffin, 141.
Amendment’s conception of personal liberty, and its implied limitations on state involvement in citizens’ private lives. Justice Blackmun states that the right to privacy presupposed in the text of the Due Process Clause is broad enough to encompass the abortion decision, yet is subject to some limitations. “Where certain ‘fundamental rights’ are involved, the Court has held that regulation limiting these rights may be justified only by a ‘compelling state interest,’… and…legislative enactments must be narrowly drawn to express only the legitimate state interests at stake.” In essence, the Court determines that a woman does have the constitutional right to terminate her pregnancy, but there is a point where compelling state interests become dominant in terms of protecting health, medical standards, and prenatal life. Justice Blackmun justifies his opinion by drawing upon a multitude of social, political, and medical institutions throughout history and in contemporary life. He analyzes the nature of abortion regulation, and concludes that its history does not justify criminalization. This methodology is a critical aspect of liberal jurisprudence because it represents a prime example of looking beyond the text to base an opinion on a combination of historical and contemporary evaluations of the American value system. Justice Blackmun grounds his definition of the right to privacy in the language of the Clause through its guarantee of liberty. With this textual groundwork in place, he shifts his focus to medical, political, and moral institutional norms to determine whether the right to privacy extends to include abortion. This begs the question of whether such a noninterpretivist analysis is a constitutionally sound methodology. And if so, is it a part of the solution for establishing a more coherent liberal jurisprudence?

Justice Blackmun looks broadly to history and tradition, and then moves on to a discussion of how to best preserve these traditions in the context of contemporary state interests.

He places his interpretation of tradition into a modern context to explore whether the enduring principles behind the relevant traditions can indeed justify criminalization. Justice Blackmun’s analysis begins all the way back with ancient attitudes about abortion. He finds that neither Greek nor Roman law prohibited abortion on the grounds of protecting the unborn. The only ancient context in which abortion was prosecuted was in circumstances where it violated a father’s right to his child. Justice Blackmun incrementally moves forward in his historical narrative to the Hippocratic Oath. He argues that although the Oath deems abortion unethical, it does not represent the greater norms of its time because it “originated in a group representing only a small segment of Greek opinion, and…was not accepted by all ancient physicians.”

After this dismissal of the Oath’s authority in representing the ethical history of abortion, Justice Blackmun discusses the tradition in common law, English statutory law, and American law. In terms of common law, Justice Blackmun states it is doubtful that abortion “was ever firmly established as a common law crime even with respect to the destruction of a quick fetus.” In English statutory law, he notes that abortion is legal under the condition that the mother’s life is at risk or the unborn child will be born handicapped. In American law, although abortion was criminalized over time on a state-by-state basis, “a woman enjoyed a substantially broader right to terminate a pregnancy than she does in most States today.”

Justice Blackmun’s next historical section is comprised of an analysis of the position of the American Medical Association (AMA). He writes that the AMA, and the medical profession in general, historically shared the country’s anti-abortion sentiment in the late nineteenth century. This position evolved in the opposite direction in later years. In 1967, the general position was

169 ibid.
170 ibid.
171 ibid.
still that abortion was a criminal act, yet exceptions were made when medical evidence documented health risks to the mother or unborn child. A few years later, the AMA was categorized as being split in its opinion on abortion. It was a very polarizing issue for the medical profession as a whole. The overall movement in favor of abortion rights was “felt to be influenced ‘by the rapid changes in state laws and by the judicial decisions which tend to make abortion more freely available;’ and a feeling ‘that this trend will continue.’” Justice Blackmun concludes his historical narrative with a sentiment in favor of the constitutional protection of abortion rights. He draws upon a wide range of tradition that encompasses arguments both in favor and against his final decision. Yet, he ultimately states that the cumulative history of abortion practices demonstrates a trend in favor of legalization. For Justice Blackmun, this trend is sufficient to justify protecting the right.

With his extensive historical analysis in place, Justice Blackmun refers back to the text of the Constitution to firmly ground his methodology. He claims that while the Constitution does not explicitly discuss the right to privacy, the Court has always recognized this right when it is deemed fundamental to protecting ordered liberty. He dismisses the disagreements over whether life begins at conception or at birth: “When those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary, at this point in the development of man's knowledge, is not in a position to speculate as to the answer.” The Court’s role in defining the right to privacy is strictly in accordance with protecting ordered liberty as best it can; it is not to make judgment calls on contentious medical, religious, and social issues. With this assertion, Justice Blackmun tiptoes on the blurry line

\[172\] ibid.
\[173\] ibid.
between acting as the ultimate political authority on a controversial social issue and rooting his opinion in the Constitution’s text.

Overall, Justice Blackmun interprets history and tradition with a high level of generality in order to create an all-encompassing narrative of the underlying liberty principles in question. In terms of the structure of his opinion, it is notable that “only well past the two-thirds mark in the opinion did Blackmun finally address the constitutional contentions advanced by ‘Roe’ and other abortion case plaintiffs.” Before this, his methodology is comprised of: issues of jurisdiction; a lengthy historical section; and an evaluation of the legislative purposes of antiabortion laws. This notably veers away from the conservative roots of the Court’s methodology due to its emphasis on the moral trends governing society’s political and social evolution. Justice Blackmun invokes an objective sense of morality into his opinion by focusing on societal attitudes towards abortion on a social, political, and legislative level. He relies on the set of moral values that society places on abortion in order to validate his opinion that the collective morality supports abortion as a protected privacy right under the Constitution’s broad conception of liberty. This methodology has been subject to relentless criticism on the grounds that Justice Blackmun does “not address the crucial challenge of substantive due process jurisprudence—how to derive new fundamental rights and specify their content. Blackmun relied on precedent to show the existence of the right of privacy.” The methodological problem is that he simply states that the right is broad enough to encompass the abortion decision. Justice Blackmun correctly looks to a general view of tradition to defend his opinion, yet does not create a sufficient framework to defend the legality of this process, or so say the conservatives.

175 Griffin, 171.
Justice Rehnquist’s dissent attacks the methodology of the liberal majority opinion on the grounds that it deviates too far from a legal decision. He writes that it “partakes more of judicial legislation than it does of a determination of the intent of the drafters of the Fourteenth Amendment.”\textsuperscript{176} In straying so far from the intent of the Framers, Justice Rehnquist argues that Justice Blackmun derives a right that “was apparently completely unknown to the drafters.”\textsuperscript{177} Justice Rehnquist invokes an originalist approach to justify his attack on Justice Blackmun’s opinion. This in itself sheds light on the different values underlying liberal and conservative jurisprudence. Conservative justices employ originalist methods to further their agenda of limiting rights. The theory of originalism provides legal grounds for conservatives to reject the argument that liberty interests can be expanded through a substantive understanding of the text. The strictest form of originalism exclusively interprets even the most abstract language on a procedural level. Liberal jurisprudence must accordingly defend the legitimacy of looking beyond the text and incorporating contemporary norms and values into Court decisions, whereas conservative jurisprudence strictly adheres to the theory of specificity in order to justify imposing severe limitations on the scope of rights. In practice, Justice Rehnquist’s criticism that Justice Blackmun’s opinion derives a nonexistent right falls flat when the majority opinion is defended as being in accordance with the definition of liberty interests throughout history.

A fundamental component of Justice Rehnquist’s dissent is the high level of specificity he uses to interpret history and tradition. Unlike the majority opinion, which employs a higher level of generality to hold that there is no sufficient historical evidence compelling enough to justify criminalizing abortion, the conservative dissent interprets tradition in a much narrower sense. Justice Rehnquist writes:

\textsuperscript{176} \textit{Roe v. Wade}, 410 U.S. 113 (1973).
\textsuperscript{177} ibid.
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,” Snyder v. Massachusetts, 291 U.S. 97 (1934). Even today, when society’s views on abortion are changing, the very existence of the debate is evidence that the “right” to an abortion is not so universally accepted as the appellant would have us believe.178

In giving authority to the most specific history of abortion restriction, Justice Rehnquist imposes fundamentally narrower limits than Justice Blackmun does. Justice Rehnquist utilizes his historical narrative to make the overall point that if the right to abortion is not universally accepted, then the validity of abortion being a protected liberty interest is unsatisfactory. By asking the question of when abortion has been restricted, Justice Rehnquist approaches his argument with an interpretation of history that supports limiting rights because it starts with an evaluation of when such rights have been historically limited.

While Justice Blackmun certainly acknowledges that abortion is not a universally accepted practice throughout history, he approaches his analysis with a level of generality that begins with a search for traditions that support the constitutionality of abortion rights. He looks to overall social trends, medical opinions, and parts of history in which abortion has been acceptable. Justice Rehnquist does not buy this approach. Perhaps Justice Blackmun’s historical review is overbroad, yet if so, Justice Rehnquist’s is undoubtedly overly narrow. He claims that the very existence of a debate is enough to claim that abortion rights are not so rooted in American traditions as to be constitutionally protected. If this is indeed the case, the larger implication of Justice Rehnquist’s assertion is that the Court cannot protect any privacy interests that have even been slightly subject to political debate. This makes Justice Rehnquist’s methodology inherently flawed in its narrowness. Essentially, the liberal methodology begins

178 ibid.
with the question of when tradition has protected the right, whereas the conservative opinion
begins with the question of when tradition has prohibited it.

The fundamental contention between Justice Rehnquist’s and Justice Blackmun’s
opinions can be traced back to the nature of liberty interests themselves. Liberty interests are
protected in the Constitution using a variety of justifications regarding history, tradition,
morality, and compelling state interests. Justice Blackmun acknowledges all of these elements,
and subsequently looks to the “big picture” to arrive at a decision that accounts for the
culmination of all interests at stake. Justice Rehnquist is quick to disregard this process by
claiming on one level that there is no evidence of this right in the text or intent, and on another
level, that history fails to prove abortion is universally accepted. This methodology is similar to
that of Justice Blackmun on the most basic level—they both look to a textual interpretation
alongside a historical analysis. Yet, on a deeper level, this basic structure leads the two justices
to drastically different places. By finding no direct textual or historical evidence as a result of his
adherence to the theory of specificity, Justice Rehnquist closes his case. Whereas Justice
Blackmun finds the conception of liberty interests, and supports such a conception through a
detailed review of history, tradition, and compelling state interests. This methodology treats the
case with a higher level of generality to justify the constitutionality of the right in terms of its
consistency with the underlying principles behind the traditions of the liberty interest at stake.

The second dissent in Roe, written by the conservative Justice White, is unsurprisingly
very critical of Justice Blackmun’s methodology as well. Justice White first points to the
problems with the majority opinion’s implication that the Constitution values the decision of the
mother more than the life of the fetus. He is highly skeptical of a ruling in which the Court gives
full discretion to the woman, and subsequently fails to protect the life of the fetus. Justice
White’s interpretation is flawed because he views the majority decision through the lens of his personal beliefs about abortion. He does not view Justice Blackmun’s decision with respect to the line of legal analysis he uses to reach his ultimate outcome. Justice White criticizes the decision purely based upon his political reaction to the outcome. By stating that “during the period prior to the time the fetus becomes viable, the Constitution of the United States values the convenience, whim, or caprice of the putative mother more than the life or potential life of the fetus,” Justice White embarks on a methodologically shaky road. He chastises the woman for selfishly killing her fetus in an impulsive, careless manner. This judgment in itself undermines his argument because it is not representative of the constitutional question at hand; it represents a conservative stereotype of the “immorality” of the abortion decision. Furthermore, Justice White’s dissent is an insulting characterization of women who choose the abortion option. Nowhere in the realm of valid constitutional decision-making is there a place for harsh character attacks on any class of individuals.

