

FUNDAMENTAL OR FUNDAMENTALLY FLAWED? A CRITIQUE OF THE SUPREME COURT’S APPROACH TO THE SUBSTANTIVE DUE PROCESS DOCTRINE UNDER THE FOURTEENTH AMENDMENT

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I. INTRODUCTION

There is no concept in modern constitutional law more controversial than substantive due process. The controversy looming over this doctrine is due, for the most part, to the tarnished reputation substantive due process developed during the infamous “*Lochner* era,” in which courts used the Due Process Clause arbitrarily to protect economic liberties from governmental interference.² Recognizing the error of its ways, however, the United States Supreme Court has since repudiated economic substantive due process and reformed the doctrine to protect only those rights that are considered

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² *Lochner v. New York*, 198 U.S. 45, 56–58 (1905).

fundamental liberty interests under the Fourteenth Amendment.³

Yet the controversy surrounding the substantive due process doctrine continues today due to fear both of the potentially unbridled power of the Court to protect rights not enumerated in the Constitution, and of a return to the dark days of the *Lochner* era.⁴ Now, the debate has turned to the proper methodology for determining which personal rights are fundamental and deserving of protection.⁵ The proper role of history and tradition in making the determination of whether a right is fundamental is one of the most hotly contested issues in modern substantive due process analysis.⁶ One popular approach to this problem, the “history and tradition” test championed on the Court by Justice Scalia, limits the category of protected rights to those rights, stated at the most specific level of generality, that are “deeply rooted in this Nation’s history and tradition.”⁷ This solution defines “rights” very specifically, and protects only those rights that were traditionally protected and deemed fundamental to the American scheme of ordered liberty by the framers of the United States Constitution.⁸ Another popular approach, the “general support” test favored by some of the more “liberal” members of the Court, does not limit the analysis to a specific version of history and tradition. Rather, it defines rights generally and seeks to determine whether there is some history generally supporting the view that the questioned right deserves special protection.⁹

The Court’s failure to provide guidance or define rules regarding how history and tradition should be used has rendered the application of either of the popular approaches unworkable for lower courts.¹⁰ The arbitrary and oftentimes contradictory outcomes reached by the Court when it appeals to “history and tradition” have resulted in a complete failure to achieve the Court’s ultimate goal of instituting an objective standard in order to rein in judicial discretion and promote consistency.¹¹ To the

³ *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379, 391 (1937).

⁴ *See Moore v. E. Cleveland*, 431 U.S. 494, 544 (1977) (White, J., dissenting).

⁵ *See infra* Part II.C.

⁶ *See infra* Part II.C.

⁷ *Michael H. v. Gerald D.*, 491 U.S. 110, 127 n.6 (1989) (quoting *Bowers v. Hardwick*, 478 U.S. 186, 192, 194 (1986) (quoting *Moore v. E. Cleveland*, 431 U.S. 494, 503 (1977))).

⁸ *Id.* at 124; *see also* Katharine T. Bartlett, *Tradition as Past and Present in Substantive Due Process Analysis*, 62 DUKE L.J. 535, 540-42 (2012).

⁹ *See Michael H.*, 491 U.S. at 139-40 (Brennan, J., dissenting); *see also* *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 851 (1992) (defining the asserted fundamental liberty interest very generally).

¹⁰ The Court has used each of the popular approaches on numerous occasions yet has never explicitly adopted either. *Compare Michael H.*, 491 U.S. at 122 (defining the asserted fundamental liberty interest at its most specific level of generality), *with Casey*, 505 U.S. at 851 (defining the asserted fundamental liberty interest very generally).

¹¹ *Michael H.*, 491 U.S. at 137 (Brennan, J., dissenting) (“Because reasonable people can disagree about the content of particular traditions . . . the plurality has not found the objective boundary that it seeks.”).

contrary, reliance upon history and tradition has created the same potential for judicial discretion and abuse that the Court vowed to abstain from after the *Lochner* era.¹² This Comment argues that the Court should abandon appeals to history and tradition in favor of a more objective and transparent balancing test. This test determines whether an asserted right should be protected by balancing the competing interests of the individual against the interests of the government in regulating the right. This proposed test, while not completely eradicating the potential for judicial discretion, will inject more objectivity into the analysis and will produce more consistent and predictable results.

Part II of this Comment begins with a discussion of the history of the substantive due process doctrine in the Supreme Court. Specifically, Part II will detail the onset of the doctrine in *Lochner v. New York* and the reasons for the Court's subsequent abandonment of that early understanding of substantive due process.¹³ The Section will then discuss the early attempts to revive the substantive due process doctrine after the *Lochner* era and the Court's ultimate transition to the modern history and tradition approach it uses today. Finally, Part II closes with a discussion of the Court's history of applying the modern approach and details the opposing views regarding how that standard should be applied.

Part III of this Comment opens with a discussion of the problematic nature of using history and tradition to determine whether a right is deemed fundamental under the Fourteenth Amendment's Due Process Clause. The Section then proposes that appeals to history and tradition should be abandoned in favor of a more objective balancing test. This proposed test determines whether a right is fundamental and therefore protected by weighing the individual's interest in retaining the right against the government's interest in regulating the right. Part IV concludes the Comment with a summary of the problematic nature of the modern approach and the reasons the proposed solution will help solve many of these issues.

II. BACKGROUND

A. Early Substantive Due Process: The Rise and Fall of Economic Substantive Due Process

During the first third of the 20th century, substantive due process was used primarily to protect economic liberties from government interference.¹⁴ This era, aptly named the "*Lochner* era," began with the

¹² See, e.g., *Moore v. E. Cleveland*, 431 U.S. 494, 502 (1977) (plurality opinion).

¹³ *Lochner v. New York*, 198 U.S. 45 (1905).

¹⁴ See *id.* at 56–58 (holding that the freedom of contract is protected under the Fourteenth Amendment).

Supreme Court's decision in *Lochner v. New York*.¹⁵ In *Lochner*, the Court struck down a New York law that limited the maximum number of hours that bakers could work.¹⁶ The Court stated that freedom of contract is a basic right protected as a liberty under the Due Process Clause of the Fourteenth Amendment and that this right could only be interfered with by the government to serve a valid police purpose.¹⁷ Concluding that the law was not a valid exercise of the state's police power, the Court held that it was unconstitutional because it infringed upon the constitutionally protected freedom of contract. So began the *Lochner era*, an era of economic substantive due process.¹⁸

During the three decades following the Court's decision in *Lochner*, over two hundred laws were invalidated for infringing upon freedom of contract.¹⁹ However, due to the economic crisis the nation faced during the Great Depression, a growing majority of the country, including President Franklin D. Roosevelt, developed the view that governmental economic regulations were essential to recovery.²⁰ These outside pressures culminated in 1937 when the Court unequivocally ended the idea of economic substantive due process in *West Coast Hotel v. Parrish*.²¹

In *Parrish*, the Court overruled *Adkins v. Children's Hospital* and upheld a state law that mandated a minimum wage for women.²² Writing for the Court, Chief Justice Hughes unambiguously ended the laissez-faire jurisprudence of the *Lochner* era and questioned whether freedom of contract even existed under the Constitution.²³ He stated: "[w]hat is this freedom [of contract]? The Constitution does not speak of freedom of contract. It speaks of liberty and prohibits the deprivation of liberty without due process of law."²⁴ Upon finding that there was no such thing as freedom to contract reserved in the Constitution, the Court's time of protecting that freedom as a fundamental right finally came to an end, and

¹⁵ See generally *id.*

¹⁶ *Id.* at 64.

