

# THOMAS V. SCALIA ON THE CONSTITUTIONAL RIGHTS OF PARENTS: PRIVILEGES AND IMMUNITIES, OR JUST “SPINACH”?

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## INTRODUCTION

“It’s spinach.” So said Justice Antonin Scalia about the constitutional law doctrine known as “substantive due process” in a talk he gave at Regent University School of Law in September of 1998.<sup>1</sup> The vegetable reference ultimately traces back through multiple permutations in American comedy to a cartoon in *The New Yorker*,<sup>2</sup> drawn by Carl Rose and famously captioned by E.B. White.<sup>3</sup> The full text is clearly not meant to be flattering to spinach, and Justice Scalia certainly did not mean to praise substantive due process by this reference.

Furthermore, for Justice Scalia, the penumbras of spinach—I should say of substantive due process—emanate<sup>4</sup> not only over the more familiar targets such as *Allgeyer v. Louisiana*<sup>5</sup> and *Lochner v. New York*,<sup>6</sup> but also over *Meyer v. Nebraska*<sup>7</sup> and *Pierce v. Society of Sisters*<sup>8</sup>—two decisions that came, methodologically, right out of the playbook typified by *Allgeyer* and *Lochner*. Ironically, the term “substantive due process”

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<sup>1</sup> Since Justice Scalia has several core messages that he wants listeners to hear in his speeches, this phrase has perhaps been used in other venues as well.

<sup>2</sup> THE NEW YORKER: TWENTY-FIFTH ANNIVERSARY ALBUM 1925–1950 (Harper Colophon Books 1977) (1951).

<sup>3</sup> JUDITH YAROSS LEE, DEFINING NEW YORKER HUMOR 207 (2000).

<sup>4</sup> The phrase “emanations from penumbras” comes, of course, from *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965) (“[S]pecific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance.”). In the opinion for the Court, Justice Douglas strove to avoid using substantive due process openly, while attaining results characteristic of substantive due process: protection of a right not enumerated in the Constitution but deemed to be fundamental nonetheless. *Id.* at 481–82, 485–86. Curiously, *Griswold* has remained an unassailable precedent since it was handed down, yet the expression “emanations from penumbras” has become something of a constitutional-law punchline, usually good for a knowing smirk or even a laugh when con-law types get together. Yet the phrase cannot be dismissed as dictum, because it was crucial to the Court’s holding, given its determination to avoid outright reliance on substantive due process. The significance of this bifurcated legacy of *Griswold* is beyond the scope of this Article.

<sup>5</sup> 165 U.S. 578 (1897).

<sup>6</sup> 198 U.S. 45 (1905).

<sup>7</sup> 262 U.S. 390 (1923).

<sup>8</sup> 268 U.S. 510 (1925).

was not used by the Supreme Court at that time; as far as the Court majorities of those days were concerned, they were implementing Fourteenth Amendment Due Process.<sup>9</sup> These decisions managed to survive the Court's general rejection of substantive due process during the New Deal Era,<sup>10</sup> and later Courts were able to see in them some value other than the "mere" economic freedom that had been central to the "*Lochner*-era" precedents—an idea that fell most into disfavor during and after the New Deal.<sup>11</sup> *Meyer* and *Pierce* were seen as protecting values that were and are distinguishable from the economic and business values that drove most of the other substantive due process decisions of the pre-1937 era.<sup>12</sup>

What did *Meyer* and *Pierce* hold, and what do they mean today? Surprisingly, given the brevity of the decisions themselves,<sup>13</sup> one very quickly exhausts the non-controversial responses that can be made in answer to this question. In the early 1920s, the Court struck down state legislation that virtually abolished private education altogether in

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<sup>9</sup> See, e.g., *Lochner*, 198 U.S. at 53 ("The statute necessarily interferes with the right of contract between the employer and employes [sic], concerning the number of hours in which the latter may labor in the bakery of the employer. 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 of the Federal Constitution. . . . Under that provision no State can deprive any person of life, liberty or property without due process of law." (citation omitted)); *Allgeyer*, 165 U.S. at 589 ("As so construed we think the statute [that requires state citizens to abstain from doing business with out-of-state insurance companies] is a violation of the Fourteenth Amendment of the Federal Constitution, in that it deprives the defendants of their liberty without due process of law.").

<sup>10</sup> See, e.g., *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379, 400 (1937) (overruling *Adkins v. Children's Hosp.*, 261 U.S. 525, 539, 562 (1923), a case that invalidated a District of Columbia minimum wage law on substantive due process grounds, without overruling or even citing *Meyer* and *Pierce*); *Nebbia v. New York*, 291 U.S. 502, 515, 539 (1934) (holding, without citing *Meyer* or *Pierce*, that a New York statute that allowed a regulatory board to fix the price of milk did not violate the Due Process Clause of the Fourteenth Amendment). I here avoid reliance on the notion of a "revolution of 1937" or a "switch in time" keyed to President Roosevelt's Court-packing plan because the iconic status of these events has come under well-deserved criticism. See BARRY CUSHMAN, *RETHINKING THE NEW DEAL COURT: THE STRUCTURE OF A CONSTITUTIONAL REVOLUTION* 3–7 (1998) (arguing that these notions are "long overdue for some serious scrutiny").

<sup>11</sup> See, e.g., *Roe v. Wade*, 410 U.S. 113, 152–53 (1973) (citing *Meyer* for the principle that elements of the right of privacy have long been protected by Section 1 of the Fourteenth Amendment and further citing *Meyer* and *Pierce* for the principle that the right to privacy protects education and child rearing); *Griswold v. Connecticut*, 381 U.S. 479, 482–83 (1965) (affirming the principle of the *Pierce* and *Meyer* cases).

<sup>12</sup> See, e.g., *Prince v. Massachusetts*, 321 U.S. 158, 165–66 (1944) (avoiding giving controlling weight to *Meyer* and *Pierce* but acknowledging that their teaching on parental rights is "cardinal with us").

<sup>13</sup> *Meyer* takes up only fourteen pages in the *United States Reports*, 262 U.S. at 390–403, and *Pierce* takes up only twenty-seven pages, 268 U.S. at 510–36.

*Pierce*<sup>14</sup> or over-regulated it at the level of content in *Meyer*,<sup>15</sup> and thus laid down certain dicta about “the liberty of parents and guardians to direct the upbringing and education of children under their control.”<sup>16</sup>

Nearly everything else one can say about these cases is controversial.<sup>17</sup> Were *Meyer* and *Pierce* pure or mere substantive due process? Were First Amendment values involved?<sup>18</sup> Did the Court intend

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<sup>14</sup> The Oregon state constitutional amendment struck down in *Pierce* required almost all school-age children to attend a public school during school hours. *Pierce*, 268 U.S. at 530 n.\*. Private schools, including those of a religious nature, were not declared illegal per se, but under the circumstances, they could have functioned only as supplemental learning centers, not as “schools” in the full sense. Given that present-day business models of for-profit institutions such as Huntington Learning Center and Sylvan Learning Center have such high economic value, perhaps plaintiffs such as the Sisters’ school and the Independent Hill Military Academy could have survived economically, but not as schools. See Siobhan Gorman, *The Invisible Hand of NCLB*, in LEAVING NO CHILD BEHIND?: OPTIONS FOR KIDS IN FAILING SCHOOLS 37, 41 (Frederick M. Hess & Chester E. Finn, Jr. eds., 2004) (estimating the value of the retail-tutoring market at approximately two billion dollars). Also, no one can deny that the law made public school mandatory in almost all cases. Both assaults—on the economic freedom of the educators, and the educational freedom/parental rights of the parents—were noted by the Court. *Pierce*, 268 U.S. at 534–35.

<sup>15</sup> The statute in *Meyer* interfered with the teaching of foreign languages other than classical languages in all schools, including private ones. *Meyer*, 262 U.S. at 403. Again, note the Court’s analysis of the two-pronged constitutional violation: the right of the teacher to pursue a lawful calling (an economic liberty, though hardly a novel one), and the right of parents to select a particular program of learning for their children. *Id.* at 401 (“[T]he legislature has attempted materially to interfere with the calling of modern language teachers, with the opportunities of pupils to acquire knowledge, and with the power of parents to control the education of their own.”).

<sup>16</sup> *Pierce*, 268 U.S. at 534–35.

<sup>17</sup> Except for one historical fact: Oregon’s Compulsory Education Act struck down in *Pierce* was the result of campaigning by the Ku Klux Klan as part of its effort to put an end to Catholic schooling. Barbara Bennett Woodhouse, “*Who Owns the Child?*”: *Meyer and Pierce and the Child as Property*, 33 WM. & MARY L. REV. 995, 1017–18 (1992). The Klan had tried to enact similar measures in several other states during the early 1920s but was successful only in Oregon. *Id.* at 1016. This success caused high-level Catholic legal talent to be enlisted from New York to argue against the state amendment’s reconcilability with the U.S. Constitution. *Id.* at 1070. I disagree sharply with Professor Woodhouse’s conclusions and philosophical framework, but, since she opposes *Pierce* and supports Oregon’s Compulsory Education Act, the historical section of her article deserves praise for being forthright in confronting the Act’s ugly origins. *Id.* at 997. For my sharper comments regarding Professor Woodhouse’s normative views, see David Wagner, *The Family and the Constitution*, FIRST THINGS, Aug./Sept. 1994, at 23, 26–27.

<sup>18</sup> Justice Douglas tried to transform *Meyer* and *Pierce* entirely into First Amendment cases in his opinion for the Court in *Griswold*. *Griswold v. Connecticut*, 381 U.S. 479, 482 (1965). Such a complete transformation cannot be reconciled with what *Meyer* and *Pierce* actually held because neither case made reference to freedom of speech or of religion nor to the First Amendment itself. Justice Douglas had a point when he remarked that *Meyer* and *Pierce* can be read to stand for the principle that “the State may not, consistently with the spirit of the First Amendment, contract the spectrum of available knowledge.” *Id.* at 482. But this formulation is problematic because it is not easily

to give parents a Dworkinian trump-type right<sup>19</sup> good against a wide range of state action? Should the Court have given this right if it did not do so?

The thin consensus about *Meyer* and *Pierce*—a veneer of left-right accord that these were good decisions, barely concealing profound differences over why they were good—was rocked when a difference emerged between Justices Scalia and Thomas over the constitutional underpinnings and possible futures of these precedents. The case was *Troxel v. Granville*.<sup>20</sup> It pitted the rights of a parent against a statute that enabled courts to order visitation rights for a child's grandparents over the objections of a parent, even though a court had never judged the parent unfit in any legal or administrative proceeding.<sup>21</sup> In a plurality opinion, the Court agreed that the *Meyer-Pierce* principle controlled this situation<sup>22</sup>—admittedly going beyond the familiar fact patterns from *Meyer* and *Pierce*, although arguably staying within their rule.

Interestingly for our purposes, Justice Scalia dissented. He affirmed the existence of natural law but denied the jurisdiction of the Supreme Court to apply it.<sup>23</sup> He noted that to apply *Meyer* and *Pierce* in the *Troxel* case was to extend them, and he expressly declined to do so.<sup>24</sup> Most

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generalized. Consider the import of this formulation: Must a public school library have every book ever published? Where, if at all, do costs, copyright, and age-appropriateness yield to a hypothetical First Amendment-based prohibition on “state restriction on the range of available knowledge”? Must public schools teach, literally, every subject or all subjects that a student demands? This formulation is also problematic because both *Meyer* and *Pierce* speak much more specifically of the right to earn a living at the respectable calling of teaching and of the right of parents to direct the upbringing of their children. See *Meyer*, 262 U.S. at 401.