After his criticism of women who choose abortion, Justice White turns to an interpretation of the text to support his claims. Lacking a concrete overview of history or textual analysis, he asserts:

I find nothing in the language or history of the Constitution to support the Court’s judgment. The Court simply fashions and announces a new constitutional right for pregnant mothers and, with scarcely any reason or authority for its action, invests that right with sufficient substance to override most existing state abortion statutes. With this argument—that the Court essentially derives a new right out of thin air—Justice White claims that Roe demonstrates an “extravagant exercise of the power of judicial review.” His argument can potentially be supported in some schools of textualist and originalist theory on a

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179 ibid.
180 ibid.
181 ibid.
theoretical level. Yet his strict interpretation is problematic for liberals because it puts substantial limitations on many already established rights. In valuing the text as a literal procedural outline for determining rights, Justice White implicitly advocates a system that disregards the multitude of liberty interests that are not explicitly mentioned. He undermines his methodology by further critiquing the decision in terms of his own political leanings, rather than looking to precedent or trends in social values. Basically, Justice White criticizes the majority opinion due to its evaluation of what the Constitution should value, and then he goes on to very clearly impose his own political values. He writes, “I cannot accept the Court's exercise of its clear power of choice by interposing a constitutional barrier to state efforts to protect human life and by investing mothers and doctors with the constitutionally protected right to exterminate it.”182 This is where the fundamental flaw resides. Defining abortion practices as allowing mothers and doctors to exterminate human life exemplifies the blatant value judgment in Justice White’s dissent. While he criticizes the majority opinion for including political and social values, he then goes on to do the exact same thing. This is problematic on two levels: it undermines his supposed strict adherence to the text, and it makes the same methodological “error” as the majority opinion. If Justice White is really basing his opinion purely on the text, as he claims, he should theoretically have no need to back up his opinion with an appeal to his subjective version of morality. His supposed textualist stance only goes so far as to state the right is nowhere to be found in the text. He does not look at the section of text that the majority uses to derive the right. He does not consider that the Constitution’s intentionally vague language is sufficient proof that the right does exist in the text. He does not explicitly refer to any part of the text that would indicate the flaw in determining the existence of such a right. Rather, his opinion makes the exact same

182 ibid.
mistake for which he attacks the majority opinion. In arguing that Justice Blackmun’s decision is rooted in a liberal political leaning, Justice White hypocritically denounces the decision based upon his conservative political leaning.

In looking at the majority opinion and dissenting opinions in *Roe*, the question inevitably returns to the problems of liberal jurisprudence. How does liberal jurisprudence differentiate itself from conservative jurisprudence? *Roe* highlights the fundamental differences between liberals and conservatives in a new way. While *DeShaney* and *Michael H.* both support the hypothesis that the difference between liberal and conservative jurisprudence is based on the different levels of generality, *Roe* takes this theory one step further by establishing a precedent of the extent to which liberal justices can employ such a high level of generality. While it is crucial to note that in terms of the final outcome, the majority and dissenting opinions in *Roe* are in accordance with the justices’ respective political ideologies (the liberal justices ultimately support the right to abortion, whereas the conservative justices do not), the methods of interpretation are greatly different. In terms of the dissenting opinions, the problem of too much narrowness in the conservative approach certainly exists. Both Justice Rehnquist and Justice White display characteristically conservative methods of interpretation through deferring authority to the Framers and the text as a means to justify their specificity. Yet, the argument that liberal jurisprudence makes the same fundamental mistakes does not seem to apply to *Roe*.

Justice Blackmun grounds his analysis in the text using a different concept of the Constitution’s authority. A major scholarly criticism of Justice Blackmun’s opinion concerns his fidelity to the text. In order to see how his methodology is not purely a political statement, and rather contains legitimate constitutional interpretation, it is important to look at how the arguments surrounding his lack of fidelity manifest themselves. Constitutional law scholar John
Hart Ely argues that while the *Roe* decision is not bad in terms of its outcome, “it is bad because it is bad constitutional law, or rather because it is not constitutional law and gives almost no sense of an obligation to try to be.”\textsuperscript{183} While Justice Rehnquist and Justice White make insurmountable methodological mistakes themselves, are they correct in claiming Justice Blackmun strays too far from the text? Through his focus on the historical and contemporary social attitudes towards abortion legislation, does Justice Blackmun ultimately disregard his “obligation to trace its premises to the charter from which it derives its authority”?\textsuperscript{184} Does he employ too high a level of generality? Justice Blackmun defends his methodology as being derived from the text through precedents relating to substantive due process and the constitutional conception of liberty itself.

A defense of Justice Blackmun’s opinion is the key to evaluating the larger implications of *Roe* and to understanding its contribution to furthering a more cohesive liberal jurisprudence. In order to argue that *Roe* is legitimate, two underlying ideas must be regarded as legitimate: “First, that the Constitution, in protecting liberty against deprivation ‘without due process of law,’ acts in a substantive manner to protect sexual and bodily privacy; second, that this privacy is ‘broad enough’ (in Justice Blackmun’s phrase) ‘to encompass a woman’s decision whether or not to terminate her pregnancy.’”\textsuperscript{185} In order to prove these two concepts are true, it is first necessary to look at how the text and precedent regard the meaning of liberty. The notion of liberty is discussed in the text on a federal level in the Fifth Amendment and on a state level in the Fourteenth Amendment, both of which prohibit the deprivation of “life, liberty, and property

\textsuperscript{184} Ely (1), 949.
without due process of law.” While this is a familiar phrase, what does it actually mean? How far can it extend? The understanding of liberty in the Constitution is vague and abstract; however it is not indeterminate. A review of history and precedent provides various insights on liberty interests that cannot be ignored in this context:

There are at least four such propositions: (1) “Liberty” was protected when citizens were protected from arbitrary government action. (2) Liberty was to be the rule, its restriction the exception. (3) The liberty of an individual could be restricted only for agreed, limited purposes: to protect another individual, or the public, from harm. (4) The purpose of government, and of the Constitution, was to protect man’s natural rights, including unenumerated rights. The most important of these rights were personal security and property, broadly understood.

These propositions all point to the conclusion that liberty interests are intended to encompass as many parts of individual life as possible. Liberty should only be restricted when absolutely necessary to protect others from harm. The role of the Court is to protect individual liberties at all times unless there are such compelling interests at stake that it absolutely cannot. Liberty extends as far as it possibly can; that is, until it encroaches on other liberty interests. As such, Justice Blackmun’s methodology is most consistent with the constitutional conception of liberty because it seeks to protect as wide a scope of liberty interests as possible. On the other hand, Justice Rehnquist’s and Justice White’s methodologies lack this fidelity to the text because they seek out traditions that limit the scope of liberty interests as much as possible.

Justice Blackmun’s assumption in Roe is that liberty extends to giving the judiciary power to make a substantive evaluation. In doing so, he remains in accordance with the historical scope of liberty interests because he regards liberty as a substantive process measuring all

186 U.S. Const., Amend. 14, Sec. 1.
187 Hirsch, 50.
188 Hirsch, 51.
interests at stake. Finding no compelling enough reasons to ban abortion, at least at the beginning of a pregnancy, he determines that it should be protected.

Two precedent cases are particularly demonstrative of the legitimacy of Justice Blackmun’s claim that privacy rights are indeed broad enough to include abortion: *Griswold v. Connecticut* (1965) and *Poe v. Ullman* (1961). *Griswold* provides background for the use of a substantive due process analysis; it affirms that the line of substantive due process reasoning is appropriately carried out in *Roe*. Furthermore, Justice Harlan’s dissent in *Poe* sets a precedent for the process of determining protected liberty interests by the Court.

*Griswold v. Connecticut* (1965) is a landmark case in which the Court overturned a Connecticut law criminalizing the use of contraceptives because it violated the right to marital privacy. The majority opinion, written by Justice Douglas, derives this right to privacy from the penumbras of other constitutionally protected rights. Justice Harlan writes a concurring opinion deriving the right to privacy from due process in the Fourteenth Amendment. In conjunction, these two opinions set up a type of conceptual groundwork for *Roe* because they establish the right to bodily privacy that they deem implicit in all other constitutional protections. Justice Douglas bases his decision on the notion that “specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance.”\(^{189}\) In essence, when reading the Bill of Rights as a set of protections, it follows that there exists an implicit set of guarantees that give greater meaning to those that are codified. Within every constitutional right to privacy, the Court derives “zones of privacy”\(^{190}\) emanating from the given right. Justice Douglas provides examples of these zones of privacy in order to back up his interpretation:


\(^{190}\) Ibid.
The Fourth and Fifth Amendments were described in Boyd v. United States (1886) as protection against all governmental invasions “of the sanctity of a man's home and the privacies of life.” We recently referred in Mapp v. Ohio (1961) to the Fourth Amendment as creating a “right to privacy, no less important than any other right carefully and particularly reserved to the people.”\textsuperscript{191}

This demonstrates how the Court can legitimately associate a specific codified right with the entire zone of privacy protected within it. Boyd shows that the Fourth and Fifth Amendments protect individuals against all government invasions in the home, including a specific protection against publicizing a man’s personal papers against his will. While the Bill of Rights does not discuss the protection of private papers, it falls within the entire zone of privacy.

Justice Douglas then applies this method of interpretation to Griswold. He claims that this idea of the zone of privacy is applicable because the right to privacy incorporates the right to use contraceptives. “It concerns a law which, in forbidding the use of contraceptives rather than regulating their manufacture or sale, seeks to achieve its goals by means having a maximum destructive impact upon that relationship.”\textsuperscript{192} This reasoning demonstrates Justice Douglas’ view on how best to remain consistent with precedent. The concept of zones of privacy provides evidence in Griswold in terms of the extent to which the Court can legitimately protect a right based on larger general principles of liberty. Justice Douglas cites NAACP v. Alabama (1958) as a concrete example of the principle of constitutionally protected zones of privacy. In terms of NAACP, the law in Griswold is unconstitutional because “governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms.”\textsuperscript{193} This explication of Griswold is in accordance with Justice Douglas’ theoretical framework because it

\textsuperscript{191} ibid.
\textsuperscript{192} ibid.
\textsuperscript{193} NAACP v. Alabama, 357 U.S. 449 (1958).
looks to the penumbras of the right to privacy as evidence of constitutionality. The right to
privacy extends far enough to allow the use of contraceptives because the Connecticut statute
bans the activity itself rather than banning its manufacture or sale. Such an overbroad ban is
inconsistent with constitutional principles because it prohibits a private behavior that is not
structurally or institutionally prohibited in society’s tradition. There exists precedent that grants
individual rights to privacy in making personal life decisions, and there exists a social and
political structure that allows the manufacture and sale of contraceptives as an acceptable tool to
use in one’s private sexual and familial decisions. As such, there is no compelling interest that
would prohibit the use of contraceptives in accordance with the Constitution’s general guarantee
of liberty.

*Roe* also remains consistent with precedent when analyzed in the context of the scope of
protected liberty interests in Justice Harlan’s dissent in *Poe v. Ullman* (1961). In *Poe*, the Court
ruled that a Connecticut statute banning the use of contraceptives was constitutional because it
has never actually been enforced. For this reason, the Court determined that the law was not ripe
to be challenged, as there had not been any repercussions for anyone who had disobeyed it.
Justice Harlan dissents on the grounds that the Connecticut statute violates the right to privacy
through invading intimate decisions in an individual’s personal sphere. He relies upon the text of
the Due Process Clause in the Fourteenth Amendment, and interprets the Clause to include any
law that encroaches on liberty interests. Rather than subscribing to the procedural view that the
Clause is intended to protect the specific liberty interests enumerated in the Bill of Rights, Justice
Harlan broadens the constitutional concept of liberty to include

* a rational continuum which, broadly speaking, includes a freedom from all substantial
  arbitrary impositions and purposeless restraints, and which also recognizes, what a
reasonable and sensitive judgment must, that certain interests require particularly careful scrutiny of the state needs asserted to justify their abridgment.\footnote{Poe v. Ullman, 367 U.S. 497 (1961).}

This line of reasoning gives the Court power to evaluate the right to privacy using rational and reasonable judgment calls based upon contemporary circumstances.

Justice Harlan begins by challenging the procedural interpretation of due process:

It is not the particular enumeration of rights in the first eight Amendments which spells out the reach of Fourteenth Amendment due process, but rather, as was suggested in another context long before the adoption of that Amendment, those concepts which are considered to embrace those rights which are \ldots fundamental\ldots Again and again this Court has resisted the notion that the Fourteenth Amendment is no more than a shorthand reference to what is explicitly set out elsewhere in the Bill of Rights.\footnote{Ibid.}

He sets up this critique of procedural due process to emphasize its narrow scope; he plays upon the absurdity of due process being included in the text solely to reiterate that the Bill of Rights must be protected. Justice Harlan advocates a substantive approach by comparing the implications of the two forms of due process decision-making. He writes: “That tradition is a living thing. A decision of this Court which radically departs from it could not long survive, while a decision which builds on what has survived is likely to be sound. No formula could serve as a substitute, in this area, for judgment and restraint.”\footnote{Ibid.} His argument is strengthened by looking at tradition more generally as a changing structure in which the Court must adapt to remain consistent with principles, rather than as a formula to remain most consistent with specific antiquated laws. Furthermore, while Justice Harlan’s dissent establishes a mode of substantive due process that defers authority to underlying principles, it is also important in regard to its text-based interpretation. He looks to the vague language of the Clause and argues:

The full scope of the liberty guaranteed by the Due Process Clause cannot be found in or limited by the precise terms of the specific guarantees elsewhere provided in the

\footnote{Ibid.}
Constitution. This ‘liberty’ is not a series of isolated points pricked out in terms of the taking of property; the freedom of speech, press, and religion…and so on.\textsuperscript{197}

The concept of liberty is intertwined with the judicial freedom to interpret the law as to most closely reflect its principles in light of the evolution of tradition and values. The language of the Due Process Clause calls upon the Court to be a decider of the scope of protected rights in accordance with whether there is any compelling interest for such rights to be limited.