¹⁷ *Id.* at 53 ("The general right to make a contract in relation to his business is part of the liberty of the individual protected by the Fourteenth Amendment The right to purchase or to sell labor is part of the liberty protected by this amendment . . ."). Additionally, the Court defined "police powers" as those designed to protect "the safety, health, morals, and general welfare of the public." *Id.*

¹⁸ *Id.* at 64.

¹⁹ See, e.g., *Weaver v. Palmer Bros., Co.*, 270 U.S. 402, 415 (1926) (striking down a state law that prohibited the use of low grade rags and debris in making mattresses); *Adkins v. Children's Hospital*, 261 U.S. 525, 562 (1923) (striking down a minimum wage law for women); *Adair v. United States*, 208 U.S. 161, 180 (1908) (declaring unconstitutional a federal law prohibiting employers from requiring employees not to unionize); see also Victoria F. Nourse, *A Tale of Two Lochners: The Untold History of Substantive Due Process and the Idea of Fundamental Rights*, 97 CAL. L. REV. 751, 754 n.19 (2009).

²⁰ ERWIN CHERMERINSKY, *CONSTITUTIONAL LAW* 623–24 (3d ed. 2009).

²¹ See generally *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937).

²² *Id.* at 400. *Adkins* was decided during the *Lochner* era and struck down a law that mandated a minimum wage for women because the Court found it infringed upon the constitutionally protected freedom of contract. See *Adkins*, 261 U.S. at 561–62.

²³ *Parrish*, 300 U.S. at 391.

²⁴ *Id.*

the idea of substantive due process itself became dormant.²⁵

One year later, however, the Court revived the notion that certain rights, although not enumerated in the Constitution, could nonetheless receive heightened protection under the Fourteenth Amendment's Due Process Clause. In *United States v. Carolene Products Co.*, the Court articulated a new policy of deference to governmental economic regulations.²⁶ This policy of deference, however, was qualified by the still-famous Footnote 4.²⁷ Footnote 4 stated that the Court would exercise deference in the case of economic regulations but that certain special situations might require more exacting judicial scrutiny under the Fourteenth Amendment.²⁸ Situations dealing with certain fundamental rights or "prejudice against discrete and insular minorities" were among these "special condition[s]" noted by the Court.²⁹ The Court has relied on this aspect of the *Carolene* decision in forming modern day substantive due process doctrine.³⁰

The reign of the economic substantive due process doctrine during the *Lochner* line of cases has been considered one of the most condemned eras of the Court in United States history and is regarded as a quintessential example of illicit judicial activism and abuse.³¹ Indeed, determining whether a law is unconstitutional because it infringes upon rights not explicitly enumerated in the constitution is a dangerous task that should not be undertaken lightly.³² This is especially true considering that federal judges are unelected and serve for life.³³ As Justice White noted, the judiciary "is the most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or even the design of the Constitution."³⁴ Considering the delicate nature of substantive due process analysis, the Court's flirtation with illegitimacy can be attributed to a failure to develop principles that limited the amount of judicial discretion in making these types of

²⁵ *Id.* at 400.

²⁶ *United States v. Carolene Prods. Co.*, 304 U.S. 144, 153–54 (1938).

²⁷ *Id.* at 152 n.4 (citations omitted) ("There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth. . . . It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation. . . . Nor need we enquire . . . whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.").

²⁸ *Id.*

²⁹ *Id.*

³⁰ See, e.g., David A. Strauss, *The Modernizing Mission of Judicial Review*, 76 U. CHI. L. REV. 859, 894–95 (2009); Erin Daly, *The New Liberty*, 11 WIDENER L. REV. 221, 245–46 (2005).

³¹ See *Moore v. E. Cleveland*, 431 U.S. 494, 544 (1977) (White, J., dissenting).

³² See *id.*

³³ U.S. CONST. art. III, § 1.

³⁴ *Moore*, 431 U.S. at 544 (White, J., dissenting).

determinations.

Despite the consensus today that *Lochner* was a complete abuse of judicial power, the case is nevertheless important to modern constitutional law, not because of the holding or logic of the Court, but rather because it serves as a prime example of what the Court ought not to do. The decision has become a guidepost that judges must consider before making a determination that may involve a subjective analysis or a judgment call.³⁵ *Lochner* stands as a guidepost to which judges must look in virtually all situations, but it is most important in a field like substantive due process where there are no concrete rules or tests to sufficiently limit the scope of the judges' opinions.³⁶

B. Modern-Day Substantive Due Process: Privacy, Personhood, and Family

Though the substantive due process doctrine undoubtedly emerged from the *Lochner* era with much disdain, it is generally agreed that the doctrine still lives on today.³⁷ With the idea of economic substantive due process out of the question, however, the Court seldom relied on substantive due process in the years following the *Lochner* era because the doctrine lacked a defined scope and purpose.³⁸ It was not until 1965 in *Griswold v. Connecticut* that the Court finally began transitioning to the modern idea of substantive due process—the protection of the right to privacy and other fundamental rights.³⁹

In *Griswold*, the Court found a law prohibiting married couples from purchasing contraceptives to be unconstitutional for violating the constitutionally protected “right to privacy”⁴⁰ Writing for the Court, Justice Douglas noted that although the Bill of Rights does not explicitly mention “privacy,” the right could be found in the “penumbras” and “emanations” of other constitutional protections.⁴¹ This penumbral approach was essentially a substantive due process argument, but Justice Douglas—with *Lochner* in mind—opted not to label it as such to avoid

³⁵ *Id.*

³⁶ *Id.*

³⁷ Even the strictest originalists agree that the Due Process Clause protects certain unenumerated rights. See, e.g., *Bowers v. Hardwick*, 478 U.S. 186, 191 (1986) (“It is true that despite the language of the Due Process Clauses of the Fifth and Fourteenth Amendments, which appears to focus only on the processes by which life, liberty, or property is taken, the cases are legion in which those Clauses have been interpreted to have substantive content, subsuming rights that to a great extent are immune from federal or state regulation or proscription.”).