<sup>19</sup> RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 364 (1978).

<sup>20</sup> 530 U.S. 57 (2000).

<sup>21</sup> The statute at issue in *Troxel*, Washington Revised Code Section 26.10.160(3), permitted “[a]ny person’ to petition a superior court for visitation rights ‘at any time,’ and authorize[d] that court to grant such visitation rights whenever ‘visitation . . . serve[d] the best interest of the child.’” *Troxel*, 530 U.S. at 60.

<sup>22</sup> The Court discussed *Meyer* and *Pierce* to support their assertion in *Troxel* that “[t]he liberty interest at issue in this case—the interest of parents in the care, custody, and control of their children—is perhaps the oldest of the fundamental liberty interests recognized by this Court.” *Id.* at 65 (plurality opinion).

<sup>23</sup> *Id.* at 91 (Scalia, J., dissenting) (“In my view, a right of parents to direct the upbringing of their children is among the ‘unalienable Rights’ with which the Declaration of Independence proclaims ‘all men . . . are endowed by their Creator.’ And in my view that right is also among the ‘othe[r] [rights] retained by the people’ which the Ninth Amendment says the Constitution’s enumeration of rights ‘shall not be construed to deny or disparage.’ The Declaration of Independence, however, is not a legal prescription conferring powers upon the courts; and the Constitution’s refusal to ‘deny or disparage’ other rights is far removed from affirming any one of them, and even further removed from authorizing judges to identify what they might be, and to enforce the judges’ list against laws duly enacted by the people.”).

<sup>24</sup> *Id.* at 92.

notably, he asserted that *Meyer* and *Pierce* date "from an era rich in substantive due process holdings that have since been repudiated"<sup>25</sup> and further stated that they have "not . . . induced substantial reliance."<sup>26</sup> Shockingly to some, Justice Scalia seemed to be teeing *Meyers* and *Pierce* up for eventual overruling.

Meanwhile, Justice Thomas went in quite a different direction. Concurring separately in *Troxel*, he chided the majority for failing to accord parental rights the normal courtesy due to fundamental rights, namely, a clear statement that violations of such rights receive strict scrutiny.<sup>27</sup> In fact, Justice Thomas suggested in a footnote that perhaps the Privileges or Immunities Clause of the Fourteenth Amendment might have been, and might be, a better constitutional home for parental rights.<sup>28</sup>

More recently, a similar disagreement flickered between these two titans of conservative jurisprudence in *McDonald v. City of Chicago*, the case which held the Second Amendment applies to the states.<sup>29</sup> Justice Thomas once again advocated the Privileges or Immunities Clause as the vehicle of incorporation, this time agreeing with the petitioners.<sup>30</sup> Justice Scalia, by contrast, both during oral argument<sup>31</sup> and in a concurring opinion in *McDonald*,<sup>32</sup> scoffed at this idea yet accepted the incorporation of the Second Amendment under the substantive due process rubric.<sup>33</sup>

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<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Id.* at 80 (Thomas, J., concurring) ("The opinions of the plurality, Justice Kennedy, and Justice Souter recognize [a parent's fundamental right to direct the upbringing of his or her children], but curiously none of them articulates the appropriate standard of review. I would apply strict scrutiny to infringements of fundamental rights.")

<sup>28</sup> *Id.* n.\* ("This case also does not involve a challenge based upon the Privileges and Immunities Clause and thus does not present an opportunity to reevaluate the meaning of that Clause.")

<sup>29</sup> 130 S. Ct. 3020, 3026 (2010) ("We have previously held that most of the provisions of the Bill of Rights apply with full force to both the Federal Government and the States. Applying the standard that is well established in our case law, we hold that the Second Amendment right is fully applicable to the States.")

<sup>30</sup> *Id.* at 3058–59 (Thomas, J., concurring) ("I cannot agree that [the Second Amendment] is enforceable against the States through a clause that speaks only to 'process.' Instead, the right to keep and bear arms is a privilege of American citizenship that applies to the States through the Fourteenth Amendment's Privileges or Immunities Clause.")

<sup>31</sup> Transcript of Oral Argument at 6–7, *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010) (No. 08-1521) ("I'm saying, assuming we give . . . the Privileges and Immunities Clause your definition, does that make it any easier to get the Second Amendment adopted with respect to the States? . . . Why do you want to undertake that burden instead of just arguing substantive due process? Which, as much as I think it's wrong, I have -- even I have acquiesced in it.")

<sup>32</sup> *McDonald*, 130 S. Ct. at 3050 (Scalia, J., concurring) (citing *Albright v. Oliver*, 510 U.S. 266, 275 (1994) (Scalia, J., concurring)) ("I join the Court's opinion. Despite my

This Article proceeds by first examining *Troxel* more closely, especially the diverging Scalia and Thomas opinions. It then takes the reader back to an earlier (albeit plurality) opinion by Justice Scalia in *Michael H. v. Gerald D.*, which suggests a less hostile approach to substantive due process, and most notably a method for cabining the doctrine and for keeping it from turning into the mere imposition of judicial value preferences.<sup>34</sup>

Next, this Article turns to *Saenz v. Roe*, decided in 1999, a year before *Troxel*, in which the majority of the Court, with Justice Scalia silently concurring, decided that the Fourteenth Amendment Privileges or Immunities Clause could accommodate the Court's previously announced, but not constitutionally tethered, "right to travel" without harming the Constitution or the Republic.<sup>35</sup> Justice Thomas, despite his well-known advocacy of greater use of Fourteenth Amendment Privileges or Immunities,<sup>36</sup> dissented in such a way as to accomplish what Justice Scalia had accomplished in *Michael H.*: to describe how the doctrine at issue, rightly understood, protects traditional understandings and how it is not a vehicle for social transformation through the unbridled creativity of law professors, cause litigators, and Supreme Court Justices.<sup>37</sup>

Finally, this Article concludes by arguing that substantive due process is indeed "spinach," that Privileges or Immunities are the better constitutional home for "fundamental rights," that either doctrine in the interest of republican legitimacy must be cabined in the ways suggested by Justice Scalia in *Michael H.* and by Justice Thomas in *Saenz*, and finally that *Meyer* and *Pierce*, perhaps reconceived as Privileges or Immunities cases as Justice Thomas suggested in *Troxel*, meet this test.

### I. EXAMINING *TROXEL*

*Troxel v. Granville* concerned the limits, if any, on a state's power to confer on parties outside the nuclear family the right to petition a family court for visitation rights.<sup>38</sup> In other words, if you are a parent, does the Constitution protect you against outsiders, even if they are grandparents

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misgivings about Substantive Due Process as an original matter, I have acquiesced in the Court's incorporation of certain guarantees in the Bill of Rights 'because it is both long established and narrowly limited.'").

<sup>33</sup> *Id.*

<sup>34</sup> *Michael H. v. Gerald D.*, 491 U.S. 110, 121–23 (1989).

<sup>35</sup> *Saenz v. Roe*, 526 U.S. 489, 503 (1999).

<sup>36</sup> Justice Thomas is very vocal about his position on the Privileges or Immunities Clause, as evidenced by the law review article he wrote on the subject in 1989. See generally Clarence Thomas, *The Higher Law Background of the Privileges or Immunities Clause of the Fourteenth Amendment*, 12 HARV. J.L. & PUB. POL'Y (1989).

<sup>37</sup> *Saenz*, 526 U.S. at 527–28 (Thomas, J., dissenting).

<sup>38</sup> *Troxel v. Granville*, 530 U.S. 57, 62–65 (2000).

who may want to visit your children, despite the fact that (a) you think such visits are not in your children’s best interests and (b) you have neither been adjudicated neglectful or abusive nor submitted your family’s internal arrangements to the jurisdiction of a court in any way, such as in a divorce proceeding?<sup>39</sup>

#### A. Introduction to Troxel

Tommie Granville had two children with her boyfriend Brad Troxel.<sup>40</sup> When she and Brad ended their relationship, Brad’s parents continued to visit the children.<sup>41</sup> Then, tragically, Brad committed suicide.<sup>42</sup> After his death, it was in Tommie’s judgment, as the sole surviving parent, that her children’s contacts with Brad’s parents should be limited.<sup>43</sup> As outsiders to the full impact of the facts, we can probably imagine reasons why she might have so decided. We might also imagine (making generous but non-record assumptions about Brad’s parents) that Tommie had made a mistake.

Family law tends to make this a question of jurisdiction: The parent(s) decide(s) visitation rights, except in cases—not present here—where the parent has been adjudicated abusive or neglectful or where visitation rights pursuant to a divorce are at issue. Does the U.S. Constitution, applying the *Meyer-Pierce* rule, require this allocation of power, or may states reallocate custodial and visitational decision-making to courts, even in the absence of neglect, abuse, or divorce?

Brad’s parents, Jenifer and Gary Troxel, sued to displace Tommie’s (the mother’s) decision and to obtain increased visitation as they were allowed to do under Section 26.10.160(3) of the Revised Code of Washington, which permitted “[a]ny person’ to petition a superior court for visitation rights ‘at any time,’ and authorized that court to grant such visitation rights whenever ‘visitation may serve the best interests of the child.’”<sup>44</sup>

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<sup>39</sup> Family courts make visitation determinations all the time, often over the objections of one or both parents. *See, e.g.*, VA. CODE ANN. § 20-124.2(B) (2008 & Supp. 2011) (allowing Virginia courts to grant visitation rights to any person with a legitimate interest if doing so is within the “best interests of the child” when determining custody). But for this to occur, something has to have happened to bring the family’s affairs into the jurisdiction of that court. A filing for divorce will have that effect as well as a finding that a parent has committed abuse or neglect toward one or more children. As will be seen, none of these factors were present in *Troxel*, and this was critical to the case’s outcome.

<sup>40</sup> *Troxel*, 530 U.S. at 60.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Id.* at 60–61.

<sup>44</sup> *Id.* at 61.

During the litigation, Tommie got married, and her new husband adopted the children.<sup>45</sup> Presumably, this gave Tommie additional reasons to want to insulate her children—now her husband’s children as well—from contact with the parents of a past, deceased boyfriend. But the Washington statute, as we have just seen, gave absolutely anyone the right to petition for the right to visit absolutely anyone’s children, and the only issue for the family court to decide was whether such visitation “*may* serve the best interests of the child.”<sup>46</sup>

As recited by Justice O’Connor, the facts show that Tommie lost pretty steadily in the court system until the Washington appellate courts began to notice that the statute, as written, intruded sharply into her parental rights, thereby raising constitutional issues.<sup>47</sup> The Washington Court of Appeals in effect tried to blue-pencil the statute: The appeals court held that the statute must have conferred visitation-petition rights only on parents because any other reading would raise grave federal constitutional issues. The appeals court therefore held that the Troxels did not have standing to bring suit.<sup>48</sup> The Washington Supreme Court agreed with the appeals court regarding the constitutional issues, but it could not ignore the plain words of the statute. It therefore held the statute unconstitutional.<sup>49</sup>

The U.S. Supreme Court affirmed the Washington Supreme Court’s ruling in a plurality opinion written by Justice O’Connor and joined by Chief Justice Rehnquist, Justice Ginsburg, and Justice Breyer (the joining of the latter two Justices in the opinion thus demonstrating the existence of a pro-*Meyer-Pierce* liberal tradition).<sup>50</sup> Justices Souter and Thomas each concurred separately in the judgment,<sup>51</sup> while separate dissenting opinions came from Justices Stevens, Scalia, and Kennedy.<sup>52</sup>

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<sup>45</sup> *Id.* at 61–62.