Once Justice Harlan lays out his interpretation of substantive due process and supports it with textual analysis, he looks at the facts of the case through the methodological lens he has just previously justified:

The very inclusion of the category of morality among state concerns indicates that society is not limited in its objects only to the physical well-being of the community, but has traditionally concerned itself with the moral soundness of its people as well. Indeed to attempt a line between public behavior and that which is purely consensual or solitary would be to withdraw from community concern a range of subjects with which every society in civilized times has found it necessary to deal.\textsuperscript{198}

Justice Harlan does not only theoretically advocate substantive due process, he practically applies it to the implication of the Connecticut statute. The nature of the statute is that of a moral judgment of acceptable behavior. When legislation veers away from the sole purpose of creating legal order to protect individuals from harm, the Court must view such legislation for its intended purpose—to improve the moral character of the citizenry. With this, it follows that constitutional interpretation must integrate these moral values into decisions about the scope of protected rights in order to fully address the issues of constitutionality within the statute. “It is in this area of sexual morality, which contains many proscriptions of consensual behavior having little or no direct impact on others, that the State of Connecticut has expressed its moral judgment that all

\textsuperscript{197} ibid.
\textsuperscript{198} ibid.
use of contraceptives is improper.”

In the Connecticut statute, the state is trying to regulate the institution of marriage to create a moral system to dictate what sexual practices are acceptable. This also takes the form of a series of implied value judgments about the appropriate context in which children should be born and raised, as well as other judgment calls about “laws forbidding adultery, fornication and homosexual practices which express the negative of the proposition, confining sexuality to lawful marriage, form a pattern so deeply pressed into the substance of our social life that any Constitutional doctrine in this area must build upon that basis.”

With such a statute, it would be methodologically ineffective to look at its constitutionality on purely procedural grounds, considering moral judgments concerning sexual behavior are nowhere to be found within the written text. With strict adherence to procedure, the Court has no basis to make any coherent ruling because no exact guidance from the text exists. This type of decision necessarily overlooks the inclusiveness of the language of due process that actually encourages incorporation of substance-based evaluations. Rather, through establishing a methodology that widens the scope of liberty interests, Justice Harlan sets a precedent emphasizing the larger picture of maintaining the conception of liberty.

Justice Harlan’s dissent in Poe provides a powerful precedent upon which to defend Justice Blackmun’s opinion in Roe. Justice Harlan sets the standard for the methodological elements that comprise a coherent substantive due process opinion.

In alluding to the traditions from which America broke, Justice Harlan thus recognized, in a way that Justice Scalia appears not to, that the existence of a tradition may be a reason for rejecting it as controlling…This is especially true, one might think, when they are impositions of values by a majority on a political, cultural, ethnic, religious, or ideological minority.

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199 ibid.
200 ibid.
201 Balkin (1), 5-6.
Justice Blackmun draws upon this precedent in *Roe* through widening the scope of liberty interests to include an evaluation of privacy rights that looks at general tradition as a living entity. This allows Justice Blackmun to include moral and political evaluations of the evolving societal traditions regarding abortion practices. The core meaning of *Poe* functions as a precedent on a deep level in its establishment of the overall way in which the liberal members of the Court should regard the meaning of liberty. Not only does it expand the scope of legitimate liberty interests, it also explains the rationale behind doing so. Justice Harlan’s dissent delves into the fundamental assumptions behind liberal jurisprudence because it grounds the legality of the liberal jurisprudential agenda in the notion that the constitutional guarantee of liberty is linguistically designed to protect individual liberties at all costs unless there is an interest against doing so that is exceedingly compelling. This is the foundation of Justice Blackmun’s methodology in *Roe*.

The differences in liberal and conservative methodologies in *Roe* are derived from differences in the most basic assumptions underlying the respective liberal and conservative constitutional ideals. As such, the contention surrounding *Roe* extends far from the Court opinions to the large assortment of discourse among both justices and scholars in the field of constitutional law. For instance, Justice Scalia sustains the relevance of *Roe* by basing later decisions upon his disagreement with its legitimacy. He interprets the components of the *Roe* decision as fundamentally backwards. In his dissent in *Lawrence*, he writes,

*Roe v. Wade* recognized that the right to abort an unborn child was a “fundamental right” protected by the Due Process Clause. The *Roe* Court, however, made no attempt to establish that this right was “deeply rooted in this Nation’s history and tradition”; instead, it based its conclusion that “the Fourteenth Amendment’s concept of personal liberty … is broad enough to encompass a woman’s decision whether or not to terminate her pregnancy” on its own normative judgment that anti-abortion laws were undesirable.\(^{202}\)

This view on the right to privacy in *Roe* is indicative of Scalia’s view of the legitimate source of privacy rights. He claims that the implied fundamental right to privacy can only be called upon for justification if it is so deeply rooted in history and tradition that it can hold up against a text-based reading of the Constitution. The *Roe* decision does not satisfy these conditions for Justice Scalia because it draws upon a moral judgment on the part of the Court. This denial of what he refers to as “normative judgment” as justification is precisely why the decision holds legitimacy for liberal constitutional law scholars. Rather than denying the right to privacy on the grounds that it is a social construction that should be left to Congress, liberal legal ideology that the Court sustains its legitimacy from its reading of the abstract clauses that encourage the incorporation of democratic moral principles.

Justice Scalia also advocates for the overturning of *Roe* in his concurring opinion in *Webster v. Reproductive Health Services* (1989). He claims that *Roe* is not derived from text-based reasoning and legal tradition; rather its faulty justification lies within the Court’s creation of a fundamental right that does not account for the Constitution’s language or history.\(^{203}\) Scalia extrapolates on this view in his concurrence in *Hodgson v. Minnesota* (1990):

> One will search in vain the document we are supposed to be construing for text that provides the basis for the argument over these distinctions; and will find in our society’s tradition regarding abortion no hint that the distinctions are constitutionally relevant, much less any indication how a constitutional argument about them ought to be resolved.\(^{204}\)

Justice Scalia explains that if the right to abortion cannot be found in the text, it is therefore not legitimate. This narrowness is indicative of the larger theoretical problems that conservatives point out in *Roe*. Conservative methodology rejects the emphasis on general privacy and liberty

\(^{203}\) Brisbin Jr., 278.

interests embedded within historical and social trends because this is purely a political declaration furthering liberal policy goals.

Aside from the issues regarding Roe’s lack of grounding in the text, Justice Scalia claims that by using the right to privacy as legitimate justification, the Court deviates from its supposed judicial role and becomes too much of a political actor. Justice Scalia outlines this idea in Webster: “Alone sufficient to justify a broad holding is the fact that our retaining control, through Roe, of what I believe to be, and many of our citizens recognize to be, a political issue, continuously distorts the public perception of the role of the Court.” Justice Scalia argues that if abortion is included within the scope of the right to privacy, it will cause great harm to the institution of the Court. Through injecting itself into all types of human behavior, particularly improper political participation, the judicial image of the Court will be irreparably tarnished. For this reason, Justice Scalia invokes the intent of the Framers to advocate for Roe to be overturned; namely, legislature should be entrusted to make policy that reflects contemporary social values. “It is not the job of the judiciary to read a right to privacy into the Constitution. Instead, Congress and the states must create and protect such a right, if they choose to do so.” With Justice Scalia’s critique, the question emerges of how political he is being himself. Is his critique of liberal methodology inherently rooted in the fact that Justice Scalia does not support the political outcome on a personal level?

On one level, the disagreement between liberals and conservatives on the legitimacy of Roe can be traced back to their different theories of the constraints of interpreting abstract text. Yet, on a more fundamental level, the differing opinions reside within their respective opposing

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206 Schultz, 93.
207 Schultz, 40.
views on the role of the Court in general. Liberal jurisprudence derives legitimacy in *Roe* partly from the assumption that the countermajoritarian difficulty is inherently evaded when the Court invokes principles to keep up with changing democratic values. On these grounds, conservatives reject *Roe* because it delegates political power to the Court that should be reserved for Congress. With political power in the hands of the Court, the countermajoritarian difficulty is exacerbated because it strays from the text-based reading, which according to Justice Scalia, is the framework of judicial legitimacy.

When looking at the scope of implied fundamental rights in a more general sense, *Roe* is decided correctly, while the justification for its overruling falls flat under Justice Scalia’s interpretation. “*Roe* recognized the right of a woman to make certain fundamental decisions affecting her destiny and confirmed once more that the protection of liberty under the Due Process Clause has a substantive dimension of fundamental significance in defining the rights of the person.”  

This type of reasoning in *Roe* emphasizes the discipline of the liberal conception of liberty as the root behind the interpretation of abstract principles.

Liberals defend *Roe* with the basic groundwork that the Court can derive authority from the concept that the text intentionally contains abstract moral principles that encourage the Court to interpret the correct application of individual rights. From a procedural standpoint, liberals defend *Roe* through a discussion, and subsequent denial, of the distinction between enumerated and unenumerated rights. This refers to the notion that the guarantee to due process exists both in terms of enumerated rights claims and unenumerated rights claims because the language of the Constitution extends to protect rights that are not specifically referred to in the document. By placing the abortion decision within the scope of the fundamental right to privacy, Justice

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Blackmun asserts his authority to interpret tradition in a manner general enough to justify expanding rights. The question at hand is whether the Court has the authority to enforce rights that are unenumerated in the Constitution, especially given that there are rights that are enumerated. Liberal constitutional law scholar Ronald Dworkin lays out three constitutional arguments to defend *Roe* by disproving the distinction between enumerated and unenumerated rights. The first argues that the Equal Protection Clause gives women protection against gender-based discrimination (with the constraint of compelling state interests). The second argues that the First Amendment grants the individual right to burn the American flag. The third argues that the Due Process Clause protects the right to privacy under which women have the constitutional right to an abortion. The first two arguments represent enumerated rights, while the third argument refers to an unenumerated right, meaning the right to an abortion. This right “is thought to bear a more tenuous or distant relationship to the language of the Constitution. It is said to be at best implied by, rather than stated in, that language.” Yet, Dworkin argues that this distinction is faulty. All three arguments contain the same interpretive elements that undermine the supposed semantic constraints of unenumerated rights. The Bill of Rights does not specifically state that “freedom of speech” means that people are free to burn flags or that “equal protection” means that excluding women from certain jobs is unconstitutional.

Each conclusion (if sound) follows, not from some historical hope or belief or intention of a “framer,” but because the political principle that supports that conclusion best accounts for the general structure and history of constitutional law. Someone who thinks that this manner of constitutional argument is inappropriate—who thinks, for example, that framers’ expectations should play a more decisive role than this view of constitutional argument allows—will have that reservation about all three arguments, not distinctly about the third. If he thinks that the third argument is wrong, because he abhors, for example, the idea of substantive due process, then he will reject it, but because it is wrong, not because the right it claims would be an unenumerated one.  

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209 Dworkin (3), 388.
210 ibid.
This discussion of the problems that arise in attempting to undermine Roe on a rights-based platform reinforces the notion that Roe contains sound procedural groundwork.

Dworkin asks the question: “How should judges decide which rights do and which do not have ‘roots’ in the abstract language?” While Justice Scalia suggests that abstract language cannot derive a right that the framers did not specifically enumerate, Dworkin points out that if we reject the right to privacy in one instance, such as Roe, we must then reject “a great number of other, unquestioned constitutional rights that lawyers frequently describe in language not to be found their either.” Rather, Dworkin sets forth a common law approach to argue that the principles in earlier privacy decisions should be applied to later decisions in order to enforce “the concept of ordered liberty,” which is the vision of the United States as a society committed to upholding individual liberty and dignity. Yet this concept in itself still provokes questions about the disciplined nature of ordered liberty. Through subscribing to the view that privacy rights are legitimate when they further the cause of liberty, one must ask how and when can the Court make judgment calls regarding a principle as abstract as “liberty”? Dworkin answers this question through a “personal judgment” justification. He states that governmental constraints on people’s freedom are not legitimate in regard to ideals about what kinds of lives are good or bad. For instance, decisions citing the immorality of abortion or sodomy are personally judgmental, and thus, unacceptable. On the other hand, impersonally judgmental decisions that appeal to the

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211 Dworkin (4), 52.
213 Dworkin (4), 53.
value of an object or state of affairs, rather than one’s personal life decisions, are subject to governmental limitation.\textsuperscript{214}

In terms of the liberal substantive arguments in favor of \textit{Roe}, there exists an appeal to a personal judgment justification. This methodology classifies \textit{Roe} as being under the scope of one’s personal responsibility to uphold his or her ethical values. Dworkin writes:

The abortion decision is at least as much of a private decision...as any other the Court has protected. In many ways it is more private, because the decision involves a woman’s control not just of her connection to others, but of the use of her own body, and the Constitution recognizes in a variety of ways the special intimacy of a person’s connection to her own physical integrity.\textsuperscript{215}

This analysis of \textit{Roe} exemplifies the legitimacy of a personal judgment line of reasoning because it sees abortion rights as inextricably intertwined with personal moral development. The principled approach to deciding the case relies on the fact that the Constitution protects lifestyle choices that are pertinent to this moral development. Therefore, a justification on these grounds is disciplined because it is in accordance with precedent in terms of the guarantee of liberty in making autonomous individual life choices as long as such choices do not infringe on more compelling interests.