³⁸ See Aaron J. Shuler, *From Immutable to Existential: Protecting Who We Are and Who We Want to Be with the “Equalerty” of the Substantive Due Process Clause*, 12 J. L. & SOC. CHALLENGES 220, 246–47 (2010).

³⁹ *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965).

⁴⁰ *Id.*

⁴¹ *Id.* at 484.

using the controversial substantive due process term.⁴² Justice Harlan, on the other hand, did not have the same wariness in his concurring opinion, in which he argued that this right to privacy is protected not by the Bill of Rights itself but by the Due Process Clause of the Fourteenth Amendment.⁴³ He argued that the statute violated due process by infringing on “basic values ‘implicit in the concept of ordered liberty.’”⁴⁴

Eight years later, in *Roe v. Wade*,⁴⁵ the Court finally adopted Justice Harlan’s approach and thereby revived the substantive due process doctrine.⁴⁶ *Roe* represented the first time since the *Lochner* era that the Court premised an opinion on substantive due process.⁴⁷ In striking down a Texas law making it a crime to procure or attempt an abortion, the Court breathed new life into the Due Process Clause.⁴⁸ Finally defining the scope of the modern substantive due process doctrine, the Court held that the Due Process Clause of the Fourteenth Amendment protects rights that are “‘fundamental’ or ‘implicit in the concept of ordered liberty’”⁴⁹ The Court also reaffirmed the standard of review from Footnote 4 of *Carolene Products*, holding that where “fundamental rights are involved . . . regulation limiting these rights may be justified only by a compelling state interest and . . . legislative enactments must be narrowly drawn to express only the legitimate state interests at stake.”⁵⁰ Since this revival of substantive due process and its protection of the right to privacy, the Court has expanded the ambit of these fundamental privacy rights to include the right to marry, have children, educate one’s children, enjoy marital privacy, use contraception, and have abortions.⁵¹

The modern approach to substantive due process is best exemplified by the Court’s decision in *Washington v. Glucksberg*.⁵² In *Glucksberg*, the Court was faced with the question of whether the right to assisted suicide was a fundamental liberty interest deserving heightened protection under the Due Process Clause.⁵³ The Court began by noting the delicate situation it is in when asked to determine whether a right is fundamental.⁵⁴ The Court stated:

But we “have always been reluctant to expand the concept

⁴² See Helen Garfield, *Privacy, Abortion, and Judicial Review; Haunted by the Ghost of Lochner*, 61 WASH. L. REV. 293, 305–06 (1986).

⁴³ *Griswold*, 381 U.S. at 499–500 (Harlan, J., concurring).

⁴⁴ *Id.* (quoting *Palko v. Connecticut*, 302 U.S. 319, 325 (1937)).

⁴⁵ *Roe v. Wade*, 410 U.S. 113 (1973).

⁴⁶ *Id.* at 152–53.

⁴⁷ CHEMERINKSY, *supra* note 20, at 82.

⁴⁸ *Roe*, 410 U.S. at 166.

⁴⁹ *Id.* at 152 (quoting *Palko*, 302 U.S. at 325).

⁵⁰ *Id.* at 155 (internal quotation marks omitted) (citations omitted).

⁵¹ *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997) (citations omitted).

⁵² *Id.* at 720–21.

⁵³ *Id.* at 705–06.

⁵⁴ *Id.* at 720.

of substantive due process because guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended.” By extending constitutional protection to an asserted right or liberty interest, we, to a great extent, place the matter outside the arena of public debate and legislative action. We must therefore “exercise the utmost care whenever we are asked to break new ground in this field,” lest the liberty protected by the Due Process Clause be subtly transformed into the policy preferences of the Members of this Court.⁵⁵

Considering the potentially dangerous amount of discretion and personal judgment that tends to go hand-in-hand with substantive due process cases, the Court announced a two-part test meant to infuse objectivity into the analysis.⁵⁶ The first step of the analysis required a “careful description” of the asserted fundamental liberty interest.⁵⁷ Once the asserted fundamental liberty interest was defined, the Court would then determine whether that interest was “‘deeply rooted in this Nation’s history and tradition,’ and ‘implicit in the concept of ordered liberty,’ such that ‘neither liberty nor justice would exist if [the interest] were sacrificed.’”⁵⁸ If the asserted right met that standard, then it would be considered a protected fundamental liberty interest, and the state’s regulation would have to meet strict scrutiny to be upheld.⁵⁹ That is, in order to be upheld, the state’s law would have to be both in furtherance of a compelling state interest and narrowly tailored to address that compelling interest.⁶⁰ If the right did not meet the criteria then it would not be considered a fundamental right, and the Court would apply a rational basis test in which the law would be upheld so long as it was rationally related to a legitimate government purpose.⁶¹

Applying this two-part test, the Court in *Glucksberg* determined that the right to assisted suicide was not a fundamental right protected by the Fourteenth Amendment’s Due Process Clause.⁶² The Court began by defining the asserted liberty interest narrowly, as the “right to commit suicide with another’s assistance.”⁶³ The Court then held that this right was not deeply rooted in the nation’s history and tradition based on the “consistent and almost universal tradition that has long rejected the [right to

⁵⁵ *Id.* (quoting *Collins v. City of Harker Heights*, 503 U.S. 115, 125 (1992)) (citations omitted).

⁵⁶ *Id.* at 720–21.

⁵⁷ *Id.* at 721.

⁵⁸ *Id.* at 721 (quoting *Moore v. E. Cleveland*, 431 U.S. 494, 503 (1977); *Palko v. Connecticut*, 302 U.S. 319, 325, 326 (1937)) (citations omitted).

⁵⁹ *Id.* at 722.

⁶⁰ *Id.* at 721.

⁶¹ *Id.* at 722.

⁶² *Id.* at 723.

⁶³ *Id.* at 724.

assisted suicide], and continues explicitly to reject it today”⁶⁴ Because the asserted right was not fundamental, the Court applied the rational basis test and upheld the law, finding that it rationally related to furthering the state’s legitimate interest in the preservation of human life.⁶⁵

This modern approach represents a significant improvement over the Court’s earlier substantive due process jurisprudence because it tends to limit the subjectivity of those early cases in which judges, not bound by any objective standard, relied solely on their personal views.⁶⁶ Relying on a test which requires looking to United States history, legal traditions, and practices provides an improved, although not highly effective, guidepost for responsible judicial decisionmaking that “direct[s] and restrain[s] [the Court’s] exposition of the Due Process Clause.”⁶⁷ By allowing the importance of the claimed right to be determined by an “objective” source rather than judges’ personal views, the modern approach provides for a substantive due process analysis that protects basic rights while continuing to further distance itself from the activism associated with the *Lochner* era.⁶⁸ However, as the next Section will demonstrate, the highly divergent opinions on how the history and tradition test should be applied evidence the test’s ultimate failure to achieve the objectivity and consistency it purported to deliver.

