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JUSTICE SCALIA'S DUE PROCESS MODEL: A HISTORY LESSON IN CONSTITUTIONAL INTERPRETATION

The due process clause of the fourteenth amendment to the United States Constitution provides that no individual shall be deprived of life, liberty or property without due process of law.[1] Because of the "fundamental fairness" aspect of the clause, the history of due process jurisprudence is replete with ambiguity.[2] Many

[1] *See* U.S. CONST. amend. V. The fifth amendment commands the federal government that "No person shall . . . be deprived of life, liberty, or property without due process of law . . . . " *Id.* The fourteenth amendment similarly binds the states: "nor shall any state deprive any person of life, liberty or property without due process of law." U.S. CONST. amend. XIV, §1. *See also* Meyer v. Nebraska, 262 U.S. 390, 399 (1923):

> [Liberty substantially protected by due process] denotes not merely freedom from bodily restraint, but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, to establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.

Id.; Twining v. New Jersey, 211 U.S. 78, 106 (1908) (due process clause prohibits procedures which abridge any fundamental principle of liberty and justice which inheres in idea of free government); Hurtado v. California, 110 U.S. 516, 531 (1884) (Supreme Court has analogized safeguards of due process to Magna Carta); Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272, 276 (1855) (due process is restraint on legislative and executive powers). *See generally* L. TRIBE, AMERICAN CONSTITUTIONAL LAW §10-7, at 664 (2d ed. 1988) (due process delineates constitutional limits on judicial, executive and administrative enforcement of governmental and legislative decisions); Sunstein, *Sexual Orientation and the Constitution: A Note on the Relationship Between Due Process and Equal Protection*, 55 U. CHI. L. REV. 1161, 1171 (1988) (clause associated with view that Court's role is to limit dramatic and insufficiently reasoned change, protect tradition against passionate majorities, and bring more balanced and disinterested perspectives to bear on the legislature).

[2] *See* Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 313 (1950) ("Many controversies have raged about the cryptic and abstract words of the Due Process Clause . . . . ").

The ambiguity is well illustrated by a historical review of "substantive" due process jurisprudence, which is based on notions of fundamental fairness inherent in due process. *See* TRIBE, *supra* note 1, §§ 8-1 - 8-7, at 560-86. In the period between 1897 and 1937, known as the "Lochner Era," the judiciary invalidated considerable economic legislation on substantive due process grounds. *Id.* at 568. *See, e.g.*, Adkins v. Children's Hosp., 261 U.S. 525, 561 (1923) (minimum wage law for women unconstitutional), *overruled by*, West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937); Coppage v. Kansas, 236 U.S. 1, 26 (1915) (anti-"yellow dog" statutes violated substantive due process), *overruled by*, NLRB v. Jones &

jurists have relied on tradition[3] in determining which principles of justice are fundamental,[4] however, their analysis has typically in-

Laughlin Steel Corp., 301 U.S. 1 (1937); Lochner v. New York, 198 U.S. 45, 64 (1905) (Court struck down as abridgement of liberty "of contract" and therefore violation of due process, New York Law which limited hours which bakery employee could work), *overruled by* Ferguson v. Skrupa, 372 U.S. 726 (1963); Allgeyer v. Louisiana, 165 U.S. 578, 589, 593 (1897) (Court interpreted "liberty" to include freedom of contract and struck down statute which prohibited anyone from obtaining insurance on Louisiana property from any company not licensed in Louisiana). *See generally* J. ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 14 (1980) (Lochner and like cases are "now universally acknowledged to have been constitutionally improper"); TRIBE, *supra* note 1, § 8-2, at 567 (much state and federal legislation invalidated between 1897 and 1937, in period known as "Lochner era").

The Court's turnover in personnel, coupled with a philosophical shift, led to greater deference to legislative intervention in economic affairs, and not since 1937 has the Court struck down an economic regulation for violating substantive due process. *See, e.g.*, Duke Power Co. v. Carolina Envtl. Study Group Inc., 438 U.S. 59, 94 (1978) (upheld limit on aggregate liability of atomic energy industry since legislature did not act in arbitrary and irrational way), *cert. denied*, 484 U.S. 815 (1987); Williamson v. Lee Optical, Inc., 348 U.S. 483, 491 (1955) (Court showed extreme deference upholding Oklahoma statute which prevented opticians from fitting eyeglasses into frames without prescription from an opthamologist or optometrist); United States v. Carolene Products, 304 U.S. 144, 154 (1938) (federal prohibition on interstate shipment of "filled" milk survived due process challenge and Court announced presumption of constitutionality in cases of economic regulation subjected to due process attack); West Coast Hotel Co. v. Parrish, 300 U.S. 379, 400 (1937) (Court upheld state minimum wage law for women); Nebbia v. New York, 291 U.S. 502, 538-39 (1934) (Court sustained New York regulatory scheme for fixing milk prices). *See generally* W. LOCKHART, Y. KAMISAR, J. CHOPER, & S. SHRIFFIN, THE AMERICAN CONSTITUTION 264 (6th ed. 1986) (suggesting modern Court would not sustain claim of substantive economic rights); Phillips, *Another Look at Economic Substantive Due Process*, 1987 WIS. L. REV. 265, 269-85 (discussing history of economic substantive due process).

[3] *See* WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE 2422 (3d ed. 1961). The word "tradition" is derived from the Latin, *traditio*, which in turn is derived from the verb tradere, meaning to deliver or hand over. *Id.* Tradition is the delivery of something into the hands of another. *Id.* It is the process of handing down a set of teachings, information, opinions and customs from generation to generation. *Id. See generally* Balkin, *Tradition, Betrayal, and the Politics of Deconstruction*, 11 CARDOZO L. REV. 1613, 1619 (1990) (discussing etymology of tradition).

[4] *See, e.g.*, Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272, 277 (1855). As early as 1855, Supreme Court justices looked to the settled usages and modes of proceeding existing in the common law and statutes of England to determine what principles were embodied in due process of law. *Id.* Similarly, in Ownbey v. Morgan, 256 U.S. 94 (1921), Justice Pitney utilized tradition as a dispositive factor in a foreign attachment case which conditioned the defendant's right to contest the merits of the plaintiff's demand upon the procurement of special bail, or surety, as was the custom in colonial days. *Id.* at 98. Harlan Stone, the attorney for the defendant, claimed that "[a] process of law is due process within the meaning of constitutional limitations if it can show the sanction of settled usage both in this country and in England." *Id.*

The Court has continued to face the issue of what elements constitute due process of law. *See* Bowers v. Hardwick, 478 U.S. 186, 196 (1986). In *Bowers*, the Court upheld a Georgia statute criminalizing sodomy against a due process attack. *Id.* Justice White, writing for the plurality, relied on the fact that proscriptions against sodomy had ancient roots

cluded a balancing of other factors.[5] Recently, in *Michael H. v. Gerald D.*,[6] *Burnham v. Superior Court*,[7] and *Pacific Mutual Life Insurance Co. v. Haslip*,[8] Justice Antonin Scalia[9] proposed an interpretive model which renders tradition dispositive in defining the parameters of due process.[10]

and at the time the fourteenth amendment was ratified all but 5 of the 37 states had criminal sodomy laws, that all 50 of the states had such laws prior to 1961, and that 24 states and the District of Columbia continued to have them. *Id.* at 192-93. *See also* Jackman v. Rosenbaum Co., 260 U.S. 22, 30 (1922) ("Where the custom of party walls . . . has prevailed for over 200 years, a statute embodying the common understanding that ownership of land is subject to the right of the adjoining owner to erect a party wall is valid under the Fourteenth Amendment"); Louisville and Nashville R.R. Co. v. Barber Asphalt Paving Co., 197 U.S. 430, 434 (1905) ("A system of delusive exactness . . . [should] not be extracted from the very general language of the Fourteenth Amendment . . . in order to destroy methods of taxation which were well known when the Amendment was adopted and which no one supposed would be disturbed"); Hurtado v. California, 110 U.S. 516, 528 (1884) (that which has been immemorially actual law of land is due process of law). *But see* Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897).

> 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.

Id.

[5] *See, e.g.*, Ake v. Oklahoma, 470 U.S. 68, 76-87 (1985) (fundamental fairness consists of weighing private interest, governmental interest, and value of additional procedural safeguards); Lassiter v. Dep't. of Social Serv. of North Carolina, 452 U.S. 18, 24-25 (1981) (fundamental fairness consists of assessing interests at stake); Mathews v. Eldridge, 424 U.S. 319, 332-35 (1976) (due process requires consideration of private interest affected, risk of erroneous deprivation of interest, and government interest). *Cf.* Press-Enterprise Co. v. Super. Ct. of Cal., 478 U.S. 1, 10-12 (1986) (noting specific reference to value of tradition, although traditional practices are still balanced against other factors); Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 577-79 (1980) (same).