Overall, \textit{Roe} is one of the rare cases that can be characterized as a precedent for a new, coherent liberal methodology. The liberal-conservative dichotomy is not simply defined by the distinction between generality and specificity in each system’s unique methodology. \textit{Roe} provides a path for to remedy the inconsistencies of liberal jurisprudence because it demonstrates the utmost level of generality that can legitimately be used. As such, Justice Blackmun creates a guideline for the liberal members of the Court to consistently draw upon when determining what


\textsuperscript{215} Dworkin (4), 51.
level of generality in interpreting tradition will provide the best evidence for expanding rights. Justice Blackmun writes a uniquely liberal opinion through regarding the constitutional conception of liberty as a living, breathing force in American life. This most importantly devises a definition of liberty as a culmination of the text, tradition, objective morality, and ultimately the preservation of all these enduring principles in light of contemporary norms and ideals. To ensure this preservation, the liberal members of the Court have a new tool upon which to know the limits to the levels of generality at their disposal.

*Roe* provides a quintessential example of the way liberal jurisprudence can indeed derive an outcome consistent with the liberal agenda through drawing upon a valid legal methodology that is distinct to liberal jurisprudence. The main problem in liberal jurisprudence is inconsistency—in terms of abiding by standards that define a distinctly liberal methodology. In conservative decision-making, the standard is to interpret tradition with the highest level of specificity. This guideline provides a concrete method for conservatives to establish coherency in their interpretations. Yet, liberal jurisprudence is disorganized. There is a consensus that tradition must be interpreted with some level of generality higher than the most specific level. Yet, at what level should liberal justices interpret tradition in order to further their motive to expand rights as often as is legally justifiable? Liberal jurisprudence dictates that the most appropriate level of generality is the most specific level that allows the Court to rule in favor of the right in question. This guideline is logical because it values more generality only when absolutely necessary to preserving the underlying principles behind the relevant traditions. *Roe* contributes to the establishment of a coherent liberal jurisprudence because it sets a precedent for the highest level of generality that may be used when absolutely necessary.
C. Gay Rights


*Lawrence v. Texas* (2003) struck down the ruling in *Bowers v. Hardwick* (1986) by determining there is an implied fundamental right to privacy with regard to sodomy laws that is in fact constitutionally protected under due process. *Lawrence* upholds the right of consenting adults to engage in sexual activity based on the level of personal privacy at stake. The statute in question is determined to further no compelling state interest that would justify a denial of privacy. While *Bowers* holds a narrow view of privacy, *Lawrence* widens the scope of protected consensual adult conduct to include sodomy.

The case denies the legitimacy of looking to the narrow conservative view of deeply rooted tradition to determine which specific sexual activities should be protected. In the majority opinion, Justice Kennedy disallows government intrusion of privacy rights if based on the notion that the right in question, such as sodomy, has not been traditionally protected by society at the most specific level. This directly over turns *Bowers* because it refers to the unconstitutionality of the judiciary to be the moral arbiter of whether individual sexual choices must only be for procreative purposes. Such judicial willingness to undermine the conservative theory of specificity creates a new precedent affording protection to a much wider scope of sexual activity between consenting adults. The Court determines that due process relies on justice, and justice includes a right to same-sex intercourse. With this logic, the abstract text of the Constitution provides a framework for the decision, but principles regarding the nature of justice are the ultimate deciders of the case.\(^\text{216}\) This methodology is distinctly liberal in nature.

Justice Kennedy’s opinion begins with a brief discussion of the Constitution’s treatment of liberty principles. This sets the tone for the rest of the opinion because it regards liberty as an all-encompassing part of American life that extends beyond spatial bounds. Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct. The instant case involves liberty of the person both in its spatial and more transcendent dimensions.\textsuperscript{217}

Justice Kennedy treats liberty as an ideal that cannot be defined solely by a laundry list of the most specifically protected activities; rather, the concept of liberty transcends this spatial dimension, and permeates all guiding principles of the public’s moral disposition. With this wider definition of liberty, Justice Kennedy interprets the Constitution as a guide of principles upon which to evaluate the scope of protected liberties in a changing social climate. Such an interpretation exemplifies liberal methodology because it opens the door for the judiciary to determine the extent of protected personal liberties based upon a cumulative evaluation of the general traditions that shed light on society’s enduring liberty principles. This differs from the methodology of the conservative dissenters because they dispute the legitimacy of deriving any authority whatsoever from sources other than the most specific interpretation of tradition in order to remain as literally authentic to the text itself and the intent of the Framers.

Justice Kennedy refers to \textit{Griswold v. Connecticut} (1965) and \textit{Eisenstadt v. Baird} (1972) as precedents for legitimizing his view on the need for a broader scope of liberty under the Due Process Clause. Although \textit{Griswold} only protects sexual autonomy as part of the right to privacy within the marital relationship, its logic extends the right to autonomy in sexual conduct beyond the marital relationship to all consensual adult relations. \textit{Eisenstadt} invalidates the prohibition of distributing contraceptives to unmarried people. From there, the Court broadens the

\textsuperscript{217} \textit{Lawrence v. Texas}, 539 U.S. 558 (2003).
interpretation of liberty with regard to privacy rights in *Roe*, among other important precedents. Justice Kennedy bases his conception of liberty within the framework of the broadening scope. While he uses these cases as precedents, there is a marked difference between the language in *Lawrence* and that of other cases; Justice Kennedy “consistently uses the word ‘liberty’ rather than ‘privacy,’ to describe the constitutional interest at stake.”\(^{218}\) This use of language is a positive step towards a more cohesive liberal methodology, because it looks at due process as an all-encompassing conception of liberty rather than as a specific discussion of whether the right to sodomy can be found in the Constitution’s language.

The starting point of the justification in the liberal majority opinion in *Lawrence* lies within the historical treatment of sodomy practices. The role of history in the Court’s decision-making has been a point of contention between liberals and conservatives because it reflects the Court’s larger view of how the text should be correctly interpreted. In liberal jurisprudence, a historical analysis provides insight into the abiding principles in existence throughout centuries of societal evolution. History is not always a literal basis for limiting individual rights. Rather, it is a means to gain a deeper understanding of the power structure of majority rule, social and political backlash, and evolving understandings of various behaviors.

In conservative jurisprudence, the most specific tradition is the key to justifying a decision based on the Framers’ intent and its subsequent steadfast legacy. In essence, the historical criminalization of a certain practice signifies it should also now be criminalized because this is more in line with the original understanding of the Constitution. In *Lawrence*, this difference in interpretational methods is highlighted in Justice Kennedy’s treatment of historical legal and social attitudes towards homosexuality. He argues that the earliest sodomy laws were

\(^{218}\) Brest, 1503.
not specifically directed towards homosexuals. They were geared towards the criminalization of non-procreative sexual activity in general. Furthermore, a large portion of sodomy prosecution was carried out in nonconsensual cases involving minors or victims of assault. Considering the underlying principles behind traditions of prohibiting sodomy were not for the purpose of criminalizing homosexual activity, the most specific tradition of the illegality of sodomy does not function as the most consistent historical narrative. Consequently, Justice Kennedy deems it inappropriate to equate historical criminalization with the current legal status of sodomy because the practice itself was placed within a different legal category. Laws specifically prohibiting same-sex relations were not put in place until the 1970’s, and even then, were only present in nine states. Thus, the historical narrative creates a much more complex picture than to warrant a simple across-the-board ban on sodomy.

In *Bowers*, the Court uses the systemic condemnation of homosexual practices throughout history to justify criminalization. This history is regarded as legitimate justification because “for many persons these are not trivial concerns but profound and deep convictions accepted as ethical and moral principles to which they aspire and which thus determine the course of their lives.”

Private acts of homosexual intimacy are viewed as criminal in the sense that they provoke moral decay and disrupt the moral and ethical course of society as a whole. While the historical discussion of society’s attitudes towards homosexual conduct plays a large role in *Bowers*, Justice Kennedy sees the main issue in *Lawrence* as “whether the majority may use the power of the State to enforce these views on the whole society through operation of the criminal law.” This relates back to his definition of liberty interests as being an overarching force pervading everyday life rather than as a concrete evaluation of whether a specific right is

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220 ibid.
protected. He subscribes to the notion that “our obligation is to define the liberty of all, not to mandate our own moral code.”[^221] In this sense, Justice Kennedy takes a much more general view of liberty than the Court takes in *Bowers*.

Alongside Justice Kennedy’s historical analysis is his deference to a social construction process. This refers to the idea that “at the core of Supreme Court decision making is the construction, or the justices’ picture of the social, political, and economic world outside the Court as it applies polity and rights principles.”[^222] The *Lawrence* decision relies on this notion of social construction through defining rights in terms of their social context.[^223] To determine the constitutionality of protecting a right with respect to social construction, the Constitution can still be legitimately viewed as a text guiding the ultimate decision. The distinction is that the text represents a set of principles that must be applied to the circumstances of the outside world. The *Lawrence* decision is primarily a social constructionist decision in regard to its reliance on an “emerging awareness” that the Framers could not have anticipated. Justice Kennedy explicitly legitimizes the use of moral judgments based upon contemporary social circumstances: “In all events we think that our laws and traditions in the past half century are of most relevance here. These references show an emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex.”[^224] He backs up this statement by referring to *County of Sacramento v. Lewis* (1998): “[H]istory and tradition are the starting point but not in all cases the ending point of the substantive due process

[^222]: Kahn, 230.
[^223]: ibid.
The recognition of an “emerging awareness” as a means to undermine specific interpretations of tradition is important in understanding the distinction between liberal and conservative methods. In liberal jurisprudence, it is legitimate to draw upon “the transformative nature of law as new social facts allow justices to build upon past social constructions.”

Unlike the narrow conservative conception of tradition, Justice Kennedy advocates an approach that incorporates tradition only to the extent that it supports the larger principles of liberty in an evolving social climate.

The authority given to changing social values is further demonstrated in post-\textit{Bowers} precedents that question the legitimacy of \textit{Bowers’} outcome. Justice Kennedy cites \textit{Planned Parenthood of Southeastern Pa. v. Casey} (1992) as a precedent for looking at the transcendental nature of liberty and privacy:

These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.

In \textit{Casey}, the Court interpreted substantive protection of liberty interests in the Due Process Clause as the protection of the autonomy to make personal life decisions without governmental interference. “It shifted the construction of abortion rights from a passive notion of privacy to a more forceful concept of personhood, placing women in closer proximity to the social and economic world in which they live.”

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\textsuperscript{225} \textit{County of Sacramento v. Lewis}, 523 U.S. 833 (1998).
\textsuperscript{226} Kahn, 231.
\textsuperscript{228} Kahn, 232.
\end{flushleft}
of sodomy rights because it primarily focuses on the constitutional right to liberty in one’s personal life choices in a contemporary social and political context.

Justice Scalia’s dissent raises issues with Justice Kennedy’s core methodology. This stems from the two justices’ fundamentally different positions on what constitutes legitimate interpretation. Justice Scalia argues that the Constitution provides no textual support for viewing homosexual sodomy as a fundamental right under due process. In fact, when the Bill of Rights was ratified, sodomy was a criminal offense, and has continued to be outlawed throughout United States history. Thus, the right to engage in sodomy does not warrant constitutional protection because it is not grounded in tradition or history. Justice Scalia disputes the Court’s claim that rather than looking to specific tradition, it should pay attention to “emerging awareness” to demonstrate that liberty principles give “substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex.”229 This view is not legitimate for Justice Scalia because an “emerging awareness” is not a sufficient basis to establish a new fundamental right. His blatant rejection of the social construction process operates on the grounds that rights cannot be changed substantively over time.230 This interpretation runs into theoretical problems in light of the counter argument to Justice Scalia’s opinion—that the incorporation of an “emerging awareness” does not constitute the creation of a new right; rather this “emerging awareness” is a tool for the Court to consistently protect liberty interests by translating their underlying principles into a contemporary context.