C. Difficulties in Applying the *Glucksberg* Test

Although the two-part test from *Glucksberg* seems fairly straightforward, the application of this “history and tradition” test has been anything but. As a result, the Court’s decisions on this issue have been highly inconsistent in both their reasoning and ultimate outcome. This is due, for the most part, to the stark contrast in how judges have engaged in the first step of the analysis: defining the asserted right. Originalist judges tend to define the asserted right at the most specific level, while nonoriginalists continue to define the asserted right at a more general level of abstraction.⁶⁹ This difference of opinion has proved to be anything but a minor factor in the substantive due process analysis. At a sufficiently general level of abstraction, nearly any liberty can be justified as consistent with the nation’s history and traditions; whereas, at a very specific level of abstraction, few non-textual rights will be justified using that same history and tradition.

One of the most famous examples showing the divergence of

⁶⁴ *Id.* at 723.

⁶⁵ *Id.* at 728–31.

⁶⁶ See generally *Lochner v. New York*, 198 U.S. 45 (1905).

⁶⁷ *Glucksberg*, 521 U.S. at 721.

⁶⁸ See *McDonald v. Chicago*, 130 S. Ct. 3020, 3100–02 (2010) (Stevens, J., dissenting).

⁶⁹ Compare *Michael H. v. Gerald D.*, 491 U.S. 110, 127 n.6 (1989) (originalist view), with *id.* at 140–41 (Brennan, J., dissenting) (nonoriginalist view).

opinions on this issue is the case of *Michael H. v. Gerald D.*⁷⁰ In *Michael H.*, the Court considered the constitutionality of a California law that created a conclusive presumption that a child born to a married woman is also the child of that woman's husband.⁷¹ The plaintiff, a man who had an affair with the mother and was the natural father of the child, challenged the law as a violation of his constitutionally protected liberty interest in his relationship with the child.⁷² Justice Scalia, writing for the Court, stated that before looking to history and tradition, it is necessary to define the asserted right at "the most specific level at which a relevant tradition protecting, or denying protection to, the asserted right can be identified."⁷³ Accordingly, Justice Scalia posed the issue as "whether the relationship between persons *in the situation of* Michael and [his wife] 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."⁷⁴ Defining the asserted right as such, Justice Scalia held that there was no fundamental right in this particular situation, concluding that "[w]e have found nothing in the older sources . . . addressing specifically the power of the natural father to assert parental rights over a child born into a woman's existing marriage with another man."⁷⁵ To the contrary, he argued "our traditions have protected the marital family"⁷⁶

Justice Brennan wrote a sharp dissent in *Michael H.* in which he characterized Justice Scalia's approach of defining the right at the most specific level as "novel" and "misguided," and argued that Justice Scalia's methodology was highly problematic.⁷⁷ He stated that "[t]oday's plurality . . . does not ask whether parenthood is an interest that historically has received our attention and protection; the answer to that question is too clear for dispute."⁷⁸ Rather, Brennan continued, Justice Scalia asked "whether the specific variety of parenthood under consideration—a natural father's relationship with a child whose mother is married to another man—has enjoyed such protection."⁷⁹ Justice Brennan stated that the right should have been defined more broadly as whether a natural parent has a right to a relationship with his or her child.⁸⁰ He argued that, "[i]n construing the Fourteenth Amendment to offer shelter only to those interests specifically protected by historical practice," Justice Scalia's approach "ignores the kind

⁷⁰ See generally *id.*

⁷¹ *Id.* at 113.

⁷² *Id.*

⁷³ *Id.* at 127 n.6.

⁷⁴ *Id.* at 124 (emphasis added).

⁷⁵ *Id.* at 125.

⁷⁶ *Id.* at 124.

⁷⁷ *Id.* at 140 (Brennan, J., dissenting).

⁷⁸ *Id.* at 139.

⁷⁹ *Id.*

⁸⁰ *Id.* at 140–41.

of society in which our Constitution exists.”⁸¹

Justice Scalia’s most specific level approach has been largely criticized on many grounds. One of the major criticisms is that this approach stifles judicial protection of important rights.⁸² The crux of this argument is that if the Court had used this approach in past cases, many of the important rights we now enjoy would not have been protected.⁸³ It has also been criticized on the grounds that it is not derived from the Fourteenth Amendment’s text or history,⁸⁴ that it does not carry out the purpose of protecting minority interests,⁸⁵ and that it is just as speculative and ambiguous as any other approach.⁸⁶

The alternative approach to Justice Scalia’s methodology, however, does not come without its critics as well. This approach, championed by nonoriginalists such as Justice Kennedy, defines the asserted right on a more general level.⁸⁷ For example, in *Planned Parenthood v. Casey*,⁸⁸ Justice Kennedy defined the asserted fundamental liberty interest not as the right to have an abortion, but rather as the right “to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life.”⁸⁹ The most prevalent criticism of this approach is that if judges define the asserted right generally, then it is nearly impossible to find a history and tradition to support that right.⁹⁰

The problematic nature of the history and tradition test and its arbitrary and inconsistent application was best showcased in the case of

⁸¹ *Id.* at 141.

⁸² See Timothy P. Loper, *Substantive Due Process and Discourse Ethics: Rethinking Fundamental Rights Analysis*, 13 WASH. & LEE J. CIVIL RTS. & SOC. JUST. 41, 70 (2006).

⁸³ See, e.g., *Michael H.*, 491 U.S. at 139 (Brennan, J., dissenting) (quoting *id.* at 122) (“If [the Court] had looked to tradition with such specificity in past cases, many a decision would have reached a different result. Surely the use of contraceptives by unmarried couples, the freedom from corporal punishment in schools, the freedom from an arbitrary transfer from a prison to a psychiatric institution, and even the right to raise one’s natural but illegitimate children, were not ‘interest[s] traditionally protected by our society’”) (citations omitted).

⁸⁴ See *id.* at 138.

⁸⁵ See Edward Gary Spitko, *A Critique of Justice Antonin Scalia’s Approach to Fundamental Rights Adjudication*, 1990 DUKE L.J. 1337, 1353 (1990).

⁸⁶ *Michael H.*, 491 U.S. at 137 (Brennan, J., dissenting). In *Michael H.*, Justice Brennan maintained that Justice Scalia was “[a]pparently oblivious to the fact that [tradition] can be as malleable and as elusive as ‘liberty’ itself, . . . [and that he] has not found the objective boundary that [he] seeks.” *Id.* Justice Brennan continued: “The pretense [that tradition can limit discretion] is seductive; it would be comforting to believe that a search for ‘tradition’ involves nothing more idiosyncratic or complicated than poring through dusty volumes on American history. Yet, as Justice White observed . . . ‘[w]hat the deeply rooted traditions of the country are is arguable.’” *Id.* (quoting *Moore v. E. Cleveland*, 431 U.S. 494, 549 (1977) (White, J., dissenting)).