<sup>46</sup> *Id.* at 61 (emphasis added).

<sup>47</sup> *Id.* at 61–62.

<sup>48</sup> *Id.* (citing *In re Troxel*, 940 P.2d 698, 700 (Wash. Ct. App. 1997)).

<sup>49</sup> *Id.* at 62–63 (citing *In re Custody of Smith*, 969 P.2d 21, 26–27 (Wash. 1998)).

<sup>50</sup> *Id.* at 75 (plurality opinion). In support of its ruling, the plurality offered the following reasoning:

In light of [cases like *Meyer* and *Pierce*], it cannot now be doubted that the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children. Section 26.10.160(3), as applied to Granville and her family in this case, unconstitutionally infringes on that fundamental parental right. The Washington nonparental visitation statute is breathtakingly broad.

*Id.* at 66–67.

<sup>51</sup> *Id.* at 75 (Souter, J., concurring); *id.* at 80 (Thomas, J., concurring).

<sup>52</sup> *Id.* at 80 (Stevens, J., dissenting); *id.* at 91 (Scalia, J., dissenting); *id.* at 93 (Kennedy, J., dissenting).



Our concern here will be with the contrast between the Thomas concurrence and the Scalia dissent in *Troxel*, as these two opinions illustrate a bifurcation within the conservative judicial philosophy that is 100% outcome-determinative for the fate of the *Meyer-Pierce* doctrine.

### B. Justice Scalia's Opinion in *Troxel*

Justice Scalia began his dissent in *Troxel* by answering a question that had long been asked of him at conferences and other off-bench appearances: Does his concept of judicial restraint proceed from a disbelief in natural law?<sup>53</sup> No, says Justice Scalia, it is jurisdictional. Abstractions, such as the Declaration of Independence's "unalienable rights"<sup>54</sup> or the other rights referred to in the Ninth Amendment,<sup>55</sup> have real content. But, to affirm these rights is one thing, and to make the leap to judicial enforceability of those rights is quite another. Among these real, but not judicially-enforceable rights, are parental rights.<sup>56</sup>

What about *Meyer* and *Pierce* themselves? According to Justice Scalia, they are two out of only "three holdings of this Court [that] rest in whole or in part upon a substantive constitutional right of parents to direct the upbringing of their children."<sup>57</sup> Furthermore, they are tainted because they come "from an era rich in substantive due process holdings that have since been repudiated."<sup>58</sup>

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<sup>53</sup> See *id.* at 91–92 (Scalia, J., dissenting). Justice Scalia generally expresses not disbelief, but skepticism, as to whether there is sufficient consensus on the meaning of natural law to make it a reference point for judges. See, e.g., *Constitutional Interpretation the Old Fashioned Way*, CFIF.ORG, [http://www.cfif.org/htdocs/freedomline/current/guest\\_commentary/scalia-constitutional-speech.htm](http://www.cfif.org/htdocs/freedomline/current/guest_commentary/scalia-constitutional-speech.htm) (last visited Nov. 26, 2011).

<sup>54</sup> THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

<sup>55</sup> U.S. CONST. amend. IX.

<sup>56</sup> *Troxel*, 530 U.S. at 91–92 (Scalia, J., dissenting).

<sup>57</sup> *Id.* at 92. The third case is the hapless *Wisconsin v. Yoder*, 406 U.S. 205 (1972), truly a "distinguished" opinion, but not in the good sense. It held that the Old Order Amish have a constitutional right to withhold their children from school above the eighth grade, based on both the Free Exercise Clause and the *Meyer-Pierce* doctrine. *Id.* at 234. But the Court used language so specific to the plaintiffs that it is doubtful whether it represents anything but a special privilege for isolated, non-socially-engaged religious communities, or perhaps just for the Amish. *Id.* at 236 ("Nothing we hold is intended to undermine the general applicability of the State's compulsory school-attendance statutes or to limit the power of the State to promulgate reasonable standards that, while not impairing the free exercise of religion, provide for continuing agricultural vocational education under parental and church guidance by the *Old Order Amish* or others similarly situated. The States have had a long history of amicable and effective relationships with church-sponsored schools, and there is no basis for assuming that, in this related context, reasonable standards cannot be established concerning the content of the continuing vocational education of Amish children under parental guidance, provided always that state regulations are not inconsistent with what we have said in this opinion.") (emphasis added).

<sup>58</sup> *Troxel*, 530 U.S. at 92 (Scalia, J., dissenting).

In this context, the expression “rich in” is difficult to contest, but it is also vaguer than Justice Scalia’s treatment. Were *Allgeyer* and *Lochner* considered good law at the time *Meyer* and *Pierce* were decided? It would seem so. Did *Meyer* and *Pierce* resemble *Allgeyer* and *Lochner* methodologically, in that by them the Court measured an asserted state exercise of its police power against an unenumerated right said to be in the Fourteenth Amendment Due Process Clause? Yes.<sup>59</sup> Was *Meyer*, decided in 1923, the same year as *Adkins v. Children’s Hospital*,<sup>60</sup> a substantive due process decision that was overruled in 1937, just as Scalia points out? Yes.<sup>61</sup>

Does that end the discussion about how to characterize *Meyer* and *Pierce*? I would say no. The dominance of substantive due process in its supposed prime is easily exaggerated. *Lochner* did not overrule<sup>62</sup> *Holden v. Hardy* (decided seven years earlier but a year after *Allgeyer*), which had upheld workplace regulations not vastly different from those struck down on substantive due process grounds in *Lochner* (such as violating freedom of contract).<sup>63</sup> *West Coast Hotel Company v. Parrish* overruled

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<sup>59</sup> In *Meyer*, the Court held, over the state’s claim of using its police powers to promote education and national unity,

Without doubt, [“liberty” in the Fourteenth Amendment’s Due Process Clause] 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, 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.

*Meyer v. Nebraska*, 262 U.S. 390, 399 (1922). The Court explained,

The calling [of a teacher] always has been regarded as useful and honorable, essential, indeed, to the public welfare. Mere knowledge of the German language cannot reasonably be regarded as harmful. Heretofore it has been commonly looked upon as helpful and desirable. Plaintiff in error taught this language in school as part of his occupation. His right thus to teach and the right of parents to engage him so to instruct their children, we think, are within the liberty of the Amendment.

*Id.* at 400. In *Pierce*, the Court cited *Meyer* and added, “The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only.” *Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925).

<sup>60</sup> 261 U.S. 525 (1923).

<sup>61</sup> See *Troxel*, 530 U.S. at 92 (Scalia, J., dissenting) (citing *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937) (overruling *Adkins*, 261 U.S. 525)).

<sup>62</sup> *Lochner* factually distinguished its holding from the decision in *Holden* rather than overruling it. *Lochner v. New York*, 198 U.S. 45, 55 (1905).

<sup>63</sup> The statute at issue in *Holden* prohibited underground mine workers from working shifts longer than eight hours. *Holden v. Hardy*, 169 U.S. 366, 380 (1898). The statute at issue in *Lochner* prohibited bakery workers from working more than sixty hours in a single week. *Lochner*, 198 U.S. at 46.

*Adkins*,<sup>64</sup> but no other decisions of its era. If Justice Scalia is suggesting that the overruling of *Meyer* and *Pierce* is made inevitable by the wholesale repudiation of the rights-jurisprudence of the opinion's era, he has somewhat overstated his case.

In closing out his brief section on the precedential status of *Meyer* and *Pierce*, Justice Scalia writes, "While I would not now overrule those earlier cases [presumably this includes *Wisconsin v. Yoder*<sup>65</sup>] (that has not been urged), neither would I extend the theory upon which they rested to this new context."<sup>66</sup> So, we are still confused. Is Justice Scalia willing, even eager, to overrule *Meyer* and *Pierce* if parties before the Court ever do, in fact, urge this? Or are *Meyer* and *Pierce* secure in Justice Scalia's eyes as long as no attempt is made, as here, to apply them to "new context[s]," meaning, presumably, contexts outside of education?<sup>67</sup>

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<sup>64</sup> *W. Coast Hotel Co.*, 300 U.S. at 400.

<sup>65</sup> Frankly, if *Yoder* survived *Employment Division v. Smith*, 494 U.S. 872, 881 (1990), it will survive anything. But, since *Yoder* does not mean very much, neither does its survival. *Employment Division v. Smith* severely restricted judicial use of the compelling-state-interest balancing test in Free Exercise cases. *Id.* at 884 ("Even if we were inclined to breathe into [the compelling-state-interest-test] some life beyond the unemployment compensation field, we would not apply it to require exemptions from a generally applicable criminal law. The [compelling-state-interest] test, it must be recalled, was developed in a context that lent itself to individualized governmental assessment of the reasons for the relevant conduct."). This same test had been part of the *ratio decidendi* of *Yoder*. See *Wisconsin v. Yoder*, 406 U.S. 205, 214 (1972) ("[I]n order for Wisconsin to compel school attendance beyond the eighth grade against a claim that such attendance interferes with the practice of a legitimate religious belief, it must appear either that the State does not deny the free exercise of religious belief by its requirement, or that there is a state interest of sufficient magnitude to override the interest claiming protection under the Free Exercise Clause."). *Yoder*, the *Smith* Court explained, involved not Free Exercise alone but Free Exercise combined with the (judicially-created) parental right of *Meyer* and *Pierce*. *Smith*, 494 U.S. at 881. This basis for *yet again* distinguishing *Yoder* is, I must say, not *Smith*'s analytic high point, though I have defended *Smith* in other contexts.

<sup>66</sup> *Troxel*, 530 U.S. at 92 (Scalia, J., dissenting).

<sup>67</sup> Justice Scalia's overriding concern here seems to be, as he states a few lines further, to avoid "ushering in a new regime of judicially prescribed, and federally prescribed, family law." *Id.* at 93. Nothing but applause should greet the impulse to curb the project of constitutionalized family law. It could be argued, however, that *Meyer* and *Pierce* are themselves curbs on this project, reining in experiments by future judicial activists. In *Troxel*, it is true, the experiment of subjecting all parents to visitation claims by sundry individuals came from a legislative source, not a judicial one, but many of our experimenters today are interested in going the more familiar route, from scholarship to legal activism. See, e.g., James G. Dwyer, *Parents' Religion and Children's Welfare: Debunking the Doctrine of Parents' Rights*, 82 CALIF. L. REV. 1371, 1446-47 (1994); Woodhouse, *supra* note 17, at 1122. According to Professor Dwyer, his envisioned constitutional requirement that all children attend secular public schools is out of his hands: He implies it is simply a requirement of the Equal Protection Clause. See JAMES G. DWYER, *RELIGIOUS SCHOOLS V. CHILDREN'S RIGHTS* 121-22, 147 (1998).