In looking at Justice Scalia’s dissent as a rebuttal to the plurality opinion, there are noticeable discrepancies in language. While Justice Scalia focuses on proving sodomy is not a fundamental right, Justice Kennedy does not refer to fundamental rights at all. Both justices use

230 Kahn, 233.
different language altogether to justify their respective interpretations. How can Justice Kennedy’s argument about liberty be compared to Justice Scalia’s argument about the tradition of privacy rights? Neither the conservative side nor the liberal side specifically address one another’s methodology as a result of their fundamentally different approaches to due process interpretation.

Justice Scalia’s dissent begins with a discussion of the procedural implications of overturning Bowers. He argues that the law cannot be determined based on ideas of morality without embarking on “a slippery slope that would lead courts to legalize a parade of sexual-conduct horribles.” If due process were to overturn laws based on moral choices, the Court would then have to overturn a multitude of decisions. Justice Scalia argues:

State laws against bigamy, same-sex marriage, adult incest, prostitution, masturbation, adultery, fornication, bestiality, and obscenity are likewise sustainable only in light of Bowers’ validation of laws based on moral choices. Every single one of these laws is called into question by today’s decision.

Ironically, this line of reasoning runs into major problems on the same procedural level upon which Justice Scalia appears so loyal to. If overturning Bowers means that all laws represent moral choices, Justice Scalia ignores the fact that he himself is making a value judgment on society’s moral compass that may or may not exist. Justice Scalia allows his political preference to pervade his so-called “procedural” opinion. This is shown by the very fact that he views consensual homosexual conduct between two adults as a moral decision equal to bestiality, prostitution, or incest. Furthermore, the use of a slippery slope argument by nature is an

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emotional appeal. While it can be a legitimate method of reasoning, its power does not necessarily reside in its rationality.

A slippery slope argument highlights the dire effects of proximately potential future decisions that are likely to result from the present case. And the slippage of the slippery slope argument comes from amplifying “likelihood” to the point of necessity. That is, someone appealing to the danger of the slippery slope seeks to convince her audience that if the present case is decided in a particular way, stare decisis will lock future courts into certain (implicitly unpalatable) decisions.233

Justice Scalia’s assertion here does not combine rationality with emotional appeal. It serves to combine a framework of an illogical argument with its outward emotional appeal. In contrast to this conservative formation of a slippery slope argument, Justice Kennedy views the slippery slope as being derived from a different place all together. He claims Bowers is at the forefront of the slippery slope because sodomy laws affect the status of homosexuals in the United States in general. While these sodomy laws appear to only prohibit a single act within the scope of sexual conduct, “in fact the effect of that act's criminalization is the blurring of the line between act and actor, between conduct and status.”234 For this reason, Justice Kennedy looks to the liberty interests of homosexuals in a more general sense to argue that the slippery slope resides in the implications of criminalizing sodomy. While Justice Scalia includes homosexuality as a traditional moral offense and warns that its legal protection will lead to the overturning of laws criminalizing all sex-based offenses, Justice Kennedy takes the opposite view by deciding the case on due process grounds instead of equal protection.235 This indicates that the issue is not the status of homosexuals versus heterosexuals; it is that of protecting the right of sexual privacy for all citizens. As such, Justice Scalia’s slippery slope holds no bearing. Lawrence does not create a new right; it simply expands the right to sexual privacy to include all adults regardless of sexual

233 Sternglantz, 1100.
234 Sternglantz, 1117.
235 Sternglantz, 1118.
Justice Kennedy addresses the same issues as Justice Scalia, but takes a rather different view of due process. He points out that the case does not involve minors, non-consenting persons, public conduct, or prostitution. Nor does it seek any formal recognition from the government for any type of homosexual relationship.

The case does involve two adults who, with full and mutual consent from each other, engaged in sexual practices common to a homosexual lifestyle. The petitioners are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making their private sexual conduct a crime. Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government. 236

Justice Kennedy’s interpretation of due process regards liberty as a general right to make moral choices that do not infringe upon anyone else’s liberty. Due process ensures protection of this autonomy in individuals’ private lives without government intervention. As Justice Scalia attempts to dispute this view of due process, he does not directly address Justice Kennedy’s argument because he is employing an entirely different interpretational scheme accompanied by an entirely different set of assumptions. For Justice Scalia, the Texas statute in question “undoubtedly imposes constraints on liberty.” 237 The main difference between the two justices is that Justice Scalia sees no problem in the constitutionality of such a constraint. He argues that although the law in question limits liberty, “so do laws prohibiting prostitution, recreational use of heroin, and, for that matter, working more than 60 hours per week in a bakery. But there is no right to ‘liberty’ under the Due Process Clause, though today’s opinion repeatedly makes that claim.” 238 This is where one fundamental difference arises. How can Justice Scalia argue that due process does not guarantee a right to liberty? Especially considering he claims to subscribe to a

237 ibid.
238 ibid.
constitutional theory that emphasizes complete fidelity to the text, it outwardly appears blatantly inconceivable that Justice Scalia would dispute the guarantee of liberty in regard to a clause that reads: “No state shall…deprive any person of life, liberty, or property.” Yet, Justice Scalia emphasizes the last part of the text of the Clause: “No state shall…deprive any person of life, liberty, or property, without due process of law. (emphasis added).” He interprets the Due Process Clause to “expressly allow States to deprive their citizens of ‘liberty,’ so long as ‘due process of law’ is provided.”

Justice Scalia addresses the majority opinion’s substantive due process analysis, yet confines it to a very narrow scope. He claims that this doctrine is applicable only when states infringe on fundamental liberty interests, unless the infringement serves a compelling state interest. Furthermore, such fundamental rights can only be protected if they are “deeply rooted in this Nation’s history and tradition.” This criterion exists because a right is only labeled ‘fundamental’ if it is “so rooted in the traditions and conscience of our people.” This interpretation of substantive due process limits the Court to protecting rights based upon their historical protection and long-standing tradition. This contradicts the liberal conception of substantive due process in terms of its disregard for the doctrine’s very purpose of upholding ordered liberty in an evolving social climate. Furthermore, in setting out to prove sodomy is not a fundamental right, Justice Scalia fails to elaborate on the fact that Justice Kennedy does not once use such terminology. With markedly different standards of decision-making, Justice Scalia

239 U.S. Const., Amend. 14, Sec. 1.
241 ibid.
attacks the majority opinion for a lack of evidence with respect to his methodology. He does not consider that Justice Kennedy holds the statute to different standards all together.

Justice Scalia highlights the undeniable role of the justices’ respective political and social predispositions being embedded within the legal process. The tradition of prosecuting sex-based offenses demonstrates that the Texas statute is well within its constitutional right to exist. The problem arises within Justice Scalia’s preexisting belief that sodomy is indeed a criminal act. Justice Scalia sets out to prove that sodomy is not rooted in history and tradition. Yet, he undermines his conservative theory of interpretation as he embarks on this quest to refute the majority decision with his own version of what constitutes tradition. He states that the presence of an “emerging awareness” has no bearing on the establishment of a fundamental right. He further argues that not only does the majority opinion rely on illegitimate criteria, it also incorrectly determines the existence of this “emerging awareness” because:

States continue to prosecute all sorts of crimes by adults ‘in matters pertaining to sex’: prostitution, adult incest, adultery, obscenity, and child pornography. Sodomy laws, too, have been enforced ‘in the past half century,’ in which there have been 134 reported cases involving prosecutions for consensual, adult, homosexual sodomy.244

This comparison between sodomy and sex crimes, such as incest or child pornography, is obviously problematic because Justice Scalia unfairly compares a consensual sexual practice to nonconsensual sexual acts involving minors. In the latter acts, the conception of liberty interests is glaringly different because these sexual practices take away the liberty of the unwilling participant. By grouping sodomy with these nonconsensual acts, Justice Scalia invokes his personal values to undermine Justice Kennedy’s opinion on what constitutes protected liberties.

Justice Scalia actually veers away from his supposed originalist theory and succumbs to the subjective moral reasoning process that he outwardly criticizes so fiercely. He implicitly

incorporates a personal value judgment; namely, that crimes such as incest and child pornography (which can include underage and non-consenting participants) should be placed within the same moral category as homosexual sex between consenting adults. While he criticizes the majority opinion for taking “sides in the culture war, departing from its role of assuring, as neutral observer, that the democratic rules of engagement are observed,” he commits the exact same offense. He attempts to justify his stance in favor of prohibiting sodomy through a rant against homosexual rights. He writes:

Many Americans do not want persons who openly engage in homosexual conduct as partners in their business, as scoutmasters for their children, as teachers in their children’s schools, or as boarders in their home. They view this as protecting themselves and their families from a lifestyle that they believe to be immoral and destructive.

For Justice Scalia to draw legitimacy from his personal view under the guise of an analysis of the perceived role of homosexuals in society today, he strays even farther from his pledge to remain faithful to an originalist interpretation. Not only does he undermine his condemnation for the Court’s use of “emerging awareness,” he blatantly deviates from the text and the intent of the Framers by basing his opinion largely on modern circumstances.

This dissent both conforms to the existing theories behind conservative methodology, and to Justice Scalia’s theory of specificity. In terms of the fundamental right to privacy concerning control over one’s own body, Justice Scalia strongly opposes substantive rights claims in general. His main contention is that such unenumerated rights deviate from the actual text and intent of the Constitution to an unacceptable extent. He says that this deviation from the text “has

\[245\] ibid.
\[246\] ibid.
enabled judges to do more freewheeling lawmaking than any other.”

As such, how does Justice Scalia read the fundamental right to privacy into the Constitution? He elaborates on his view of the proper application of due process:

> Well, it may or may not be a good thing to guarantee additional liberties, but the Due Process Clause quite obviously does not bear that interpretation. By its inescapable terms, it guarantees only process. Property can be taken by the state; liberty can be taken; even life can be taken; but not without the process that our traditions require—notably, a validly enacted law and a fair trial.

This procedural reading of due process fundamentally opposes liberal methodology because it is completely means-based rather than outcome-oriented. Justice Scalia only cares that individuals are granted liberty, as per due process, in terms of their navigation through the legal process. He does not pay attention to the liberty principles that liberal jurisprudence generally argues will grant an expansion the right to privacy that is validated through the constitutional ideals of protecting liberties to the utmost extent, except when there is a compelling enough interest not to do so.

The other dissenting opinion in *Lawrence*, written by Justice Thomas, agrees with Justice Scalia’s dissent and adds a brief personal analysis. Justice Thomas first proclaims his disagreement with the Texas statute on a political level due to its waste of law enforcement resources. Despite this contention, he argues that the Court does not have authority to decide such cases because there is no specific evidence within the text of the Constitution to repeal the statute. There is no explicit general right to privacy to guide the Court in making decisions.

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248 ibid.

regarding the “liberty of the person both in its spatial and more transcendent dimensions.”  

With this statement, Justice Thomas ends his dissent. This opinion exemplifies the shortcomings of conservative methodology at its core. Justice Thomas boils the decision down to the fundamental question: do the Constitution and the Framers explicitly provide for the protection of such a right? Finding no evidence in the text or intent, Justice Thomas is content to rule that the right does not exist. With no concern for implicit guidelines embedded in the text that allow the Court to adapt to modern circumstances, this opinion leaves no room for judicial authority to substantially interpret the Constitution.

The Lawrence decision exemplifies the liberal-conservative dichotomy through engaging in an argument over the legitimacy of looking outside the most specific tradition into an all-encompassing interpretation of larger concepts and principles embedded in the text. Lawrence makes important headway in the quest for a method of a more coherent liberal jurisprudence. “As such, the Court’s decision in Lawrence did not simply overturn Bowers, but rather eviscerated it.”  

Lawrence relies on broad notions of liberty that allow for the protection of as many rights as possible in the context of contemporary American life. This is the foundation of the most reasoned and organized liberal methodology.

The contentions between liberal and conservative justices run into new problems in Lawrence. When due process is interpreted in such fundamentally different ways, the dialogue comes to a standstill. The justices argue on completely different planes, and with completely different sets of assumptions. Each sets forth a unique methodology to bring him or her to a conclusion based upon the respective approach. In such a circumstance, the justices are not directly addressing one another. While Justice Kennedy bases his discussion on more general

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250 ibid.
251 Kahn, 229.
liberty principles, Justice Scalia is preoccupied with defining the narrowest scope of legitimate fundamental privacy rights. This disconnect indicates progress in the sense that the political differences between the liberals and conservatives are argued as legal differences. It also creates a new set of problems because it hinders direct discussion as a result of the different terminology being used.

Overall, Lawrence overcomes major problems in liberal jurisprudence because “it set in motion the continuation of a social construction process involving the meaning of liberty that began decades ago and provided the jurisprudential bases for expanding homosexual rights in the near future and decades to come.”

IV. Methodological Patterns in Liberal Methodology: In conjunction, do these cases suggest an answer as to what level of generality should be standardized in liberal jurisprudence?

