

**THE ROBERTS COURT AND THE FUTURE OF
SUBSTANTIVE DUE PROCESS: THE DEMISE OF “SPLIT-THE-
DIFFERENCE” JURISPRUDENCE?**

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I. INTRODUCTION

Over the past fifteen years, the Rehnquist Court has sought to satisfy the politically moderate majority of Americans by engaging in a pragmatic and results-orientated “split-the-difference” jurisprudence when deciding difficult constitutional questions.¹ This approach, while

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¹ The term “split-the-difference” jurisprudence originates from a recently published Stanford Law Review article written by Circuit Judge J. Harvie Wilkinson, III, *The Rehnquist Court at Twilight: The Lures and Perils of Split-the-Difference Jurisprudence*, 58 Stan. L. Rev. 1969 (2006). Although this article makes use the phrase “split-the-difference” and the general principle encompassing it, this article is distinct in that it focuses exclusively on split-the-difference jurisprudence as it applies to substantive due process doctrine. In this respect, it not only illustrates the historical source of split-the-difference substantive due process jurisprudence,

seductive for its temperance and customary “evenhandedness,”² can no longer serve as the basis for constitutional decisionmaking. As illustrated by recent substantive due process case law, the Supreme Court has unjustifiably expanded judicial authority at the expense of legitimately exercised democratic judgment. Under the leadership of Chief Justice John G. Roberts, Jr., the Supreme Court must return to a process-orientated approach to constitutional law.

The early years of the Rehnquist Court were often characterized as a period of “revivalism.”³ Chief Justice Rehnquist sought to restore a democratic balance in government by “reinvigorating ... the authority of individual states to exercise their residual police powers” because he “seemed intent on recognizing the American Constitution as a document with enforceable structural features that would bolster this country’s enjoyment of democratic liberties and, ultimately, of personal rights.”⁴ However, due to the Chief Justice’s “ebbing influence and stamina” and a “growing faith in the powers of judicial wisdom,” this legacy began to shift. Rather than promoting a limited institutional role, the latter years of the Rehnquist Court became increasingly synonymous with “judicial supremacy.”⁵ The source of this dramatic transformation was, in part, Justice Sandra Day O’Connor.⁶ Her refusal to adopt a universal jurisprudence in favor of judicial pragmatism and her willingness to exploit a strategic position as the “swing vote”⁷ led to a “split-the-difference” jurisprudence, which greatly increased judicial discretion.

it also suggests doctrinal solutions, which extend well-beyond the intended purpose of Judge Wilkinson originally published article.

² *Id.* at 1971.

³ *Id.* at 1970.

⁴ *Id.* at 1970.

⁵ *Id.* at 1969.

⁶ *Id.* at 1972.

⁷ *See generally* MARK TUSHNET, A COURT DIVIDED: THE REHNQUIST COURT AND THE FUTURE OF CONSTITUTIONAL LAW 207 (describing how Justice O’Connor strategically deprived Chief

Split-the-difference jurisprudence materializes in two basic forms: result and reasoning. The Supreme Court splits-the-difference in result when “actual holdings straddle both sides of a difficult issue, and the outcomes, while perhaps unsatisfying to the adversaries in a polarized debate, nevertheless attempt to settle upon a constitutional middle ground.”⁸ The most recent and perhaps glaring example of this occurred during the last term of the Rehnquist Court. In both *Van Order v. Perry*⁹ and *McCreary County v. ACLU*,¹⁰ the Court was confronted with the public display of the Ten Commandments on government property. In the former case, the monument was donated to the state of Texas in 1961 by a civic fraternal organization and placed with other commemorative and historical markers and memorials.¹¹ In the latter case, copies of the Ten Commandments were posted in the hallways of two Kentucky courthouses.¹² Despite the similarity of these facts, the Supreme Court found by a 5-4 margin *Van Order's* Ten Commandments display constitutional, but affirmed a preliminary injunction requiring removal of *McCreary County's* display. This result avoided a divisive and emotional Establishment Clause issue by attempting to secure a sensible, albeit ultimately unsatisfying solution, which avoided a universal constitutional pronouncement, grounded in the text, history and structure of the First Amendment.

The Supreme Court splits-the-difference in its reasoning when it adopts a legal standard, which is based on compromise rather than an intellectually consistent doctrine. In *Vieth v. Jubelirer*,¹³ the Court considered the constitutionality of state legislatures’ practice of politically

Justice Rehnquist of a majority opinion in a pivotal abortion case by adopting a new constitutional standard after realizing that her vote would be decisive).

⁸ Wilkinson, *supra* note 1, at 1972.

⁹ *Van Order v. Perry*, 125 S. Ct. 2854 (2005).

¹⁰ *McCreary County v. ACLU*, 125 S. Ct. 2722 (2005).

¹¹ *Van Order*, 125 S. Ct. at 2858.

¹² *McCreary County*, 125 S. Ct. 2728.

¹³ *Vieth v. Jubelirer*, 541 U.S. 267 (2004).

gerrymandering congressional districts. In the view of Justice Antonin G. Scalia, the issue was absolute: all political gerrymandering claims are nonjusticiable because there is no “judicially manageable criteria for adjudicating them.”¹⁴ By contrast, Stephen G. Breyer believed that the Court should adjudicate political gerrymandering claims and set forth a fact-intensive balancing test to determine when a political party’s power becomes too “entrenched.”¹⁵ Splitting-the-difference between these two outermost positions was Justice Anthony M. Kennedy, because, by his measure, political gerrymandering claims should not be foreclosed *per se*.¹⁶ He appreciated the lack of neutral principles, which could present constitutional guidance, but nevertheless declined to take a definitive position given the importance of voting rights.¹⁷ Instead, absent meaningful guidance from the Supreme Court, he encouraged lower courts to develop standards for adjudicating such claims.¹⁸ Consequently, he expanded the scope of judicial discretion and inappropriately reserved a measure of institutional authority. In contrast to the traditional standards of constitutional adjudication, Justice Kennedy simply made a decision with “an eye toward a middle ground.”¹⁹

Although Justice O’Connor has since retired from the Court, and she, along with her colleague, Chief Justice Rehnquist have been replaced with “conservative” appointees Samuel A. Alito, Jr. and John G. Roberts, Jr., respectively, the temptation to implement a split-the-difference jurisprudence remains ever-present. As many observers have pointed out, Justice Kennedy has taken the place of Justice O’Connor as the Court’s swing vote, and “deliberately

¹⁴ *Id.* at 281.

¹⁵ *Id.* at 365 (Breyer, J., dissenting).

¹⁶ *Id.* at 306 (Kennedy, J., concurring).

¹⁷ *Id.* at 309-10.

¹⁸ *Id.*

¹⁹ Wilkinson, *supra* note 1, at 1980.

and craftily” well-positioned himself as a “necessary but distinctive vote for a majority.”²⁰ Thus, Justice Kennedy, by some accounts, now stands “alone in deciding the outcomes in the most divisive cases.”²¹ Yet, as Professor Douglas W. Kmiec notes, the appointment of Chief Justice Roberts may transform constitutional doctrine and stem the tide of difference-splitting jurisprudence. In his first term as Chief Justice, Roberts has crafted an impressive measure of consensus and unanimity through his advocacy, pleasant demeanor and intellectual brilliance.²² If the Chief Justice maintains this newborn influence, it could “overwhelm [Justice] Kennedy’s ability to deploy his swing vote” and provide the Supreme Court with a decisive opportunity to remake substantive due process while simultaneously finding common ground among strongly competing judicial philosophies.

For the reasons provided herein, the Chief Justice must succeed in creating an intellectual environment suitable for adopting consistent, rules-based substantive due process doctrine that builds upon the uniformity enjoyed during the Roberts Court’s first term. Beginning with a brief historical outline, this article will discuss the source of split-the-difference substantive due process jurisprudence by illustrating conflicting approaches made famous by Justices Hugo L. Black and John Marshall Harlan. Then, by charting the approaches of selected current Supreme Court justices, it will shed light on modern difference-splitting substantive due process

²⁰ Dahlia Lithwick, *Swing Time*, SLATE (January 17, 2006), at www.slate.com/id/2134421/ (last visited August 7, 2006).

²¹ David G. Savage, *Déjà vu Once Again*, ABA JOURNAL 13 (September 2006).

²² Douglas W. Kmiec, *Who Really Rules the Supreme Court?*, Los Angeles Times (July 8, 2006), available at www.latimes.com/news/opinion/commentary/la-oe-kmiec8jul08,0,1887126.story?coll=la-news-comment-opinions (last visited August 8, 2006) (Chief Justice Roberts “has a conservative mind but a diplomat’s nature”); Dahlia Lithwick, *Charm Offensive*, THE AMERICAN LAWYER (August 1, 2006), available at www.law.com/jsp/tal/PubArticleFriendlyTAL.jsp?id=1153991132514 (last visited August 1, 2006); see, e.g., *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 126 S. Ct. 1297 (2005) (unanimous opinion on contentious First Amendment issue implicating associational

jurisprudence.²³ Finally, this article will suggest doctrinal mechanisms that will allow Chief Justice Roberts to eliminate split-the-difference jurisprudence and return the Supreme Court to its role as a limited, but nevertheless equally important, institutional authority.²⁴

II. A BRIEF HISTORY OF SUBSTANTIVE DUE PROCESS

Substantive due process “is widely viewed as the most problematic category in constitutional law”²⁵ and it has long been the subject of tremendous controversy from the period of the so-called *Lochner* Era to the contentious decisions of *Roe v. Wade* and *Lawrence v. Texas*.

speech). *But see, e.g., Hudson v. Michigan*, 547 U.S. ___ (2006) (divisive 5-4 decision on the continued applicability of the Fourth Amendment’s exclusionary rule).

²³ Kmiec, *supra* note 22, available at www.latimes.com/news/opinion/commentary/la-oe-kmiec8jul08,0,1887126.story?coll=la-news-comment-opinions (last visited August 8, 2006) (commenting that the four-vote liberal block led by Justice John Paul Stevens is deadlocked with the rock-solid conservatives led by Justice Antonin Scalia and Clarence Thomas); *see generally* Laurence H. Tribe, *Treatise Power*, 8 Green Bag 2d 291, 292 (2005) (letter to Associate Justice Stephen G. Breyer stating that constitutional law “could go in any of several directions”).

²⁴ “The case for split-the-difference jurisprudence is not an insubstantial one.” Wilkinson, *supra* note 1, at 1981. Split-the-difference leads to moderation, which “is a trait that the public admires in the judiciary” and it “permits the Court to stay above the fray and to assume a statesmanlike pose.” *Id.* at 1981-82. But at the same token, split-the-difference jurisprudence also leads to an unwarranted increase in judicial authority, which infringes too greatly on the Congress, the executive and the States. As Justice Scalia noted in *Vieth*,

“The judicial Power” created by Article III, § 1, of the Constitution is not whatever judges choose to do, see *Valley Forge Christian College v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 487 (1982); cf. *Grupo Mexicano de Desarrollo, S. A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 332-333 (1999), or even whatever Congress chooses to assign them, see *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 576-577 (1992); *Chicago & S. Air Lines, Inc. v. Waterman S. S. Corp.*, 333 U.S. 103, 110-114 (1948). It is the power to act in the manner traditional for English and American courts. One of the most obvious limitations imposed by that requirement is that judicial action must be governed by standard, by rule. Laws promulgated by the Legislative Branch can be inconsistent, illogical, and ad hoc; law pronounced by the courts must be principled, rational, and based upon reasoned distinctions.

Id. at 278. The purpose of this article, therefore, is to explain the source of split-the-difference substantive due process jurisprudence and suggest doctrinal mechanisms for overcoming the temptation to implement it.

²⁵ Richard H. Fallon, *Some Confusions About Due Process, Judicial Review, and Constitutional Remedies*, 93 Colum. L. Rev. 309, 314 (1993).

The doctrine originates from the Supreme Court’s interpretation of the Due Process Clauses of the Fifth and Fourteenth Amendments, which provide that neither the federal government nor the states, respectively, shall “deprive any person of life, liberty, or property without due process of law.”²⁶ The early history of the Due Process Clause dates back to 1215 and the signing of Magna Carta, a document, which bound the King of England to guarantee certain procedural rights to all free men: “No free man shall be taken, or imprisoned, or disseized, or outlawed, or exiled, or any wise destroyed; nor will we not pass upon him, nor condemn him, but by the lawful judgment of his peers or by the law of the land.”²⁷ Although the drafters of the Fifth and Fourteenth Amendments replaced the phrase “law of the land” with “due process of law,” they did not remake or expand upon the intent of the Magna Carta.²⁸ Instead, substantive protection under the Due Process Clause evolved as a matter of judicial interpretation and the Supreme Court’s increasing desire to supplement constitutional protections, which evaporated as a result of the *Slaughter House Cases*’ “liquidation”²⁹ of the Fourteenth Amendment’s Privileges and Immunities Clause.