[6] 109 S. Ct. 2333 (1989).

[7] 110 S. Ct. 2105 (1990).

[8] 111 S. Ct. 1032 (1991).

[9] *See* Comment, *Justice Scalia and Judicial Restraint: A Conservative Resolution of Conflict Between Individual and State*, 62 TUL. L. REV. 225, 225 (1987). Antonin Scalia was appointed to the Supreme Court in the summer of 1986 by President Ronald Reagan. *Id.* He was the only child of Italian immigrant parents. Stengel, *Warm Spirits, Cold Logic*, TIME, June 30, 1986, at 30. He attended high school in Manhattan, was valedictorian at Georgetown University and a member of the Law Review at Harvard University. *Id.* He spent six years at a Cleveland law firm before accepting a position as law professor at the University of Virginia. *Id.* In 1971, he became general counsel to the White House Office of Telecommunications Policy. *Id.* Finally, in 1982, he was appointed to the United States Court of Appeals for the District of Columbia Circuit, where he served until his appointment to the United States Supreme Court. *Id. See also* Kannar, *The Constitutional Catechism of Antonin Scalia*, 99 YALE L.J. 1297, 1313-20 (1990) (Roman Catholic upbringing shaped Scalia's outlook and sense of relationship between legal form and substance). *See generally* Brisbin, *The Conservatism of Antonin Scalia*, 105 POL. SCI. Q. 1, 5-10 (1990) (discussion of Scalia's democratic vision and orientation).

[10] *See* Pacific Mut. Life Ins. Co. v. Haslip, 111 S. Ct. 1032, 1065 (1991); Burnham v.

This Note will clarify and evaluate Justice Scalia's model which utilizes tradition as a guide in constitutional interpretation. Part I will discuss Justice Scalia's applications of tradition in recent cases. Part II will explain the judicial ideology behind his model and examine its specific parameters which safeguard against judicial subjectivity. Part III will suggest that invoking Justice Scalia's model, while functional in a due process analysis, may have adverse ramifications in cases involving equal protection or first amendment challenges.

I. Justice Scalia's Recent Applications of the Model

In *Michael H. v. Gerald D.*,[11] Justice Scalia embraced a new due process methodology in the Supreme Court's rejection of a due process challenge to a California Family Law statute.[12] The statute provided for an irrebuttable presumption of legitimacy for any child born to a married woman living with her husband.[13] In

Super. Ct. of Cal., 110 S. Ct. 2105 (1990); Michael H. v. Gerald D., 109 S. Ct. 2333 (1989). The argument that traditional practices are immune from constitutional scrutiny is advanced in the concurring opinion in *Pacific Mutual*, and the plurality opinions in *Michael H.* and *Burnham*, all authored by Justice Scalia, but not in any opinion joined by a majority of the Members of the Supreme Court.

Early Supreme Court decisions reflect principles similar to those espoused in Justice Scalia's due process model, however, Justice Scalia explained and refined the methodology those decisions suggested. *See, e.g.*, Hurtado v. California, 110 U.S. 516 (1884); Walker v. Sauvinet, 92 U.S. 90, 92-93 (1876); Murray's Lessee v. Hoboken Land & Improvement Co., 18 (1 How.) 272 (1856). As Justice Scalia noted in *Pacific Mutual*, more recent due process opinions have shifted away from a wholesale tradition analysis in favor of a balancing test. *Pacific Mutual*, 111 S. Ct. at 1051.

Many state court decisions have also relied on tradition in due process analysis. *See* Property Research Fin. Corp. v. Sup. Ct., 23 Cal. App. 3d 413, 419, 100 Cal. Rptr. 233, 237 (1972) (foreign attachment valid under due process clause since rooted in tradition of common law); People v. DelGuidice, 199 Colo. 41, 45-46, 606 P.2d 840, 843-44 (1979) (jury consideration of defendant's intoxication proper in murder case since rule is one of long-standing tradition); *In re* Estate of Freeman, 34 N.Y.2d 1, 9, 311 N.E.2d 480, 484, 355 N.Y.S.2d 336, 341 (1974) (attorney's fees reasonable in light of long and almost universal tradition for fixation); Cohn v. Borchard Affiliations, 25 N.Y.2d 237, 249, 250 N.E.2d 690, 695, 303 N.Y.S.2d 633, 641 (1969) (procedural statute constitutional since general power of legislature to make such rules was firmly embedded in tradition).

[11] 109 S. Ct. 2333 (1989).

[12] Cal. Evid. Code § 621 (West Supp. 1989). This law provides that "the issue of a wife cohabitating with her husband, who is not impotent or sterile, is conclusively presumed to be a child of the marriage." *Id.*

[13] Cal. Evid. Code § 621 (c) & (d) (West Supp. 1989). This section declares that except in limited circumstances, it is irrelevant for purposes of paternity, whether a child born into an existing marriage is actually the natural child of another man; the presumption can be

Michael H., petitioner had an adulterous affair with a married woman which resulted in the birth of a child.[14] Rebuffed in his attempts to visit the child, petitioner filed a filiation action to establish his paternity in an evidentiary hearing.[15] The California Superior Court held that it was legally impossible under the statute for petitioner to establish paternity to his natural child.[16] On appeal, the United States Supreme Court held that the statute did not violate petitioner's procedural or substantive due process rights.[17]

Justice Scalia, writing for a plurality of the Court, framed the issue as whether the statute violated petitioner's liberty interest as a matter of substantive due process.[18] He identified the liberty interest involved as the right of a biological father to assert parental rights over a child born into a woman's existing marriage to another man.[19] Justice Scalia noted the long-standing "sanctity" traditionally accorded to the marital family,[20] with its genesis in common law.[21] In contrast, he found no tradition protecting a natural

rebutted only by the husband or wife, and then only in limited circumstances. *Id.*

[14] *Michael H.*, 109 S. Ct. at 2337. Carole D., an international model, was married in May of 1976 to Gerald D., an executive in a french oil company. *Id.* The couple lived together as husband and wife when one or the other was not out of town on business. *Id.* In the summer of 1978, Carole had an affair with her neighbor, Michael H., and conceived a child, Victoria D., in September of 1980. *Id.* Gerald's name appeared on Victoria's birth certificate and he always held the child out as his own. *Id.* However, pursuant to Carole's admission to her husband that he may not be Victoria's natural father, blood tests were conducted which concluded that Michael H. was Victoria's natural father. *Id.* After a short separation, Carole reconciled with Gerald, and two other children have since been born into the marriage. *Id.*

[15] *Id.* at 2337.

[16] *Id.* at 2338.

[17] *Id.*

[18] *Id.* at 2341-43. Michael challenged § 621 on both procedural and substantive due process grounds. *Id.* at 2338. His procedural due process argument was that the state could not terminate his liberty interest in his relationship with his natural child without allowing him the opportunity to demonstrate his paternity in an evidentiary hearing. *Id.* at 2340. Justice Scalia responded that while the statute is procedural in its denial of certain parental rights to all men in Michael H.'s circumstances, the law serves the additional purpose of implementing the substantive policy of preserving the integrity of the family unit, and therefore, the statute should be reviewed under a substantive due process analysis. *Id.*

[19] *Michael H.*, 109 S. Ct. at 2342-43.

[20] *Id.* at 2342 (citing Lehr v. Robertson, 463 U.S. 248, 261 (1983) (recognizing constitutionally protected family relationship)); Quilloin v. Wallcott, 434 U.S. 246, 254-55 (1978) (same); Moore v. East Cleveland, 431 U.S. 494, 503 (1977). (Constitution protects sanctity of family because of its deeply rooted history and tradition).

[21] *Michael H.*, 109 S. Ct. 2342-43. Justice Scalia noted that the common law presumption

father's interest in asserting parental rights over a child born into a woman's existing marriage to another man.[22] Since the specific liberty interest involved was not so deeply embedded within society's traditions that it could be considered a fundamental right protected by the fourteenth amendment,[23] Justice Scalia concluded that the challenged statute did not violate due process.[24]

In a vigorous dissent, Justice Brennan criticized the plurality's sole reliance on tradition because he believed that reasonable people may differ in identifying which practices constitute a tradition, and which traditions are relevant to the concept of liberty.[25] In addition, the dissent criticized the plurality's decision to protect the interests of the marital family over the interests of natural parents.[26]

A similar analysis was applied the following year in *Burnham v.*

of legitimacy for children born to married parents was motivated by policy goals of preservation of children's inheritance rights and succession. *Id.* at 2343.

[22] *Id.* at 2343. Justice Scalia asserted that there was "nothing in the older sources, nor in older cases, 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." *Id.*

[23] *Id.* at 2341 (citing Snyder v. Massachusetts, 291 U.S. 97, 105 (1034) (due process affords those protections so rooted in traditions and conscience of people so as to be fundamental) *overruled by*, Malloy v. Hogan, 378 U.S. 1 (1964)).