*C. Justice Thomas's Opinion in Troxel*

Quite similar in one way and radically different in another is the approach taken by Justice Thomas in his separate concurring opinion in *Troxel*.<sup>68</sup> Justice Thomas has a way of introducing issues by *not* introducing them. Thus, he alludes directly to the possibility “that the original understanding of the Due Process Clause precludes judicial enforcement of unenumerated rights under that constitutional provision.”<sup>69</sup> Rather than endorse this thesis, he notes that “neither party has argued that our substantive due process cases were wrongly decided”<sup>70</sup> and that therefore “I express no view on the merits of this matter, and I understand the plurality as well to leave the resolution of that issue for another day.”<sup>71</sup> Of course, the plurality had not mentioned the issue (that is one form that leaving it for another day can take!), and given the Court’s deep institutional investment in modern substantive due process,<sup>72</sup> that would have to be quite a day.

Then, Justice Thomas introduces another issue into his opinion, again, by *not* introducing it. Just as neither party had asked for a revolution in the Court’s substantive due process doctrine, neither did either party ask the Court to perform the scarcely less revolutionary feat of re-grounding some portion of its substantive due process jurisprudence elsewhere in the Constitution, namely, on the Privileges or Immunities Clause of the Fourteenth Amendment. Justice Thomas

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<sup>68</sup> *Troxel*, 530 U.S. at 80 (Thomas, J., concurring).

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> The recent acme of this investment is surely *Planned Parenthood v. Casey*, 505 U.S. 833 (1992). *Casey* stands unreversed, although notably its approach to substantive due process was not followed in *Washington v. Glucksberg*, 521 U.S. 702, 727–28 (1997) (“That many of the rights and liberties protected by the Due Process Clause sound in personal autonomy does not warrant the sweeping conclusion that any and all important, intimate, and personal decisions are so protected . . . and *Casey* did not suggest otherwise.”) (citation omitted). *Lawrence v. Texas*, 539 U.S. 558 (2003), may represent a return to the *Casey* methodology, but it declined to be specific about the constitutional clause or particular legal doctrine on which the case based its holding. *See id.* at 578; *see also* Nelson Lund & John O. McGinnis, *Lawrence v. Texas and Judicial Hubris*, 102 MICH. L. REV. 1555, 1614 (2004) (“Many Supreme Court decisions have had worse immediate consequences than *Lawrence*. But few decisions in its entire history are so poorly reasoned, and almost none seeks so overtly to maximize future judicial discretion. Because *Lawrence* represents the final dissolution of meaningful legal constraints on substantive due process, it is likely to generate bad policy results in the future and it will certainly undermine the Court’s role as an institution that is more than a reservoir of political discretion for whatever forces can control it. The one possibly happy consequence is that the transparent emptiness of *Lawrence*’s analysis may cause a rethinking of the trends in substantive due process that have estranged the Court from anything that resembles the rule of law in such cases. Unfortunately, the better prediction may well be that *Lawrence*’s judicial hubris will prove contagious, and that other doctrinal areas will succumb to its virulent lawlessness.”).

discretely introduces this issue in a footnote, which consists solely of noting that the present case “does *not* involve a challenge based upon the Privileges and Immunities Clause, and thus does *not* present an opportunity to reevaluate the meaning of that Clause.”<sup>73</sup> Thus, by calling attention to an important issue that the present case did not raise, Justice Thomas invites us to think about that issue.

As a further guide to thought, Justice Thomas cites his own dissent in *Saenz v. Roe*.<sup>74</sup> This dissent is important because it sets forth principles for cabinining Privileges or Immunities jurisprudence and preventing it from becoming merely another fountainhead of unrestrained judicial creativity.<sup>75</sup> But before we turn to that, let us first look at how Justice Scalia tried to achieve exactly the same goal for substantive due process in his opinion for a plurality of the Court in *Michael H. v. Gerald D.*<sup>76</sup>

## II. EXAMINING JUSTICE SCALIA’S OPINION IN *MICHAEL H.*

### A. *Substantive Due Process: Friend or Enemy of “Tradition”?*

A rather different take on substantive due process, again in the context of family law, was offered by Justice Scalia in his plurality opinion in *Michael H. v. Gerald D.*<sup>77</sup> Here, and as a dissenter in *Troxel*, Justice Scalia was interpreting the substantive due process parental-rights doctrine so as to argue against its extension to the circumstances at hand. In both cases, Justice Scalia came out in defense of legislative

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<sup>73</sup> *Troxel*, 530 U.S. at 80 n.\* (Thomas, J., concurring) (emphasis added).

<sup>74</sup> *Id.* (citing *Saenz v. Roe*, 526 U.S. 489, 527–28 (1999) (Thomas, J., dissenting)).

<sup>75</sup> See *Saenz*, 526 U.S. at 526–28 (Thomas, J., dissenting). In his *Saenz* dissent, Justice Thomas contends that the term “privileges or immunities” as used by the framers of the Fourteenth Amendment meant what today we call “fundamental rights” and that the Court has misinterpreted the Privileges or Immunities Clause since the *Slaughter-House Cases*. *Id.* at 527–28. He contends that this misunderstanding has resulted in great confusion surrounding Fourteenth Amendment jurisprudence and that the Court should reevaluate its equal protection and substantive due process jurisprudence based on the Privileges or Immunities Clause’s correct, historical meaning. *Id.* at 528.

<sup>76</sup> 491 U.S. 110 (1989).

<sup>77</sup> Unlike Justice Thomas, who argued for a re-grounding of fundamental rights in the Privileges or Immunities Clause, Justice Scalia argued for judicial restraint in the application of substantive due process. *Id.* at 121 (“It is an established part of our constitutional jurisprudence that the term ‘liberty’ in the Due Process Clause extends beyond freedom from physical restraint. . . . Without that core textual meaning as a limitation, defining the scope of the Due Process Clause ‘has at times been a treacherous field for this Court,’ giving ‘reason for concern lest the only limits to . . . judicial intervention become the predilections of those who happen at the time to be Members of this Court.’”) (citations omitted) (quoting *Moore v. City of East Cleveland*, 431 U.S. 494, 502 (1977)).

authority and against judicial expansion of rights.<sup>78</sup> A key difference, though, is that in *Troxel* the state had legislated against parental rights,<sup>79</sup> while in *Michael H.* the state had legislated through a rule lodged in its evidence code in favor of *legally recognized* parents, which as the case showed, may be different from the biological parents.<sup>80</sup>

Justice Scalia's opinions in *Troxel* and *Michael H.* differ in that he effectively rejected substantive process in *Troxel*<sup>81</sup> but sketched a method for disciplining it in *Michael H.*, rendering it more legal and less political and also more traditionalist and less experimental. Justice Scalia showed that all of this can be done without overruling or even calling into question any substantive due process precedents not already overruled by the Court.<sup>82</sup>

When the complicated facts of *Michael H.* are boiled down, we are left with the following story: Carole and Gerald, a couple who had experienced marital trouble that included infidelity and the birth of a daughter to Carole by another man, reconciled and wished to settle down, including Gerald adopting child, Victoria. Michael, whom blood tests showed to be almost certainly the biological father of Victoria, wanted a hearing to assert his claims to parental rights over Victoria.<sup>83</sup> Though at one time Carole was willing to work with Michael to prove his

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<sup>78</sup> See *Troxel*, 530 U.S. at 93 (Scalia, J., dissenting) ("If we embrace this unenumerated right, I think it obvious—whether we affirm or reverse the judgment here, or remand as Justice Stevens or Justice Kennedy would do—that we will be ushering in a new regime of judicially prescribed, and federally prescribed, family law. I have no reason to believe that federal judges will be better at this than state legislatures; and state legislatures have the great advantages of doing harm in a more circumscribed area, of being able to correct their mistakes in a flash, and of being removable by the people."); *Michael H.*, 491 U.S. at 122 ("That the Court has ample precedent for the creation of new constitutional rights should not lead it to repeat the process at will. The Judiciary, including this Court, is the most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or even the design of the Constitution. Realizing that the present construction of the Due Process Clause represents a major judicial gloss on its terms, as well as on the anticipation of the Framers . . . , the Court should be extremely reluctant to breathe still further substantive content into the Due Process Clause so as to strike down legislation adopted by a State or city to promote its welfare. Whenever the Judiciary does so, it unavoidably pre-empts for itself another part of the governance of the country without express constitutional authority." (quoting *Moore*, 431 U.S. at 544 (White, J., dissenting)).

<sup>79</sup> The statute in *Troxel* allowed the Court to overrule parents' wishes about the visitation rights of others if it was in "the best interests of the child." *Troxel*, 530 U.S. at 60.

<sup>80</sup> The evidence rule at issue in *Michael H.* created an irrebuttable presumption that the husband of a child's mother is the child's father if he was living with the mother at the time of conception and is not sterile or impotent. *Michael H.*, 491 U.S. at 115. In *Michael H.*, the biological father of the child was not the father listed on the birth certificate; therefore, he was not the legal father of the child. *Id.* at 113–14.

<sup>81</sup> *Troxel*, 530 U.S. at 91–93 (Scalia, J., dissenting).

<sup>82</sup> *Michael H.*, 491 U.S. at 121–23.

<sup>83</sup> *Id.* at 113–15.

paternity through blood tests, she now wanted no more to do with him. Thus, as the facts get freeze-framed for purposes of resolving the constitutional issue, we have an intact legal family—Carole, Gerald, and Victoria—fighting off a challenge from an outsider, Michael.

State law may help the person in Michael's position by widening the range of persons legally entitled to contest parental rights within a legally-intact family, or it can protect that family by restricting such challenges to the legal father himself (Gerald, in this case) or the mother (Carole). At the time of the *Michael H.* litigation, California law protected the legal family, and Michael argued that by making this choice, California had violated his rights, which were grounded in substantive due process, to a parental relationship with his biological daughter.<sup>84</sup>

Quite a few scholars saw the Court's approval of this choice as a setback for "parents' rights."<sup>85</sup> Michael is a parent of Victoria, is he not? It is more accurate to see this case as pitting a father's rights against the rights of the family as defined by marital law and adoption law. Such a conflict will rarely arise, but when it does, it takes a strong commitment to social innovation via the judiciary to maintain that the Fourteenth Amendment *requires* that the state favor Michael, though the state surely may if it chooses.

In his dissent, Justice Brennan was under no illusions on this point, and he was fully equipped with just such a commitment.<sup>86</sup> Objecting that

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<sup>84</sup> *Id.* at 116 ("On appeal, Michael asserted, *inter alia*, that the Superior Court's application of [Cal. Evid. Code Section 621] had violated his procedural and substantive due process rights.")

<sup>85</sup> See, e.g., Scott Fruehwald, *Behavioral Biology and Constitutional Analysis*, 32 OKLA. CITY U. L. REV. 375, 405 (2007) ("In sum, Justice Scalia came to the wrong outcome in *Michael H.* because he favored tradition over evolution, a choice that ignored human nature. He should have seen that technology eliminated the foundation for the rule that paternity of a child born in a marriage should be challenged only in limited circumstances. Moreover, he wrongly favored marriage over protecting paternity and the paternal bond because paternity and the paternal bond are essential to human nature, while marriage is only a way to protect those attributes. Justice Scalia had it right that there is no dual fatherhood in nature. However, in nature Michael was Victoria's father. If California law interferes with Michael's relationship with his natural daughter, it has violated his due process rights under the Fourteenth Amendment."); Nancy Levit, *Theorizing and Litigating the Rights of Sexual Minorities*, 19 COLUM. J. GENDER & L. 21, 26–27 (2010) ("Along the way, of course, there were some Supreme Court cases that may have gotten it flat wrong on love—*Michael H. v. Gerald D.*, for example.")