A. The *Lochner* Era

²⁶ U.S. Const. Amend. XIV, § 1. The Fifth Amendment offers identical protection, which is applicable to the federal government.

²⁷ *In re Winship*, 397 U.S. 358 (1970) (citing 9 Hen. 3, c. 29 (1225)) (Black, J., dissenting).

²⁸ *Id.* (citing *Murray’s Lessee v. Hoboken Land & Improv. Co.*, 18 How. 272, 276 (1856) (“the words, ‘due process of law,’ were undoubtedly intended to convey the same meaning as the words ‘by the law of the land’ in the Magna Carta”)).

²⁹ Michael Kent Curtis, *Resurrecting the Privileges and Immunities Clause and Revising the Slaughter House Cases Without Exhuming Lochner: Individual Rights and the Fourteenth Amendment*, 38 B.C. L. Rev. 1, 1 (1996); see also *Washington v. Glucksberg*, 521 U.S. 702, 760 n. 6 (1997) (Souter, J., concurring in the judgment).

The theory that the Due Process Clause contained substantive protections only became “serious”³⁰ in the late 1890’s. In *Allgeyer v. Louisiana*,³¹ the Supreme Court considered the constitutionality of a Louisiana statute, which prohibited persons from contracting with marine insurance companies that had not complied with state law.³² The trial court entered a judgment in favor of defendants, but the Louisiana Supreme Court reversed.³³ On appeal, the United States Supreme Court reversed, holding that Louisiana’s regulation of the contracts at issue violated the Due Process Clause’s protection of “liberty.”³⁴ In dictum, the Court reasoned that the Due Process Clause embraces a right of citizens “to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; [and] to pursue any livelihood or avocation”³⁵

Following *Allgeyer*, the Supreme Court elaborated on its broad mandate of freedom to enjoy “all faculties”³⁶ in a case, which would eventually serve to infamously identify this time period of *laissez faire* jurisprudence.³⁷ In *Lochner v. New York*, the Supreme Court in a five-four decision declared unconstitutional a New York statute that set maximum hours for bakers at 10 hours per day or 60 hours per week.³⁸ Closely scrutinizing the legislation, the Supreme Court reasoned that it was “an unreasonable, unnecessary and arbitrary interference with the right of the individual to . . . enter into those contracts in relation to labor which may seem to him

³⁰ *Washington v. Glucksberg*, 521 U.S. 702, 760 (1997) (Souter, J., concurring); see also *Planned Parenthood v. Casey*, 505 U.S. 833 (1992) (noting that substantive due process has existed since at least *Mugler v. Kansas*, 123 U.S. 623, 660-61 (1887)) (joint opinion).

³¹ *Allgeyer v. Louisiana*, 165 U.S. 578 (1897).

³² *Id.* at 593.

³³ *Id.* at 584-89.

³⁴ *Id.* at 589.

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Lochner v. New York*, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting).

³⁸ *Id.* at 52.

appropriate or necessary.”³⁹ Freedom of contract, the Court believed, is the general rule and restraint is the exception.⁴⁰ In dissent, the first Justice John Marshall Harlan acknowledged the mandate prescribed in *Allgeyer*, but conceded that economic liberty is still subject to regulations, which may sometimes prohibit certain business practices.⁴¹ Charting a line of cases “so numerous that further citations are unnecessary,”⁴² he concluded that the regulation in question should properly be considered a lawful police power of New York State.⁴³ Writing separately, Justice Oliver Wendell Holmes, Jr. added that the Court’s current conception of “liberty” in the Fourteenth Amendment is “perverted when it is held to prevent” a regulation enacted through democratic means “unless it can be said that ... the statute ... would infringe [on] fundamental principles as they have been understood by the traditions of our people and our law.”⁴⁴

As any first year constitutional law student can attest, by 1937 the Supreme Court’s *Lochner* Era protectionist mindset evaporated and the focus on economic liberty diminished.⁴⁵ Despite a strong willingness to question democratically enacted legislation and invalidate it as an arbitrary restraint on economic “liberty,” the Supreme Court’s jurisprudence eventually succumb to outside pressures such as the Great Depression and shifted to adopt the deferential approach articulated in *Lochner*’s dissent.⁴⁶ Substantive due process, “the earlier constitutional principle

³⁹ *Id.* at 56.

⁴⁰ *Adkins v. Children's Hospital*, 261 U.S. 525, 546 (1923).

⁴¹ *Lochner*, 198 U.S. at 65-66 (Harlan, J., dissenting).

⁴² *Id.* at 67.

⁴³ *See id.* at 72 (stating that New York’s rationale for enacting the legislation “ought to be the end of th[e] case”).

⁴⁴ *Id.* at 76 (Holmes, J., dissenting).

⁴⁵ *See West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 399 (1937) (signaling the demise of *Lochner*).

⁴⁶ *Casey*, 505 U.S. at 861-62.

that states have power to legislate against what are found to be injurious practices in their internal commercial and business affairs,⁴⁷ was no longer supportable.

B. Justice John M. Harlan and the Second Coming of Substantive Due Process

Subsequent to *Lochner*'s demise, substantive due process was thought to be a dead letter.⁴⁸ But with the liberalization of constitutional doctrine in the 1960's, which included an endorsement of a so-called "living Constitution"⁴⁹ from the Warren Court, substantive due process was remade into a mechanism in which to question the reasonableness of social, rather than economic, legislation. This constitutional rebirth became a convenient tool for invalidating statutes thought to intrude too prominently on the individual and personal decisions of American citizens. As a result, state and federal legislation that infringes on deeply personal issues such as a woman's decision to terminate her pregnancy;⁵⁰ a married couple's ability to use birth control;⁵¹ an extended family's decision to live as one unit;⁵² or a patient's right to refuse medical treatment,⁵³ are treated as suspect and afforded a higher level of judicial review. If a State seeks to regulate such issues, it is ordinarily required to first demonstrate that there exists a compelling governmental interest.

⁴⁷ *Lincoln Federal Labor Union v. Northwestern Iron & Metal Co.*, 335 U.S. 525, 536 (1949).

⁴⁸ *Casey*, 505 U.S. at 862 (citing ROBERT H. JACKSON, THE STRUGGLE FOR JUDICIAL SUPREMACY 85 (1941)); see also *Griswold v. Connecticut*, 381 U.S. 479, 522 (1965) (stating that substantive due process was thought to be put to "rest once and for all") (Black, J., dissenting).

⁴⁹ See e.g., *Poe v. Ullman*, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting).

⁵⁰ *Roe v. Wade*, 410 U.S. 113 (1973).

⁵¹ *Carey v. Population Services Int'l*, 431 U.S. 678 (1977); *Griswold v. Connecticut*, 381 U.S. 479 (1965).

⁵² *Moore v. City of East Cleveland*, 431 U.S. 494 (1977) (plurality opinion).

⁵³ *Cruzan v. Director, Mo. Dept. of Health*, 497 U.S. 261, 287-89 (1990) (O'Connor, J., concurring); *id.* at 302 (Brennan, J., dissenting).

The intellectual source of the second coming of substantive due process owes itself to the second Justice John Marshall Harlan's dissent in *Poe v. Ulman*.⁵⁴ In *Poe*, the plaintiffs were doctors and patients challenging the constitutionality of a Connecticut statute prohibiting the use of contraceptive devices.⁵⁵ The Supreme Court of Errors of Connecticut held that the statutes were applicable to married couples even under a claim that contraception would pose a serious threat to the health of a married woman.⁵⁶ On appeal, the United States Supreme Court held that the mere existence of the challenged statute did not afford standing to the plaintiffs.⁵⁷ The State had not prosecuted anyone for violating the statute and the plaintiffs were in no danger of immediately sustaining any injury to its enforcement.⁵⁸

In dissent, Justice Harlan moved beyond the question of justiciability and addressed the merits of the plaintiffs' challenge, which he concluded, violated the Due Process Clause's guarantee against "arbitrary impositions ... of purposeless restraints."⁵⁹ To arrive at this holding, Justice Harlan began his analysis with commentary on the original understanding of the Fourteenth Amendment.⁶⁰ Anticipating objections from his colleagues who would dispute any substantive component to the Due Process Clause, he acknowledged that its historical source, the Magna Carta, contemplated procedural safeguards "against executive usurpation and tyranny."⁶¹ Nevertheless, in a cursory and somewhat convenient fashion, he concluded that the history of the

⁵⁴ See *Glucksberg*, 521 U.S. at 762 (1997) (Souter, J., concurring) (stating that Justice Harlan's dissent in *Poe* serves as a "major opinion leading to the modern doctrine"); *id.* at 765 (engaging in an analysis of unenumerated rights "in the wake of *Poe*"); see also *Poe*, 367 U.S. at 539 (Harlan, J., dissenting) (conceding that his approach to substantive due process does not find a basis in the "explicit language of the Constitution" or "in any decision" of the Supreme Court's prior case law).

⁵⁵ Conn. Gen. Stat. §§ 53-32, 54-196 (1958).

⁵⁶ *Poe*, 367 U.S. at 498.

⁵⁷ *Id.* at 508-09.

⁵⁸ *Id.* at 501.

⁵⁹ *Id.* at 543.

⁶⁰ *Id.* at 540-42.

Fourteenth Amendment “shed[] little light”⁶² on the meaning of the Due Process Clause. Therefore, as an original matter, the Due Process Clause was not necessarily confined to procedural guarantees.⁶³ Buttressing this conclusion, Justice Harlan offered a pragmatic explanation for recognizing substantive due process rights. The protection of procedural rights, but the denial of substantive rights would “fail to reach those situations where the deprivation of life, liberty or property was accomplished by legislation which by operating in the future could, given even the fairest possible procedure in application to individuals, nevertheless destroy the enjoyment of all three.”⁶⁴ Stated another way, even where procedural rights were protected to the greatest extent possible, the denial of substantive rights would eventually lead to destruction of any entitlement to life, liberty or property.

Even assuming Justice Harlan’s reading of the Due Process Clause is correct, there remains the considerable challenge of developing a methodology for determining what substantive protections are afforded by the Fourteenth Amendment. In the case of procedural rights under the Due Process Clause, the Supreme Court has appropriately engaged in a balancing of interests.⁶⁵ After all, the word “due” is not an absolute prescription, but a recognition that a safeguard must be afforded in proportion to the life, liberty or property at stake.⁶⁶ Taken further, the Supreme Court has distilled procedural due process to notice and an opportunity to be heard.⁶⁷ In the case of substantive due process, Justice Harlan advocated for a

⁶¹ *Id.* at 540.

⁶² *Id.* at 541 (citing Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights*, 2 Stan. L. Rev. 15).

⁶³ *See id.* at 540-42.

⁶⁴ *Id.*

⁶⁵ *Zinermon v. Burch*, 494 U.S. 113, 127 (1990).

⁶⁶ *See id.*

⁶⁷ *Goss v. Lopez*, 419 U.S. 565, 579 (1975).

similar balancing of interests because he believed that such rights could not be “reduced to any formula” or “determined by reference to any code.”⁶⁸

Despite an amorphous balancing of competing interests, Justice Harlan did not believe that “judges have felt free to roam where unguided speculation might take them;”⁶⁹ or, stated in modern jargon, “legislate from the bench.” On the contrary, judges can strike the proper balance of interests by “having regard to what history teaches are the traditions from which ... [this country] developed as well as the traditions from which it broke.”⁷⁰ Moreover, judges can exercise “limited and sharply restrained judgment” and engage in the common law tradition of making a decision on novel claims by closely following “well-accepted principles and criteria.”⁷¹ Quoting the Court’s language in *Rochin v. California*,⁷² Justice Harlan repeated that the “vague contours of the Due Process Clause do not leave judges at large” because they cannot merely draw on “personal and private notions and disregard the limits that bind judges in their judicial function.”⁷³

While reason and restraint are well-accepted mechanisms for limiting judicial discretion, Justice Harlan’s reliance on “living” tradition⁷⁴ as a guidepost is decidedly more problematic and has led in no small part to the Supreme Court’s current crisis of consistency.⁷⁵ In *Poe*, Justice Harlan’s application of “living” tradition provided him with justification for reaching a benign

⁶⁸ *Poe*, 367 U.S. at 542 (Harlan, J., dissenting).

⁶⁹ *Id.* at 542.

⁷⁰ *Id.*

⁷¹ *Id.* at 544.

⁷² *Rochin v. California*, 342 U.S. 165 (1952).

⁷³ *Id.* at 170-71.

⁷⁴ *Poe*, 367 U.S. at 542 (Harlan, J., dissenting).

⁷⁵ See John F. Basiak, Jr., *Dangerous Predictions: Referencing “Emerging” History and Tradition in an Era of Blue State Federalism*, 15 *Widener L. J.* 135, 136-37 (2005) (concluding that the utilization of “emerging” during a rise in Blue State Federalism creates a “dangerously predictive methodology” that “invites lower federal courts to seek constitutional guidance from recent social trends supported by powerful progressive states”).

and comfortable result: the invalidation of an “uncommonly silly”⁷⁶ and “asinine”⁷⁷ contraception statute. From a common sense perspective, the government’s interest in regulating a married couple’s access to contraception seems minimal; thus, the decision, at first blush, appears correct. Yet, despite this pragmatic conclusion, the appeal of *Poe*’s extravagant language and the deep reverence and respect many have for its author,⁷⁸ not all justices or legal scholars appreciate its historical or deductive justifications.