The sources used to identify the relevant historical traditions protected by our society included the common law texts of Bracton, Blackstone, Schouler, and others dating back to the sixteenth century. *Id.* Justice Stevens, however, refused to foreclose the possibility that a natural father could never have a constitutionally protected interest with a child born to a woman married to another man, because enduring family relationships may develop in unconventional settings. *Id.* at 2347 (Stevens, J., concurring). Justice O'Connor wrote separately to express her concern that Justice Scalia's methodology, if applied without exception, might foreclose the "unanticipated" by the imposition of a single mode of historical analysis. *Id.* at 2347 (O'Connor, J., concurring in part). She also questioned whether prior due process decisions could withstand Justice Scalia's test. *Id.* at 2346-47 (citing Eisenstadt v. Baird, 405 U.S. 438 (1972); Loving v. Virginia, 388 U.S. 1 (1967); Griswold v. Connecticut, 381 U.S. 479 (1965)). *See infra* notes 65 & 67 (discussing privacy cases)).

[24] *Michael H.*, 109 S. Ct. at 2342-46.

[25] *Id.* at 2349. Justice Brennan did not agree with Justice Scalia's reliance on the works of Bracton, Blackstone, et al., for the content of tradition because in his view the "deeply rooted traditions of the country [are] arguable." *Id.* In addition, Justice Brennan faults the plurality for failing to provide guidelines for identifying the point at which a tradition becomes obsolete such that it should no longer be referred to. *Id.* at 2349-50.

[26] *Id.* at 2350-51. While Justice Brennan does not reject all uses of tradition in constitutional analysis, the dissent criticizes the majority's adherence to the specific tradition involved. *Id.* Justice Brennan favors an analysis which accounts for the general tradition of protecting the interests of a natural parent rather than the specific one relating to rights of a natural parent over those of the non-biological parent. *Id. See infra* notes 66-67 and accompanying text (Justice Brennan's criticism of Justice Scalia's narrow identification of the issue in *Michael H.*).

Superior Court,[27] as a divided Supreme Court relied on tradition in varying degrees in rejecting a due process challenge to a California court's exercise of personal jurisdiction.[28] In *Burnham*, a New Jersey resident was served with a California summons and divorce petition while in California to conduct business and visit his children.[29] Petitioner asserted that the due process clause of the fourteenth amendment prohibited California courts from asserting jurisdiction over him because he lacked the requisite "minimum contacts" with the forum state.[30] The Court rejected the challenge, and held that personal service on a non-resident individual who is temporarily in the state subjects the individual to jurisdiction even though the suit is unrelated to the individual's activities in the state.[31]

In support of this conclusion, Justice Scalia noted that the history antedating the fourteenth amendment sanctioned transient jurisdiction.[32] He reasoned that since transient jurisdiction was

[27] 110 S. Ct. 2105 (1990).

[28] *Id.* at 2106. The California Superior Court denied a motion to quash the service of process, and the court of appeals denied mandamus relief. *Id.*

[29] *Id.* at 2109. When Mr. and Mrs. Burnham decided to separate, they agreed that Mrs. Burnham would file for divorce on grounds of "irreconcilable differences" after she moved to California with her two children. *Id.* Mr. Burnham did not adhere to their agreement; instead he filed for divorce in New Jersey on grounds of "desertion." *Id.* After Mrs. Burnham unsuccessfully demanded Mr. Burnham comply with their agreement, she filed for divorce in California. *Id.* In January 1987, Mr. Burnham visited California on business, visited his children and took the older child away for the weekend. *Id.* Upon returning the child to Mrs. Burnham's home, he was served with process. *Id.*

[30] *Id.* at 2116. At least one lower court had held that the transient presence of a defendant was not sufficient to confer personal jurisdiction over him. *See* Harold M. Pitman Co. v. Typecraft Software, Ltd., 626 F. Supp. 305, 313-14 (N.D. Ill. 1986).

As part of his due process challenge, petitioner relied on a statement from Shaffer v. Heitner, 433 U.S. 186, 212 (1977), that "[A]ll assertions of state court jurisdiction must be evaluated according to the standards set forth in *International Shoe* and its progeny." 110 S. Ct. at 2116. In *Shaffer*, Heitner had brought a shareholder derivative suit in a Delaware court and obtained *quasi in rem* jurisdiction over the corporation's directors by sequestering their property in that state. 433 U.S. at 190-92. The defendants challenged jurisdiction alleging violations of their due process rights and asserted that under *International Shoe*, 326 U.S. 310 (1945), they did not have sufficient contacts with Delaware to sustain jurisdiction. 433 U.S. at 193. The *Shaffer* Court held that jurisdiction was improper since defendant's sole contact with the state was unrelated to the lawsuit. *Id.* at 213-15. *See generally* Heichel, *The Physical Presence Basis of Personal Jurisdiction Ten Years After* Shaffer v. Heitner: *A Rule in Search of a Rationale*, 62 NOTRE DAME L. REV. 713 (1987) (analyzing *Shaffer* and its effect on personal jurisdiction); Reisenfeld, Shaffer v. Heitner: *Holding, Implications, Forebodings*, 30 HASTINGS L.J. 1183 (1979) (implications of *Shaffer*).

[31] *Burnham*, 110 S. Ct. at 2120.

[32] *Id.* at 2120 n.1. Justice Scalia's use of the term "transient jurisdiction" refers to juris-

consistently upheld by the several states,[33] it necessarily constituted a tradition and could not be said to conflict with "traditional notions of fair play and substantial justice."[34] Consequently, he maintained that the practice was validated "by virtue of its pedigree."[35]

In his concurring opinion, Justice Brennan endorsed a predominantly subjective standard for determining which practices comported with traditional notions and fairness.[36] Conceding that jurisdictional tradition was a relevant factor to consider,[37] he supported the Court's decision using a two-prong approach which

diction premised solely on the fact that a person is served with process while physically present in the forum state. *Id.* Justice Scalia asserted, "Among the most firmly established principles of personal jurisdiction in American tradition is that the Courts of a state have jurisdiction over non-residents who are physically present in that state." *Id.* at 2110. He asserted that such was the understanding in 1868 when the fourteenth amendment was adopted. *Id.* at 2111.

[33] *Id.* at 2111-12. "Not one American case . . . held, or even suggested that in-state personal service on an individual was insufficient to confer personal jurisdiction." *Id.* Justice Scalia's approach would examine the fairness of the exercise of jurisdiction only if a particular basis in the law was practiced in a "small minority of the states." *Id.* at 2116.

[34] *Id.* at 2117. The seminal case in the realm of personal jurisdiction is International Shoe Co. v. Washington, 326 U.S. 310 (1945). *Id.* In that case, International Shoe Company, which had its principal place of business in Missouri but was incorporated in Delaware, was served with process in Washington based on the presence of its salesmen in that state. 326 U.S. at 313-14. The Supreme Court upheld the court's exercise of jurisdiction and set out what continues to be the standard for determining whether a state may constitutionally subject a nonresident to the jurisdiction of its courts:

> [D]ue process requires only that in order to subject a defendant to a judgment *in personam*, if he be not present within the territory of the forum, he have certain minimum contacts with it such that maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'

Id. at 316 (quoting Milliken v. Meyer, 311 U.S. 457 (1940)).

Justice Scalia distinguished *Burnham* from *International Shoe* and *Shaffer*, since those cases dealt only with absent defendants; in *Burnham*, petitioner was served while physically present in the forum state. *See Burnham*, 110 S. Ct. at 2116. Further, Justice Scalia asserted that by its very language, the "traditional notions" test is satisfied by jurisdictional rules which have always been applied in the United States. *Id.* at 2117. He criticized the concurrence's standard of "contemporary notions of due process" because it would measure state court jurisdictional rules against what each Justice considered fair and just. *Id.*

[35] *Burnham*, 110 S. Ct. at 2116-17.