<sup>86</sup> *Michael H.*, 491 U.S. at 148 (Brennan, J., dissenting) ("It is obvious, however, that the effect of [the law] is to terminate the relationship between Michael and Victoria before affording any hearing whatsoever on the issue whether Michael is Victoria's father. This refusal to hold a hearing is properly analyzed under our procedural due process cases, which instruct us to consider the State's interest in curtailing the procedures accompanying the termination of a constitutionally protected interest. California's interest,

the plurality's rule would deprive the judiciary of the power to keep everybody up to date,<sup>87</sup> he declared the purpose of "those who, with care and purpose, wrote the Fourteenth Amendment"<sup>88</sup> to be both *anti-majoritarian* (clearly a defensible view in light of practices in the newly-readmitted ex-Confederate states, supported by majorities of the enfranchised in those states, that the Fourteenth aimed to give Congress the power to counteract) and *anti-traditional* (much less defensible). This latter purpose is hard to defend as slavery was already banned by the Thirteenth Amendment, so animus against tradition was not needed in the Fourteenth in order to get rid of it. Other forms of racial injustice were banned by the inherent meaning of the other clauses of Section 1 of the Fourteenth, and broader interpretations of that section near-contemporary with its enactment read these as broad bans on state action against traditional rights and privileges,<sup>89</sup> not as mandates to despise tradition and go in search of innovative rights-claims.

To *allow* California to protect Gerald and Carole's marital family against Michael's no-longer-desired intrusion would be, as Justice Brennan maintains, to ignore "the kind of society in which our Constitution exists."<sup>90</sup> In his *Michael H.* dissent, Justice Brennan remarked,

We are not an assimilative, homogeneous society, but a facilitative, pluralistic one, in which we must be willing to abide someone else's unfamiliar or even repellent practice because the same tolerant impulse protects our own idiosyncrasies. Even if we can agree, therefore, that "family" and "parenthood" are part of the good life, it is absurd to assume that we can agree on the content of those terms and destructive to pretend that we do. In a community such as ours, "liberty" must include the freedom not to conform.

. . . [The Constitution according to the plurality] is not the living charter that I have taken to be our Constitution; it is instead a

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minute in comparison with a father's interest in his relationship with his child, cannot justify its refusal to hear Michael out on his claim that he is Victoria's father.").

<sup>87</sup> *Id.* at 140.

<sup>88</sup> *Id.* at 141.

<sup>89</sup> See *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 93 (1872) (Field, J., dissenting) ("The [Fourteenth Amendment] was adopted to obviate objections which had been raised and pressed with great force to the validity of the Civil Rights Act, and to place the common rights of American citizens under the protection of the National government."); *id.* at 118 (Bradley, J., dissenting) ("But we are not bound to resort to implication, or to the constitutional history of England, to find an authoritative declaration of some of the most important privileges and immunities of citizens of the United States. It is in the Constitution itself."); *id.* at 129 (Swayne, J., dissenting) ("It is necessary to enable the government of the nation to secure to every one within its jurisdiction the rights and privileges enumerated, which, according to the plainest considerations of reason and justice and the fundamental principles of the social compact, all are entitled to enjoy.").

<sup>90</sup> *Michael H.*, 491 U.S. at 141 (Brennan, J., dissenting).



stagnant, archaic, hidebound document steeped in the prejudices and superstitions of a time long past.<sup>91</sup>

This is quite an indictment. Jet-setting model Carole and international businessman Gerald, who only wanted to get on with their married life free from the threat of Michael's paternal-rights claim over Victoria, would probably not recognize themselves in that part about "stagnant, archaic, [and] hidebound,"<sup>92</sup> and Gerald might well object that Michael should be a little more "facilitative" toward Carole's final decision in this regard, even if that decision is "unfamiliar or even repellent" to him. But no, for Justice Brennan, it is precisely the "traditional" (or legal) family, and rules of law protecting it, that are "stagnant, archaic, [and] hidebound,"<sup>93</sup> and it is precisely rules that advance the life-projects of the adulterous that are "facilitative [and] pluralistic."<sup>94</sup>

Justice Scalia took this challenge by Justice Brennan seriously enough to respond to it in the final version of his plurality opinion and, in doing so, captured the irony:

Here, to *provide* protection to an adulterous natural father is to *deny* protection to a marital father, and vice versa. If Michael has a "freedom not to conform" (whatever that means), Gerald must equivalently have a "freedom to conform." One of them will pay a price for asserting that "freedom"—Michael by being unable to act as father of the child he has adulterously begotten, or Gerald by being unable to preserve the integrity of the family unit he and Victoria<sup>95</sup> have established. Our disposition does not choose between these two "freedoms," but leaves that to the people of California. Justice Brennan's approach chooses one of them as the constitutional imperative, on no apparent basis except that the unconventional is to be preferred.<sup>96</sup>

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<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> That is, the child. Her own personal views are unknown. She was represented in this litigation by a court-appointed guardian ad litem whose filings and arguments mirrored Michael's at all times. Of the twenty-one cases Victoria D. cites, Michael H. cites ten. Brief for Appellant Victoria D. at iii, *Michael H.*, 491 U.S. 110 (No. 87-746), 1987 WL 880074; Brief for Appellant Michael H. at iv–v, *Michael H.*, 491 U.S. 110 (No. 87-746), 1987 WL 880072. The briefs also advance similar equal protection and due process theories based on their relationship as biological parent and child. Brief for Appellant Victoria D., *supra*, at 13–14. Brief for Appellant Michael H., *supra*, at 6–10.

<sup>96</sup> *Michael H.*, 491 U.S. at 130.

*B. Justice Scalia's Teaching on Substantive Due Process in Michael H.*

In both *Troxel* and *Michael H.*, a plaintiff sought to deploy the parental-rights prong of substantive due process.<sup>97</sup> The cases are otherwise quite different because *Michael H.*, as discussed previously, sought to set aside the privileges of a traditional family as recognized by law in favor of a right whose principle champion on the Court, Justice Brennan, recognized as a novelty.<sup>98</sup> In *Troxel*, by contrast, Tommie Granville sought only the traditional *Meyer-Pierce* judicially-enforced state deference to parental decision-making, albeit in a factual environment unlike *Meyer* and *Pierce* themselves. In both cases, Justice Scalia was unwilling to go along. In *Troxel*, where a more “traditional” application of *Meyer-Pierce* was sought, he was openly critical of *Meyer* and *Pierce*,<sup>99</sup> while in *Michael H.*, where an innovative use of substantive due process was sought (albeit with the *Meyer-Pierce* doctrine relegated to the background), he also said no—but not to family-oriented substantive due process and all its works.<sup>100</sup>

Rather, Justice Scalia urged a restrained use of due process in cases where unenumerated rights are claimed. Most of this discussion is found in the footnotes of the *Michael H.* case. But before turning to the famous “Footnote Six,”<sup>101</sup> we must not ignore “Footnote Two,” which announces in relevant part: “Nor do we understand why our practice of limiting the Due Process Clause to traditionally protected interests turns the Clause ‘into a redundancy.’ Its purpose is to prevent future generations from

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<sup>97</sup> *Troxel v. Granville*, 530 U.S. 57, 65 (2000) (“The Fourteenth Amendment provides that no State shall ‘deprive any person of life, liberty, or property, without due process of law.’ We have long recognized that the Amendment’s Due Process Clause, like its Fifth Amendment counterpart, ‘guarantees more than fair process.’ . . . The Clause also includes a substantive component that ‘provides heightened protection against government interference with certain fundamental rights and liberty interests.’ . . . The liberty interest at issue in this case—the interest of parents in the care, custody, and control of their children—is perhaps the oldest of the fundamental liberty interests recognized by this Court.” (citations omitted)); *Michael H.*, 491 U.S. at 121 (“Michael contends as a matter of substantive due process that, because he has established a parental relationship with Victoria, protection of Gerald’s and Carole’s marital union is an insufficient state interest to support termination of that relationship.”).

<sup>98</sup> See *Michael H.*, 491 U.S. at 136–37 (Brennan, J., dissenting).

<sup>99</sup> In *Troxel*, Justice Scalia referred to *Meyer* and *Pierce* as “from an era rich in substantive due process holdings that have since been repudiated.” *Troxel*, 530 U.S. at 92 (Scalia, J., dissenting).

<sup>100</sup> In his opinion in *Michael H.*, Justice Scalia only cites *Meyer* and *Pierce* for the proposition that “[i]t is an established part of our constitutional jurisprudence that the term ‘liberty’ in the Due Process Clause extends beyond freedom from physical restraint.” *Michael H.*, 491 U.S. at 121.

<sup>101</sup> In Footnote Six, Justice Scalia defends his use of tradition against Justice Brennan’s dissent. *Id.* at 127 n.6.

lightly casting aside important traditional values—not to enable this Court to invent new ones.”<sup>102</sup>

“Its purpose.” What is the referent of “it”? There are seemingly two possibilities. The referent is either the Due Process Clause itself or “our practice of limiting [it] to traditionally protected interests.”<sup>103</sup> Either way, the purport of the remark seems clear enough: The Due Process Clause is not a fountainhead of social transformation waiting to be tapped by the Court. What, then, is this part about “prevent[ing] future generations from lightly casting aside important traditional values”?<sup>104</sup> The least activist interpretation that can be placed on this assertion is that “our practice of limiting the Due Process Clause to traditionally protected interests” has the effect of preventing future generations of *Supreme Court Justices* from “lightly casting aside traditional values.”

But nothing in Footnote Two limits its application to the Justices themselves. It clearly says “future generations.”<sup>105</sup> This designation would seem to affirm the notion (not ordinarily associated with Justice Scalia, but perhaps winning his reluctant approval in this case) that the Due Process Clause stands as an outer barrier against overly-innovative state experimentation, which notion, in turn, is at the heart of the *Meyer-Pierce* doctrine of substantive due process.

The better-known Footnote Six is even more important than Footnote Two since it suggests nothing less than a system for reconciling substantive due process with judicial restraint and perhaps even with Fourteenth Amendment originalism.<sup>106</sup> This footnote explains that when a substantive due process claim is placed before the Court, the Court must test the claim to see whether the right that is claimed is “implicit in the concept of ordered liberty”<sup>107</sup> or “so rooted in the traditions and conscience of our people as to be ranked as fundamental”<sup>108</sup> as the Court has been known to put it. Too often this inquiry has been carried out in terms of the moral hunches of the Justices; this argument is the standard one for discarding substantive due process altogether. But Footnote Six suggests a different method. Use historical sources, especially legal history sources such as the old hornbooks cited in *Michael H.*, and answer the question that Footnote Six famously

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<sup>102</sup> *Id.* at 122 n.2 (citation omitted).

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> See Steven G. Calabresi & Sarah Agudo, *Individual Rights Under State Constitutions when the Fourteenth Amendment Was Ratified in 1868: What Rights Are Deeply Rooted in American History and Tradition?*, 87 TEX. L. REV. 7, 11 (2008).

<sup>107</sup> *Michael H.*, 491 U.S. at 128 n.6 (citing *Palko v. Connecticut*, 302 U.S. 319, 325 (1937)).