C. Justice Hugo L. Black and the Total Incorporation Doctrine

Among Justice Harlan’s colleagues, the most influential⁷⁹ and vocal critic was Justice Hugo L. Black, who on “many occasions ... express[ed] ... [a] strong belief that there is no constitutional support whatsoever” for the doctrine of substantive due process.⁸⁰ Such assured opposition stemmed from three related premises: (1) the text and history of the Due Process Clause demonstrate that it guarantees procedural, not substantive rights;⁸¹ (2) substantive due process is a mechanism for Supreme Court justices to interject their own predilections and determine what they believe to be “fair” rather than what is a genuine constitutional right;⁸² and

⁷⁶ See *Griswold*, 381 U.S. at 527 (Stewart, J., dissenting).

⁷⁷ *Id.*

⁷⁸ GEOFFREY R. STONE, *THE FIRST AMENDMENT* lxiii (Aspen 2nd ed. 2003); see also Cass R. Sunstein, *Minimal Appeal*, *THE NEW REPUBLIC* (August 1, 2005), available at <http://www.tnr.com/doc.mhtml?i=20050801&s=sunstein080105> (calling Justice Harlan a “great conservative voice” on the Warren Court).

⁷⁹ See Akhil Reed Amar, *Hugo Black and the Hall of Fame*, 53 *Ala. L. Rev.* 1221, 1222 (2002) (stating that “Justice Black ranks as one of the greatest constitutional jurists of the last century, a first-ballot hall-of-famer”); *id.* at 1247-48 (concluding that Justice Black was the intellectual leader of the Warren Court).

⁸⁰ *Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 675-76 (1966) (Black, J., dissenting).

⁸¹ *In re Winship*, 397 U.S. 358 (1970) (citing *Murray’s Lessee v. Hoboken Land & Improv. Co.*, 18 How. 272, 276 (1856) (“the words, ‘due process of law,’ were undoubtedly intended to convey the same meaning as the words ‘by the law of the land’ in the Magna Carta”)).

⁸² See *Griswold*, 381 U.S. at 510 (conceding a personal preference, but nonetheless deciding the case in accordance with the text of the Constitution) (Black, J., dissenting); *Ferguson v. Skrupa*, 372 U.S. 726, 730-31 (1963). Of course, the temptation to rely upon fairness as a guidepost in interpretation persists to this day. As Judge Frank H. Easterbrook frustratingly noted in *United*

(3) substantive due process doctrine allows for a method of interpretation that effectively amends the Constitution without utilizing the deliberative amendment process because it ignores the Supreme Court’s duty to place itself “as nearly as possible in the condition of the men who framed the instrument.”⁸³ To the first criticism, there is little doubt that Justice Black is correct. Even those who support substantive due process acknowledge this limitation;⁸⁴ and, as many commentators have observed, “substantive due process is not just an error, but a contradiction in terms.”⁸⁵ The Supreme Court has, in a sense, left readers of its “substantive due process cases . . . to feel like a moviegoer who arrived late and missed a crucial bit of exposition. Where is the part that explains the connection between this doctrine and the text of the constitutional provisions from which it takes its name?”⁸⁶ To the second and third criticisms, however, the

States v. Logan, “[l]aws are not ‘harsh’ or ‘pointless’ in any value-free framework; they seem harsh or pointless by reference to a given judge’s beliefs about how things ought to work, which is why a claim of power to revise ‘harsh’ or ‘pointless’ laws elevates the judicial over the legislative branch and must be resisted.” Slip Opinion at 9 (7th Cir. July 6, 2006).

⁸³ *Id.* (citing *Ex parte Bain*, 121 U.S. 1, 12). *But see Griswold*, 381 U.S. 479, 500-01 (1965) (submitting that Justice Black’s method of interpreting specific provisions of the Constitution, no less than the Due Process Clause, lends itself to the dangers of a judge’s personal predilections “whose constitutional outlook is simply to keep the Constitution in supposed ‘tune with the times’”) (Harlan, J., concurring).

⁸⁴ *See Casey*, 505 U.S. at 846 (acknowledging that “a literal reading of the Clause might suggest that it governs only the procedures by which a State may deprive persons of liberty”) (joint opinion); *id.* at 847 (recognizing that due process’ roots are in the Magna Carta); *Glucksberg*, 521 U.S. at 760 n. 6 (citing JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 14-30 (1980)) (acknowledging the Privileges and Immunities Clause rather than the Due Process Clause, is the “proper warrant for courts’ substantive oversight of state legislation”) (Souter, J., concurring in the judgment); LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW VOL. ONE* 1328-29 (Foundation Press 3rd ed. 2000) (commenting on the Privileges and Immunities Clause’s “apparent textual and historical superiority to the substantive due process method of incorporating and protecting fundamental rights”).

⁸⁵ John Harrison, *Substantive Due Process and the Constitutional Text*, 83 Va. L. Rev. 493, 494 (1997); JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 18 (1980) (substantive due process is a “contradiction in terms-sort of like ‘green pastel redness’”); *see also Mays v. City of East St. Louis*, 123 F.3d 999, 1001 (7th Cir. 1997) (observing that the fact that “‘substantive due process’ is an oxymoron” has led to a circuit split regarding some aspects of its doctrine) (Easterbrook, J.).

⁸⁶ *Id.* at 493.

debate will endlessly continue. Since Chief Justice John Marshall's landmark opinion in *Marbury v. Madison*⁸⁷ establishing the doctrine of judicial review, the Supreme Court has struggled to draw a line between interpretation and alteration. While conservative jurists would argue that discovery of unenumerated fundamental rights is an unwarranted expansion of judicial authority, liberal-minded jurists see such measures as a fulfillment of their constitutional obligations.⁸⁸ As Justice David H. Souter once pronounced, using words first made famous by Chief Justice John Marshall, "it is *a constitution* we are expounding."⁸⁹

In addition to a forceful critique of Justice Harlan's view of substantive due process, Justice Black offered "eccentric"⁹⁰ support for his own affirmative theory of the Fourteenth Amendment: total incorporation. Under this doctrine, the Fourteenth Amendment incorporated the first eight amendments of the Bill of Rights and made them applicable to the states.⁹¹ Thus, following ratification of the Fourteenth Amendment, state as well as federal laws would be invalidated as violative of the Constitution if they infringed on the substantive guarantees of the Bill of Rights. However, those rights not explicitly enumerated in the Bill of Rights could not later be discovered in open-ended constitutional clauses such as the Ninth Amendment or the Due Process Clause.⁹²

⁸⁷ *Marbury v. Madison*, 1 Cranch 137 (1803).

⁸⁸ Ronald J. Krotoszynski, Jr., *The Eleventh Amendment, Federalism, and Judicial Activism: Questions and Answers: The Wages of Crying Wolf Revisited: The Essential Consanguinity of Lochner, Roe, and Eastern Enterprises*, 1 *Geo. J. L. & Pub. Pol'y* 133, 133 (2002).

⁸⁹ *County of Sacramento v. Lewis*, 523 U.S. 833, 846 (1998) (emphasis in original) (quoting *Daniels v. Williams*, 474 U.S. 327, 332 (1986) (quoting *M'Culloch v. Maryland*, 17 U.S. 316 (1819))).

⁹⁰ *Adamson v. California*, 332 U.S. 46, 62 (1947) (Frankfurter, J., concurring).

⁹¹ *Id.* at 71-72 (1947) (Black, J., dissenting) (citing Flack, *The Adoption of the Fourteenth Amendment* 94 (1908)).

⁹² See e.g., *Griswold*, 381 U.S. at 507-27 (rejecting Justice Goldberg's reliance on the Ninth Amendment and Justice Harlan's approach under the Due Process Clause of the Fourteenth Amendment) (Black, J., dissenting).

Justice Black’s understanding of the Fourteenth Amendment “was the product of years of study ..., reading and rereading primary and secondary sources that his fellow Justices had ignored or slighted.”⁹³ This research culminated in his dissent in *Adamson v. California*, where he made three notable findings: the Fourteenth Amendment was designed (1) to make the Bill of Rights (the first eight Amendments) binding upon the States; (2) to give validity to the Civil Rights Bill; and (3) to declare who were citizens of the United States.⁹⁴ An illustrative and famous example⁹⁵ of total incorporation can be found in the dissent of *Griswold v. Connecticut*.⁹⁶ In *Griswold*, the Supreme Court was again confronted with C.G.S.A. §§ 53-32, 54-196 (1958), the Connecticut statute that made it illegal to provide “information, instruction, and medical advice to married persons as to the means of preventing conception.”⁹⁷ Unlike its decision in *Poe*, a majority of the Court reached the merits of the case and held that it was “repulsive” to the Constitution.⁹⁸ Writing for the majority, Justice William O. Douglas reasoned that the First, Third, Fourth, Fifth, and Ninth Amendments have “penumbras,” which create a “zone of privacy” that protected the conduct at issue.⁹⁹ Concurring in the result, Justice Harlan reaffirmed his belief that the Due Process Clause was the appropriate mechanism to question the arbitrariness of the legislation and protect “basic values ‘implicit in the concept of ordered liberty.’”¹⁰⁰ In dissent, Justice Black placed aside his personal feelings regarding the statute’s fairness and deemed it constitutional: “I like my privacy as well as the next one, but I am

⁹³ Amar, *supra* note 79, at 1232-33.

⁹⁴ *Adamson*, 332 U.S. at 71-72 (1947) (Black, J., dissenting) (citing Flack, *The Adoption of the Fourteenth Amendment* 94 (1908)).

⁹⁵ See Amar, *supra* note 79, at 1246-47 (commenting on how Justice Black’s “famous[.]” dissent has quelled recognition of his leadership on the Warren Court).

⁹⁶ *Griswold*, 381 U.S. at 506-27 (1965) (Black, J., dissenting).

⁹⁷ *Id.* at 480 (citing C.G.S.A. §§ 53-32, 54-196 (1958)).

⁹⁸ *Id.* at 484-86.

⁹⁹ *Id.* at 484.

¹⁰⁰ *Id.* at 500 (quoting *Palko v. Connecticut*, 302 U.S. 319, 325 (date) (Harlan, J., concurring))

nevertheless compelled to admit that government has the right to invade it unless prohibited by some specific constitutional provision.”¹⁰¹ He then sharply criticized Justice Harlan’s “natural law” approach, and in an instructive footnote, discounted any notion that the discretion of judges could be limited by spelling out superficial “catchwords and catch phrases.”¹⁰² In Justice Black’s view, phrases such as “shock the conscience,”¹⁰³ or “fundamental notions of fairness,”¹⁰⁴ “inherent,”¹⁰⁵ “fundamental”¹⁰⁶ or “essential”¹⁰⁷ sound “impressive,” but they “are all that ... lie behind [a] decision” based on personal preferences.¹⁰⁸

D. In the Wake of Justices Harlan and Black: “Split-the-Difference Jurisprudence”

Despite offering a significant critique of Justice Harlan’s natural law approach and a persuasive (albeit simplistic)¹⁰⁹ argument in support of total incorporation doctrine, Justice Black never garnered a majority opinion in support of his position.¹¹⁰ The Burger and Rehnquist Courts sought to limit both the number of unenumerated rights and method utilized to discover them, but neither adopted an absolutist, textualist view of the Bill of Rights.¹¹¹ On the contrary, when *the* substantive due process issue, abortion, finally re-crystallized before the Supreme Court in the 1992 case *Planned Parenthood v. Casey*, recent Republican appointees David H. Souter and Anthony M. Kennedy joined Justice Sandra Day O’Connor in a joint opinion, which

¹⁰¹ *Id.* at 510.

¹⁰² *Id.* at 511 n. 4.

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at 511 n. 5.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ Amar, *supra* note 79, at 1232.

¹¹⁰ *See Casey*, 505 U.S. at 847 (noting that Justice Black’s total incorporation doctrine has never been the “accepted ... view”) (citing *Adamson*, 332 U.S. at 68-92) (joint opinion).

¹¹¹ *See e.g., Glucksberg*, (adopting a “conservative” approach to the discovery of new substantive due process rights, but nevertheless commenting that the potential for new rights exists).

rejected principle in favor of a politically compromising and pragmatic approach.¹¹² Thus, rather than clarifying substantive due process doctrine, the intellectual struggle between Justices Black and Harlan created a convoluted doctrine¹¹³ increasingly contingent upon respective appointments to the Supreme Court.¹¹⁴ The constitutional environment, in other words, became ripe for the development of split-the-difference substantive due process jurisprudence.