[36] *Id.* at 2122. (Brennan, J., concurring). Justice Brennan asserted that rules must comport with "contemporary notions of due process." *Id.*

[37] *Id.* at 2122 n.7 (Brennan, J., concurring). Justice Brennan's claim that tradition is relevant to the inquiry is consistent with opinions authored by Justice Brennan himself; the opinions have relied on tradition as a factor in constitutional analysis. *See, e.g.*, Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 589 (1980) (Brennan, J., concurring) (historical evidence illustrates that when our laws were adopted, criminal trials both here and in England had long been presumptively open).

considers the fairness of the tradition in light of an individual's reasonable expectations.[38]

Recently, in *Pacific Mutual Life Insurance Co. v. Haslip*,[39] a majority of the Court relied on tradition in rejecting a due process challenge to a punitive damages award.[40] Petitioner, a life insurance company, was found guilty of fraud[41] under the theory of respondeat superior.[42] Following the trial court's charge on liability,[43] the jury awarded respondent Haslip punitive damages equal to over four times the compensatory damages claimed.[44] On appeal,

[38] *See Burnham*, 110 S. Ct. at 2124-25. Justice Brennan noted that the transient rule accords with reasonable expectations because when an individual enters the forum state, "[h]is health and safety are guaranteed by the state's police, fire and emergency medical services" . . . [and] he likely enjoys the fruits of the state's economy as well." *Id.* at 2124. *See also* Burger King Corp. v. Rudzewicz, 471 U.S. 462, 476 (1985) (territorial presence enhances reasonable foreseeability of suit there; modern advances reduce need for physical presence); World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980) (defendant's conduct and connection with forum state gives rise to expectation that he may be hauled into court there); Shaffer v. Heitner, 433 U.S. 186, 218 (1977) (minimal contact with forum state gives rise to predictable risks). *See generally* Maltz, *Sovereign Authority, Fairness, and Personal Jurisdiction: The Case for the Doctrine of Transient Jurisdiction*, 66 WASH. U.L.Q. 671, 699 (1988) (transient jurisdiction is consistent with doctrine of sovereign authority); Glen, *An Analysis of "Mere Presence" and Other Traditional Bases of Jurisdiction*, 45 BROOKLYN L. REV. 607, 611-12 (1979) (purposeful presence in forum state found sufficient to confer jurisdiction, and proper under fairness test).

[39] 111 S. Ct. 1032 (1991).

[40] *Id.* at 1043.

[41] *Id.* at 1036-37. Petitioner's agent, Ruffin, was also an agent for Union Fidelity Life Insurance Company, which issued health insurance. *Id.* Representing himself as an agent for Pacific Mutual, petitioner obtained a contract from Roosevelt City, Alabama, whereby group health insurance was to be provided by Union Pacific and life insurance was to be provided by Pacific Mutual. *Id.* at 4158. An arrangement was made whereby Union Pacific would send its billings for health premiums to Ruffin at petitioner's Birmingham office, and the premiums were paid by deductions from the insured's paychecks. *Id.* Instead of remitting the premium payments to Union Pacific, however, Ruffin misappropriated them. *Id.* Respondents were among those employees with health coverage and were unaware that their coverage was cancelled for failure to pay the premiums. *Id.* Respondent Haslip was subsequently hospitalized, and unpaid physician's charges resulted in a judgment against her which adversely affected her credit. *Id.*

[42] *Id.* at 1041. Petitioner was held responsible for the acts of its agent, Ruffin, upon the theory of respondeat superior, because among other things he had actual authority to sell life insurance for petitioner and to use their letterhead, and he worked exclusively out of petitioner's branch office. *Id.*

[43] *Id.* at 1037 n.1. The jury was instructed that if it determined liability for fraud, it could award punitive damages. *Id.* The jury was further instructed that the purpose of punitive damages is to punish the defendant and that if punitive damages were awarded, they should take into consideration the degree of wrong and necessity of preventing future wrong. *Id.*

[44] *Pacific Mutual*, 111 S. Ct. 1032, 1046 (1991). The jury awarded respondent Haslip $1,040,000, which the majority concluded was probably composed of punitive damages of

petitioner claimed that because of the vagueness of the jury instructions, the award was the product of unbridled jury discretion, and was therefore per se unconstitutional.[45]

Without deciding whether the traditional method for assessing punitive damage awards was per se unconstitutional,[46] Justice Blackmun, writing for the plurality, concluded that the award in the instant case did not violate petitioner's due process rights.[47] In so doing, he noted the existence of a long-standing tradition of juror discretion in granting these awards.[48] However, Justice Blackmun declined to accept Justice Scalia's due process model, and instead conducted a separate inquiry into the fairness of the award in light of the jury instructions and appellate review.[49] Because the instructions enlightened the jury as to the purposes of

not less than $840,000. *Id.* at 1037 n.2. Haslip claimed compensatory damages of $200,000, which included a claim for out-of-pocket expenses of less than $4,000, thereby making punitive damages over 200 times the out-of-pocket expenses. *Id. See generally* Burlington Northern R.R. Co. v. Whitt, 575 So.2d 1011, 1024 (1990) (notwithstanding decedent's negligence, jury awarded his estate $15 million in punitive damages although he requested only $3 million), *cert. denied*, 111 S. Ct. 1415 (1991); Land & Assocs., Inc. v. Simmons, 562 So. 2d 140, 151 (Ala. 1989) (punitive award of $2,490,000 was 249 times compensatory award).

After the decision in *Simmons*, the Alabama legislature enacted a statute that places a $250,000 limit on punitive damages in most cases. 1987 Ala. Acts, No. 87-185, §§1, 2, & 4.

[45] *See Pacific Mutual*, 111 S. Ct. at 1037 n.3.

[46] *Id.* at 1043. Justice Blackmun noted that the question of whether due process acts as a check on undue jury discretion to award punitive damages has never been addressed, and that the inquiry must await another day. *Id.*

[47] *Id.* at 1046. In rejecting this claim, the Court noted that the constitutional status of punitive damages had long been questioned and was therefore not unanticipated. *Id.* at 1037-38. *See, e.g.*, City of Newport v. Fact Concerts, Inc., 453 U.S. 247, 270-71 (1981) (impact of windfall recovery likely to be unpredictable and substantial); International Bhd. of Elec. Workers v. Foust, 442 U.S. 42, 50 (1979) (since juries are given such broad discretion to impose and decide amount of damages, recoveries can be great and not readily determinable); Gertz v. Robert Welch, Inc., 418 U.S. 323, 350 (1974) ("In most jurisdictions jury discretion over the amounts awarded is limited only by the gentle rule that they not be excessive. Consequently, juries assess punitive damages in wholly unpredictable amounts bearing no necessary relation to the actual harm caused.").

[48] *Pacific Mutual*, 111 S. Ct. at 1043. *See also* Silkwood v. Kerr-McGee Corp., 464 U.S. 238, 255 (1984) (punitive damages have always been part of state tort law, and will continue to be unless Congress supplants it with maximum amount allowable); Barry v. Edmunds, 116 U.S. 550, 565 (1886) (well settled that there is no fixed law to determine damages); Missouri Pac. R.R. Co. v. Himes, 115 U.S. 512, 521 (1885) (discretion of jury in awarding damages not controlled by any definite rules).

[49] *Pacific Mutual*, 111 S. Ct. at 1043-44. Justice Blackmun asserted that it is not enough to just consider tradition. *Id.* at 4161. "It would be just as inappropriate to say that, because punitive damages have been recognized for so long, their imposition is never unconstitutional." *Id.*

the award, namely punishment and deterrence, Justice Blackmun concluded that the jury's discretion was not unlimited, and therefore, the award did not violate due process.[50]

In a concurring opinion, Justice Scalia reiterated his view that a process which accords with long-standing tradition, and which does not violate the Bill of Rights, is exempt from constitutional scrutiny.[51] He concluded that since it had been a traditional practice of the courts to leave punitive damages to the discretion of the jury, any punitive award necessarily comports with due process.[52]

II. Justice Scalia's Crusade Against Judicial Subjectivity

The division in the Supreme Court over the proper role of tradition in constitutional decision-making may be explained by reference to the divergent philosophies among members of the Court on the theory of judicial review.[53] Justice Scalia is clearly a

[50] *Id.* at 1043-44. The Court applied the test espoused by the Alabama Supreme Court, in Hammond v. City of Gadsden, 493 So. 2d 1374 (Ala. 1986). *Hammond* provided a post-trial check for review of punitive awards which included an evaluation of: "[t]he culpability of the defendant's conduct, the desirability of discouraging others from similar conduct, . . . [and] the impact upon the parties . . . ." *Id.* at 1379 (citations omitted). The *Hammond* test was further refined and elaborated upon in Green Oil v. Hornsby, 539 So. 2d 218 (Ala. 1989) wherein the Alabama Supreme Court, applying the substantive standards from *Hammond*, established post-trial procedures to scrutinize punitive awards in order to ensure that they did "not exceed an amount that will accomplish society's goals of punishment and deterrence." *Hornsby*, 539 So. 2d at 222 (citations omitted).

[51] *Pacific Mutual*, 111 S. Ct. at 1047 (Scalia, J., concurring). Justice Scalia stated:

> Since it has been the traditional practice of American courts to leave punitive damages . . . to the discretion of the jury; and since in my view a process that accords with such a tradition and does not violate the Bill of Rights necessarily constitutes "due" process; I would approve the procedure challenged here without further inquiry into its "fairness" or "reasonableness."

Id.