<sup>108</sup> *Id.* (citing *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934)).

articulates, which is “What is ‘the most specific level at which a relevant tradition protecting, or denying protection to, the asserted right can be identified?’”<sup>109</sup>

Misreading this analytic method is easy to do by focusing solely on the words “most specific” as Justice Scalia himself is forced to do later in the footnote for reasons of verbal economy, but not in the passage quoted above where he states the proposed rule fully. One example of the most notorious of all such misreadings occurs in the joint opinion of *Planned Parenthood v. Casey*,<sup>110</sup> where the Court called it “tempting . . . to suppose that the Due Process Clause protects only those practices, defined at the most specific level, that were protected against government interference by other rules of law when the Fourteenth Amendment was ratified.”<sup>111</sup> In his dissent, which was joined by Chief Justice Rehnquist, Justice White, and Justice Thomas, Justice Scalia describes this passage as “evidently meant to represent my position.”<sup>112</sup> Of course, it fails to represent Justice Scalia’s position because it fails to

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<sup>109</sup> Footnote Six reads, in relevant part,

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

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

. . . The need, if arbitrary decisionmaking is to be avoided, to adopt the most specific tradition as the point of reference—or at least to announce, as Justice Brennan declines to do, some other criterion for selecting among the innumerable relevant traditions that could be consulted—is well enough exemplified by the fact that in the present case Justice Brennan’s opinion and Justice O’Connor’s opinion . . . , which disapproves this footnote, *both* appeal to tradition, but on the basis of the tradition they select reach opposite results. Although assuredly having the virtue (if it be that) of leaving judges free to decide as they think best when the unanticipated occurs, a rule of law that binds neither by text nor by any particular, identifiable tradition is no rule of law at all.

*Id.* at 127–28 n.6 (citations omitted).

<sup>110</sup> 505 U.S. 833 (1992).

<sup>111</sup> *Id.* at 847 (1992) (citing *Michael H.*, 491 U.S. at 127–28 n.6).

<sup>112</sup> *Id.* at 981 (Scalia, J., concurring in the judgment in part and dissenting in part).

note the work done in the Footnote Six analysis by the word "relevant," as in, "a relevant tradition protecting, or denying protection to, the asserted right."<sup>113</sup>

Michael's marital status vis-à-vis Carol, or lack thereof, and also Carol's marital status vis-à-vis Gerald are both of considerable relevance to Michael's claim to be entitled to have a paternal relationship with Carol's daughter. These relationships are relevant, at least in a legal system that believes as ours did and evidently still does, that the marital unit is the preferred venue for raising children and that legally-intact families have an interest in resisting outside assaults on their legal status.<sup>114</sup>

### C. Putting the Pieces Together

Once we have identified the correct level of generality by the historical research sketched in Footnote Six of *Michael H.*, the next question to address is the following: Has American legal culture traditionally protected or traditionally denied protection to the asserted right? The answer to this question will determine the outcome of the substantive due process claim. One may concede to critics of *Michael H.* that there is room for the influence of ideology or policy preferences in the delicate business of unearthing the most specific relevant tradition, but there is much *less* room for it than there is when substantive due process is nakedly a matter of life-tenured Justices who conceive the "duties of [their] office"<sup>115</sup> as including relieving the nation of "the prejudices and superstitions of a time long past."<sup>116</sup>

Thus, we have from Justice Scalia in *Michael H.* a teaching on substantive due process where the rights of the family unit are concerned, which is all one needs to bring us within the universe of not only *Meyer* and *Pierce* but also *Troxel* that cabins substantive due process by harnessing it to both tradition and historical scholarship.<sup>117</sup>

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<sup>113</sup> *Michael H.*, 491 U.S. at 128 n.6.

<sup>114</sup> Notably, several American jurisdictions have some form of a presumption in favor of the husband of the child's mother at the time of conception. For instance, the Uniform Parentage Act of 2002, which has been adopted by nine states in addition to being endorsed by several American Bar Association Committees, provides for such a presumption. UNIF. PARENTAGE ACT § 204 (2002); *Legislative Fact Sheet - Parentage Act*, UNIF. LAW COMM'N, <http://www.nccusl.org/LegislativeFactSheet.aspx?title=Parentage%20Act> (last visited Nov. 26, 2011).

<sup>115</sup> *Casey*, 505 U.S. at 849.

<sup>116</sup> *Michael H.*, 491 U.S. at 141 (Brennan, J., dissenting).

<sup>117</sup> *Id.* at 121 (majority opinion) ("It is an established part of our constitutional jurisprudence that the term 'liberty' in the Due Process Clause extends beyond freedom from physical restraint. . . . Without that core textual meaning as a limitation, defining the scope of the Due Process Clause 'has at times been a treacherous field for this Court,' giving 'reason for concern lest the only limits to . . . judicial intervention become the

Textual rights do not need a jurisprudence of tradition to back them up, but non-textual rights seeking recognition under the rubric of substantive due process need to be able to show historical roots at a level of specificity not so low as to be absurd (we are not concerned, for example, with Michael's hair color), but also not so high either as to leave the Justices free to pick their personal favorite policies.

### III. EXAMINING JUSTICE THOMAS'S OPINION IN *SAENZ*

#### A. *What Justice Thomas Said in Saenz: Cabining Privileges or Immunities*

*Saenz v. Roe* represents what seems to be a momentary revival of interest by the Court in identifying the Privileges or Immunities Clause of the Fourteenth Amendment as a source of a substantive right.<sup>118</sup> Justice Thomas dissented in the case.<sup>119</sup> But the gravamen of this dissent was not that this clause should not be revisited as a source of substantive rights protection, but rather that this revisiting must be done in light of the Privileges or Immunities Clause's historical background.<sup>120</sup>

The *Saenz* majority, with Justice Stevens writing, had held that the plaintiffs' right to travel was unconstitutionally burdened by a California statute limiting the maximum welfare benefits available to otherwise-eligible persons moving into the state.<sup>121</sup> The right to travel is itself a non-textual, unenumerated right, granted protection in *Shapiro v. Thompson*,<sup>122</sup> but that decision did not specify from which clause of the Constitution this right came or on what clause it was based.<sup>123</sup> The

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predilections of those who happen at the time to be Members of this Court.” (citations omitted).

<sup>118</sup> *Saenz v. Roe*, 526 U.S. 489, 502–03 (1999).

<sup>119</sup> *Id.* at 521 (Thomas, J., dissenting).

<sup>120</sup> *Id.* at 527–28 (“Because I believe that the demise of the Privileges or Immunities Clause has contributed in no small part to the current disarray of our Fourteenth Amendment jurisprudence, I would be open to reevaluating its meaning in an appropriate case. Before invoking the Clause, however, we should endeavor to understand what the Framers of the Fourteenth Amendment thought that it meant. We should also consider whether the Clause should displace, rather than augment, portions of our equal protection and substantive due process jurisprudence.”).

<sup>121</sup> *Id.* at 500–07 (majority opinion).

<sup>122</sup> 394 U.S. 618, 629 (1969). The right to travel was also discussed by the Court in *Crandall v. Nevada*, 73 U.S. 35, 49 (1867) (striking down a state tax on persons leaving the state).

<sup>123</sup> The Court majority in *Saenz* noted,

In *Shapiro* . . . [w]ithout pausing to identify the specific source of the right, we began by noting that that the Court had long “recognized that the nature of our Federal Union and our constitutional concepts of personal liberty unite to require that all citizens be free to travel throughout the length and breadth of our land uninhibited by statutes, rules, or regulations which unreasonably burden or restrict this movement.”

*Saenz* majority held that the constitutional right to travel needed a proper constitutional home, and the best home for it was the Fourteenth Amendment Privileges or Immunities Clause.<sup>124</sup>

In his dissenting opinion, Justice Thomas clarified that he is and remains open to a revival of the Privileges or Immunities Clause subject to original-intent conditions that, in his judgment, the majority (including Justice Scalia) did not observe.<sup>125</sup> Citing Justice Bushrod in Washington’s classic ante-bellum decision *Corfield v. Coryell*,<sup>126</sup> which was based on the Article IV Privileges and Immunities Clause and later became a reference point for the drafters of the Fourteenth Amendment’s Privileges or Immunities Clause,<sup>127</sup> Justice Thomas remarked,

[Justice] Washington rejected the proposition that the Privileges and Immunities Clause guaranteed equal access to all public benefits (such as the right to harvest oysters in public waters) that a State chooses to make available. Instead, he endorsed the colonial-era conception of the terms “privileges” and “immunities,” concluding that Article IV encompassed only *fundamental* rights that belonged to all citizens of the United States.<sup>128</sup>

Harvesting oysters in public waters was, of course, what *Corfield* was actually *about*. Justice Washington’s oft-cited dicta in *Corfield* listing examples of fundamental rights<sup>129</sup> sometimes obscures this fact.

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*Saenz*, 526 U.S. at 499 (citing *Shapiro*, 394 U.S. at 629). The *Shapiro* Court also held that, the right to travel being assumed to exist on no particular textual basis, the Equal Protection Clause is violated by “any classification which serves to penalize the exercise of that right.” *Shapiro*, 394 U.S. at 629, 633–34.

<sup>124</sup> *Saenz*, 526 U.S. at 502–03 (“What is at issue in this case, then, is this third aspect of the right to travel—the right of the newly arrived citizen to the same privileges and immunities enjoyed by other citizens of the same State. That right is protected not only by the new arrival’s status as a state citizen, but also by her status as a citizen of the United States. That additional source of protection is plainly identified in the opening words of the Fourteenth Amendment.”).

<sup>125</sup> *Id.* at 521–22 (Thomas, J., dissenting) (“Unlike the majority, I would look to history to ascertain the original meaning of the Clause.”).

<sup>126</sup> 6 F.Cas. 546, 551–52 (C.C.E.D. Pa. 1825) (No. 3,230).

<sup>127</sup> *Saenz*, 526 U.S. at 526 (Thomas, J., dissenting) (citing John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 YALE L.J. 1385, 1418 (1992)). Thomas also cites numerous colonial-era charters that contain language closely paralleling “privileges and immunities.” *Id.* at 523.

<sup>128</sup> *Id.* at 525–26.

<sup>129</sup> In *Corfield*, Justice Washington wrote,

We feel no hesitation in confining these expressions to those privileges and immunities which are, in their nature, fundamental; which belong, of right, to the citizens of all free governments; and which have, at all times, been enjoyed by the citizens of the several states which compose this Union, from the time of their becoming free, independent, and sovereign. What these fundamental principles are, it would perhaps be more tedious than difficult to enumerate. They may, however, be all comprehended under the following general heads: Protection by the government; the enjoyment of life and liberty, with the right

Here, Justice Thomas is analogizing between fundamental rights, on one hand, and on the other hand, benefits that the state may create but is not obliged to create, which the state may therefore restrict to its own citizens. To the latter category, Justice Thomas would allocate the right to harvest oysters in the state's territorial waters (following the holding of *Corfield*). He would also allocate welfare benefits to the same category (therefore disagreeing with the majority in *Saenz*).