In *Casey*, the petitioners were abortion clinics and a class of physicians who brought suit seeking declaratory and injunctive relief from a Pennsylvania statute, which made it illegal for a physician to perform an abortion on a married woman who fails to provide certain documentary proof of spousal notification.¹¹⁵ The district court held that all provisions of the statute were unconstitutional and entered a permanent injunction, but the United States Court of Appeals for

¹¹² See *Casey*, 505 U.S. at 945 (characterizing the joint opinion’s outcome as an “unjustified constitutional compromise”) (Rehnquist, C.J., concurring in the judgment in part and dissenting in part); see also *Stenberg v. Carhart*, 530 U.S. 914, 982 (2000) (characterizing the joint opinion as created out of “whole cloth”) (Thomas, J., dissenting). But see *Casey*, 505 U.S. at 865-66 (implying that the decision to preserve the central holding of *Roe* is principled) (joint opinion).

¹¹³ See Note, David B. Anders, *Justices Harlan and Black Revisited: The Emerging Dispute Between Justice O’Connor and Justice Scalia Over Unenumerated Fundamental Rights*, 61 Fordham L. Rev. 895, 922 (1993) (stating that the current debate regarding unenumerated rights “harks back” to the debate between Justices Harlan and Black); see also Toni M. Massaro, *Reviving Hugo Black?: The Court’s “Jot For Jot” Account of Substantive Due Process*, 73 N.Y.U. L. Rev. 1086, 1121 (1998) (concluding that Justice Black and Justice Harlan’s views of substantive due process are “wholly incompatible logics” that “now struggle within this doctrine” and create “a tension that is becoming increasingly insistent” on Supreme Court intervention).

¹¹⁴ See Layla Summers, *The Future of the Abortion Right: Ayotte v. Planned Parenthood & The Roberts Court*, 5 Whittier J. Child & Fam. Advoc. 669, 688 (2006) (“History has shown that the right to abortion is one that evolves given the composition of the Court, and thus, new appointments are crucially important to the future and development of the right [to abortion]”); see also *Casey*, 505 U.S. at 943 (recognizing that the decision in *Casey* depended on “but a single vote” that may change when the issue of abortion is again brought before the Court subsequent Justice Blackmun stepping down) (Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting in part); *id.* at 843 (recognizing that the “definition of liberty is still questioned” two decades after *Roe*) (joint opinion).

¹¹⁵ 18 Pa. Cons. Stat. §§ 3203-3220 (1990).

the Third Circuit, with then-Judge Alito dissenting, affirmed in part and reversed in part. On certiorari, the Supreme Court affirmed in part, reversed in part, and remanded.

Casey's "elaborate" analysis of *stare decisis*¹¹⁶ served to justify the preservation of the "central holding of *Roe*,"¹¹⁷ but it nevertheless offered an intriguing historical dialogue on the source of substantive due process. Interestingly, the joint opinion began by acknowledging that the "most familiar of the substantive liberties protected by the Fourteenth Amendment are those recognized by the Bill of Rights" and conceding that a temptation exists, as a means of curbing "discretion of federal judges, to suppose that liberty encompasses no more than those rights already guaranteed ... by the first eight Amendments to the Constitution."¹¹⁸ However, the joint opinion reaffirmed that the Supreme Court has "never accepted that view." On the contrary, it cited to a number of circumstances in which arbitrary state legislation was correctly invalidated as violative of a substantive, fundamental right despite finding no source in the text of the Constitution.¹¹⁹ According to the joint opinion, the Bill of Rights does not "mark[] the outer limits of the substantive sphere of liberty which the Fourteenth Amendment protects."¹²⁰

The joint opinion firmly rejected the principles set forth by Justice Black in *Adamson*, but it fell short of the eloquent and well-expressed approach of Justice Harlan in *Poe*. While it cited *Poe* with liberality, it did not generate the certainty and stability associated with a sound common law conclusion. Instead, the joint opinion reaffirmed *Roe*'s collection of isolated cases of a "deep, personal character,"¹²¹ and prematurely concluded, reminiscent of *Allgeyer*, that "the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe,

¹¹⁶ *TRIBE*, *supra* note 84, at 1322.

¹¹⁷ *Casey*, 505 U.S. at 853.

¹¹⁸ *Id.* at 843 (citing *Adamson*, 332 U.S. at 68-92 (1947) (Black, J., dissenting)).

¹¹⁹ *Id.* at 847-48 (citing *Loving v. Virginia*, 388 U.S. 1, 12 (1967); *Turner v. Safley*, 482 U.S. 78, 94-99 (1987); *Carey v. Population Services International*, 431 U.S. 678, 684-86 (1977)).

¹²⁰ *Id.* at 848 (citing U.S. CONST. AMEND. IX).

and of the mystery of human life.”¹²² This deduction did not “pay respect to detail, seeking to understand old principles afresh by new examples and new counterexamples.”¹²³ By most accounts, a reading of those cases does not clearly endorse “an all-encompassing ‘right to privacy.’”¹²⁴

Casey’s “ultimately cryptic”¹²⁵ holding represented a squandered opportunity to clarify substantive due process doctrine and it marked the beginning of the Rehnquist Court’s split-the-difference jurisprudence. Rather than acknowledging the superior pedigree of Justice Black’s total incorporation doctrine and thus approach fundamental rights in an all-or-nothing manner, or at minimum, faithfully adopting the calculated and cautious (albeit flawed) balancing test of Justice Harlan, the Supreme Court, in a “sadly ironic” reduced “certainty and predictability”¹²⁶ by attempting to split-the-difference in reasoning (not to mention split-the-difference in the national political debate), by adopting the now infamous “undue burden” standard for abortion regulations.¹²⁷ Following *Casey*, abortion was still considered in some respects to be a “fundamental right,” but it was capable of regulation repugnant to other recognized rights such

¹²¹ *Id.* at 853.

¹²² *Id.* at 851.

¹²³ *Glucksberg*, 521 U.S. at 770 (Souter, J., concurring in the judgment). *But see* Wilkinson, *supra* note 1, at 1988 (stating that *Roe* was the “culmination of earlier minimalist steps”) (citing LINDA GREENHOUSE, *BECOMING JUSTICE BLACKMUN: HARRY BLACKMUN’S SUPREME COURT JOURNEY* 72-101 (Henry Holt & Co. 2005))

¹²⁴ *Casey*, 505 U.S. at 951 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part). *But see Casey*, 505 U.S. at 940 (arguing that the Court’s “personal liberty cases” have created more than merely a “laundry list of particular rights”) (Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting in part).

¹²⁵ Erin Daly, *The New Liberty*, 11 *Widener L. Rev.* 221, 232 (2005).

¹²⁶ *Id.* at 233.

¹²⁷ *Casey*, 505 U.S. at 877.

as freedom of expression or free exercise of religion. This result momentarily quelled outrage on both sides of the political debate while simultaneously satisfying neither.¹²⁸

In the years following *Casey*, the justices' escalating and much observed willingness to write separately (sometimes to express disagreement with reasoning that would otherwise appear minor), resulted in constitutional law "becoming an aggregation of nine idiosyncratic theories and nine bodies of personal precedent [t]o a degree that would have shocked the Founders...."¹²⁹ As a result of this declining consensus on the Court, the attraction of split-the-difference jurisprudence further increased. Now, with Justice Kennedy firmly situated as the Supreme Court's swing vote, a major challenge to the Roberts Court will be to find common ground among strongly competing judicial philosophies.

III. THE ROBERTS COURT

A. Justice Antonin G. Scalia

¹²⁸ In effect, *Casey* made certain that regardless of the analytic framework, unenumerated fundamental rights under the pretext of substantive due process were in no immediate danger of abolition. They are, so to speak, prescriptive easements over the text of the Fourteenth Amendment. See Robert Bork, *Enforcing a "Mood,"* The New Criterion, at www.newcriterion.com/archives/24/02/enforcing-mood/ (last visited June 29, 2006). While most civic-minded citizens cannot even identify sitting Supreme Court justices, they are acutely aware of their "right to abortion" or their "right to free speech." Jimmy Moore, *Poll: Six Out of Ten Americans Cannot Identify Any Cabinet Departments*, Hawaii Reporter (November 7, 2003), available at <http://www.hawaiireporter.com/story.aspx?8f3483a2-8c8b-4ae5-97c8-7c3b7b646f39> (last visited June 29, 2006). Recognizing this fact, during the confirmation hearing of Justice Alito, Judiciary Committee Chairman Arlen Specter curiously asked whether "the right to abortion" is "super-precedent." Robert F. Nagel, *Bowing to Precedent*, The Weekly Standard (April 17, 2006), available at http://www.weeklystandard.com/Utilities/printer_preview.asp?idArticle=12083&R=ECC7422 (last visited June 29, 2006). Although Justice Alito coyly responded by stating that such terminology "reminded him 'of the size of the laundry detergent in the supermarket,'" the exchange was a testament to enduring influence of fundamental rights. *Id.*

¹²⁹ Nelson Lund & Craig S. Lerner, *Precedent Bound?*, National Review Online (March 6, 2006), at http://www.nationalreview.com/comment/lund_lerner200603060828.asp (last visited June 29, 2006).

Recent scholarship has suggested that close parallels can be drawn between the jurisprudence of Justice Black and Justice Scalia.¹³⁰ While this scholarship has, perhaps, raised the interesting premise that a staunch supporter of President Roosevelt's New Deal legislation¹³¹ and a socially and religiously conservative Republican¹³² can share similar judicial philosophies, it does not translate well into a discussion of substantive due process doctrine. Although both justices share a strong preference for textualism and originalism, Justice Black took a more principled approach to the recognition of unenumerated fundamental rights. As evident from his dissent in *Griswold*, Justice Black never split-the-difference in reasoning or conceded to Justice Harlan and his fluid mechanism for invalidating social regulation.

Justice Scalia is known for rabble-rousing comments on the legitimacy of substantive due process,¹³³ but he is not an absolutist.¹³⁴ On the contrary, since his controversial plurality opinion in *Michael H. v. Gerald D.*, Justice Scalia has settled into a position, which substantially restricts, but does not abolish, substantive rights guaranteed by the Due Process Clause. In *Michael H.*, a man whose blood tests indicated there was a 98.07% probability of paternity challenged a California statute that presumed that a child born to a married woman living with her husband is a child of the marriage.¹³⁵ The mother of the child lived with another man who

¹³⁰ See, e.g., Akil Reed Amar, *Rethinking Originalism*, SLATE (September 21, 2005), at <http://www.slate.com/id/2126680/> (last visited August 3, 2006); Michael J. Gerhardt, *A Tale of Two Textualists: A Critical Comparison of Justices Black and Scalia*, 74 B.U. L. Rev. 25 (1994).

¹³¹ STONE, *supra* note 78 at lvii.

¹³² TUSHNET, *supra* note 5, at 204 (describing Justice Scalia has a “devout Catholic” who “opposed abortion on moral grounds” because he “believed that abortion were indeed murders”).

¹³³ See *Albright v. Oliver*, 510 U.S. 266, 275 (1994) (rejecting the “proposition that the Due Process Clause guarantees certain (unspecified) liberties, rather than merely guarantees certain procedures as a prerequisite to deprivation of liberty”).

¹³⁴ See *Albright*, 510 U.S. at 275 (rejecting “the proposition that the Due Process Clause guarantees certain (unspecified) liberties,” but nevertheless conceding that he has acknowledged the doctrine of substantive due process) (citing *Michael H. v. Gerald D.*, 491 U.S. 110 (1989) (plurality opinion of Justice Scalia)) (Scalia, J., concurring).

¹³⁵ 1981 Cal. Stats., ch. 1180, p. 4761 § 621.

was presumed to be the father under the statute. Writing for a plurality of the Court, Justice Scalia engaged in a two pronged analysis to determine whether the statute violated the plaintiff's substantive due process rights. First, Justice Scalia framed the issue in narrow terms: "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."¹³⁶ Second, Justice Scalia engaged in a historical analysis to determine whether the plaintiff's liberty interest, as defined by Justice Scalia, has been traditionally protected at common law.¹³⁷ Given the exceedingly narrow level of generality used to frame the issue, the Court concluded that the interests at hand did not warrant protection as a fundamental right, and therefore, were subject to "the ordinary 'rational relationship' test."¹³⁸

Fundamentally, Justice Scalia's justification for implementing his methodology is to avoid arbitrary decisionmaking¹³⁹ and limit the discretion of judges so as to conform to, as he views it, the designed role of the judiciary.¹⁴⁰ Quoting a famous dissent of Justice Byron R. White, he stated:

That the Court has ample precedent for the creation of new constitutional rights should not lead it to repeat the process at will. The Judiciary, including this 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. Realizing that the present construction of the Due Process Clause represents a major judicial gloss on its terms, as well as on the anticipation of the Framers . . . , the Court should be extremely reluctant to

¹³⁶ *Michael H.*, 491 U.S. at 124.

¹³⁷ *Id.* at 124-27.

¹³⁸ *Id.* at 131.