[52] *See id.* at 1053-54 (Scalia, J., concurring).

[53] *See* Burnham v. Super. Ct. of Cal., 110 S. Ct. 2105, 2117-19 (1990). Justice Scalia alluded to the divergent viewpoints among the Justices when he referred to Justice Brennan's subjective approach to due process interpretation as inadequate due to its potential for judicial lawmaking:

> The difference between us and Justice Brennan has nothing to do with whether "further progress [is] to be made" in the "evolution of our legal system." It has to do with whether changes are to be adopted as progressive by the American people or decreed as progressive by the Justices of this Court.

Id. at 2119. *See also* Hay, *Transient Jurisdiction, Especially over International Defendants: Critical Comments on* Burnham v. Superior Court of California, 1990 U. Ill. L. Rev. 593, 597 (Scalia's opinion is result of judicial philosophy). *See generally* Chemerinsky, *The Vanishing*

proponent of judicial restraint, and therefore envisions the appropriate role of the Court as a detached and objective interpreter of the Constitution.[54] This philosophy is highly deferential to the legislature, and justifies striking down a law only when necessary to preserve clear constitutional principles.[55]

Justice Scalia's model uses tradition to gauge the legitimacy of the practice in question only in cases where constitutional text is silent or ambiguous.[56] If the practice in question is consistent with

Constitution, 103 HARV. L. REV. 43, 61-72 (1989) (discussing competing ideologies of Court).

[54] *See* Cox, *The Role of the Supreme Court: Judicial Activism or Self Restraint?*, 47 MD. L. REV. 118, 122 (1987). Those compelled by judicial self-restraint stress one or more of four considerations: promoting values of representative self government and majority rule, reluctance to set aside local laws in favor of national rules, prevention of judicial subjectivity, and/or cultivation of legitimacy to promote public support. *Id. See, e.g.*, Rutan v. Republican Party of Ill., 110 S. Ct. 2729, 2752 (1990) (Scalia, J., dissenting) (desirability of patronage is policy question which must not be addressed by judiciary); *In re* Reporters Comm'n for Freedom of the Press, 773 F.2d 1325, 1331 (D.C. Cir. 1985) (examined historical practice of public's right of access to judicial proceedings and adopted approach that constrained judge's ability to infer new first amendment rights in that area); United States v. Hansen, 772 F.2d 940, 948-49 (D.C. Cir. 1985) (refused to apply rule of lenity because it would expand judicial discretion without congressional mandate), *cert. denied*, 475 U.S. 1045 (1986); Gott v. Walters, 756 F.2d 902, 916 (D.C. Cir. 1985) (reflecting Scalia's belief that courts should not readily impose legalistic structures on administrative process); Community Nutrition Inst. v. Block, 698 F.2d 1239, 1255-59 (D.C. Cir. 1983) (Scalia, J., concurring in part and dissenting in part) (previous decisions represent view of preeminence of legislative process over judicial control), *rev'd*, 467 U.S. 340 (1984). *See generally* Rehnquist, *The Notion of a Living Constitution*, 54 TEX. L. REV. 693, 696 (1976). Chief Justice Rehnquist, also a proponent of judicial restraint, noted that since judges are merely to interpret an instrument framed by the people, they should do so in an objective and detached manner. *Id.*; *see also* Note, *The Appellate Jurisprudence of Justice Antonin Scalia*, 54 U. CHI. L. REV. 705 (1987) (tracing Scalia's view of role of Court and his disdain for judicial subjectivity in his four terms on United States Court of Appeals for District of Columbia).

[55] *See, e.g.*, Cruzan v. Director, Mo. Dep't. of Health, 110 S. Ct. 2841, 2859 (1990) (Scalia, J., concurring) (concluding "right to die" claim raises purely political issues courts are not qualified to resolve); Webster v. Reproductive Health Serv., 109 S. Ct. 3040, 3064-66 (1989) (Scalia, J., concurring) (urged Court to overrule Roe v. Wade, 410 U.S. 113 (1973), and leave issue to be resolved by political process). *See generally* Chemerinsky, *supra* note 53, at 48-61 (identifying Court's philosophy of deference to legislature in striking down laws only in very narrow circumstances); Rehnquist, *supra* note 54, at 698 (council of judicial revision should be connected with popular feeling); Scalia, *Originalism: The Lesser Evil*, 57 U. CINN. L. REV. 849, 854 (1989) (legislature is appropriate expositor of social values and judiciary should exercise restraint in invalidating laws). *But see* Stock, *Justice Scalia's Use of Sources in Statutory and Constitutional Interpretation: How Congress Always Loses*, DUKE L.J. 160, 187-91 (1990) (Scalia's approach, while purporting to be deferential to legislature, actually reduces power of Congress).

[56] *See Rutan*, 110 S. Ct. 2729, 2748 n.1. (Scalia, J., dissenting). Justice Scalia does not advocate a position whereby tradition could supersede the explicit mandates of the Constitution. *Id.* Justice Stevens asserts that cases similar to Brown v. Board of Educ., 347 U.S.

historical practices, it is consistent with due process, regardless of whether the historical practice is valid or desirable.[57] This rigid adherence to historical practices is designed to protect the purpose of the due process clause, which is to restrict arbitrary measures of reform.[58] Further, the model requires that the inquiry into traditional practices is done on the most specific level possible, in order to ensure that the judiciary is unable to make subjective choices between various generally protected rights.[59]

Opponents of Justice Scalia's approach, including Justice Brennan, may be characterized as judicial activists, who see the proper role of the judiciary as a promoter of the general policies underlying the Constitution.[60] Their interpretive method is more flexible and allows for subjective evaluations into the desirability and justification of settled state practices.[61] This view of a "living charter"[62] encourages a scrutiny of traditional practices and favors

483 (1954), invalidate Justice Scalia's model, because they were decided in contravention of traditional practices. *Id.* However, Justice Scalia overcomes this argument by demonstrating that the equal protection mandates of the fourteenth amendment, combined with the thirteenth amendment's abolition of slavery, demonstrate that constitutional text dispositively prohibits racial discrimination, and therefore, tradition does not factor into the analysis. *Id.*

[57] *See infra* notes 71-82 and accompanying text (analysis applied in *Pacific Mutual* and *Burnham*).

[58] *See* Pacific Mut. Life Ins. Co. v. Haslip, 111 S. Ct. 1032, 1046-52 (1991) (discussing purpose behind due process clause); *supra* note 1 (same).

[59] *See* Michael H. v. Gerald D., 109 S. Ct. 2333, 2343-44 (1989). Justice Scalia justifies his reliance on tradition at the most specific level possible by the following manifesto: the more specific the inquiry into tradition, the more likely it is that the Court is protecting something that already is in place, instead of creating tradition or stretching an existing tradition further than is historically permissible. *Id. But see* Sunstein, *supra* note 1, at 1170-79 (Scalia shows bias in reference to tradition for the unitary family).

[60] *See* Cox, *supra* note 54, at 121 (judicial activists engaged in judicial policymaking). *See also infra* note 62 (Justice Brennan's view of living charter). *See generally* Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971) (discussing negative ramifications of judiciary which is free to make, rather than implement, value judgments).

[61] *See* Burnham v. Super. Ct. of Cal., 110 S. Ct. 2105, 2119 (1990) (White J., concurring). Justice White indicated that "the Court has the authority under the [Fourteenth] Amendment to examine even traditionally accepted procedures and declare them invalid . . . ." *Id.* Justice O'Connor seems likely to carry on this idea in Justice White's absence. *See Pacific Mutual*, 111 S. Ct. at 1065 (O'Connor, J., dissenting) (due process not fixed, even ancient procedural rules must satisfy contemporary notions of due process).

[62] *See Michael H.*, 109 S. Ct. at 2351 (Brennan J., dissenting). Justice Brennan noted:

> The document that the plurality construes today is unfamiliar to me. It is not the living charter that I have taken to be our Constitution; it is instead a stagnant, archaic, hidebound document steeped in the prejudices and superstitions of a time long past. This Constitution does not recognize that times change, does not see that

protection of general concepts of liberty which may be found in the common law or which may arise from other rights specifically enumerated in the Constitution.[63] This mode of analysis provides potential counter examples of judicial free-wheeling because of a lack of a discernible standard for defining the liberty interests protected by the due process clause.[64]

For example, the dissenters in *Michael H.* might have applied the general tradition of protecting marital privacy to the facts of the case.[65] Indeed, they criticized Justice Scalia's model for being too specific to account for general concepts[66] and maintained that the decision was inconsistent with the results reached in previous

sometimes a practice or rule outlives its foundations.

Id.