⁸⁷ See e.g., *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 851 (1992) (in which Justice Kennedy defined the asserted right as the right “to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life.”).

⁸⁸ See generally *id.*

⁸⁹ *Id.* at 851.

⁹⁰ See, e.g., *Michael H.*, 491 U.S. at 127 n.6 (1989) (opining that a rule that does not look to a particular and specific tradition leads to arbitrary decisionmaking and “leav[es] judges free to decide as they think best when the unanticipated occurs”).

*Bowers v. Hardwick*⁹¹ and the case that overruled it, *Lawrence v. Texas*.⁹² Both *Bowers* and *Lawrence* had similar fact patterns in which homosexual men were facing criminal prosecution for engaging in the act of sodomy in their homes. The outcome in *Lawrence*, however, wholly contradicted the conclusion reached in *Bowers* regarding whether the asserted right was protected.⁹³ More troubling than the contradiction itself, though, is the fact that the only real reason for the contradiction seems to be that the majority in *Lawrence* arbitrarily decided to define the asserted right more generally than it did in *Bowers*.⁹⁴ The Court in *Bowers* defined the asserted fundamental liberty interest narrowly, asking “whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy”⁹⁵ Finding that “[p]roscriptions against that conduct have ancient roots,” the Court held that homosexuals did not have a fundamental right to engage in sodomy in their respective homes.⁹⁶

When this question was revisited in *Lawrence*, however, the Court opted to define the fundamental liberty interest at stake more generally. The *Lawrence* Court asked whether “liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex.”⁹⁷ Generalizing the fundamental liberty interest to the right of adults to a private sex life as opposed to the right of homosexuals to engage in sodomy, the Court found ample historical evidence to support its decision that such a right is fundamental and deserves constitutional protection.⁹⁸

The most troubling aspect of the *Lawrence* decision was not the result.⁹⁹ Rather, the most troublesome aspect of *Lawrence* was how easily the Court, recognizing that homosexual persons are much more accepted in society today than they were when *Bowers* was decided over fifteen years earlier, arbitrarily altered how it defined the asserted right to reach the Justices’ desired outcome. It is this ability to change the analysis in order to reach a desired outcome that best exemplifies the problems associated with the application of the history and tradition test. The fact that the Court can reach such blatantly opposite results on so many occasions shows that the

⁹¹ *Bowers v. Hardwick*, 478 U.S. 186 (1986).

⁹² *Lawrence v. Texas*, 539 U.S. 558 (2003).

⁹³ *Id.* at 581–85.

⁹⁴ *Id.* at 566–67 (holding that the asserted right was fundamental and thereby overruling the opposite decision reached in *Bowers*).

⁹⁵ *Bowers*, 478 U.S. at 190.

⁹⁶ *Id.* at 192, 196.

⁹⁷ *Lawrence*, 539 U.S. at 572.

⁹⁸ *Id.* at 567.

⁹⁹ Indeed, those who agree that homosexuals should not have the right to engage in a private sex life are part of a rapidly diminishing minority in modern society. See, e.g., Peyton M. Craighill & Scott Clement, *Support for same-sex Marriage hits new high; half say Constitution Guarantees right*, WASH. POST (Mar. 5, 2014), http://www.washingtonpost.com/politics/support-for-same-sex-marriage-hits-new-high-half-say-constitution-guarantees-right/2014/03/04/f737e87e-a3e5-11e3-a5fa-55f0c77bf39c_story.html.

only consistency in this area is inconsistency itself. This is especially troublesome in the substantive due process arena, considering its treacherous past in the *Lochner* era.¹⁰⁰ As Justice White famously stated in *Bowers*, “[t]he Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution.”¹⁰¹ As the Analysis section of this Comment suggests below, there is a great need for considerable reform of the substantive due process doctrine.¹⁰² The protection of the most basic human rights in our democratic society is a task far too important to be left to a judge who has no concrete restraints or rules guiding his analysis.

III. ANALYSIS

To address the still unresolved tensions inherent in modern substantive due process jurisprudence, the Court should abandon its reliance on history and tradition in determining whether a right is fundamental. The constant technological breakthroughs and adapting societal attitudes of modern times make the historical approach arbitrary and irrelevant to the question of the importance of certain rights today. This section begins with a description of the many problems associated with using history as the standard in substantive due process doctrine, and provides reasons the Court should abandon this practice. To address the glaring problems surrounding the use of history as the proper standard in substantive due process cases, this Comment next argues that the Court should adopt a balancing test that weighs the interests of the individual in keeping the right against the government’s interest in regulating the right.

A. The Modern History and Tradition Approach to Substantive Due Process Should be Abandoned

The history and tradition test is not flawed only because of its malleability and subjectivity. The very logic upon which it rests is flawed as well. The purpose of the substantive due process doctrine is to protect individuals against majoritarian policy enactments that exceed the limits of governmental authority—that is, its purpose is to protect minority interests and other rights that our society deems deserving of heightened protection.¹⁰³ As explained below, there are many reasons why the history and tradition test does not effectuate this purpose.

First, the history and tradition test does not adequately protect the

¹⁰⁰ *McDonald v. Chicago*, 130 S. Ct. 3020, 3100–01 (2010).

¹⁰¹ *Bowers*, 478 U.S. at 194.

¹⁰² See *infra* Part III.

¹⁰³ TIMOTHY SANDEFUR, *THE RIGHT TO EARN A LIVING: ECONOMIC FREEDOM AND THE LAW* 90–100 (2010).

interests of the minority due to its circular nature. The history and tradition test is circular in that it examines whether an asserted right is deserving of protection by asking whether that right was valued and protected in the past.¹⁰⁴ In this respect, relying on history makes the analysis incomplete because it will not protect the minority; rather, it will only protect those who have a tradition of protection and, therefore, need it the least. Thus, reliance on history will tend to only protect those rights that the majoritarian political process has already protected and will necessarily fail to protect the rights of the minority.¹⁰⁵

Next, the history and tradition test is logically flawed in that history often has little bearing on the present. It has been argued that the history and tradition test is at odds with the democratic nature of our government.¹⁰⁶ As one commentator put it, the “overtly backward-looking character [of history and tradition] highlights its undemocratic nature: it is hard to square with the theory of our government the proposition that yesterday’s majority . . . should control today’s.”¹⁰⁷ Moreover, the history and tradition test fails to compensate for the fact that certain historical values either change over time or become completely wrong considering advances in technology.¹⁰⁸ As Justice Blackmun stated:

“It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.”¹⁰⁹

Given that the practical significance and public understanding of asserted rights evolve and change on such a frequent basis, determining whether a right is fundamental to our society by looking to history will often lead to a result that is in direct conflict with the modern-day understanding of such rights.¹¹⁰

Finally, the modern approach is flawed in that the understanding of what is historically significant is often conflicting and inconsistent

¹⁰⁴ David Crump, *How do the Courts Really Discover Unenumerated Fundamental Rights? Cataloguing the Methods of Judicial Alchemy*, 19 HARV. J.L. & PUB. POL’Y 795, 861 (1996).