¹³⁹ *Id.* at 127 n. 6.

¹⁴⁰ *See Roper v. Simmons*, 543 U.S. 551, 616 (2005) (stating that "[t]he reason for insistence on legislative primacy is obvious and fundamental: '[I]n a democratic society legislatures, not courts, are constituted to respond to the will and consequently the moral values of the people'") (quoting *Gregg v. Georgia*, 428 U.S. 153, 175-176 (1976) (joint opinion of Stewart, Powell, and Stevens, JJ.) (internal quotations omitted)) (Scalia, J., dissenting); *see also Michael H.*, 491 U.S. at 127 n. 6 (reasoning that a broad level of generality permits judges to "dictate rather than discern society's views").

breathe still further substantive content into the Due Process Clause so as to strike down legislation adopted by a State or city to promote its welfare. Whenever the Judiciary does so, it unavoidably pre-empts for itself another part of the governance of the country without express constitutional authority.¹⁴¹

In light of these warnings, Justice Scalia devised his two-pronged analysis. By narrowly framing the issue, a significant avenue of judicial manipulation and results oriented jurisprudence was eliminated. No longer could judges devise their own question-begging level of generality for framing the issue, which would inevitably result in the desired outcome.¹⁴² Moreover, by grounding the discovery of substantive due process rights in history and tradition, there was little danger that this undemocratic process would proceed too quickly.¹⁴³

To Justice Scalia's critics, the difficulties with this methodology are obvious. Sharply dissenting in *Michael H.*, Justice William J. Brennan, Jr. disagreed with the decision to utilize a narrow level of generality in framing the issue or to rely upon history and tradition unrepentantly. Rather than disputing the dangers of arbitrary decisionmaking, Justice Brennan warned his colleagues not to be "seduced" by Justice Scalia's claims of objectivity because what traditions are "deeply rooted" is "arguable;"¹⁴⁴ and cautioned against the danger of defining the scope of liberty so narrow that it would "[t]ransform[] the protection afforded by the Due Process Clause into a redundancy [that] mocks those who, with care and purpose, wrote the Fourteenth Amendment."¹⁴⁵ While these criticisms did little to impact the jurisprudence of Justice Scalia, they have, in conjunction with the writings of Justice Harlan, served as a powerful

¹⁴¹ *Michael H.*, 491 U.S. at 121 (quoting *Moore v. East Cleveland*, 431 U.S. 494, 544 (1977) (White, J., dissenting)) (plurality).

¹⁴² See *Michael H.*, 491 U.S. 127 n. 6 (concluding that a narrow level of generality binds judges to the rule of law rather than what "they think best when the unanticipated occurs").

¹⁴³ See generally *id.* at 126-27.

¹⁴⁴ *Id.* at 137-38 (Brennan, J., dissenting).

¹⁴⁵ *Id.* at 141 (Brennan, J., dissenting).

influence on those members of the Court seeking to split-the-difference between the conservative reasoning of Justice Scalia and a more liberal reading of the Due Process Clause.

B. Justice David M. Souter

Justice Souter's approach to substantive due process can be aptly characterized as antagonistic to Justice Scalia's. Instead of heading warnings over unfettered judicial discretion and the unwarranted expansion of Fourteenth Amendment jurisprudence, Justice Souter has sought to liberalize the doctrine by instituting an approach, which mimics in part Justice Harlan's in *Poe v. Ulman*.¹⁴⁶ Justice Souter regards Justice Harlan's dissent in *Poe* as the modern source of the second coming of substantive due process,¹⁴⁷ and distinguishes himself in only respect. While Justice Harlan appeared to present his dissent in *Poe* as an approach that applied equally in force to both executive and legislative action, Justice Souter believes that the "criteria to identify what is fatally arbitrary differ depending on whether it is legislation or a specific act of a governmental officer."¹⁴⁸

In *County of Sacramento v. Lewis*, parents of a motorcycle passenger killed in a high-speed police chase sued alleging deprivation of their son's substantive due process right to life.¹⁴⁹ The District Court granted summary judgment,¹⁵⁰ but the Ninth Circuit reversed, reasoning that a genuine issue of material fact existed as to whether the police officers were deliberate indifferent in pursuing the deceased and the driver of the motorcycle.¹⁵¹ The Supreme

¹⁴⁶ Although Justice Souter has sought to liberalize doctrine he has nevertheless at times used caution by refusing to implement his approach. *See, e.g., Troxel v. Granville*, 530 U.S. 57, 62-79 (2000) (stating that the issues presented could have been addressed by interpreting the state statute at issue rather than "turning any fresh furrows in the 'treacherous field' of substantive due process") (quoting *Moore*, 431 U.S. at 502 (Powell, J.)) (Souter, J., concurring in the judgment).

¹⁴⁷ *Glucksberg*, 521 U.S. at 762-63.

¹⁴⁸ *Lewis*, 523 U.S. at 846.

¹⁴⁹ *Id.* at 836-37.

¹⁵⁰ *Id.* at 837-38.

¹⁵¹ *Id.* at 839.

Court granted certiorari to address the Ninth Circuit’s “deliberate indifference” standard and resolve the conflict between the Circuits over the standard of culpability required to find a violation of substantive due process in the context of a police pursuit.¹⁵² Writing for a majority of the Court, Justice Souter determined that the police officers’ conduct did not constitutionally “shock the conscience.”¹⁵³ A higher degree of culpability was required because liability in circumstances such as this must turn on the good faith effort of the police officers.¹⁵⁴

The centerpiece of Justice Souter’s executive action-substantive due process doctrine is *Rochin v. California* and its invocation of the “shocks the conscience” standard. By its very terms, the test connotes a significant level of discretion and flexibility, which is designed to protect against executive action that is perceived to be arbitrary under the circumstances. As Justice Souter noted, substantive due process

formulates a concept less rigid and more fluid than those envisaged in other specific and particular provisions of the Bill of Rights. Its application is less a matter of rule. Asserted denial is to be tested by an appraisal of the totality of facts in a given case. That which may, in one setting, constitute a denial of fundamental fairness, shocking to the universal sense of justice, may, in other circumstances, and in the light of other considerations, fall short of such denial.¹⁵⁵

Thus, by way of example, a police chase that results in the death of a suspect, such as in *Lewis*, may not shock the conscious, but the egregious and unnecessary forced pumping of a suspect’s stomach to recover evidence of drug possession would satisfy the standard.¹⁵⁶

Justice Souter recognizes the significant limitations of the shock-the-conscience standard,¹⁵⁷ but nevertheless invokes it in the context of executive action in the belief that its

¹⁵² *Id.*

¹⁵³ *Id.* at 855.

¹⁵⁴ *Id.* at 852-53.

¹⁵⁵ *Id.* at 850 (quoting *Betts v. Brady*, 316 U.S. 455, 462 (1942)).

¹⁵⁶ *See id.* at 846-47 (discussing *Rochin*).

flexibility will prevent the Fourteenth Amendment from becoming a “font of tort law to be superimposed upon whatever systems may already be administered by the States[.]”¹⁵⁸ By avoiding any duplication of traditional common-law fault, greater care is made to avoid liability simply because a person is “cloaked with state authority.”¹⁵⁹ Or, as Justice Souter explained, “executive action challenges raise a particular need to preserve the constitutional proportions of constitutional claims.”¹⁶⁰ Consequently, by Justice Souter’s measure, substantive due process protection will only be afforded when state actors engage in behavior that is so egregious that it “violates the ‘decencies of civilized conduct.’”¹⁶¹

Despite Justice Souter willingness establish a high burden under the pretext of a “shocks-the-conscience” standard, Justice Scalia denounced *Lewis*’ fluid and imprecise methodology as well as its legislative-executive distinction. As to its methodology, Justice Scalia first pointed out that it is an apparent departure from the recent precedent, *Washington v. Glucksberg*, a case that adopted a derivative of the two-pronged test set forth in the plurality opinion in *Michael H.*¹⁶²

¹⁵⁷ See *id.* at 847 (“While the measure of what is conscious shocking is no calibrated yard stick, it does, as Judge Friendly put it, ‘point the way’”) (quoting *Johnson v. Glick*, 481 F.2d 1028, 1033 (2d Cir.), *cert. denied*, 414 U.S. 1033 (1973)).

¹⁵⁸ *Id.* at 848 (quoting *Paul v. Davis*, 424 U.S. 693, 701 (1976)) (internal quotations omitted).

¹⁵⁹ *Id.*

¹⁶⁰ *Id.* at 847 n. 8.

¹⁶¹ *Id.* at 846 (quoting *Rochin*, 342 U.S. at 172-73).

¹⁶² In *Glucksberg*, terminally ill patients challenged a Washington state statute banning the practice of assisted suicide. Writing for a majority of the Court, Chief Justice Rehnquist concluded that recognition of a substantive due process right required (1) a determination of whether the right had been “objectively, ‘deeply rooted in this Nation’s history and tradition’” and (2) a “careful description” of the asserted right. 521 U.S. at 720-21 (citation omitted). This two-pronged approach mirrors the method adopted by Justice Scalia in *Michael H.*, with the exception of the specificity required to frame the issue. See generally Basiak, *supra* note 74, at 418-418 n.109.

In other words, *Michael H.*, by all appearances, features a narrower level of generality used to characterize the potential fundamental right.

Today's opinion gives the lie to those cynics who claim that changes in this Court's jurisprudence are attributable to changes in the Court's membership. It proves that the changes are attributable to nothing but the passage of time (not much time, at that), plus application of the ancient maxim, "That was then, is now."¹⁶³

But more importantly, Justice Scalia also brashly questioned how courts could determine whether executive action shocked the conscience: "Adhering to our decision in *Glucksberg*, rather than ask whether the police conduct here at issue shocks my unelected conscious, I would ask whether our Nation has traditionally protected the right respondents assert."¹⁶⁴ His concern, as made evident from previous substantive due process cases, was how courts could appropriately limit themselves to their designed constitutional role: "In allocating such risks, the people of California and their elected representatives may vote their consciences. But for judges to overrule that democratically adopted policy judgment on the ground that it shocks *their* consciences is not judicial review but judicial governance."¹⁶⁵ Although Justice Scalia's reasoning failed command a majority in *Lewis*, these concerns did not fall silent on Chief Justice Rehnquist or, more importantly, Justice Kennedy. In words that would eventually prove ironic, by Justice Kennedy's assessment, the "shocks-the-conscience" test carries with it an "unfortunate connotation" because it is "standard laden with subjective assessments;"¹⁶⁶ it splits-the-difference in reasoning by failing to adopt an approach capable of universal application. Thus, according to Justice Kennedy, it should be viewed "with considerable skepticism."¹⁶⁷

¹⁶³ *Id.* at 860.

¹⁶⁴ *Id.* at 862.

¹⁶⁵ *Id.* at 865 (emphasis in original).

¹⁶⁶ *Id.* at 857 (Kennedy, J., concurring).

¹⁶⁷ *Id.* This skepticism has proved to be warranted because many lower courts have had difficulty in interpreting *Lewis*' shock-the-conscience standard. Robert Chesney, *Old Wine or New? The Shocks-the-Conscience Standard and the Distinction Between Legislative and Executive Action*, 50 Syracuse L. Rev. 981, 1000 (2000) (citing *Khan v. Gallitano*, 180 F.3d 829, 836 (7th Cir. 1999); *Singleton v. Cicil*, 176 F.3d 419, 425 n. 7 (8th Cir. 1999) (en banc); *Payne v.*

C. Justice Clarence Thomas

Although Justice Scalia is often credited with being the Supreme Court's recognized conservative, Justice Clarence Thomas has quietly distinguished himself from his more well-known colleague with a "profound and far-reaching jurisprudence."¹⁶⁸ Unlike Chief Justice Rehnquist, who eventually succumb to the seductive qualities of split-the-difference jurisprudence, or Justice Scalia, who, just recently and surprisingly accepted an expansive interpretation of the Commerce Clause and Necessary and Proper Clause,¹⁶⁹ Justice Thomas has rejected any evolution in his constitutional jurisprudence. His exceedingly conservative (some would even say "bizarre") positions make him a unique and often the sole dissenter on the Court,¹⁷⁰ but they also demonstrate that Justice Thomas is arguably the most process-oriented, intellectually consistent justice. Many members of the Supreme Court, past and present, have compromised doctrine in favor of results-oriented, split-the-difference jurisprudence. Justice Thomas has compromised little since joining the Court and, like Justice Black before him, appears willing to defend doctrine over any result.¹⁷¹

Churchich, 161 F.3d 1030, 1040 (7th Cir. 1998); *Tonkovich v. Kansas Bd. of Regents*, 159 F.3d 504, 529 (10th Cir. 1998); *Armstrong v. Squadrito*, 152 F.3d 564, 571 (7th Cir. 1998)).