Thus, according to Justice Thomas, the Privileges or Immunities Clause<sup>130</sup> should not be invoked where, as here, only discretionary public benefits are at stake. Rather, as in *Corfield* and the other authorities he cites, the Privileges or Immunities Clause should be reserved for "fundamental rights."<sup>131</sup> But, once properly invoked, if properly invoked, the clause could be powerful indeed:

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to acquire and possess property of every kind, and to pursue and obtain happiness and safety; subject nevertheless to such restraints as the government may justly prescribe for the general good of the whole. The right of a citizen of one state to pass through, or to reside in any other state, for purposes of trade, agriculture, professional pursuits, or otherwise; to claim the benefit of the writ of habeas corpus; to institute and maintain actions of any kind in the courts of the state; to take, hold and dispose of property, either real or personal; and an exemption from higher taxes or impositions than are paid by the other citizens of the state; may be mentioned as some of the particular privileges and immunities of citizens, which are clearly embraced by the general description of privileges deemed to be fundamental: to which may be added, the elective franchise, as regulated and established by the laws or constitution of the state in which it is to be exercised. These, and many others which might be mentioned, are, strictly speaking, privileges and immunities . . . .

*Corfield*, 6 F.Cas. at 551–52.

<sup>130</sup> A point of clarification for readers who are not privileges/immunities nerds: The term in Article IV is "privileges *and* immunities." U.S. CONST. art. IV, § 2 (emphasis added). In the Fourteenth Amendment, it is "privileges *or* immunities." U.S. CONST. amend. XIV, § 1 (emphasis added). The difference is of no substance: It is purely a syntactical result of the negative phrasing used in the Fourteenth Amendment ("No state shall . . ."). But it does provide a handy signaling device for letting readers or listeners know about which clause one is talking.

<sup>131</sup> *Saenz*, 526 U.S. at 527 (Thomas, J., dissenting) ("That Members of the 39th Congress appear to have endorsed the wisdom of Justice Washington's opinion does not, standing alone, provide dispositive insight into their understanding of the Fourteenth Amendment's Privileges or Immunities Clause. Nevertheless, their repeated references to the *Corfield* decision, combined with what appears to be the historical understanding of the Clause's operative terms, supports the inference that, at the time the Fourteenth Amendment was adopted, people understood that 'privileges or immunities of citizens' were fundamental rights, rather than every public benefit established by positive law. Accordingly, the majority's conclusion—that a State violates the Privileges or Immunities Clause when it 'discriminates' against citizens who have been domiciled in the State for less than a year in the distribution of welfare benefits—appears contrary to the original understanding and is dubious at best.").



Because I believe that the demise of the Privileges or Immunities Clause [referring to the *Slaughter-House Cases*<sup>132</sup>] has contributed in no small part to the current disarray of our Fourteenth Amendment jurisprudence, I would be open to reevaluating its meaning in an appropriate case. Before invoking the Clause, however, we should endeavor to understand what the Framers of the Fourteenth Amendment thought that it meant. We should also consider whether the Clause should displace, rather than augment, portions of our equal protection and substantive due process jurisprudence.<sup>133</sup>

Though it is Justice Scalia, not Justice Thomas, who is apt to denounce substantive due process from the lecture podium as “spinach,” it would appear from this passage in Justice Thomas’s *Saenz* dissent that he too is critical of the effects of over-reliance on the Due Process Clause. Justice Thomas seems even open to the possibility of re-grounding some subset of the Court’s existing substantive due process corpus on Privileges or Immunities.

The radical nature of Justice Thomas’s proposal should not go unnoticed. It is the same proposal he repeated in his *Troxel* footnote,<sup>134</sup> but here he made the proposal more clearly. Presumably, given Justice Thomas’s restriction of Privileges and/or Immunities to “fundamental rights” as opposed to state-created benefits, this would give a traditionalist cast to the resulting muster of protected rights. Parenthood, with its attendant rights and duties (*Pierce*, of course, spoke of both<sup>135</sup>), is not state-created.<sup>136</sup>

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<sup>132</sup> *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 74 (1873) (adopting a very narrow reading of the Fourteenth Amendment Privileges or Immunities Clause, an interpretation that has remained criticized yet authoritative within the Court).

<sup>133</sup> *Saenz*, 526 U.S. at 527–28 (Thomas, J., dissenting).

<sup>134</sup> See *supra* note 73 and accompanying text.

<sup>135</sup> The *Pierce* Court’s now-famous characterization of these rights and duties proceeds as follows: “The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.” *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 535 (1925).

<sup>136</sup> The case is closer with regard to adoption, which normally involves a process that a court oversees. But adoption is ancient and accepted at Common Law and in other legal traditions, even including the relationship of Jesus to the good man Joseph widely taken to have been His father. *Matthew* 1:16; *Luke* 2:4, 48; 3:23. A more risky proposition would be the case of more recently recognized forms of parenthood, such as the “psychological” or “de facto” variety, which lack *Michael H.*-type roots in the history and traditions of our people or *Saenz*-dissent-type fundamentality. See Nancy D. Polikoff, *Making Marriage Matter Less: The ALI Domestic Partner Principles Are One Step in the Right Direction*, 2004 U. CHI. LEGAL F. 353, 353–54; David M. Wagner, *Balancing “Parents Are” and “Parents Do” in the Supreme Court’s Constitutionalized Family Law: Some Implications for the ALI Proposals on De Facto Parenthood*, 2001 BYU L. REV. 1175, 1175–76.

*B. Linking Justice Thomas in Troxel and Saenz to Justice Scalia in Michael H.*

Reserving a potentially open-ended constitutional clause to “fundamental rights,” and, moreover, to rights that can vindicate their “fundamental” status by appeal to age, deep roots, and long practice—does that not sound familiar? Is that not the preferable way of analyzing substantive due process claims, according to the teaching of the *Michael H.* plurality<sup>137</sup>—a teaching that while scorned by the Court in *Casey*,<sup>138</sup> was nonetheless partly adopted by it later in *Glucksberg*?<sup>139</sup>

As we have seen, the purpose of restricting substantive due process, Justice Scalia’s more-or-less spelled-out goal, was to permit the Court’s well-settled practice of protecting unenumerated rights under the Fourteenth Amendment to survive while at the same time not allowing it to spin into outright government by the judiciary. Also, restricting substantive due process allows that practice to act in line with “the traditions of our people” rather than as a counter-majoritarian dynamo.<sup>140</sup> These same concerns drove Justice Thomas to write the following passage in his *Saenz* dissent:

The majority’s failure to consider these important questions [of the original meaning of privileges and/or immunities] raises the specter that the Privileges and Immunities Clause will become yet another convenient tool for inventing new rights, limited solely by the “predilections of those who happen at the time to be Members of this Court.”<sup>141</sup>

Does the *Meyer-Pierce* doctrine of parental rights, grounded in substantive due process, have a chance of surviving in a world of originalist constitutional law?<sup>142</sup> First, would it survive in an originalist

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<sup>137</sup> See *supra* note 109 and accompanying text.

<sup>138</sup> See *supra* note 111 and accompanying text.

<sup>139</sup> Notably, the Court in *Glucksberg* began its analysis as follows: “We begin, as we do in all due process cases, by examining our Nation’s history, legal traditions, and practices.” *Washington v. Glucksberg*, 521 U.S. 702, 710 (1997). Though citing *Casey*, *inter alia*, for authority, this statement reflects more the general approach of *Michael H.*, though not the particular analytic mode of that opinion’s Footnote Six. See *Michael H. v. Gerald D.*, 491 U.S. 110, 127 n.6 (1989) (“Justice Brennan criticizes our methodology in using historical traditions specifically relating to the rights of an adulterous natural father, rather than inquiring more generally ‘whether parenthood is an interest that historically has received our attention and protection.’”).

<sup>140</sup> See *supra* note 89 and accompanying text.

<sup>141</sup> *Saenz v. Roe*, 526 U.S. 489, 528 (1999) (Thomas, J., dissenting) (quoting *Moore v. City of East Cleveland*, 431 U.S. 494, 502 (1977)).

<sup>142</sup> This is not the place even to describe, much less defend, originalism. I mean by it, briefly, constitutional decision-making cabined by fidelity to the actual meaning of the text as it would have been understood by reasonably well-educated persons at the time it was adopted, as that meaning can be recovered through historical research, and combined with a willingness to understand past drafters and ratifiers as they understood themselves,

world in which substantive due process had been admitted and approved, subject to the restraints of *Michael H.*? I believe so. In the face of a statute, such as the ones found in *Pierce* and *Troxel*, that derogates from the rights and responsibilities of parents to direct the upbringing of their children, it should not be difficult for a plaintiff, even articulating this right at a level of generality or specificity suitable to the case, as *Michael H.* would require, to show that the right is deeply rooted in our history and tradition, sufficient to shift the burden of proof to the government.<sup>143</sup>

On the other hand, Justice Scalia's most recent statement on the *Meyer-Pierce* doctrine remains his dissent in *Troxel*,<sup>144</sup> grudging acceptance, potential willingness to overrule given an appropriate case with a demand by parties to do so, and unwillingness to extend the doctrine beyond the fact patterns in which it arose. Justice Scalia's policy

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rather than as stock-figures in a morality play to which our era has all the answers. See *United States v. Virginia*, 518 U.S. 515, 566–67 (1996) (Scalia, J., dissenting); Gerard V. Bradley, *Beguiled: Free Exercise Exemptions and the Siren Song of Liberalism*, 20 HOFSTRA L. REV. 245, 248–55 (1991).

<sup>143</sup> The issue of the exact standard of review in such a case may be left to another day. The plurality in *Troxel* did not address it (drawing a rebuke for that from Justice Thomas). *Troxel v. Granville*, 530 U.S. 57, 80 (2000) (Thomas, J., concurring). I am myself not sufficiently an enthusiast for the "compelling state interest" test to defend it against other forms of "heightened scrutiny" that may do the job, or even categorical rules to the effect that given a parent who has not been adjudicated unfit and no intra-parental dispute submitted to a court, a specified and not-too-grudging list of parental decisions simply may not be second-guessed by government. Obviously, such a proposal merely kicks the hard cases down the road, including borderline definitions of abuse and neglect, the vaccination issue, etc.

<sup>144</sup> *Troxel*, 530 U.S. at 91 (Scalia, J., dissenting). Actually he addresses *Meyer* again, very briefly, in his concurrence in *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3051 (2010) (Scalia, J., concurring); see *infra* notes 159–160 and accompanying text. The thrust of that concurrence is to critique Justice Stevens's dissent in the same case for advocating non-historically-tethered substantive due process. On Justice Scalia's list of substantive due process precedents that in his view are *not* well grounded in history and tradition, one finds *Meyer!* *McDonald*, 130 S. Ct. at 3051 (Scalia, J., concurring). This may seem remarkable until one notices that he sums up *Meyer* as having invented a "right to teach one's children foreign languages." *Id.* In this phrasing, he is perhaps merely repeating Stevens's own phrasing of the *Meyer* holding. *Id.* at 3091 (Stevens, J., dissenting). It could also be, if one were to try the experiment, the result of a rigorous but defensible application of Justice Scalia's own *Michael H.* Footnote Six methodology. See *supra* note 101. Note that articulation of the claim in *Meyer* here does not add "the German language": That would have added a level of specificity that is legally irrelevant. It is definitely arguable, however, that to take *Meyer* to any higher level of generality than "the right to teach one's children foreign languages"—certainly to take it to as high a level as "parental rights," or even the level the *Meyer* Court in fact chose, which was Mr. Meyer's right to exercise the "helpful and desirable" profession of teaching "and the right of parents to engage him so to instruct their children"—is to generalize so highly that any right could become protected. This is a valid critique of *Meyer*. *Meyer v. Nebraska*, 262 U.S. 390, 400 (1923). Whether the same critique can be made of *Pierce* is a separate question, and Justice Scalia does not attempt it here.

concern appears to be the same in both *Michael H.* and *Troxel*. Constitutionalized family law, in practice, has done net harm to the family by entrenching liberal morality (*Meyer* and *Pierce*, to the extent they are counter-examples, are the exceptions and not the rule). It has done so in ways that entrench rules into constitutional law, whereas mistakes by legislators can be undone through elections and lobbying.<sup>145</sup> Therefore, the argument goes, let us either constrain constitutionalized family law through a rigorous level-of-generality/history-and-tradition requirement (*Michael H.*)<sup>146</sup> or by denying it any opportunity to expand, even if hypothetically a history-and-tradition basis for such an expansion could be shown (*Troxel* dissent).<sup>147</sup> The fact remains, though, that under the teachings of Justice Scalia's *Troxel* dissent, *Meyer-Pierce* is going nowhere.