See also Mathias, *Ordered Liberty: The Original Intent of the Constitution*, 47 MD. L. REV. 174, 188 (1987) (Constitution's future will depend on ability of nation to construe it as "living charter" in order to confront challenges); Tribe, *Levels of Generality in the Definition of Rights*, 57 U. CHI L. REV. 1057, 1101 (1990) (proponent of living charter could be criticized for altering Constitution in order to keep it current with changing times).

[63] *See, e.g.*, Griswold v. Connecticut, 381 U.S. 479, 481-86 (1965). In *Griswold*, Justice Brennan supported the general concept of parental liberty as justification for the protection of "substantive" due process rights not specifically protected in the Constitution. *Id.* The mode of adjudication in the area of privacy has resulted in judicial creation of "penumbras" of rights "emanating" from those explicitly granted in the Constitution. *Id.* at 484-86. *See generally* Kauper, *Penumbras, Peripheries, Emanations, Things Fundamental and Things Forgotten: The* Griswold *Case*, 64 MICH. L. REV. 235, 249 (1965) (discussing whether rights not enumerated in Bill of Rights are protected under due process clause); Wellington, *Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication*, 83 YALE L.J. 221, 308-09 (1973) (examples of inconsistent results promulgated by constitutional double standards).

[64] *Michael H.*, 109 S. Ct. at 2342 n.4. Justice Scalia points out the potential for bizarre results made possible by the dissenters' approach, in addition to those illustrated here. *Id.* For example, if Michael's liberty interest in his daughter must be viewed in isolation without reference to the circumstances that her mother is married to another man, the logic follows that his liberty interest would also not be affected if he had begotten Victoria by rape. *Id.*

[65] *See* Palko v. Connecticut, 302 U.S. 319, 325 (1937), *overruled by*, Benton v. Maryland, 395 U.S. 784 (1969). The Court has asserted in the past that only personal rights that can be deemed "fundamental" or "implicit in the concept of ordered liberty" are included in the guarantee of personal privacy. *Id.* The Court has extended the right of privacy to encompass a wide range of activities. *See, e.g.*, Roe v. Wade, 410 U.S. 113, 153 (1973) (abortion); Eisenstadt v. Baird, 405 U.S. 438, 453 (1972) (contraception); Loving v. Virginia, 388 U.S. 1, 12 (1967) (marital privacy); *Griswold*, 381 U.S. at 485-86 (contraception); Prince v. Massachusetts, 321 U.S. 158, 166 (1944) (family relationships); Skinner v. Oklahoma, 316 U.S. 535, 541-42 (1942) (procreation).

[66] *Michael H.*, 109 S. Ct. at 2349-51 (Brennan, J., dissenting). The dissenters objected to Scalia's narrow identification of the tradition involved as that of adulterous fathers, instead of referring to the general tradition of protecting parental rights. *Id.*

cases involving marital privacy rights.[67] An application of a general right to privacy in *Michael H.*, however, could conceivably justify the very result the dissenters opposed; allowing petitioner to assert his parental rights could be rejected as a violation of the married parents' right to privacy.[68] The subjective nature of this approach is also evident from the fact that Justice Brennan rejected the traditional presumption of legitimacy because of his subjective belief that the common law basis of the presumption no longer justified its existence, notwithstanding its continued popular support.[69]

Justice Scalia's proposition that tradition be dispositive, rather than a mere factor in due process evaluation, is similarly motivated by a desire to avoid judicial subjectivity.[70] This approach is intolerant of the Court's customary resort to balancing tests in cases where there is a concrete societal tradition supporting or withholding the right in question.[71] Critics of the balancing test point out that it is imprecise and promotes subjectivity; in a due process context, justices who disagree with a traditional practice may, in effect, disregard it almost entirely by according it little

[67] *See id.* at 2350-51 (Brennan, J., dissenting). The dissenters argued that in past privacy cases, the Court had not viewed the rights involved with such specificity as that employed by Justice Scalia. *Id.* The dissent noted, for example, in Griswold v. Connecticut, 381 U.S. 479 (1965), the Court recognized a constitutionally protected right to privacy even though the specific interest under consideration, namely the use of contraception, was not traditionally protected. *Id.* at 2350-51.

Critics of Justice Scalia's approach have identified the privacy cases as a source of potential embarrassment due to the fact that they involved a judicial reversal of traditional notions. *See* Sunstein, *supra* note 1, at 1173. This criticism, however, misapprehends the model, as Justice Scalia points out, because those cases did not acknowledge a longstanding societal tradition withholding the subject liberty interest; therefore, in the absence of any constitutional or traditional protection for the activity, it was appropriate to consult general concepts of marital privacy. *Michael H.*, 109 S. Ct. at 2344-45 n.6.

[68] *See supra* note 65 and accompanying text (discussing Court's earlier applications of general right to privacy).

[69] *See Michael H.*, 109 S. Ct. at 2351 (Brennan, J., dissenting). Justice Brennan asserted that the presumption of paternity is out of place in the modern world because blood tests can prove paternity with certainty, and in addition, illegitimacy no longer plays the stigmatizing role it once did. *Id.*

[70] *See* Rutan v. Republican Party of Ill., 110 S. Ct. 2729, 2748 (1990) (Scalia, J., dissenting) (criticizing Court's frequent resort to latest rule or balancing test because application of those tests favors personal philosophical dispositions of Justices).

[71] *See, e.g.*, Pacific Mutual Life Ins. Co. v. Haslip, 111 S. Ct. 1032, 1048, 1052 (1991) (Justice Scalia criticizes Justice Brennan's resort to balancing test since tradition validating punitive damages exists).

weight in favor of their own personal predilections.[72]

The validity of this criticism is evident in *Pacific Mutual*,[73] wherein Justice Blackmun used a balancing approach to determine the fundamental fairness of juror discretion in awarding punitive damages.[74] He concluded that the award in the case was, in fact, fair due to the limiting jury instructions and review by the trial and appellate courts.[75] However, the jury was instructed only to "take into consideration the character and the degree of the wrong as shown by the evidence and [the] necessity of preventing similar wrong."[76] Furthermore, the review of the verdict by the trial and appellate courts similarly reveals the lack of a clear standard.[77] In her dissent, Justice O'Connor stated that the conclusion that scant guidance justified the imposition of such enormous liability as "fundamentally fair," is controversial and highly subjective.[78] While Justice Scalia found the process undesirable,[79] he advocated its survival because of its historical acceptance.[80]

Similarly, in *Burnham*, Justice Brennan's proposed use of a balancing test to determine "traditional notions of fairness" clearly raises the specter of subjectivity because it weighs settled jurisdictional procedures against each justice's assessment of fairness.[81]

[72] *See generally* Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943, 952-63 (1987) (criticizing many flaws of balancing tests, including problems of "conceptualism" and disparate values); Reynolds, *The Judicial Role in Intergovernmental Land Use Disputes: The Case Against Balancing*, 71 MINN. L. REV. 611, 615 (1987) (balancing test criticized as nebulous and unpredictable); Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1185 (1989) ("When balancing is the mode of analysis, not much general guidance may be drawn from the opinion . . . . "); Sonenshein, *The Error of a Balancing Approach to the Due Process Determination of Jurisdiction over the Person*, 59 TEMP. L.Q. 47, 60 (1986) (balancing tests "rob" parties of predictable, bright-line standard).

[73] 111 S. Ct. at 1045.

[74] *See id.* at 1041-46. (reasonableness, guidance and tradition enter into consideration). Justice Blackmun noted that while juror discretion in awarding punitive damages is not limited by any definite rules, the method does not in itself violate due process. *Id.* at 1042-43.

[75] *Id.* at 1046.

[76] *Id.* at 1037 n.1.

[77] *Id.* at 1044 (only culpability of defendant's conduct, need for deterrence and impact on parties taken into consideration in review of award).

[78] *See Pacific Mutual*, 111 S. Ct. at 1065 (O'Connor, J., dissenting). Justice O'Connor opined that the jury instructions were so nebulous that they could not even be rationally implemented. *Id.* at 1056.

[79] *Id.* at 1046 (Scalia, J., concurring).

[80] *Id.* at 1054 (Scalia, J., concurring).

[81] *See* Burnham v. Super. Ct. of Cal., 110 S. Ct. 2105, 2120-25 (1990) (Brennan, J., con-

The subjective nature of this analysis becomes even more obvious in light of the concurring justices' conclusion that the exercise of jurisdiction was, in fact, fair because of the convenience of modern travel and procedure.[82] This analysis could justify the exercise of jurisdiction over anyone, regardless of whether that person ever entered the forum state.[83] It is submitted that the due process approach supported by Justice Scalia's critics is too flexible because it allows judges to choose between various means in order to achieve a desired end. In addition, since their view of a "living charter"[84] promotes change by advocating scrutiny of settled practices, it may be unfaithful to the purpose of the due process clause. Since the role of the clause is negative rather than affirmative, it is the one provision of the Constitution which should be resistant to measures of reform. Justice Scalia's model provides such resistance and thereby promotes stability in due process interpretation, ensuring that legal procedures will be improved by the legislature rather than the judiciary.