¹⁶⁸ John C. Eastman, *Taking Justice Thomas Seriously*, 2 Green Bag 2d 425, 426 (1999). "Thomas' 'classical liberal' originalism differs in significant respects from Borkean conservative originalism often attributed to Chief Justice William Rehnquist and Justice Antonin Scalia (not to mention Robert Bork himself). It is a jurisprudence ... that seeks to uncover (and recover) the original principles rather than merely the original practice of the Founders. And it is a jurisprudence rooted in the self-evident truths of human nature and the inalienable rights derived from that nature, as articulated in the Declaration of Independence." *Id.*

¹⁶⁹ See *Raich v. Ashcroft*,

¹⁷⁰ Eastman, *supra* note 168, at 426; see also TUSHNET, *supra* note 6, at 86 (stating that Justice Thomas will more often "los[e] a Court" because of strong opinions, which draw sharp lines).

¹⁷¹ See *United States v. New York Times*, 403 U.S. 713, 714-15 (1971) (stating that "every moment's continuance" of the injunctions against newspapers, which were poised to divulge classified intelligence, amounted to a "flagrant, indefensible, and continuing violation of the First Amendment") (Black, J., concurring); *Konigsberg v. State Bar of California*, 366 U.S. 36, 60-61 (1961) (Black, J., dissenting) (rejecting any balancing approach to the First Amendment under the belief that the men who drafted the Bill of Rights "did all the 'balancing' that was to be done

Given Justice Thomas' uncompromising approach, it is no surprise that he has not authored a single seminal substantive due process case since his tenure on the Court. After all, far too commonly, decisions on substantive due process, and especially enumerated fundamental rights, are the product of negotiation and political posturing. One need only look to the joint opinion in *Casey* and its so-called undue burden test to reach this conclusion. As Justice Thomas noted in *Stenberg v. Carhart*, the "*Casey* joint opinion was constructed by its authors out of whole cloth. The standard is a product of its authors' own philosophical views about abortion, and it should go without saying that it has no origins in or relationship to the Constitution and is, consequently, as illegitimate as the standard it purported to replace."¹⁷² Since *Casey*, Justice Thomas has continued to plainly and concisely refute majority positions on substantive due process and offer intriguing insight into his desire to shift substantive due process into a framework that may serve as a more appropriate historical basis for unenumerated fundamental rights.

The simplicity of Justice Thomas' approach to constitutional law is exemplified in the dissent of *Lawrence v. Texas*.¹⁷³ In *Lawrence*, the Supreme Court reversed Texas criminal court rulings affirming the convictions of two men for "deviate sexual intercourse with another individual of the same sex."¹⁷⁴ Writing for a six-three majority of the Court, Justice Kennedy overturned the defendants' convictions by determining that the term "liberty" under the Due

in this field"); Gerhardt, at 26. Justice Thomas' most controversial opinion in this regard is no doubt *Hudson v. McMillian*, 503 U.S. 1 (1992), where he argued in dissent that prisoners beaten by guards have no cause of action under the Eight Amendment because the conduct, while tortious, did not constitute "punishment" for the purposes of the "cruel and unusual punishment" clause. *Id.* at 17-30.

¹⁷² *Stenberg*, 530 U.S. at 982 (Thomas, J., dissenting).

¹⁷³ *Lawrence v. Texas*, 123 S. Ct. 2472 (2003).

¹⁷⁴ Tex. Penal Code Ann. § 21.06(a) (Vernon 2003). "Deviate sexual intercourse" is defined as "any contact between any part of the genitals of one person and the mouth or anus of another

Process Clause of the Fourteenth Amendment “presumes an autonomy of the self that includes freedom of thought, belief, expression, and certain intimate conduct.”¹⁷⁵ The Texas criminal statute could not withstand scrutiny because the conduct at issue “involve[d] liberty of the person both in its spatial and more transcendent dimensions.”¹⁷⁶ In dissent, Justice Thomas recognized the majority’s frustration with Texas’ misguided and ill-advised attempts to legislate harmless, private and consensual adult, sexual activity, but disagreed with their decision overstep their limited judicial function and question the wisdom of the legislation. Invoking the words of Justice Stewart in *Griswold*, he acknowledged that legislation punishing a person for his expressing his sexual preference through harmless, consensual sexual conduct was “uncommonly silly.”¹⁷⁷ Nevertheless, Justice Thomas explained in a manner reminiscent of Justice Black, that, as a member of the Supreme Court, he was “not empowered to help [the] petitioners” because his “duty ... is to ‘decide cases agreeable to the Constitution and laws of the United States.’”¹⁷⁸ A “general right of privacy,” or as the Court termed it in *Lawrence*, “the ‘liberty of the person both in its spatial and more transcendent dimensions,’” could not be found by Justice Thomas in the Constitution.¹⁷⁹

Despite a firm rejection of the doctrine of substantive due process and Justice Kennedy’s broad and imprecise language, Justice Thomas has not discounted the possibility that unenumerated fundamental rights can be discovered from the text of the Constitution. Some well-known originalists such as Judge Robert H. Bork reject enumerated rights outright and read

person; or ... the penetration of the genitals or the anus of another person with an object.” *Id.* at § 21.01(1).

¹⁷⁵ *Lawrence*, 539 U.S. at 562.

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ *Lawrence*, 123 S. Ct. at 2498 (quoting *Griswold*, 381 U.S. at 527 (Stewart, J., dissenting)) (Thomas, J., dissenting) (some internal quotations omitted).

¹⁷⁹ *Id.*

open-ended clauses of the Constitution to be superfluous,¹⁸⁰ but Justice Thomas has never taken such an affirmative stance. Instead, he has indicated a clear preference for making any such determinations within the framework of the Privileges and Immunities Clause, which, as noted, has been effectively read out of the Constitution as a result of the *Slaughter House Cases*.

In *Troxel v. Granville*, grandparents petitioned the Washington Superior Court for the right to visit their grandchildren. After the grandchildren's motion opposed any visitation, the Washington Superior Court entered a visitation order. When the Washington Supreme Court reversed the visitation order, the United States Supreme Court granted certiorari and affirmed. A plurality of the Court determined that a Washington statute granting grandparents certain visitation rights violated the mother's substantive due process right to child-rearing. Concurring in the judgment, Justice Thomas expressed no opinion on the substantive due process issue or whether the Due Process Clause's original understanding included unenumerated fundamental rights.¹⁸¹ However, intriguingly, in a footnote he also stated that the case did not involve a challenge to the Washington statute based on the Privileges and Immunities Clause. Therefore, the opportunity to "reevaluate the meaning of that Clause" remained available for a future case.¹⁸²

Justice Thomas' eagerness to reevaluate the meaning of the Privileges and Immunities Clause is motivated by his belief that the Clause's demise has led "in no small part to the current disarray of our Fourteenth Amendment jurisprudence."¹⁸³ Only when substantive due process is abolished can the Court, according to Justice Thomas, determine whether unenumerated rights,

¹⁸⁰ Judge Bork famously referred to the Ninth Amendment as an "inkblot," because its meaning is irretrievable due to its indefinite language. See Randy Barnett, *A Ninth Amendment for Today's Constitution*, 26 Valparaiso Un. L. Rev. 419, 419 (1991) (citing Judge Bork's confirmation hearing before the Senate).

¹⁸¹ *Troxel*, 530 U.S. at 80.

¹⁸² *Id.* at 80 n. 1 (citing *Saenz v. Roe*, 526 U.S. 489, 527-28 (1999) (Thomas, J., dissenting)).

such as “the right to privacy,” can be discovered in the Constitution. It is clear, however, that even with the rebirth of the Privileges and Immunities Clause, Justice Thomas would not introduce “yet another convenient tool for invention new rights, limited solely by the ‘predilections of those who happen at the time to be Members of this Court.’”¹⁸⁴ Thus, even if the Court were to ground unenumerated rights in the Privileges and Immunities Clause rather than the Due Process Clause, it is unlikely that Justice Thomas would recognized the legitimacy of *Roe* and its privacy-based progeny, or split-the-difference in result by recognizing their precedential force.

D. Justice Stephen G. Breyer

In 2005, Justice Stephen G. Breyer published a book entitled *Active Liberty: Interpreting Our Democratic Constitution*.¹⁸⁵ It was a monumental occasion in the legal world because it is rare that a sitting Supreme Court justice presents a formal account of his jurisprudence. Unfortunately, despite its promise as a long-awaited liberal response to originalism, and its potential to offer the first detailed presentation of “non-originalism” jurisprudence,¹⁸⁶ *Active Liberty* does not, in the words of Judge Bork, “qualify as a major intellectual event.”¹⁸⁷ Rather than offering a formal, unifying method for constitutional and statutory interpretation, Justice Breyer, as typical with other non-originalists, merely offers counterarguments to originalism and presents ad-hoc rationales for difficult, divisive cases. While he acknowledges the benefits of a

¹⁸³ *Saenz*, 526 U.S. at 527-28 (Thomas, J., dissenting).

¹⁸⁴ *Id.* at 528 (Thomas, J., dissenting) (citing *Moore v. East Cleveland*, 431 U.S. 494, 502 (1977)).

¹⁸⁵ STEPHEN BREYER, *ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION* (Alfred A. Knopf 2005).

¹⁸⁶ *Active Liberty* was intended to refute the arguments raised by Justice Scalia in his book *A Matter of Interpretation*. Nina Totenburg, *Justice Breyer: The Case Against "Originalists"*, National Public Radio (September 29, 2005), available at <http://www.npr.org/templates/story/story.php?storyId=4930456> (last visited August 27, 2006).

¹⁸⁷ Bork, *supra* note 128, at www.newcriterion.com/archives/24/02/enforcing-mood/.

judge's customary methods for interpretation, i.e. language, history, tradition, precedent, purpose and consequences, he conveniently abstains from any fixed labels.¹⁸⁸

Despite Justice Breyer's failure to provide a unifying theory that would bind the judiciary to their designed institutional role, *Active Liberty* is unique in one respect: it expounds a "theme." To Justice Breyer, judges should interpret the Constitution in a manner that promotes "a government in which all citizens share and participate in the creation of public policy."¹⁸⁹ What this means, however, despite a "balanced and dispassionate tone,"¹⁹⁰ is that Justice Breyer promotes a radical idea: judges should maintain the freedom to utilize balancing tests in all areas of constitutional law (not just in areas that textually justify balancing, i.e., the Fourth Amendment or procedural due process), that fail provide lower courts with guiding principles or remove the perception that the constitution is interpreted in light of a judge's personal predilections.

The most striking example of *Active Liberty*'s shortcomings occurred in the 2004-2005 Supreme Court term. As noted in both *Van Order v. Perry* and *McCreary County v. ACLU*, the Court was confronted with the public display of the Ten Commandments on government property. Despite the similarity of these facts, Justice Breyer alone found a constitutional distinction between the cases. In justifying this result, Justice Breyer emphasized that "no single mechanical formula"¹⁹¹ or universal jurisprudence could "substitute for the exercise of legal judgment."¹⁹² Rather than limiting his institutional role by seeking cautious, but consistent guidance from a universal approach to interpreting the Constitution, Justice Breyer reserved the

¹⁸⁸ See BREYER, *supra* note 185, at 117.

¹⁸⁹ *Id.* at 15-16.

¹⁹⁰ Kathleen M. Sullivan, *Consent of the Governed*, NEW YORK TIMES (February 5, 2006), at <http://www.nytimes.com/2006/02/05/books/review/05sullivan.html?ex=1154145600&en=6025b1efcd0c4289&ei=5070> (last visited July 27, 2006).

¹⁹¹ *Van Order*, 125 S. Ct. at 2868.

right to merely bind himself to his notion of active liberty and find unconstitutional a display, which, in his opinion, limits a religious minorities and non-Christians from participating in democratic government. Not surprisingly, this decision dumbfounded many legal commentators and was questioned by those seeking guidance and clarity in Establishment Clause jurisprudence, which had unfortunately become convoluted and overly complex.

Given the flexibility of active liberty and its capability of expounding result-splitting jurisprudence, it is surprising that Justice Breyer has had few opportunities to express views on substantive due process doctrine.¹⁹³ Nevertheless, based on past practices, it can be predicted with little difficulty how Justice Breyer will vote in future cases.¹⁹⁴ The more interesting issue is the apparent contradiction between support for substantive due process and active liberty. Substantive due process, by definition, is antidemocratic because it ascends certain rights beyond the review of the political majority. Active liberty, by contrast, requires interpretation of the Constitution in a manner that promotes democratic participation. If, by example, Justice Breyer continues to uphold the undue burden standard and preserve a weakened right to abortion, he will be removing the most politically divisive and emotionally charged issue in American politics from the political debate and forbidding citizens from participating in a democratic discussion on how best to reconcile their differences. How can these two principles be reconciled? According to Justice Breyer, a component to consider within the concept of active liberty is the concern for “dramatic legal change.”¹⁹⁵ Thus, when abortion is the issue, Justice Breyer preserves the undue burden standard under the pretense that he can maneuver the competing interests so as to create the least controversial or destabilizing effect. Neither the legitimacy of the undue burden

¹⁹² *Id.* at 2869.