¹⁰⁵ *Id.*

¹⁰⁶ JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 62–63 (1980).

¹⁰⁷ *Id.* at 62.

¹⁰⁸ *See, e.g.*, Michael H. v. Gerald D., 491 U.S. 110, 140 (1989) (Brennan, J., dissenting) (“In the plurality’s constitutional universe, we may not take notice of the fact that the original reasons for the conclusive presumption of paternity are out of place in a world in which blood tests can prove virtually beyond a shadow of a doubt who sired a particular child and in which the fact of illegitimacy no longer plays the burdensome and stigmatizing role it once did.”)

¹⁰⁹ *Bowers v. Hardwick*, 478 U.S. 186, 199 (1986) (Blackmun, J., dissenting) (quoting Oliver W. Holmes, *The Path of The Law*, 10 HARV. L. REV. 457, 469 (1897)).

¹¹⁰ *McDonald v. Chicago*, 130 S. Ct. 3020, 3117–18 (2010) (Stevens, J., dissenting).

depending on the account on which the judge relies.¹¹¹ The conflicting accounts of history lead to the high potential that this standard will be abused. It is nearly impossible to consult history and find a conclusion that is indisputable.¹¹² Conversely, it is almost always possible to find historical justification for nearly any preconceived outcome the judge desires. The potential for a judge to make a decision and then justify it by cherry-picking bits and pieces of history evinces the standard's complete lack of objectivity.

B. A Proposed Alternative to Replace the History and Tradition Standard

Due to its manipulability (and often times inapplicability) to modern views on rights and liberties, the history and tradition test should no longer be the touchstone for determining whether a right is fundamental in modern times. Instead, the Court should adopt a balancing test in which it determines, on a case-by-case basis, whether the government overstepped its authority by balancing the competing interests of the individual in maintaining the asserted right against the government's interest in regulating that right. This proposed alternative mirrors the test used for determining the adequacy of procedures under the similar doctrine of procedural due process from *Mathews v. Eldridge*.¹¹³

1. Explanation of the Proposed Balancing test

The proposed balancing test has three steps, each of which are discussed below. The first step of the proposed balancing test requires the Court to define the interests of the individual in keeping the right. When determining the extent of the individual's interest, the Court should focus on two factors: (1) the importance of the right to the individual, and (2) the seriousness of the consequences for the individual if deprived of that right, including whether the individual has any other alternatives available.¹¹⁴

Step two of the proposed balancing test requires the Court to define the interests of the government in regulating the right. There are several factors that determine the extent of the government's interest in this analysis. First, it is necessary for the Court to determine whether the government is regulating in a purely private area or whether it is regulating a

¹¹¹ See, e.g., *Michael H.*, 491 U.S. at 137 (Brennan, J., dissenting) (stating that history and tradition "can be as malleable and as elusive as 'liberty' itself The pretense [that history and tradition can limit discretion] is seductive; it would be comforting to believe that a search for 'tradition' involves nothing more idiosyncratic or complicated than poring through dusty volumes on American history.").

¹¹² See, e.g., *id.* (quoting *Moore v. E. Cleveland*, 431 U.S. 494, 549 (1977) (White, J., dissenting)) ("What the deeply rooted traditions of the country are is arguable.").

¹¹³ See generally *Mathews v. Eldridge*, 424 U.S. 319 (1976). The test in *Mathews* holds that, to determine "whether the administrative procedures provided . . . are constitutionally sufficient requires [an] analysis of the governmental and private interests that are affected." *Id.* at 334 (citation omitted).

¹¹⁴ *Id.* at 334-35.

public matter.¹¹⁵ The more the government regulates a purely private area, the less weight should be assigned to the government's purported interest in regulating it. Next, the Court should look to the government's stated reasons for infringing upon the right. The particular weight of these interests should be determined by looking at the extent to which they relate to the traditional police powers of the state.¹¹⁶ Finally, the Court should determine the seriousness of the consequences to the government if the law were struck down and whether the interests of the government could be effectuated without infringing upon the right at issue.

Step Three is simply a balancing of the competing interests of the individual and the government. When weighing the interests, the judge should determine whose interests are most important. This step would require a judge to state, on the record, her reasons for determining that one interest outweighs another. If the individual's interest outweighs the government's interest in regulating the right, then the law is an unconstitutional infringement on liberty. However, if the government's interest in regulating the right is higher than the individual's right in retaining the interest, then the law must be upheld.

2. Benefits and Criticisms of the Proposed Balancing test

Balancing interests on a case-by-case basis rather than looking to history and tradition in each case will better protect those rights that are presently deemed important by society and will address many of the shortcomings of the modern approach described above. Most importantly, requiring judges to assess the importance of the right by looking directly to its significance to the individual in the case, rather than its importance in history and tradition, will better protect the interests of the minority. The present-focused nature of the balancing test will also improve upon the history and tradition standard's failure to recognize that values change over time. A judge applying the balancing test will determine, in each individual situation, whether the asserted right is too important to the individual to allow the government to regulate it. Looking at the unique circumstances of the individual to determine the interests at stake will adequately take into account values and interests as they stand in the individual's current

¹¹⁵ A purely private area would be one that included, for example, one's personal thoughts, feelings, bodily integrity, or one's intimate relationships. This would also include conduct that takes place in the privacy of one's home and does not affect the public in any substantial manner. By contrast, a purely public matter would include, for instance, the regulation of public areas, of commercial activity, or of government benefits. In other words, regulation in areas that tend to affect the public as a whole and not simply the actions of individuals specifically.

¹¹⁶ See *Chicago, Burlington & Quincy Ry. Co. v. Illinois*, 200 U.S. 561, 593 (1906). "Police powers" include regulations to promote public health, morals, and safety and add to general public convenience, prosperity, and welfare. *Id.* at 592. Actions in furtherance of a state's police powers are given more weight under this analysis based on the traditional notion that states are acting appropriately when promoting such interests. *Id.* at 592-93.

situation and not as they were in the past.

The proposed balancing test also improves upon the history and tradition approach by increasing the transparency of the judge's determination and thereby lessening the potential for abuse. A judge applying the proposed balancing test will have to cite all of the individual's and government's interests at stake and then justify the reason for her decision as to which interest is more important. Listing all of the interests the judge took into consideration and assigning relative weight to each on the record promotes transparency as to why the judge reached a particular decision. Using the history and tradition test, judges simply need to cite to a particular view of history to justify the decision they reached. Forcing judges to go through a process, in which they define each interest, assign weight to each interest, and then make a reasoned decision based upon the relative weight of each interest will cut down on the potential for abuse by forcing judges to explain themselves on the record throughout each step of the analysis.