III. Dysfunction of the Model

Clearly, Justice Scalia's model requires an adherence to tradition until the tradition is reversed through the legislative process.[85] This view presupposes that the political process is sensitive to state and local values,[86] and may be questionable in light of structural and political changes such as the adoption of the seven-

curring) (all rules of jurisdiction must satisfy contemporary notions of due process, which includes evaluation of burden on defendant, interests of forum state, and plaintiff's interests in obtaining relief). In contrast, Justice Scalia noted that "traditional notions of fair play and substantial justice," by its very language, satisfies the test if the state court adhered to established jurisdictional rules. *Id.* at 2117.

[82] *Id.* at 2125.

[83] *Id.* at 2117. *Cf.* Asahi Metal Indus. Co. v. Super. Ct. of Cal., 480 U.S. 102, 108, (1987) (requiring minimum contacts for assertion of personal jurisdiction over corporations).

[84] *See supra* note 62 and accompanying text (discussing Brennan's view of living charter).

[85] *See* Pacific Mut. Life Ins. Co. v. Haslip, 111 S. Ct. 1032, 1054 (1991). Justice Scalia states that when the legislative process has purged the common law procedure for awarding punitive damages, the Court could announce that it is no longer the law of the land. *Id.*

[86] *See generally* Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 Colum. L. Rev. 543 (1954) (seminal article espousing view adopted by Justice Scalia that structure of federal government is sufficient to protect state and local interests).

teenth amendment,[87] the weakening of local political parties, and the rise of the national media.[88] It is submitted that this weakening in the representative process may have an adverse impact on the protection of certain minority interests.

The possibility that the political process may be impaired in terms of its ability to represent minority interests was envisioned in 1938, in *United States v. Carolene Products*.[89] In a famous footnote, Justice Harlan Stone articulated various scenarios warranting increased judicial intervention in cases involving minority interests.[90] The premise behind Justice Stone's argument was that minorities may not be able to affect changes in their state legislatures.[91] This theory of judicial review seeks to correct defects in the political process, which can be slow to respond to the needs of those who may be most vulnerable to its effect.[92]

Since Justice Scalia's model safeguards the interests of the majority, it necessarily comports with the purpose behind the due process clause, namely, the protection of traditional practices against short-term deviations.[93] However, for this very reason, Justice Scalia does not advocate the use of his model in cases in-

[87] U.S. CONST. amend. XVII. The seventeenth amendment, which provides for the direct election of senators, states in pertinent part: "[W]hen vacancies happen in the representation of any State in the Senate, the executive authority of such State shall issue writs of election to fill such vacancies . . . . " *Id.*

[88] *See* Kaden, *Federalism in the Courts: Agenda for the 1980s, in* ADVISORY COMM'N. ON INTERGOVERNMENTAL RELATIONS [ACIR], REGULATORY FEDERALISM: POLICY, PROCESS, IMPACT AND REFORM 50 (1984) (discussing development of independent national constituencies which weaken Congress' identification with state interests).

[89] 304 U.S. 144 (1938).

[90] *Id.* at 152 n.4.

[91] *Id. See* Ackerman, *Beyond Carolene Products*, 98 HARV. L. REV. 713, 728-31 (1985) (discussing philosophy of *Carolene*, and meaning of "discrete and insular minorities"). *See also* ELY, *supra* note 2, at 74-77 (discussing Warren Court's implementation of *Carolene Products* footnote).

[92] *See generally* ELY, *supra* note 2, at 75-88 (same); TRIBE, *supra* note 1, §16-6, at 1452-54 (discussing *Carolene* theory and democracy); Ackerman, *supra* note 91, at 715. (*Carolene* solution seizes high ground of democratic theory and establishes that challenged legislation was produced by profoundly defective process).

[93] *See* Pacific Mut. Life Ins. Co. v. Haslip, 111 S. Ct. 1032, 1050-51 (Scalia, J., concurring); Sunstein, *supra* note 1, at 1163 (since inception, due process clause has largely been interpreted to safeguard traditional values from short term deviations).

The due process clause does have an equal protection component which grew out of English law impositions on the executive of "generality" and "equal treatment"; this component, however, is distinct from the equal protection clause's special provisions for disadvantaged groups. *See* Sunstein, *supra* note 1, at 1170 n.41.

volving equal protection challenges.[94] The equal protection clause promotes a principle of equality which reflects an intentional repudiation of the traditional definitions of constitutional principles; since Justice Scalia's model does not protect "counter-majoritarian" liberties, it is not an appropriate expedient in equal protection adjudication.[95]

The principles underlying the first amendment have a similar counter-majoritarian purpose. The right to freedom of speech guarantees that the government will not prohibit expression of an idea simply because society may find it offensive.[96] Therefore, it is additionally submitted that Justice Scalia's model should not be invoked to decide the legitimacy of first amendment issues. In cases involving constitutionally protected counter-majoritarian liberties, a balancing approach would be more appropriate since it allows an inquiry into other factors, such as the validity of the practice in question, and the nature and degree of the encroachment.

However, Justice Scalia did advocate the use of his model in a recent case involving a first amendment challenge to political patronage practices, *Rutan v. Republican Party of Illinois*.[97] In *Rutan*,

[94] *See Pacific Mutual*, 111 S. Ct. at 1054 (Scalia, J., concurring) (model is not invoked in equal protection challenges); Michael H. v. Gerald D., 109 S. Ct. 2333, 2346 (1989) (Justice Scalia applied "rational relationship" test to equal protection challenge); Richmond v. J.A. Croson Co., 109 S. Ct. 706 (1989) (Justice Scalia agreeing with application of strict scrutiny balancing test, rather than reference to tradition in case dealing with racial discrimination).

[95] *See Pacific Mutual*, 111 S. Ct. at 1054 (equal protection clause has counterhistorical content; invalidation of traditional practices may be appropriate in equal protection context). *See also* Brown v. Bd. of Educ., 347 U.S. 483 (1954) (equal protection clause designed to eliminate traditional practices which were expected to endure). *See generally* A. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS, 16 (1962) (discussing "countermajoritarian difficulty" in judicial review); Easterbrook, *Substance and Due Process*, 1982 SUP. CT. REV. 85, 95 (Bill of Rights designed as nondegradation principle to ensure things would not worsen, rather than as protection for traditional values); Sunstein, *supra* note 1, at 1168-74.

[96] *See* Texas v. Johnson, 109 S. Ct. 2533, 2544 (1989). "If there is a bedrock principle underlying the First Amendment, it is that the Government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable". *Id.*; City Council of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789, 804 (1984) ("First Amendment forbids government to regulate speech in ways that favor some viewpoints or ideas at the expense of others.") *Id. See also* Bolger v. Youngs Drug Products Corp., 463 U.S. 60, 65 (1983) (first amendment means government has no power to restrict expression because of message or content) (quoting Police Dep't. of Chicago v. Mosely, 408 U.S. 92, 95 (1972)); Carey v. Brown, 447 U.S. 455, 462-63 (1980) (government cannot regulate expressive activity based on content).

[97] 110 S. Ct. 2729 (1990).

low-level public employees challenged a hiring freeze which prohibited state officials from hiring, filling any vacancy, or creating any new position without the Governor's permission.[98] Petitioners alleged that the Governor was operating a discriminatory political patronage system, which penalized them because they had not supported the Republican Party.[99] Justice Brennan's plurality opinion relied on *Branti v. Finkel*[100] and *Elrod v. Burns*,[101] which precluded the government from discharging or threatening to discharge low-level public employees based on political affiliation.[102]

[98] *Id.* at 2732.

[99] *Id.* at 2732-33. According to petitioners, the Governor's office based employment decisions on whether the applicant voted in Republican primaries in previous election years, whether the applicant provided financial support to the Republican party, whether the applicant promised to join the Republican party in the future, and whether the applicant was supported by Republican party officials. *Id.* at 2732. More specifically, petitioner Cynthia Rutan claimed that for nine years she had been repeatedly denied promotions to supervisory positions for which she was qualified because she did not support the Republican party. *Id.* at 2733. Petitioner Franklin Taylor claimed that in addition to being denied promotions because he did not have the support of the Republican party, he was denied a transfer to an office nearer to his home because of opposition from Republican party chairmen. *Id.* Petitioner James Moore claimed that he had been repeatedly denied state employment as a prison guard because he did not have the support of Republican party officials. *Id.* Plaintiff/cross-respondent Ricky Standefer claimed that he was not recalled after a layoff because he had voted in a Democratic primary. *Id.* Similarly, Dan O'Brien claimed that he was not recalled after a layoff because of his political affiliation and that he later obtained a lower paying position with the corrections department only after receiving support from the chairman of the local Republican party. *Id.*

[100] 445 U.S. 507 (1980).