¹⁹³ Nor does Justice Breyer address substantive due process in *Active Liberty*.

¹⁹⁴ In *Stenberg v. Carhart*, 530 U.S. 914 (2000) Justice Breyer invalidated an abortion regulation by applying Justice O’Connor’s undue burden test. *Id.* at 920.

standard, the expansion of judicial authority, nor the lack of jurisprudential guidance to lower courts is of major concern.¹⁹⁶

Criticism of *Active Liberty* is not to say that the promotion of citizens' democratic participation in government is not an important goal – it is. The difficulty with *Active Liberty* is that it seeks to accomplish its goal through “interpretation” of the Constitution, which by most accounts, must be done within the designed framework of the Constitution. Regardless of the importance of active liberty or its apprehension for dramatic legal change, the judiciary cannot simply rewrite or update constitutional principles for the modern, pragmatic world when it must remain confined to a much more narrow institutional function. Therefore, in the event Justice Breyer explicitly elaborates on active liberty in a future substantive due process case, it is likely the justices will write separately seeking to avoid broad pronouncements on the increased role for the Supreme Court in promoting democratic participation in government. His difference-splitting results, however, will continue to gain favor unless a more attractive, minimalist approach can be promoted.

E. Justice Anthony M. Kennedy

Criticizing Justice Kennedy for his split-the-difference jurisprudence is, unfortunately, nothing new. As Supreme Court commentator Dahlia Lithwick recently observed, “Kennedy’s inability to find certain, easy answers and his tendency to hold grandiose hopes for the law are fodder for his detractors. This is the Kennedy of *Casey*, and *Lawrence*, and *Rapanos*, and it’s the Kennedy that plows up fields of constitutional law and sows of confusion and inscrutable

¹⁹⁵ BREYER, *supra* note 185, at 119.

¹⁹⁶ *Id.* at 116-18 (explaining how a jurisprudence need not set forth legal conclusions in terms of rules that will guide other institutions, including lower courts”).

grandeur in their place.”¹⁹⁷ Given the monumental responsibility imputed on Justice Kennedy as a result of his transformation as the Court’s “swing vote,” it is important to scrutinize his decisions and evaluate whether his reasoning is fundamentally based upon the text, structure and history of the Constitution. Although some attacks on him are regrettably personal or verbose in nature (James Dobson famously called him “the most dangerous man in America”),¹⁹⁸ much of the legal and academic commentary is appropriate.

In the area of substantive due process doctrine, Justice Kennedy’s most recognized pronouncement occurred in *Lawrence*. As noted, *Lawrence* involved a challenge to a Texas criminal sodomy statute,¹⁹⁹ which was invalidated by the Supreme Court in a 6-3 decision.²⁰⁰ Writing for the majority, Justice Kennedy utilized dramatic language designed to broadly characterize the liberty interest at stake and emphasize individual dignity and autonomy.²⁰¹ The

¹⁹⁷ Dahlia Lithwick, *No Man is an Island*, SLATE (August 7, 2006), at www.slate.com/id/2147247/ (last visited August 7, 2006).

¹⁹⁸ *Id.*

¹⁹⁹ Tex. Penal Code Ann. § 21.06(a) (Vernon 2003). “Deviate sexual intercourse” is defined as “any contact between any part of the genitals of one person and the mouth or anus of another person; or . . . the penetration of the genitals or the anus of another person with an object.” *Id.* at § 21.01(1).

²⁰⁰ *Lawrence*, 123 S. Ct. at 2475.

²⁰¹ While many commentators have harshly criticized Justice Kennedy’s usage of expansive and indeterminate language, others have commended him for reading the Due Process Clause as if it should not be read in isolation. According to Professor Laurence H. Tribe, *Lawrence* is a narrative in which due process and equal protection, far from having separate missions and entailing different inquiries, are profoundly interlocked in a legal double helix. It is a single, unfolding tale of equal liberty and increasingly universal dignity. This tale centers on a quest for genuine self-government of groups small and large, from the most intimate to the most impersonal.

Laurence H. Tribe, *The Fundamental Right that Dare Not Speak Its Name*, 117 Harv. L. Rev. 1893, 1898 (2004). If in fact Professor Tribe is correct in his assessment of *Lawrence*, then Justice Kennedy’s jurisprudence could be compared favorably with the process-orientated approach to due process first articulated in *United States v. Carolene Products Co.*, 304 U.S. 144, 152-53 n. 4 (1938), the most famous footnote in constitutional law; and it also be likened to the approach articulated in John Hart Ely’s monumental work, *Democracy and Distrust: A Theory of Judicial Review*. However, Justice Kennedy’s failure to provide a suitable methodology for selecting the appropriate level of generality would remain problematic.

question presented to the Court therefore was whether a constitutionally recognized “liberty of the person in its spatial and more transcendent dimensions” requires the invalidation of a Texas statute “making it a crime for two persons of the same sex to engage in certain intimate sexual conduct.”²⁰² Drawing on cases such as *Griswold v. Connecticut*, *Roe* and *Casey*, he rejected the claim that the Court should focus its analysis narrowly as it had done in a previous sodomy case, *Bowers v. Hardwick*.²⁰³

“The issue presented is whether Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy and hence invalidates the laws of many States that still make such conduct illegal and have done so for a very long time.” That statement, we now conclude, discloses the Court’s own failure to appreciate the extent of the liberty at stake. To say that the issue in *Bowers* was simply the right to engage in certain sexual conduct demeans the claim the individual put forward, just as it would demean a married couple were it to be said marriage is simply about the right to have sexual intercourse.²⁰⁴

Next, Justice Kennedy discounted the usefulness of established history and tradition in constitutional decisionmaking:

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. “[H]istory and tradition are the starting point but not in all cases the ending point of the substantive due process inquiry.”²⁰⁵

Based on Justice Kennedy’s broad characterization of the liberty interest at stake, and his decision to emphasize “emerging” history and tradition, the Court concluded that the Due Process Clause protected the conduct at issue.

²⁰² *Id.*

²⁰³ *Bowers v. Hardwick*, 478 U.S. 186 (1986).

²⁰⁴ *Lawrence*, 123 S. Ct. at 2478 (quoting *Bowers*, 478 U.S. at 190) (citations omitted).

²⁰⁵ *Id.* at 2480 (emphasis added).

While many legal commentators commend the Court's decision in *Lawrence* because it corresponded with their own personal political sympathies,²⁰⁶ and it protected a "discrete and insular minority,"²⁰⁷ those commentators fail to appreciate how Justice Kennedy's split-the-difference reasoning inappropriately expands the institutional role of the judiciary. First, Justice Kennedy's characterization of the issue before the Court was composed too broadly and without suitable explanation. No justification for the level of generality is offered (other than to state that *Bowers*' level of generality was too narrow) and no methodology is provided to formulate a consistent level of generality for future substantive due process cases. Thus, if so inclined, judges are left to decide in a case by case fashion what level of generality is best suited to reach a results-orientated conclusion. This ad-hoc approach permits "judges [to] improperly expand their role in government, infringe upon the responsibilities of political actors and violate the principle of separation of powers."²⁰⁸ As Judge Frank H. Easterbrook has suggested, "[i]nstead of assuming power and then searching for a level of abstraction, the court should search for that degree of generality capable of justifying a judicial role."²⁰⁹ Second, and perhaps more importantly, Justice Kennedy's treatment of history and tradition leaves open the possibility that judges may constitutionalize conduct when there exists an "emerging awareness" that states are

²⁰⁶ See, e.g., Tribe, *supra* note 201.

²⁰⁷ ELY, *supra* note 85, at 85-86.

²⁰⁸ John F. Basiak, Jr., *Inconsistent Levels of Generality in the Characterization of Unenumerated Fundamental Rights*, 16 Un. Fl. J. L. & Pub Pol'y 401, 403 n. 8 (2005).

²⁰⁹ Frank H. Easterbrook, *Abstraction and Authority*, 59 U. Chi. L. Rev. 349, 372 (1992). Solutions to results-orientated manipulation of the level of generality are, by most accounts, difficult to formulate so it is understandable that Justice Kennedy abstained from developing a methodology. Justice Scalia has suggested that the "most specific" generality possible. *Michael H.*, 491 U.S. at 127 n. 6. Others have offered a more pragmatic approach in light of the current, damaging inconsistencies. See Basiak, *supra* note 207, at 432-33 (suggesting that a methodology that utilizes a "moderate" generality that is consistently applied is a plausible alternative).

engaging in certain social “experiments.”²¹⁰ Rather than allowing states to exercise their police powers and modify or repeal laws dealing with the regulation of the health, safety and welfare of their citizens, the judiciary will be empowered with the ability to amend the constitution when a political trend can be recognized as social progress, and usurp the legitimate democratic will of the people and the “progressive life-cycle of acceptance” that occurs in American politics through federalism.²¹¹ But as Justice Scalia noted in dissent, “[c]onstitutional entitlements do not spring into existence because some States choose to lessen or eliminate criminal sanctions on certain behavior.”²¹² “[T]he Constitution was not created to react to the immediacies of the shifting political will of a yet unqualified number of jurisdictions.”²¹³ Consequently, this difference-splitting reasoning should not be embraced under the guise of tolerance, moderation or social temperance. *Lawrence*’s motives are admirable, but its method is badly chosen.²¹⁴

²¹⁰ Describing social legislation as state “experimentation” finds its source in Justice Louis D. Brandeis’ *Lochner* Era dissent in *New State Ice Co. v. Liebmann*, 285 U.S. 262 (1932) whereby he stated that it was “one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.” *Id.* at 311.

²¹¹ See generally Lawrence G. Sager, *Cool Federalism and the Life-Cycle of Moral Progress*, 46 Wm. & Mary L. Rev. 1385 (2005). “Although Sager suggests that final recognition of [moral progress] may take the form of . . . ‘federal judicial judgment,’ . . . the most appropriate solution” is the democratic process. Basiak, *supra* note 75, at 174.

²¹² *Lawrence*, 123 S. Ct. at 2494 (Scalia, J., dissenting).

²¹³ Basiak, *supra* note 75, at 165.

²¹⁴ Beyond substantive due process doctrine, Justice Kennedy has also split-the-difference in significant criminal procedure and environmental law cases. In *Roper*, Justice Kennedy recognized that an emerging awareness existed, which condemned the usage of the death penalty for individuals convicted of a crime under the age of 18. Thus, state statutes permitting such penalties are now considered to be cruel and unusual and violative of the Eighth Amendment. In *Booker v. Hudson*, 126 S. Ct. 2159 (2006), Justice Kennedy casts the decided fifth vote in a case, which refused to extend the exclusionary rule to knock-and-announce doctrine. However, he denied Justice Scalia a majority by concurring and limiting any further restriction of the exclusionary rule. Finally, in *Rapanos v. United States*, 126 S. Ct. 2208 (2006), the Court was asked to decide the scope of authority granted to the Army Corp of Engineers to regulate wetlands as “navigable waters” under the Clean Water Act. Justice Kennedy similarly denied Justice Scalia by adopting a case-by-case approach, which unsatisfactorily held to a “significant nexus” standard.

F. Chief Justice John G. Roberts, Jr.

The Supreme Court confirmation hearings of Chief Justice Roberts and Justice Alito predictably focused on substantive due process, especially the right to obtain an abortion.²¹⁵ Senators concerned with the continued erosion of such rights repeatedly questioned the nominees on their respective opinions of *Roe* and posed hypothetical questions designed to elaborate on cryptic and uninformative opening statements.²¹⁶ Particularly in the case of Chief Justice Roberts, the reaction to these difficult and sometimes combative proceedings was masterful. Although his opinion on a number of important constitutional issues remained unknown, the

²¹⁵ See Susan Page, 'Roe v. Wade': *The divided states of America*, USA Today (April 17, 2006), available at www.usatoday.com/news/washington/2006-04-16-abortion-states_x.htm (last visited June 21, 2006) (stating that the abortion fight has “focused on nine members of the Supreme Court” for three decades); see also *Webster v. Reproductive Health Services*, 492 U.S. 490, 532 (1989) (Scalia, J., concurring in part) (stating that the Supreme Court’s abortion jurisprudence makes it “the object of the sort of organized political pressure that political institutions in a democracy ought to receive”); Statement of Senate Judiciary Chairman Arlen Specter, U.S. Senate Judiciary Committee Hearing on Judge Samuel Alito's Nomination to the Supreme Court, available at <http://www.washingtonpost.com/wp-dyn/content/article/2006/01/09/AR2006010900755.html> (stating that the “dominant issue in these hearings is the widespread concern about Judge Alito's position on a woman's right to choose”); Daniel Henninger, *A Day in Court: Scalia Floats and Breyer Rocks*, THE WALL STREET JOURNAL (April 28, 2006), available at www.opinionjournal.com/columnists/dhenninger/?id=110008304 (stating that the nomination hearings “are all about the right to abortion, with the rest of the world mere footnotes”).