Despite the many benefits the proposed balancing test has over the modern history and tradition approach, it is by no means a perfect solution to the inherent problems of substantive due process and will likely invite many criticisms of its own. One of the main arguments against this proposed approach will likely be that, in leaving judges alone to determine which interests are important, it does not foreclose the potential for abuse. The potential for abuse can never be eradicated. The established and listed criteria used by the proposed standard, however, result in much less discretion than is typically involved in the "picking and choosing" that is inherent to using the history and tradition standard.¹¹⁷ Judges applying the history and tradition standard are faced with the insurmountable task of looking to history, *as a whole*, and deciphering a single conclusion from that infinite amount of available information. Judges applying the proposed standard, on the other hand, would look only to the interests of the two parties in court, which is a decidedly smaller amount of information to choose from than simply history in general.

Critics will also likely argue that this proposed standard is unpredictable due to the fact that courts will apply the test on a case-by-case basis and will not rely on determinations made by past decisions. What this standard presumably lacks in predictability, however, it will make up for with consistency. Current Supreme Court doctrine is highly inconsistent in that it fails to apply the history and tradition standard in the same manner every time.¹¹⁸ The proposed standard, however, creates stricter guideposts that narrow the Court's analysis and results in minimal opportunity for an

¹¹⁷ See *supra* Part III.A.

¹¹⁸ See *supra* Part II.A.

abuse of discretion. Being constricted in their respective analyses, all members of the Court will more often reach decisions in a similar manner. This will result in greater consistency and ultimately more predictability.

3. Hypothetical Applications of the Proposed Balancing test

This section showcases the application of the proposed balancing test. The following hypothetical applications show that this proposed standard, even though it may not yield the same results as the history and tradition approach, is more transparent and allows for readers to understand why a certain outcome was reached. The detailed steps a judge must follow when applying this proposed test result in more consistent outcomes and, most importantly, a detailed explanation on the record for why the judge reached a certain decision.

a. Right to Physician-Assisted Suicide: Proposed Analysis Results in Same Outcome as History and Tradition Approach

In *Washington v. Glucksberg*, the Court considered whether there was a constitutional right to assistance in committing suicide.¹¹⁹ Using the modern history and tradition test, the Court determined that the right was not fundamental and therefore not entitled to special protection under the Due Process Clause of the Fourteenth Amendment.¹²⁰ In reaching this conclusion, the Court relied on the fact that it was a crime to assist a suicide in almost every state and almost every western democracy.¹²¹

The first step of the proposed balancing test is to define the right at stake at its most specific level. Here, the specific right asserted is the right to physician-assisted suicide. Once the right is defined, the proposed balancing test next requires a consideration of the interests of the individuals in having the right to physician-assisted suicide. The private interests here include the individual's interest in dying on their own terms, and the interest in being relieved of chronic pain at the end of their lives. Analysis of the individual's right then looks to the seriousness of the consequences if he or she was deprived of that right. The main consequence includes the possibility that an individual will have to endure more pain until they later die naturally. Another possible consequence if the person were deprived of the right, however, is the chance that the individual regains their health and ultimately lives longer.

After defining the individual interests at stake, the proposed test then considers the government's interest in regulating the right. The extent

¹¹⁹ See *Washington v. Glucksberg*, 521 U.S. 702, 735 (1997).

¹²⁰ See *id.* at 723.

¹²¹ *Id.* The Court held there was "a consistent and almost universal tradition that has long rejected the [right to assisted suicide], and continues explicitly to reject it today . . ." *Id.*

of the government's interest depends on three separate determinations: (1) the extent to which the government is regulating a purely private activity; (2) the legitimacy and seriousness of the government's stated reasons for regulating the right; and (3) whether the government has any alternatives by which it could still effect its primary interests while not completely infringing on the right at stake.

Here, it is clear that the activity being regulated—the right to physician-assisted suicide—is not purely private or public. While the patient's right to physician-assisted suicide is private because it deals with an individual's desire to die on his own terms, the physician's right to assist with the suicide is a public matter because it deals with an entire profession that is heavily regulated. Next, the governmental interests at stake include the primary interest of preservation of life, the interest in protecting the integrity and ethics of the medical profession, and the interest in protecting vulnerable groups.¹²² Finally, there are no viable alternatives for the government to effectuate its primary interest of preserving human life. There is simply no way for the government to allow physician-assisted suicide and protect its interest in preserving life at the same time.

The final step of the proposed test requires a careful balancing of all the interests at stake. Here, the government's compelling interest in the preservation of life and the lack of any alternatives to achieving this compelling interest weigh heavily in favor of the government's interest. While the individual interest in dying on one's own terms is important, the consequences of the deprivation of this right are not severe enough to outweigh the government's strong interest and lack of alternatives. Moreover, the possibility that an individual could overcome the pain and enjoy their continued life weighs heavily against the private interest at stake. The individual's interest and the consequences at stake cannot overcome the government's important interest in preserving life and the lack of viable alternatives for effectuating this purpose. Thus, the proposed test would not protect this right.

b. Right to Own Handguns—Proposed Analysis Results in Different Outcome Than History and Tradition Approach

In *McDonald v. City of Chicago*, the Court was faced with the question of whether individuals have the right to possess handguns in their homes.¹²³ The Court concluded that the Second Amendment's right to bear arms—specifically, handguns—was incorporated by and therefore applicable to the states through the Fourteenth Amendment.¹²⁴ If the Court

¹²² *Id.* at 728–31.

¹²³ *McDonald v. Chicago*, 130 S. Ct. 3020, 3036 (2010).

¹²⁴ *Id.* at 3049–50.

analyzed this question under substantive due process rather than incorporation, however, and applied the proposed balancing test, the outcome would have been different.

The first step of the proposed balancing test—defining the right in its most specific level of generality—requires defining the right as the right to own handguns in the home for self-defense. The next step of the proposed test is to define and value the interests of individuals in keeping the right, which requires a consideration of the importance of the right to the individual and the seriousness of the consequences to the individual if he were deprived of the right. The importance of the right at issue is not highly important to the individual in this situation. While the individual has an important interest in self-defense, he does not have a very important interest in self-defense with a handgun. The ban of handguns is not a complete ban on all types of firearms, only handguns. Therefore, the individual can promote her interest in defending herself through other means, such as owning a rifle or another type of weapon that is not a handgun. For this reason, the consequences of a deprivation of the right to own handguns would likewise not be very serious. Individuals can still own firearms for the purpose of defending themselves; they simply cannot own handguns for this reason.