[101] 427 U.S. 347 (1976).

[102] *See* Branti v. Finkel, 445 U.S. 507 (1980); Elrod v. Burns, 427 U.S. 347 (1976). In *Elrod*, it was the practice of the Sheriff in the county where respondents were employed to replace non-civil service employees with members of his own party when the existing employees failed to obtain requisite support from that party. *Elrod*, 427 U.S. at 351. Subsequent to Sheriff Elrod's assumption of office, respondents were fired because they did not support the Democratic party. *Id.* The Court examined the reasons behind the longstanding tradition of patronage employment in government and found that, on balance, the government's needs for loyalty and efficiency could be achieved through less restrictive means than patronage dismissals. *Id.* at 353-73. Further, the Court noted that the dismissals could have withstood strict scrutiny under this test, if respondents had been employed in a policymaking capacity. *Id.* at 367. A dominant theme in the majority opinion is the view that patronage practices are undesirable in terms of the free functioning of the democratic process, irrespective of the continued adherence to the practice on both the state and federal levels, since the presidency of Thomas Jefferson. *Id.* at 353, 356-57, 368-69.

In *Branti*, petitioner, a Democrat, was appointed as Public Defender in Rockland County, New York and immediately fired six of the nine Republican assistants, including respondents, who remained after the Republican incumbent's term expired. 445 U.S. at 509-10. The Court, in an opinion authored by Justice Stevens, concluded that respondents were discharged solely because of their political beliefs, which was a first amendment violation under Elrod v. Burns, 427 U.S. 347 (1976), since the assistant public defenders were not in

The opinions in these two cases, which were also authored by Justice Brennan, represented a reversal of the long-standing history of political patronage practices in government.[103] In a 5 - 4 decision, the *Rutan* Court held that the rule against discharging low-level public employees based on political affiliation also extended to transfer, recall and hiring decisions.[104] While the Court did allude to the long-standing tradition in this area, it noted that the practice had been waning in recent years,[105] and determined that its infringement on first amendment rights was not justified.[106]

In dissent, Justice Scalia fashioned his most ardent pronouncement regarding the proper role of tradition in constitutional decision-making.[107] Joined by Justices Kennedy and O'Connor, Justice

policymaking positions. *Branti*, 445 U.S. at 518-20.

[103] *See Elrod*, 427 U.S. 347, 375 (1976) (Burger, C.J., dissenting). Chief Justice Burger took exception to the Court's significant intrusion into the legislative and policy concerns implicated by political patronage. *Id.* Similarly, Justices Powell and Rehnquist dissented to the plurality's unilateral reversal of "a practice as old as the Republic." *Id.* at 376 (Powell, J., dissenting). *See also Branti*, 445 U.S. at 518-20. The dissent objected to the Court's "exercise of judicial lawmaking . . . [w]ith scarcely a glance at almost 200 years of American political tradition." *Id.* at 521.

[104] Rutan v. Republican Party of Ill., 110 S. Ct. 2729, 2739 (1990). The plurality extended the holdings of *Branti* and *Elrod*, because the rule, which applied only to situations which constitute the "substantial equivalent of dismissal" failed to account for more subtle deprivations, such as the denial of promotions that also press state employees to conform to beliefs they may not share. *Id.* at 2737.

[105] *See id.* at 2737 (recognizing practice of political patronage was more prevalent century ago than today).

[106] *Id.* at 2736-37. Based on a strict scrutiny analysis, the Court concluded that the government was required to utilize the least restrictive means available to implement its legitimate interests. *Id.* "Unless these patronage practices are narrowly tailored to further vital government interests, we must conclude that they impermissibly encroach on First Amendment freedoms." *Id.* at 2736. The Court concluded that the individual employee's interests in unfettered expression outweighed the government's interests in patronage. *Id.* at 2736-37.

[107] *Id.* at 2752 (Scalia, J., dissenting). "Preliminarily, I may observe that the Court today not only declines, in this area replete with constitutional ambiguities, to give the clear and continuing tradition of our people the *dispositive* effect I think it deserves, but even declines to give it substantial weight in the balancing." *Id.* (emphasis in original). Justice Scalia also asserted:

> Today the Court establishes the constitutional principle that party membership is not a permissible factor in the dispensation of government jobs, except those jobs for the performance of which party affiliation is an "appropriate requirement." It is hard to say precisely (or even generally) what that exception means, but if there is any category of jobs for whose performance party affiliation is not an appropriate requirement, it is the job of being a judge, where partisanship is not only unneeded but positively undesirable. It is, however, rare that a federal administration of one party will appoint a judge from another party. And it has always been rare. Thus, the new principle that the Court today announces will be enforced by a corps of

Scalia criticized the plurality's scrutiny of traditional patronage practices, since it was done without any textual basis in the Constitution,[108] and maintained that this mode of analysis constitutes an impermissible intrusion into the province of the legislature.[109]

Conversely, Justice Scalia joined the majority in *Texas v. Johnson*[110] in acknowledging that flag burning was a constitutionally protected form of expression under the first amendment,[111] notwithstanding the deeply rooted tradition in the several states criminalizing the activity.[112]

Given Justice Scalia's rejection of traditional practices in *Johnson*, it is unclear why he advocates his due process model so ardently in *Rutan*, which was also decided upon first amendment grounds. This disparity suggests that Justice Scalia may recognize the need for judicial intervention in certain situations involving free speech.[113] Justice Scalia's model also lacks sufficient guidelines to aid the Court in determining when a practice becomes "settled" or widely accepted so as to be considered a "tradition."[114]

> judges (the Members of this Court included) who overwhelmingly owe their office to its violation. Something is wrong here, and I suggest it is the Court.

Id. at 2746-47 (citations omitted).

[108] *Id.* at 2757 (Scalia, J., dissenting) (there is no "right line" that can be known by judges).

[109] *Rutan*, 110 S. Ct. at 2748 (Scalia, J., dissenting). Justice Scalia maintained that where a practice not expressly prohibited by the Bill of Rights bears the endorsement of a long tradition of acceptance dating back to the beginning of the Republic, the Court must use it as a frame of reference by which to gauge the legitimacy of other practices. *Id.* To scrutinize such a practice by way of a balancing test, he contended, necessarily results in the application of judge-made law; the policy question of the desirability of the system is one properly left to the people's representatives. *Id.* at 2752. Moreover, Justice Scalia objected to the majority's diminution of the significance of the tradition involved by finding, through a balancing test, that the legislature could not reasonably determine that its benefits outweigh its "coercive" effects. *Id.*

[110] 109 S. Ct. 2533 (1989).

[111] *See id.* at 2538-48.

[112] *See id.* at 2548-52 (Rehnquist, C.J., dissenting) (criticizing plurality's failure to accept traditional symbolic nature of flag and numerous state and federal laws regulating its misuse).

[113] *See* Pacific Mut. Life Ins. Co. v. Haslip, 111 S. Ct. 1032, 1054 (1991). Justice Scalia noted that the equal protection clause and other provisions of the Constitution can be characterized as having some counterhistorical content. *Id.* He then maintained that punitive damage awards, despite their traditional acceptance, can violate the first amendment. *Id.*

[114] *See* Michael H. v. Gerald D., 109 S. Ct. 2333, 2349-51 (1989) (Brennan, J., dissenting) (criticizing Justice Scalia's model for failure to provide standard for determining when practice becomes "tradition"); ELY, *supra* note 2, at 60-63 (discussing lack of relevant time

Justice Scalia has indicated that only when the legislative process has "purged" a practice can it properly cease to be considered "the law of the land" for due process purposes.[115] It is unclear whether this means that every state must reject a practice before it may be disregarded or relegated to a balancing test in due process challenges. Clearly, more guidance is needed, as these unanswered questions create the potential for inconsistent applications of the model in the future.

Conclusion

Justice Scalia's model presents an objectively precise method for determining the validity of practices not specifically addressed in the Constitution. The model provides stability and neutrality in due process adjudication because it compels adherence to settled practices. However, for this reason, the model is not an appropriate expedient in cases involving the constitutional protection of counter-majoritarian interests. In addition, the model lacks a clear standard for defining a "tradition." These issues leave open considerations regarding the proper invocation of the model, and may therefore compromise the integrity of future applications of the model unless further guidance is provided by the Court.

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frame for ascertaining that practice is tradition). *Accord* Moore v. East Cleveland, 431 U.S. 494, 549 (1977) (White, J., dissenting) (deeply rooted traditions of country are arguable); *Balkin, supra* note 3, at 1616 (asserting that Justice Scalia wrongly assumes traditions are both identifiable and correct).

[115] *Pacific Mutual*, 111 S. Ct. at 1054 (Scalia, J., concurring).