Through analyzing the methodologies of the liberal and conservative opinions in DeShaney, Michael H., Roe, and Lawrence, the interpretational problems embedded in such substantive due process cases return back to the fundamental question—what is tradition? How can the Court coherently determine its limitations and latitudes? These questions are so pressing specifically in terms of the Due Process Clause because its language provides the Court an exceptionally high level of leeway in which they can interpret the most constitutionally correct conception of rights. The Due Process Clause protects liberty interests in a way that “paradoxically, is both limited and limitless.” The Clause is so vague in nature specifically for this reason—liberty interests can only be protected throughout time and societal evolution with

252 Kahn, 230.
language that extends far enough to encompass new circumstances. The substantive guarantee of
due process remains both limited and limitless in the same way it was centuries ago. By
returning to *McCulloch*, the legitimacy of a more general reading of the Constitution’s abstract
language can be seen:

> To have prescribed the means by which Government should, in all future time, execute its
powers would have been to change entirely the character of the instrument and give it the
properties of a legal code. It would have been an unwise attempt to provide by immutable
rules for exigencies which, if foreseen at all, must have been seen dimly, and which can
be best provided for as they occur. To have declared that the best means shall not be
used, but those alone without which the power given would be nugatory, would have
been to deprive the legislature of the capacity to avail itself of experience, to exercise its
reason, and to accommodate its legislation to circumstances.\(^{254}\)

While conservatives commonly argue for a strictly literal reading of the text, the method of
constitutional interpretation that advocates an understanding of the abstract language as a
guideline to adapt the text’s enduring principles to contemporary circumstances is entrenched in
precedent beginning shortly after the document was written.

Liberal jurisprudence has come a long way in establishing a uniquely liberal
methodology for determining the most coherent level of generality upon which to further the
liberal agenda of expanding rights. This agenda is based upon the liberal conception of the
intended level of constitutional protection of individual rights. It is not a political or moral goal
of expanding rights. It is based on the Framers’ intent and the language of the Constitution as
being a conception of personal rights and liberties that calls for expansion.

Natural rights define a private domain within which persons may do as they please,
provided their conduct does not encroach upon the rightful domain of others. As long as
their actions remain within this rightful domain, other persons—including persons calling
themselves government officials—should not interfere without a compelling
justification.\(^{255}\)

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\(^{254}\) *McCulloch v. Maryland* 17 U.S. 316 (1819).

\(^{255}\) Barnett, 58.
With this interpretation of the constitutional conception of natural rights and liberties, it becomes apparent that these rights can never be exhaustively listed or enumerated in the Constitution.

The trouble is that the liberal jurisprudential approach has not yet reached a point where it has consistent standards. Liberal and conservative justices alike craft opinions with discussions of the language and original meaning of the text, and then go on to set forth substantial arguments about tradition with deference to varied levels of generality. Yet, liberal opinions have not been uniquely liberal while working within this framework. Conservative jurisprudence advocates employing the highest level of specificity that will support limiting rights in such a way that the scope of protecting rights remains as close to its historical roots as possible. So, what are the bounds of interpretation for liberals? If a liberal opinion is to give authority to an all-encompassing view of liberty interests in an evolving social climate, it is exceedingly more difficult to standardize the best level of generality at which to do so. Liberal justices take ownership of a distinct liberal methodology that looks at due process as an intentionally vague clause written to expand liberty interests in an evolving social and political climate. This provides judicial freedom to interpret the Constitution in a way that supports rights expansion.

These four cases in conjunction highlight the major problems in the Court’s overall approach to interpreting tradition, as well as the somewhat successful attempts by liberal justices to combat these problems. The problem is that “our most specific historical traditions may often be opposed to our more general commitments to liberty or equality. Curiously, then, different parts of the American tradition may conflict with each other. And indeed, this is one of the untidy facts of historical experience.” By giving authority to the most specific tradition, conservative justices ignore the fact that such specificity can undermine larger principles of

256 Balkin (1), 6.
liberty. By viewing tradition so narrowly, tradition can be interpreted so out of context that it serves the opposite of its intended purpose. “Traditions do not exist as integrated wholes. They are a motley collection of principles and counterprinciples, standing for one thing when viewed narrowly and standing for another when viewed more generally. Tradition never speaks with one voice, although, to be sure, persons of particular predilections may hear only one.”

The aforementioned cases all involve conflicting theories of due process interpretation to illuminate the trajectory of the new liberal jurisprudence. It becomes apparent that liberal justices have been loosely subscribing to similar methodologies over the past century, and a more coherent and consistent methodological structure has finally become more institutionalized in landmark cases such as Roe. Yet, the establishment of a uniquely liberal methodological structure does not follow quite as easily. Liberal justices continue to work with shaky ground rules in interpreting the most appropriate level of generality that will forward their jurisprudential agenda. This “shakiness” refers to the inconsistency in determining the appropriate level of generality to employ, rather than the legitimacy of these varying levels. The real shift in liberal jurisprudence resides in selecting the most liberal interpretation of substantive due process and consistently justifying it with a uniform liberal methodology. The progression towards consistency has certainly undergone impressive strides, and hopefully will continue to do so until a coherent methodology becomes concretely standardized. Yet, there are many questions left unanswered:

If there is a tradition of protecting marital privacy, but not a more specific tradition protecting marital purchase of contraceptives, how do we know whether the latter situation is nevertheless subsumed under the former for purposes of constitutionally protected liberty? Might one not conclude instead that the real historical tradition was

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257 ibid.
protection of marital privacy in the home, so that the purchase of contraceptives in the open marketplace could be regulated or even proscribed consistent with the tradition?^258

The main contention is in the issue of how the Court can legitimately determine which traditions are worth protecting. While liberal jurisprudence supports the protection of those traditions that serve to expand rights in a contemporary context, there is no methodological tactic to do so that extracts the justices’ personal value judgments out of the equation. The concept of tradition is a convoluted and subjective interpretational undertaking. For instance, “if sexual harassment directed toward women in the workplace and respect for marital privacy are both traditions, but only one is worth protecting, how do we tell the difference?”^259 The answer to this may seem obvious in terms of contemporary social and political norms, yet on a legal level, the picture is much more complex. The Court must adhere to precedent as a basis to interpret tradition, but when antiquated precedent supports sexual harassment, what is the Court to do? “What normative status should be assigned to a set of values given the fact that many people have held these values at one point or another in our nation's history?”^260 The liberal jurisprudential agenda must standardize a methodology to interpret tradition in a way that encompasses the most constitutionally consistent level of generality. This view of tradition should provide enough leeway to expand liberty interests and break free from historically oppressive traditions, while still remaining consistent to some semblance of fidelity to history and tradition.

The liberal methodology is even more effective when placed in the context of the view that the conservative approach is oversimplified and unrepresentative of the underlying liberty principles at stake. Conservatives

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^258 Balkin (1), 5.
^259 ibid.
^260 ibid.
assume that constitutionally protected liberties match or do not match existing traditions in an unproblematic way. For each asserted right there either is or is not a specific tradition associated with its protection. Yet there are many different ways of describing a liberty, and many different ways of characterizing a tradition.\textsuperscript{261}

The core contention is that of how conservative justices select the most specific tradition. The concept of tradition cannot be compartmentalized in this way because it gives the Court too much interpretive freedom to isolate one chosen tradition as the baseline upon which to decide a case. This is the irony of the conservative methodology—in its proclaimed narrowsness, it gives the Court more interpretive freedom than would a more general approach. Justice Scalia’s opinion in \textit{Michael H.} provides a good example of the hidden lack of narrowsness underlying the conservative methodology: “there is a tradition of protecting marital privacy but not a tradition of protecting the marital privacy of a narrower class—-for example, middle class persons, and certainly not a tradition of protecting the privacy of a broader class of persons that would include unmarried couples.”\textsuperscript{262} Justice Scalia expands his scope of analysis to allow for the Court to pick and choose its desired interpretation of the boundaries enclosing the most specific tradition. For instance, “\textit{Griswold v. Connecticut} is…a potential embarrassment for Justice Scalia”\textsuperscript{263} because he claims that there exists a tradition of protecting the right to privacy within the marital unit, but there does not exist a tradition of the right to privacy within the marital unit in protecting this unit to purchase contraceptives. What gives Justice Scalia the judicial authority to place his own boundaries on what constitutes the most specific marital tradition? This discontinuity embedded in the theory of specificity derives from the problem that such a theory allows the Court to decide which traditions are deserving of constitutional protection.

\textsuperscript{261} Balkin (1), 3.
\textsuperscript{262} Balkin (1), 4.
\textsuperscript{263} ibid.
In order to uncover the best solution to furthering a coherent liberal jurisprudence in face of such an undisciplined history of traditionalism, the discussion inevitably leads back to the evidence itself—the cases. In *DeShaney*, the liberal dissent hints at a coherent liberal methodology, yet does not go far enough. The liberal justices still adhere to narrow conservative methodological tactics too much to broaden cohesively the scope of liberty interests under due process enough to justify the politically liberal outcome. *Michael H.* remedies this fundamental problem of liberal methodology to the extent that the liberal dissenters actually engage in an argument about the nature of liberty in the Due Process Clause. While the liberal dissenters make substantial claims against the conservative conception of liberty, they still subscribe to fundamental conservative assumptions by placing too much emphasis on analyzing specific liberty interests of the past as a means to understand their application in a present day context.

The coherency of liberal jurisprudence undoubtedly takes big strides forward in *Roe*. The majority opinion subscribes to a uniquely liberal methodology in a landmark way in terms of Justice Blackmun’s level of generality. This unsurprisingly causes a lot of conservative backlash, yet sets the stage for a more standardized and coherent liberal methodology in terms of giving authority to a more general conception of liberty. *Roe* tests the waters in discovering how far the Court can go in its level of generality. One of the legal reasons there is such backlash is because Justice Blackmun organizes and defends a methodology that is more general than the Court is accustomed to seeing. This was somewhat of a shock to the system in its time. In this way, *Roe* is a hugely important contribution to liberal jurisprudence in the way it uses past privacy and liberty rights precedents to cumulatively define a coherent liberal conception of the scope of liberty interests. Yet, *Roe* is not the last step in the process of establishing a distinctly liberal methodology. In fact, *Roe* is the first step. As one of the first cases of its kind in its high level of
generality, Justice Blackmun’s methodology must be drawn upon as a precedent for the Court to determine the extent of the freedoms and limitations of substantive due process reasoning in later individual rights cases.

In *Lawrence*, the liberal majority opinion follows *Roe* and its string of precedents to further institutionalize the liberal treatment of liberty interests under due process. *Lawrence* surpasses most of its precedent cases in solving the problems of liberal methodology. In a sense, it goes a step further than *Roe* because it does not succumb to the obligation to explain or defend itself within a conservative framework. While continuing to draw upon the liberal conception of liberty, *Lawrence* is also liberal in structure because it sets forth its justification without backtracking or defending itself within the typical conservative structure. This is an important step forward because it demonstrates that liberal methodology does not in fact have to address institutionally conservative methods of justification in order to prove itself. Conservative justices certainly do not feel any obligation to abide by liberal assumptions of substantive due process interpretation in their quest to invalidate liberal opinions. In fact, there are many instances where conservatives reject liberal opinions by rejecting the doctrine of substantive due process all together. Yet, where are the cases where liberals reject conservative opinions by rejecting their theory of specificity all together? In *Lawrence*, the positive step in liberal jurisprudence creates an interesting problem—the uniquely liberal methodology is so outside the conservative scope of interpretation and understanding that while the liberal interpretation is coherent, the discourse between the liberals and conservatives becomes somewhat incoherent because they do not address each others’ arguments directly. When liberals and conservatives subscribe to methodologies unique to their respective theoretical assumptions, they are arguing with one another on completely different planes of understanding.
While the path for a new liberal jurisprudence appears to make progress from *DeShaney* and *Michael H.* to *Roe* and *Lawrence*, this image is not quite accurate when placed within the entire historical narrative. *Roe* was decided over a decade before *DeShaney* and *Michael H.* Why is the case that provides the most coherent example of liberals overcoming the problems of interpreting tradition the first case to be decided among this group? Why did *Roe* not set an example for all liberal interpretations of tradition thereafter? The answer resides in the fact that the path towards a more coherent liberal jurisprudence is not a straight trajectory. There was so much conservative backlash after *Roe* that the result was the emergence of a conservative era in the Court’s history. While *Roe* provides a powerful example of the capabilities of the Court to overcome the narrowness of the conservative view of tradition, it does not set a series of rights expansions in motion, as evidenced in *DeShaney* and *Michael H.* It took three decades until the principles underlying Justice Blackmun’s methodology in *Roe* are once again drawn upon in *Lawrence* to rule in favor of another expansion of liberty interests so fundamental that it should have been protected long before. In this sense, *Roe* is both revolutionary and detrimental. It provides the necessary groundwork in the long run, but elicits the opposite response in the short run.