The next step of the proposed balancing test considers the interests of the government in regulating the asserted right. First, it should be noted that, although the right being regulated deals with private conduct in the home, it should not be considered a purely private matter. The possession of handguns may have a direct effect on the amount of gun violence in a particular locale, which in turn has a direct impact on that community. Therefore, the government should not be considered to be regulating a purely private matter even though the asserted right occurs in the home.

Additionally, the government has a strong and important interest in public safety that is served by prohibiting handguns. Handguns are more dangerous than rifles because they can be hidden, and the government therefore has a strong interest in promoting public safety in regulating this right. And the government has narrowly tailored its regulations to promote this interest. Finding that a large majority of shootings in the city were perpetrated by handguns instead of other types of firearms, the government only chose to regulate handguns and left alone the right to own other types of firearms.¹²⁵

Finally, moving to the last step—weighing the interests of the individual and government—application of the proposed balancing test would likely find that the government's interest in regulating the right to

¹²⁵ *Id.* at 3026 (citation omitted).

own handguns outweighs the interest of the individual. This conclusion is based on the relatively low consequences suffered by individuals in effectuating their important interest in self-defense, as compared to the government's very important interest in promoting public safety by prohibiting the type of firearm most responsible for violence within the city. Individuals still have the ability to defend themselves with a firearm even if the government bans the possession of handguns. Since the ability to defend oneself using other firearms remains intact, the individual has only a marginal interest in owning handguns. This marginal interest is easily outweighed by the government's very important interest in promoting public safety by prohibiting the biggest culprits of violence in the city. Application of the proposed test, therefore, would likely come to a different conclusion than the one reached in *McDonald* but with more information on the record to support the reasons for reaching such a contrary decision.

c. Same-Sex Marriage—The Proposed Analysis Would Result in the Protection of this Right

A question sure to be considered more frequently in the near future is whether individuals have the right to marry another of the same sex. Although the Court has not had occasion to confront this issue specifically, it will likely have the opportunity to do so in the upcoming years.¹²⁶ If the Court were to use the analysis proposed by this Comment, the outcome would likely result in the protection of the right to marry others of the same sex.

To begin the analysis, the right at issue, defined at its most specific level, would be defined as the right of a man or woman to marry another of the same sex. The interests of the individuals would consist of the interest in marrying whomever they want, the opportunity to enter into a legal bond with another, and the opportunity to avail themselves of the legal benefits of marriage. While the deprivation of these interests is likely not dire to the individuals, they are nevertheless highly important interests. For instance, while a gay couple can still have a relationship without being married, there are many benefits and privileges of marriage that they could not enjoy such as “hospital visitation,” “the ability to obtain ‘family’ health coverage,” “taxation and inheritance rights,” the “role as parent of their children,” or “protection in case the relationship ends.”¹²⁷ These benefits can hardly be considered unimportant to the lives of gay couples. With respect to the extent of the deprivation, this varies depending on the state. Obviously in

¹²⁶ *Editor's Note:* This Comment was written and selected for publication prior to the Court's respective rulings in *United States v. Windsor*, 133 S. Ct. 2675 (2013), and *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013). The editors will leave it to the reader to discern the prescience of the author's observations in this comment as applied to the issue of same-sex marriage.

¹²⁷ *Marriage 101*, FREEDOM TO MARRY, <http://www.freedomtomarry.org/pages/marriage-101> (last visited May 18, 2014).

states where gay marriage is completely banned, the individuals experience a total deprivation of the right. However, even in states that recognize civil unions or domestic partnerships, there is still essentially a total deprivation of the right. This is due to the fact that the relationship is still not recognized outside of the state and only some of the privileges and benefits of marriage are available to domestic partners and the like.

Next, the governmental interest analysis begins with determining the extent to which the ban on gay marriage regulates a purely private area. In this case, it is obvious that the right to marry the person of one's choosing is a very private matter. This factor weighs heavily against the government's interests in this case. Next, the government has many interests supporting its ban of gay marriage. First, the government has an interest in regulating marriage with respect to the benefits and privileges given by the state to spouses. This is an important interest because the state has the ultimate discretion, for the most part, to determine who will receive certain benefits it offers. Next, the government would argue that it has an interest in upholding the values of its citizens and the traditional marital ideals. This interest, however, is very weak due to the fact that it is grounded in prejudice against a class of persons. Finally, the government would argue that it has an important interest in regulating marriage in order to encourage procreation, which will not result from the marriage of gay couples. Furthermore, the government would argue that there are alternatives to marriage available to gay couples, such as civil unions and domestic partnerships. However, as discussed earlier, these do not avail gay couples of all of the privileges and benefits as other married couples.

Weighing the interests of both the individual and the government, a court would likely find that the individual's interest in marrying the person of his choosing heavily outweighs the interest of the government in regulating gay marriage. The fact that the government is regulating an interest that is of such private, as opposed to public, concern weighs heavily in favor of the individual and ultimately favors protecting the individual's right. Furthermore, the fact that the government has alternatives available, but that the alternatives do not completely measure up to those available to other married couples, shows that the government is not merely concerned with providing benefits to more individuals. Rather, it shows that the decision to not grant full benefits to gay couples is grounded in discriminatory, rather than fiscal, concerns. In the end, the individual's right to marry whomever he wants and have the same opportunity to build a family as any other married person is a strong and compelling interest that would likely result in a court protecting the right of gay couples to enter into marriage.

IV. CONCLUSION

The problems associated with the history and tradition approach to the fundamental rights doctrine are evident. The manipulability of history and the inconsistent definition of rights result in a high propensity for judicial discretion and abuse. The history and tradition standard has thus outlived its usefulness by failing to provide the objectivity it promised to deliver.

The proposed balancing test recommended by this Comment would help rectify many of the issues associated with the history and tradition standard while continuing to dedicate itself to protecting rights that society deems inalienable. Utilizing the proposed balancing test, a court would determine, on a case-by-case basis, whether a right should be protected by balancing the interest of the individual in keeping the right against the government's interest in regulating the right. Thus, so long as the government has a legitimate reason for regulating the right and the consequences of losing the right are not dire to the individual, the law infringing upon the right will likely be upheld. If, however, the right is highly personal and important to the individual and the state does not stand to promote a valuable and collective interest, the law will likely be invalidated as an impermissible infringement upon the privacy and personhood of the individual.

The requirement for a judge applying this standard to engage in a thorough explanation of both the background and relative weight of each interest implicated in the case represents a clear guidepost that will help rein in judicial discretion. The requirement for both clarity and explanation will also lead to more predictable outcomes in future cases and promote increased transparency into the decision-making process, which is essential for appeals. The Court desperately needs tangible and recognizable guideposts for its fundamental rights jurisprudence in order to curb judicial discretion and to ensure that the Court does not exceed the scope of its judicial powers and thereby continue its reversion toward unfettered, *Lochner* era activism.