²¹⁶ Chief Justice Roberts opened the confirmation hearings by proclaiming that he had no platform and portraying himself as a humble, non-political judge who would interpret the law “without fear or favor.” Charles Babington & Jo Becker, 'Judges are not Politicians,' *Roberts Says*, WASHINGTON POST (September 13, 2005), available at <http://www.washingtonpost.com/wp-dyn/content/article/2005/09/12/AR2005091200642.html>; see also Jack Shafer, *How the Court Imitates the World Series: John Roberts' Winning Baseball Analogy*, SLATE (September 13, 2005), at www.slate.com/toolbar.aspx?action=print&id=2126241 (analyzing Chief Justice Roberts’ “balls and strikes” analogy and referring to his opening statement as “slow as molasses”). Although Chief Justice Roberts’ statements were clever and generally reassuring, they are, in form, commonplace to all confirmation hearings and provide no insight into a jurisprudential approach, including the role of precedent, history or text in constitutional interpretation.

Senate became preoccupied with his self-promoted modesty and was content to confirm him with largely bi-partisan support.²¹⁷

Since joining the Court, Chief Justice Roberts has lived up to the considerable expectations of conservatives and largely debunked the cynical perspective of liberals. Rather than presenting a “bold and ideological”²¹⁸ approach like Justices Scalia and Thomas by seeking reevaluate precedents he believes to be wrongly decided,²¹⁹ Chief Justice Roberts’ has mimicked his judicial hero and former mentor, Henry J. Friendly, a famous and well-respected U.S. Court of Appeals Judge for the Second Circuit,²²⁰ by taking careful measure of existing case law before encroaching on new legal theories.²²¹ As noted by Professor Douglas Kmiec, “Roberts has a conservative mind but a diplomat’s nature. His abiding concern is to keep the court within bounds on legal, rather than ideological, grounds.”²²² Thus, his “collegial, consensus-building”

²¹⁷ The United States Senate voted 78 to 22 to confirm, including all 55 Republicans. United States Senate Legislation & Records, available at http://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=109&session=1&vote=00245

²¹⁸ See E.J. Dionne, Jr., *The Chief Justice Sets a Standard*, WASHINGTON POST A17 (June 20, 2006).

²¹⁹ STONE, *supra* note 78, at lxx; see, e.g., *Rangel-Reyes v. United States*, 547 U.S. ____ (2006) (urging the Court to revisit past precedents because they find no basis in the Constitution) (Thomas, J., dissenting from denial of certiorari); *Kelo v. City of New London*, 125 S. Ct. 2655, 2686 (stating that he would “revisit” Public Use Clause cases because he believes they are not in accordance with the Clause’s original meaning) (Thomas, J., dissenting); see also Cass R. Sunstein, *Minimal Appeal*, THE NEW REPUBLIC (August 1, 2005), available at <http://www.tnr.com/doc.mhtml?i=20050801&s=sunstein080105> (calling Justices Scalia and Thomas “radical revision[ists]”) (last visited June 15, 2006).

²²⁰ Adam Liptak, *Court in Transition: The Judicial Record; In His Opinions, Nominee Favors Judicial Caution*, New York Times A1 (July 22, 2005).

²²¹ In fact, during his 2003 confirmation hearing to become a member of the D.C. Circuit, Chief Justice Roberts stated that *Roe* was “the settled law of the land....” Terry Frieden & Ed Henry, *Moderates Cast Doubt on Court Stalemate*, CNN.com (July 21, 2005), at <http://www.cnn.com/2005/POLITICS/07/20/scotus.main/index.html> (last visited August 28, 2006).

²²² Kmiec, *supra* note 22, available at www.latimes.com/news/opinion/commentary/la-oe-kmiec8jul08,0,1887126.story?coll=la-news-comment-opinions.

approach “has the capacity to draw votes from both sides on controversial and pedestrian cases alike.”²²³

The earliest and perhaps most poignant example of the Chief Justice’s “consensus-building” occurred in *Rumsfeld v. Forum for Academic and Institutional Rights*, a contentious case, which pitted the associational and free speech rights of law schools against the military and spending powers of Congress. Various law schools challenged a statute that denied federal funding to those institutions, which had denied equal access to military recruiters on campus based on the military’s treatment of homosexuals.²²⁴ The District Court denied an application for a preliminary injunction, but the Third Circuit reversed, concluding that the statute was an unconstitutional condition on the law schools.²²⁵ The Supreme Court reversed.²²⁶ Remarkably, despite the controversial political issues raised by the case, Chief Justice Roberts crafted a narrow, but intellectually sound ruling that drew unanimous approval from the other justices. Rather than clumsily applying compelled speech case law, he correctly recognized that such doctrine was “plainly incidental” because “it has never been deemed an abridgment of freedom

²²³ *Id.*

²²⁴ *Rumsfeld*, 126 S. Ct. at 1302. The Solomon Amendment denied federal funding to an institution,

if the Secretary of Defense determines that that institution (or any subelement of that institution) has a policy or practice (regardless of when implemented) that either prohibits, or in effect prevents-- (1) the Secretary of a military department or Secretary of Homeland Security from gaining access to campuses, or access to students (who are 17 years of age or older) on campuses, for purposes of military recruiting in a manner that is at least equal in quality and scope to the access to campuses and to students that is provided to any other employer; or (2) access by military recruiters for purposes of military recruiting to the following information pertaining to students (who are 17 years of age or older) enrolled at that institution (or any subelement of that institution): (A) Names, addresses, and telephone listings. (B) Date and place of birth, levels of education, academic majors, degrees received, and the most recent educational institution enrolled in by the student.

10 U.S.C. § 983(b) (2005).

²²⁵ *Id.* at 1304.

²²⁶ *Id.*

of speech or press to [regulate] ... a course of conduct....”²²⁷ This result avoided the temptation to convolute doctrine and it preserved a clearly demarcated speech/conduct distinction, implying that speech rather than conduct would retain its standing as the most rigorously guarded constitutional right.²²⁸ Consequently, neither the Court’s liberals nor its conservatives quarreled with reasoning or result.

In the context of substantive due process doctrine, Chief Justice Roberts has thus far succeeded in applying his minimalist, consensus-building approach. In *Ayotte v. Planned Parenthood of Northern New England*,²²⁹ the Court was asked to consider the constitutionality of a New Hampshire abortion law, which failed to provide for a health exception for the mother. Reasoning that the law explicitly violated the undue burden standard set forth in *Casey*, the District Court entered a preliminary injunction and the First Circuit affirmed. Rather than unnecessarily and prematurely revisiting abortion precedents (given the infancy of his tenure as Chief Justice), at oral argument in November 2005, Chief Justice Roberts indicated at oral argument that the case could be decided narrowly based on the issue of remedy.²³⁰ Writing for a unanimous Supreme Court (incidentally, for the first time ever in an abortion case) Justice O'Connor reasoned that the District Court could have entered an injunction narrower in scope. Therefore, the case was remanded.

Admittedly, despite Chief Justice Roberts’ first term successes, it important not to overstate the significance of the Court’s newfound consensus. As evident from the holding of *Ayotte*, the Roberts Court has yet to squarely address the issue of abortion, and when it does, the Chief Justice will need more than his cautious, minimalist approach and celebrated intellect to

²²⁷ *Id.* at 1308 (quoting *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 502 (1949)).

²²⁸ *See id.* at 1309-10.

²²⁹ *Ayotte v. Planned Parenthood of Northern New England*, 126 S. Ct. 961 (2006).

²³⁰ Summers, *supra* note 114, at 689.

obtain a clear majority. The moderate and evenhanded approaches of Justice Breyer and Justice Kennedy (despite his extravagant language) undoubtedly hold tremendous appeal and they will continue to serve as a tempting solution for decisions that create political divisiveness. Avoiding split-the-difference substantive due process jurisprudence in future cases will therefore require additional, well-settled doctrinal components.

IV. POTENTIAL SOLUTIONS

If split-the-difference substantive due process jurisprudence is to be marginalized and uniformity in reasoning sustained, the Roberts Court will have to, at minimum, remain faithful to two recent developments. First, the Supreme Court must continue its extension of the *Graham* doctrine. Under *Graham*, substantive due process claims brought pursuant to 42 U.S.C. § 1983 cannot succeed where a more “explicit textual source of constitutional protection” exists.²³¹ Thus, for example, when a constitutional claim is brought as a result of a law enforcement officer’s excessive force, the Fourth Amendment’s reasonableness standard rather than the Fourteenth Amendment’s “generalized notion of ‘substantive due process’ must be the guide”²³² At minimum, a faithful adherence to this principle will substantially limit the availability of substantive due process claims and avoid opportunity to craft compromised-minded solutions. It may even slowly return the Court to the “jot-for-jot” approach of Justice Black.²³³

The second, and perhaps more revolutionary, way in which the Roberts Court can limit split-the-difference jurisprudence is through the revitalization of the Privileges and Immunities

²³¹ *Graham v. Connor*, 490 U.S. 386, 396 (1989).

²³² *Id.*

²³³ Massaro, *supra* note 113, at 1121. “The logic of *Graham* requires that substantive due process be confined to its current doctrinal limits, at the very least, and, carried to its furthest extreme, requires overruling the Court’s substantive due process ‘unenumerated rights’ caselaw altogether.” *Id.* at 1091. Whether or not this prediction comes to fruition, the benefit of *Graham* is that both the Court’s liberals and conservatives appear to recognize its validity, and thus, its application is likely to continue.

Clause. Even though the *Slaughter House Cases* liquidated the Privileges and Immunities Clause as a source of unenumerated fundamental rights, recent interest from both the Court's liberals and conservatives brings intriguing possibility of new life.²³⁴ If this development were to persist, less reliance would be placed on the Due Process Clause. While the dormancy of the Privileges and Immunities Clause leaves the Court with little constitutional guidance for its decisions,²³⁵ it would nevertheless create greater legitimacy for the discovery (or subsequent demise) of unenumerated fundamental rights and diminish the significant expansion of institutional authority afforded to the Supreme Court.²³⁶ This increased legitimacy may create a greater consensus among the Court's most sharply divided justices and reduce the temptation to split-the-difference in reasoning or result.

V. CONCLUSION

In Federalist 78, Alexander Hamilton famously assured the People of the State of New York that “the judiciary, from the nature of its functions, will always be the least dangerous to

²³⁴ In *Saenz*, the Supreme Court, for the first time since *Colgate v. Harvey*, 296 U.S. 404 (1935), utilized the Privileges and Immunities Clause to invalidate a state regulation. Within the context of substantive due process doctrine, liberal judges and scholars have, as noted, acknowledged the Privileges and Immunities Clause's enhanced legitimacy for the discovery of unenumerated rights. *Glucksberg*, 521 U.S. at 760 n. 6 (citing JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 14-30 (1980)) (acknowledging the Privileges and Immunities Clause rather than the Due Process Clause, is the “proper warrant for courts’ substantive oversight of state legislation”) (Souter, J., concurring in the judgment); TRIBE, *supra* note 84, at 1328-29 (commenting on the Privileges and Immunities Clause’s “apparent textual and historical superiority to the substantive due process method of incorporating and protecting fundamental rights”). Likewise, Justice Thomas appears ready to reconsider the Clause’s meaning. *See Troxel*, 530 U.S. at 80 n. 1 (Thomas, concurring in the judgment).

²³⁵ Judge Wilkinson has suggested that the Privileges and Immunities Clause is a “dormant volcano” noting that “[n]either the language of the clause nor any judicial interpretations provides useful guidance in determining what rights would be fundamental.” J. Harvie Wilkinson, III, *The Fourteenth Amendment Privileges or Immunities Clause*, Harv. J. L. & Pub. Pol’y 43, 51 (1989).

²³⁶ The resurrection of the Privileges and Immunities Clause should not of course be a means of exhuming *Lochner* Era economic liberty. Otherwise it would merely contribute to the current state of judicial supremacy.

the political rights of the Constitution; because it will be least in a capacity to annoy or injure them.”²³⁷ Thus, as the weakest of the three departments of power,²³⁸ the judiciary, it could “truly be said,” would have “neither FORCE nor WILL, but merely judgment[.]”²³⁹ Yet, despite Hamilton’s pledge, in the wake of the intellectual struggle between Justices Black and Harlan and aided by the jurisprudential pragmatism of Justice O’Connor, a split-the-difference substantive due process jurisprudence has developed, which inappropriately expands the Supreme Court’s judicial discretion. Under the leadership of Chief Justice Roberts, the Supreme Court has a unique opportunity to restore its institutional role. Rather than “interpreting” the Constitution in a manner that purports to promote participation in democracy or preempting democratic judgment through judicial intervention aimed at political moderation, Chief Justice Roberts can and must apply the principles of judicial modesty and intellectual consistency that he routinely expressed during his confirmation hearing, and account for the authority of the Congress, the executive and the States.

²³⁷ THE FEDERALIST NUMBER 78 (Benjamin Fletcher Wright ed. at 490) (Hamilton).

²³⁸ *Id.* at 491

²³⁹ *Id.* at 490.