VI. The Future of Liberal Jurisprudence—A speculation on the likelihood of the Court expanding the scope of protected liberty interests to include same-sex marriage

With all this contention regarding the most legitimate substantive due process interpretation, the important question for liberal justices and citizens alike becomes: what is the future of liberal jurisprudence in terms of expanding the Court’s scope of protected liberty and privacy rights? Within the current political and social climate, the most recent issue of rights
expansion that calls on the Court to interpret the substantive due process doctrine is that of same-sex marriage. The path towards a more coherent liberal jurisprudence will reach a crossroads when dealing with this issue because it will test the ability of the liberal members of the Court to choose the best method of carrying out the rights-expanding liberal agenda by ruling in favor of protecting same-sex marriage.

Before exploring how generally the liberal justices should interpret tradition to best defend their opinions, it is important to understand the relationship between the Court and the policymakers that will necessarily come under scrutiny when dealing with such a socially fractious issue. The liberal brand of constitutional theory rests upon the assumption that politics and morality cannot be extracted from the law because they are guiding forces behind the legal understanding of the conception of liberty. As the judiciary is the source of ultimate legal authority, it is inevitable that contentious social issues such as same-sex marriage will come before the Court when the political and moral context shifts in the direction of viewing the denial of such a right as discriminatory. Contrary to conservative criticism, this does not turn the Court into a policymaker. It does not permit the Court to inject politics and morality into its legal opinions. Rather, the Court analyzes

the recognition and protection of a bounded freedom to make choices and act upon them. This bounded freedom is called Liberty (as opposed to an unbounded freedom called “license”). The recognition of “liberty rights” of this kind provides the inescapable means by which these and other social problems are solved.264

Since the Constitution protects the freedom to make personal choices, such freedom will inevitably relate back to the collective morality and its political manifestations. The due process guarantee of liberty provides the Court with the authority to rule on social and political issues if they arise as a result of conflicting interpretations of constitutionally protected liberties.

264 Barnett, 80.
“According to this account, natural rights are the set of concepts that define the moral space within which persons must be free to make their own choices and live their own lives if they are to pursue happiness while living in society with others.”

If the Constitution allows individuals to have autonomy over their personal life decisions, it follows that their protected rights may not regulate their freedom to make these personal decisions, but do regulate the collective moral space in which those decisions do not encroach on anyone else’s liberties.

With this groundwork for the liberal approach to due process interpretation, it is only natural that such divisive social and political issues, such as abortion, sodomy, or same-sex marriage, will come before the Court. While liberals generally do not find it problematic to rule upon such cases, this view is not agreed upon across the board. The debate largely stems from Roe because “it raised grave doubts about the Court’s use of the Constitution to solve divisive social controversies.”

Although there exists the argument that cases such as Roe confuse the roles of the legislature and the judiciary, the truth of the matter is quite the opposite. Same-sex marriage does fall under the scope of protected liberty interests because, among other reasons, it is a personal life decision that does not diminish anyone else’s liberty interests. When the policymakers criminalize a practice that should be constitutionally protected, it is within the Court’s rightful scope of power to take on such a case in order to determine whether the law is constitutional or not. “Rather than imposing moral duties on persons to live their lives in certain ways, natural rights protect persons from the State and from each other.”

With the notion of the Court’s subjective morality extracted from the equation, the judicial regulation of personal

\[265\] ibid.
\[267\] Barnett, 84.
rights is necessary because individuals live together in society in such a way that the actions of one person may adversely affect the welfare of another.\textsuperscript{268}

The issue of same-sex marriage is next on the liberal agenda for the Court’s expansion of privacy rights in the last half century. Beginning with the establishment of the modern right to privacy in \textit{Griswold}’s protection of the right to contraceptive use for married persons, and followed by \textit{Eisenstadt}’s expansion of the right to privacy outside the institution of marriage, the Court established a ‘zone of privacy’ for individuals to make decisions concerning personal choices in their private lives. By tracing the Court’s treatment of privacy and liberty rights in regard to the Due Process Clause, it becomes apparent that the protection of unenumerated rights, time and time again, has been an integral part of constitutional law. The Court has consistently expanded individual personal rights as the need for the specific protection of more unenumerated rights becomes more and more glaringly apparent in contemporary society.

The expansion of liberty interests in \textit{Roe} was the beginning of the contentious and publicized disputes over the correct scope of liberty and privacy. “To put it bluntly, the law became a mess.”\textsuperscript{269} This mess refers to the height of the disagreements among the courts and scholars of constitutional law over the role and power of the judiciary. From \textit{Roe} emerged an attempt by the Court to become more disciplined through giving authority to traditionalism.\textsuperscript{270} Unfortunately for liberals, this trend was attractive to the conservative agenda of limiting rights. The idea of traditionalism refers to the theory that liberty and privacy rights are not constitutionally protected unless the Court can prove that they have been upheld by longstanding tradition. With this in place, the aftermath of \textit{Roe} began an era where conservative traditionalist

\textsuperscript{268} ibid.
\textsuperscript{269} Sunstein (2), 88.
\textsuperscript{270} Sunstein (2), 90.
opinions consistently prevailed over liberal rights-expanding opinions. This trend is exemplified in *Michael H.*, *DeShaney*, and *Bowers*, among other individual rights cases. It was not until *Lawrence* that the conservative, narrow view of tradition was called into question.

*Lawrence* has been the last stop in the quest for rights expansion. Lawrence effectively undermined the conservative methodology of specific and narrow traditionalism. From *Roe*, which instigated the emergence of the Court’s conservative era, to *Michael H.* and *DeShaney*, which exemplified the Court’s steadfast conservatism, *Lawrence* was the case in which the liberals finally succeeded in fighting back. *Lawrence* is certainly an important case concerning the legal status of homosexual practices, yet its procedural implications are markedly different than those of other precedential sexual rights cases. “In the last decades, sodomy prosecutions have been rare and unpredictable, simply because the public would not stand for many of them.”

The procedural issues in *Lawrence* are distinct because the case is in regard to a law that was hardly ever enforced. Even in the states that had criminalized sodomy, it was still a generally accepted practice. The Court basically ruled in favor of what the policymakers and the general citizenry had long since regarded as non-prosecutable behavior.

*Lawrence*, and many of the Court’s privacy decisions, should be understood as an American variation on the old English idea of desuetude. According to that idea, laws lapse, and can no longer be enforced, when their enforcement has already become exceedingly rare because the principle behind them has become hopelessly out of step with people’s convictions.

Since the statute struck down in *Lawrence* was based on an antiquated set of societal values that no longer held much weight, it logically followed that the law was seldom enforced. From a legal standpoint, it is unconstitutional for the state to continue to follow an old statute that is neither supported by the collective societal judgment and morality, nor is taken seriously as a law. In

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271 Sunstein (2), 97.
272 ibid.
fact, the law “is therefore a tool for harassment, and not an ordinary law at all—in fact a violation of the rule of law itself.”

This procedural aspect of why the liberal justices were able to prevail in *Lawrence* provides a key piece of the puzzle in conjecturing about the future of same-sex marriage. Although liberal jurisprudence favors expanding the scope of personal rights to include the right to same-sex marriage, the history of the Court from *Roe to Lawrence* provides a less straightforward picture. *Roe* and *Lawrence* are the two quintessential cases for liberals that demonstrate the potential of a more coherent liberal jurisprudence. These cases were decided in such a way for reasons more complex than simply the political makeup of the Court, or the strength of the liberal justices’ opinions. There are marked political similarities between these cases that aided in their outcomes. The *Roe* decision coincided with a time when “the nation was rapidly moving in the direction of easing up restrictions on abortion. The society’s moral trend-line was clear.” And, it was the same with *Lawrence* in regard to the nation’s moral trend-line towards not prosecuting sodomy cases. This pattern even holds true in cases like *Griswold* and *Brown v. Board of Education* (1954). If the Court had ruled in favor of same-sex marriage already, and even assuming the decision was based upon a constitutionally correct conception of liberty, it would have actually been a setback for the liberal jurisprudential agenda. By legalizing same-sex marriage at a time when there was strong social, political, and moral opposition, the Court would have done more harm than good from a legal standpoint. “Such a ruling would undoubtedly have produced a large-scale social backlash, and very likely a constitutional amendment that might have made same-sex marriage impossible and set back the cause of gay

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273 ibid.
274 Sunstein (2), 104.
rights for decades.

While this may be true, the legal and political harm from the decision must be balanced with the need for justice for those not allowed to marry. Yet it is impossible to attain a harmonious balance. For example, in Brown v. Board of Education (1954), the Court’s decision did not reflect the general sense of collective morality, and thus, provoked decades of serious backlash. In fact, Brown partly caused the Democratic Party to lose control of the South, which is a political repercussion that still exists today. Thus, the future of same-sex marriage not only lies in the hands of the Court, but also in the hands of the policymakers and society at large.

With a discussion about the political and social context necessary to successfully arguing a case in favor of same-sex marriage, it is also necessary to make the distinction between the Court intentionally waiting to take on such a case and the mere observation that the case is not winnable unless the context is favorable. By no means should the Court intentionally hold off on making the decision for political reasons. If the Court were to wait for public opinion to shift before acting on same-sex marriage, this would turn the Court into a political institution. In essence, “waiting” is the equivalent of saying that rights should be put to a vote and subjected to majority rule. This goes against the entire theory behind constitutional law. The very purpose of the Constitution is to protect minority groups from being oppressed by majority rule. It is up the Court to rule discriminatory legislation unconstitutional and overrule majority voters in cases where certain classes of individuals are being deprived of their rights. The distinction is that the Court’s role in rights cases is to intervene when individuals are not being afforded their constitutional protections, yet it is the social and political context that reflects the objective collective morality governing the modern conception of liberty. As such, in a social and political context where denying the protection of same-sex marriage is ingrained as a moral and legal

\[275\] Sunstein (2), 100.
aspect of society, the Court has less solid grounds to stand on because the case would reflect the political motivations of the Court. Yet, when society’s moral code reflects a willingness to protect such a right, it turns into a situation where majority rule is oppressing minority groups. This is when the Court has a judicial obligation to step in and enforce the Constitution’s authority to protect such oppression.

With this piece of the puzzle in place, the discussion returns to the need for a coherent liberal methodology to interpret tradition in such a way that justifies same-sex marriage on legitimate legal grounds. The Court should begin “with the fact that denying gays the right to marry damages them and their children. The Supreme Court has repeatedly held that the right to marry is a fundamental right and critical to the pursuit of happiness.”276 Then, it is important to establish that same-sex marriage does not harm heterosexuals in anyway. “It’s ironic that the most vocal proponents of family values and marriage oppose extending it to everyone.”277 After this, it is necessary to investigate how the fundamental argument opposing same-sex marriage is in regard to religion, “but the First Amendment also precludes pushing views on others. To have the state step in and say we're going to legislate for one religious group over another is exactly what is prohibited in the anti-establishment [of a state religion] clause.”278 These arguments work together to refute the constitutional basis behind the arguments against same-sex marriage, as well as undermine the relevance of the theory of specificity in such a case. This is because the conservative argument about the most specific tradition primarily relies on the fact that the marital tradition does not extend to include same-sex marriage. Once this claim is undermined,

277 ibid.
278 ibid.
the constitutional basis of the argument in favor of same-sex marriage is exponentially more
difficult to dispute.

The arguments for same-sex marriage necessarily must be grounded in precedent as well.
In one sense, Lawrence provides a good framework because it establishes a precedent allowing
the right to sexual privacy regardless of sexual orientation. “If new interpretations of history
played a role in making the Lawrence decision possible, Lawrence in turn matters because of
how it will change even further the history of same-sex relations.” 279 Lawrence protects sexual
practices for same-sex couples, yet may not provide a specific enough precedent for the Court to
expand rights even more to include same-sex marriage. Rather, the arguments in favor of same-
sex marriage have more ground to stand on when analyzed in terms of precedents more directly
tied to the institution of marriage. In another sense, Lawrence positions the legal status of same-
sex relations as another forward step in the trend of expanding personal liberties. 280 This
indicates the possibility that the next step for the Court could be to expand the conception of
liberty further to include marriage for same-sex couples.

When the time comes that the political context is ripe for such a case, how can liberals
defend same-sex marriage on legal grounds? If liberal due process jurisprudence prevails, the
conception of liberty will necessarily include the right to marry for homosexuals. This is derived
from the liberal position that private and consensual life decisions, such as sexual autonomy,
bodily autonomy, family decisions, and marital freedom, should be protected across the board
unless there is a compelling reason not to do so. As such, the argument could be made that
marriage is a liberty interest that is a private decision protected from government intrusion. This

280 ibid.
argument stems from a series of rights-expanding precedents that have prevailed throughout history as society has embraced a more accepting vision of equality in terms of race, gender, and sexual orientation.

The Court has been indirectly addressing the issue of how to interpret the constitutional right to marry for over a century. Along with the liberal position on the conception of liberty, there is also an abundance of evidence upon which the Court can create a narrative of the tradition of marriage. This is an imperative step in the methodological process. So far, the reach of the Court to intervene in contentious social issues has been tested in Roe and Lawrence, among other cases, which has helped to establish a more coherent methodology for the Court to interpret the meaning of the guarantee of liberty with a wider scope. The next step in the quest to include same-sex couples within the protected right to marry is to look to precedent in such a way that explains the tradition of marriage without succumbing to conservative ideals of rigid specificity. The precedent concerning the right to marry began in Meyer v. Nebraska (1923), where the Court struck down a law that banned the teaching of languages other than English in schools. In Meyer, the Court gave a broad reading to due process by stating that liberty included:

> the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home…and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.\(^\text{281}\)

After specifically acknowledging the right to marry as being constitutionally protected in Meyer, the Court mentioned marriage again in Skinner v. Oklahoma (1942): “Marriage is one of the ‘basic civil rights of man,’ fundamental to our very existence and survival.”\(^\text{282}\) These opinions demonstrate that the Court regards the institution of marriage as being strongly worth protecting.

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With this framework, the three main precedents that the Court must address in deciding a same-sex marriage case are *Loving v. Virginia* (1967), *Zablocki v. Redhail* (1978), and *Turner v. Safley* (1987). In *Loving*, the Court ended all race-based restrictions on marriage. This only came about when racial equality was such an ingrained societal tradition that the existence of such race-based marital restrictions was largely viewed as ludicrous anyway. The unanimous decision ruled that the Virginia statute violated both the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment. Justice Warren extrapolated on this argument to prove that the right to marriage cannot discriminate based on skin color because such restriction infringes on the constitutional right to due process and equal protection.

To deny this fundamental freedom on so unsupportable a basis as the racial classifications embodied in these statutes, classifications so directly subversive of the principle of equality at the heart of the Fourteenth Amendment, is surely to deprive all the State's citizens of liberty without due process of law.284

The claim that the Constitution protects the right to marry for all citizens regardless of race is defended on the grounds that the guarantees of due process and equal protection are broad enough to encompass this freedom. Furthermore, the principles behind these clauses are that individual freedoms should be expanded in all circumstances unless they encroach on another individual’s freedom or on a compelling state interest. Justice Warren wrote, “The Fourteenth Amendment requires that the freedom of choice to marry not be restricted by invidious racial discriminations. Under our Constitution, the freedom to marry, or not marry, a person of another race resides with the individual, and cannot be infringed by the State.”285 With Justice Warren’s opinion, *Loving* sets a solid precedent for the legalization of same-sex marriage.

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283 Sunstein (2), 113.
285 ibid.
If the arguments in *Loving* are viewed as also applying to same-sex marriage, it follows that the “arguments against same-sex marriage suffer from the same sectarian reasoning offered in and rejected by the Court in *Loving* and therefore as equally violative of equality and due process.” If the Court ruled that the protection of marriage could not be limited by race, such precedent can be drawn upon to prove that this protection cannot be limited by sex either.

If the only arguments against same-sex marriage are sectarian - then opposing the legalization of same-sex marriage is invidious in a fashion no different from supporting anti-miscegenation laws: each is a fundamental assault on equality, and neither has any rhyme or reason beyond sectarian commitments which would foist one’s own diseased, personal morality on the whole of the polity.

*Loving* is a convincing precedent for same-sex marriage because it creates a narrative of the marital tradition that is general in nature, but still specific enough to be relevant.

After *Loving*, the Court should look to *Zablocki* as another example of its previous treatment of the tradition of marriage. In *Zablocki*, the Court invalidated a law prohibiting persons receiving child support to remarry unless they obtained a court order stating that the children would not become dependents of the state. Justice Marshall wrote, “the right to marry is of fundamental importance for all individuals.” He further claimed:

It is not surprising that the decision to marry has been placed on the same level of importance as decisions relating to procreation, childbirth, childrearing, and family relationships. As the facts of this case illustrate, it would make little sense to recognize a right of privacy with respect to other matters of family life and not with respect to the decision to enter the relationship that is the foundation of the family in our society.

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287 ibid.
289 ibid.
This is an important precedent for same-sex marriage because it treats marriage as a tradition so fundamental to society that it has the same protection as longstanding traditions, such as childrearing or procreation.

The precedent set by Zablocki was even further extended in Turner because the Court applied the interpretation of the marital tradition in Zablocki to the question of whether prison inmates could marry. The Court ruled that the law prohibiting inmates from marrying was unconstitutional unless there existed compelling reasons to suggest otherwise. The basis of Turner referred back to Loving and Zablocki as support for the view that marriage is a fundamental right derived from the guarantee of liberty in the Due Process Clause. Justice O’Connor wrote, “inmate marriages, like others, are expressions of emotional support and public commitment. These elements are an important and significant aspect of the marital relationship.”290 She extracted the principles behind the tradition of marriage, and extended their significance to encompass the protection of marriage in unconventional circumstances. Justice O’Connor cited other aspects of the significance of the marital union as evidence that it is a tradition so fundamental that it cannot be limited to only some classes of people. She argued that “many religions recognize marriage as having spiritual significance; for some inmates and their spouses, therefore, the commitment of marriage may be an exercise of religious faith as well as an expression of personal dedication.”291 As well as the spiritual meaning behind marriage, Justice O’Connor also looked at the legal implications of the marital union that go beyond the marriage document itself. She noted that, “marital status often is a precondition to the receipt of government benefits (e.g., Social Security benefits), property rights (e.g., tenancy by the entirety, inheritance rights), and other, less tangible benefits (e.g., legitimation of children born out of

291 ibid.
wedlock). By interpreting marriage as a tradition far more complex than a symbol of the traditional conventions of the family unit, Justice O’Connor set an important precedent for the Court to draw upon in the future as justification for same-sex marriage.

These precedents tell a story about the Court’s treatment of marriage. First, there is indeed a fundamental right to marry. The Court has consistently referred to such a right in precedents spanning the past century. But secondly, there are no established determinations on the nature and limits of this right. Perhaps some of this confusion about the significance of the marital tradition comes from the fact that marriage is somewhat intangible. While arguments can be made about the benefits and legal status that come with marriage, the Court acknowledges that marriage is also symbolic. This is demonstrated through Turner’s emphasis on the emotional and spiritual aspects of marriage. The notion of marriage as a symbol provides an interesting perspective in terms of its treatment within the Court. Although the majority of individuals regard the symbol of marriage as highly important, “in no other context is a purely or even largely symbolic reason enough to give special constitutional protection to an interest.”

This demonstrates the gravity of the situation. There is so much value placed on marriage, a largely symbolic institution. With the Court’s repeated claims that the tradition of marriage is fundamental to individuals’ liberty interests, it becomes apparent that this right is an integral part of every individual’s personal life.

With the understanding that the right to marry is one of the most valued and meaningful traditions, the next question for the Court becomes: who has the right to marry? The answer to this question returns back to the methodology in which the Court analyzes tradition. The

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292 ibid.
293 Sunstein (2), 115.
294 Sunstein (2), 118.
295 Sunstein (2), 121.
narrowest understanding of the right to marriage looks to the most specific tradition of the man and woman entering into the marital unit, procreating, and living as the “conventional” family. This conservative methodology forces the Court to prove each new right is indeed fundamental and is deeply rooted in tradition. For conservatives, the outcome of the theory of specificity does not include same-sex marriage. When interpreting tradition from a more general standpoint, the Court can extract the principles behind the tradition of marriage, in terms of its emotional, spiritual, and symbolic meanings. Furthermore, the Court can analyze the tradition of family in relation to marriage as being preserved in the case of same-sex marriage, just like it is preserved in heterosexual marriage. At the most specific level, the tradition of the conventional family unit includes married parents and their biological children. Yet, liberals would say that this antiquated view of the conventional family is not the most constitutionally correct tradition. The principle behind the tradition is that families should be stable, loving, and supportive units—and marriage is one of the main features that define this stability. As such, a more general interpretation of tradition looks at the symbolic meaning of marriage as holding true for same-sex couples just like it does for heterosexual couples, just as it held true for prison inmates in Turner. Furthermore, the liberal interpretation looks at the tradition of the family as being created by married parents in order to question whether same-sex marriages would uphold the same enduring principles of stability, love, and support. And this general view of tradition would undoubtedly lead the Court to conclude that same-sex marriage is indeed just as capable of creating stable, loving, and supportive family units.

So far, the future of same-sex marriage seems pretty simple. If societal trends favor it, the liberal methodology will prevail in Court. Yet, the situation is more complex than this. Even with explicit legislative support as a framework for the liberal jurisprudential agenda, the legality of
gay marriage may not necessarily follow. Conservative jurisprudence relies on the use of the most specific traditions, “which is, as Justice Brennan points out, manipulable and difficult to maintain.”296 The conservative justices carry out this narrow interpretation of tradition to quell their fears about the Court’s limitless interpretational freedom to expand liberty interests. They argue that such generality mistakes the Court for a political actor. “The more specific the inquiry into tradition, the more likely it is that a court is protecting something that already is in place, rather than simply creating a tradition, or stretching an existing tradition further than is historically permissible.”297 With this disposition, if liberal justices were to argue “the traditional respect for the privacy of marriage [extends] to protect extramarital sexual relations,”298 the conservative members of the Court would be quick to undermine such an interpretation on the grounds that “specific traditions are more reliable guides to the contours of liberty than are general traditions because they are more easily identifiable, and because they involve less danger of countermajoritarian value choices by the judiciary.”299 While this argument certainly runs into fundamental methodological problems, its strength is in its consistency across the board among conservatives. The notion of deferring authority to the most specific tradition is a concrete guideline that conservative justices can rely on as their uniform methodological structure. Liberal opposition to the theory of specificity contains more constitutionally sound arguments, yet lacks the coherence to establish uniform guidelines for a theory of generality.

Unfortunately, even if the same-sex marriage issue does make it to the Supreme Court, it is likely that the conservative interpretation of the most specific tradition will win out. Primarily,
If the liberal jurisprudential vision does not very strongly coincide with the nation’s political and moral trends, a liberal attempt to win the same-sex marriage case will fall flat on its face.

If *Lawrence* tells us anything about the marriage battle, it is that the last thing proponents of same-sex marriage should be hoping for is a Supreme Court case on the issue, since it is unlikely to result in a favorable ruling. The Court eliminated sodomy laws when there were almost no sodomy laws left and almost no support for those laws and their enforcement. When same-sex marriage becomes as commonplace as sodomy laws were rare, maybe then we will see the Supreme Court offering its constitutional blessing.  

Even if same-sex marriage becomes more commonplace, it will still take a substantial amount of time for the collective societal morality to be in favor of the right to an extent powerful enough to ensure that the Court will rule accordingly. The legacy of denying such a right will be too strongly ingrained in societal norms even when the moral trend begins to shift. Thus, in the foreseeable future, conservative arguments about specificity and tradition will have the political fuel they need to emerge victorious. Regardless of the liberal justices’ wishes to protect same-sex marriage, the liberal jurisprudential vision will not permit them to attempt to make such a ruling at this time because the Supreme Court does not create social change. Its role is to recognize shifting social and political attitudes, and decide cases based upon trends that have already occurred. The Court will only legalize gay marriage when society has displayed a clear trend towards legalization in such a way that a Court decision would largely be a formality rather than a policy decision. Legal arguments advocating that the marital tradition is broad enough to encompass the right for same-sex couples will only be strong enough to entertain a liberal jurisprudential victory if proceedings are carried out in this context.

Overall, the future of gay rights is *not* entirely dependent on the political makeup of the Court. The lesson to be learned is that “tradition, it thus appears, rather than solving our problems, has proven to be a very troublesome concept. Traditions may be worthy or pernicious.

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D’Emilio, 13-14.
Traditions may conflict. Traditions at a more abstract level may contradict traditions at a more concrete level.”301 If the Court’s interpretation of tradition is the key to the outcome of these substantive due process individual rights cases, a future characterized by rights expansion necessarily depends on the coherence of liberal jurisprudence, and more importantly, on the hope for an era when the collective moral trend of society shifts toward an embodiment of liberal political ideals.

I affirm that I have adhered to the Honor Code.

X_______________________________________

301 Balkin (1), 7.
Cases Cited


Harris v. McRae, 448 U.S. 297 (1980).


McCulloch v. Maryland, 17 U.S. 316 (1819).


Works Cited


U.S. Constitution, Art. 1, Sec. 8, Cl. 18.

U.S. Constitution, Amend. 14, Sec. 1.