#### IV. WHAT THEN ABOUT PRIVILEGES AND IMMUNITIES?

As we have seen, vindicating parental rights through the *Michael H.* version of substantive due process would entail historical research showing that such rights are deeply rooted in our history and tradition. Vindicating them under the *Saenz* dissent's version of the Privileges or Immunities Clause would mean showing that they are fundamental as opposed to state-created and discretionary. In all likelihood, the body of research necessary to carry either of these two burdens of proof would be the same, and that burden could, in fact, be carried.<sup>148</sup> This would put all

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<sup>145</sup> *Troxel*, 530 U.S. at 93 (Scalia, J., dissenting). In proclaiming that state legislators can "correct their mistakes in a flash," Scalia may be underestimating the torpor and logrolling of state capitals. But their work surely *does* take place "in a flash" compared to the process of undoing a mistaken Supreme Court decision.

<sup>146</sup> *Michael H. v. Gerald D.*, 491 U.S. 110, 121 (1989) ("It is an established part of our constitutional jurisprudence that the term 'liberty' in the Due Process Clause extends beyond freedom from physical restraint. Without that core textual meaning as a limitation, defining the scope of the Due Process Clause 'has at times been a treacherous field for this Court,' giving 'reason for concern lest the only limits to . . . judicial intervention become the predilections of those who happen at the time to be Members of this Court.'" (citations omitted)).

<sup>147</sup> *Troxel*, 530 U.S. at 91–92 (Scalia, J., dissenting).

<sup>148</sup> There are dicta in both *Meyer* and *Pierce* to this effect, but one need not rely circularly on these. In Aristotle's *The Politics*, though, "[t]he city is thus prior by nature to the household . . . . For the whole must of necessity be prior to the part . . . ." ARISTOTLE, *THE POLITICS* 37 (Carnes Lord trans., Univ. of Chicago Press 1984) (c. 350 B.C.). Nonetheless, the family (union of man and woman and household activities) is formed first, then the village, and only then the city. *Id.* at 35–37. The "priority" of the city, therefore, is like the priority of a goal to its means: a priority of *telos* (end), not of *timē* (honor). *Id.* at 37, 275–76. (It should be noted, however, that Aristotle was not averse to extensive government regulation of family-life and procreation. *Id.* at 224–26. In the Bible, we see the same order of foundational events. The book of *Genesis* shows the earliest families (Adam and Eve plus Cain, Abel, and later Seth) forming before what are possibly the earliest states. *Genesis* 4:1–2, 25. At the very earliest, we perhaps see primitive state

but the most extravagant parental rights claims on the “fundamental” side, rather than the “state-created” side, of the bright line Justice Thomas drew for the Privileges or Immunities Clause analysis that he sketched in his dissent in *Saenz*.<sup>149</sup> Furthermore, Justice Thomas has virtually invited, both in *Saenz* and *Troxel*, reconsideration of at least some substantive due process claims as Privileges or Immunities Claims.<sup>150</sup>

Of course, the obstacle is that no one on the Court except Justice Thomas shows signs of interest in such a doctrinal development. When the Court recently considered the question of incorporating against the states an individual right to bear arms that was grounded in the text of the Bill of Rights, the Court recognized it as an individual right rather than exclusively a group or “militia” right in *D.C. v. Heller*,<sup>151</sup> and the Court subsequently applied that right against the states in *McDonald v. City of Chicago*.<sup>152</sup> The plaintiffs in *McDonald* argued the Privileges or Immunities Clause as their principle vehicle of incorporation.<sup>153</sup> Their alternative theory was, of course, substantive due process.<sup>154</sup> At oral argument, Justice Scalia dismissed the Privileges or Immunities theory as “the darling of the professoriate.”<sup>155</sup> When the decision came down,

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formation when people first “play the lyre and pipe,” when there first appears among mankind a “forger of instruments of bronze and iron,” or possibly when organized worship first appears. See *Genesis* 4:21–26. Popular culture, industrial artisanship, and organized worship all suggest that some form of political organization, even if minimal and small-scale, has come about by this point—but not before the family.

<sup>149</sup> See *supra* note 75.

<sup>150</sup> See *supra* notes 28, 75.

<sup>151</sup> 128 S. Ct. 2783, 2797 (2008).

<sup>152</sup> 130 S. Ct. 3020, 3026 (2010).

<sup>153</sup> Petitioners’ Brief at 9, 42, *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010) (No. 08-1521) (arguing that the Privileges or Immunities Clause incorporates the Second Amendment and that the *Slaughter-House Cases* and its progeny must be overruled); Respondent’s Brief at 5, *D.C. v. Heller*, 128 S. Ct. 2783 (2008) (No. 07-290).

<sup>154</sup> Petitioners’ Brief, *supra* note 153, at 66 (arguing that the Second Amendment is incorporated by the Fourteenth Amendment’s Due Process Clause).

<sup>155</sup> The following exchange comes from the *McDonald* oral argument:

Justice Scalia: Mr. Gura, do you think it’s at all easier to bring the Second Amendment under the Privileges and Immunities Clause than it is to bring it under our established law of substantive due process?

Mr. Gura [attorney for petitioners]: It’s—

Justice Scalia: Is it easier to do it under privileges and immunities than it is under substantive due process?

Mr. Gura: It’s easier in terms, perhaps, of—the text and history, the original public understanding of—

Justice Scalia: No, no. I’m not talking about whether—whether the *Slaughter-House Cases* were right or wrong. I’m saying, assuming we give, you know, the Privileges and Immunities Clause your definition, does that make it any easier to get the Second Amendment adopted with respect to the States?

Justice Alito announced for a majority of the Court (Part II.B) that many legal scholars—including Justice Thomas—continue to disapprove of the *Slaughter-House* majority decision.<sup>156</sup> But, in the plurality (Part II.C, not joined by Justice Thomas), Justice Alito did not see any reason to overturn it.<sup>157</sup> Justice Scalia concurred, devoting to the substantive due process issue a single sentence that encapsulated both his *Troxel* grumpiness about substantive due process and his *Michael H.* agenda of saving it by limiting it: “Despite my misgivings about Substantive Due Process as an original matter, I have acquiesced in the Court’s incorporation of certain guarantees in the Bill of Rights because it is both long established and narrowly limited.”<sup>158</sup>

Justice Scalia specifically references the Bill of Rights in his *McDonald* concurrence,<sup>159</sup> so that, most likely, the “acquiescence” to substantive due process that he acknowledges is to incorporation of the Bill of Rights through the Due Process Clause, *rather than* to judicial recognition of substantive rights (under *any* clause) that are not specified in the Bill of Rights. Therefore, this concurrence signals no change on Justice Scalia’s part concerning such rights (including those recognized in the *Meyer-Pierce* doctrine).<sup>160</sup>

Justice Thomas, on the other hand, gave *McDonald* a crucial fifth vote with a concurring opinion, arguing at length for grounding

Mr. Gura: Justice Scalia, I suppose the answer to that would be no, because—

Justice Scalia: And if the answer is no, why are you asking us to overrule 150, 140 years of prior law, when—when you can reach your result under substantive due—I mean, you know, unless you’re bucking for a—a place on some law school faculty—

(Laughter.)

Mr. Gura: No. No. I have left law school some time ago, and this is not an attempt to—to return.

Justice Scalia: Well, I mean, what you argue is the darling of the professoriate, for sure, but it’s also contrary to 140 years of our jurisprudence. Why do you want to undertake that burden instead of just arguing substantive due process? Which, as much as I think it’s wrong, I have—even I have acquiesced in it.

(Laughter.)

Mr. Gura: Justice Scalia, we would be extremely happy if the Court reverses the lower court based on the substantive due process theory that we argued in the Seventh Circuit.

Transcript of Oral Argument at 6–7, *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010) (No. 08-1521).

<sup>156</sup> *McDonald*, 130 S. Ct. at 3029–30.

<sup>157</sup> *Id.* at 3030–31.

<sup>158</sup> *Id.* at 3050 (Scalia, J., concurring).

<sup>159</sup> *Id.*

<sup>160</sup> See *Troxel v. Granville*, 530 U.S. 57, 92–93 (2000) (Scalia, J., dissenting) (reflecting Justice Scalia’s narrow reading of the right actually protected by *Meyer*).

incorporation of the Second Amendment solely on the Privileges or Immunities Clause.<sup>161</sup> His concurrence was itself a substantial treatise on the history of the concepts of "privileges" and "immunities," tailored so as to focus on the original public meaning of that clause in the Fourteenth Amendment.<sup>162</sup> Justice Thomas completely rejected substantive due process: "The notion that a constitutional provision that guarantees only 'process' before a person is deprived of life, liberty, or property could define the substance of those rights strains credulity for even the most casual user of words."<sup>163</sup>

But as to the applicability of the Privileges or Immunities Clause to the *Meyer-Pierce* right, Justice Thomas's concurrence in *McDonald* takes us no further than he did in his *Troxel* concurrence.<sup>164</sup> The project of upending the Court's substantive due process corpus and re-grounding some of it on the Privileges or Immunities Clause, possibly leaving some of it permanently upended along the way, is daunting. Yet, Justice Thomas insists that *McDonald* is about one rights-claim only: personal arms-ownership. According to Justice Thomas, "The question presented in this case is not whether our entire Fourteenth Amendment jurisprudence must be preserved or revised, but only whether, and to what extent, a particular clause in the Constitution protects the particular right at issue here."<sup>165</sup>

Furthermore, the rights-claim in *McDonald* is grounded in the text of the Bill of Rights. This alone makes *McDonald* a vastly easier case than those cases that have arisen when the rights-claim involves non-textual rights, such as teachers' rights to exercise their profession and

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<sup>161</sup> *McDonald*, 130 S. Ct. at 3059 (Thomas, J., concurring in part and concurring in the judgment) ("But I cannot agree that it is enforceable against the States through a clause that speaks only to 'process.' Instead, the right to keep and bear arms is a privilege of American citizenship that applies to the States through the Fourteenth Amendment's Privileges or Immunities Clause.").

<sup>162</sup> Thus, for instance, when he goes over the floor debates in Congress on the Fourteenth Amendment, he is careful to stress the evidence that crucial portions of these debates were printed, distributed, and widely discussed by the news-consuming public of the day. Justice Thomas's opinion is very much a jurisprudence of original public meaning, not a jurisprudence of original legislators' subjective intent. *Id.* at 3071–72.

<sup>163</sup> *Id.* at 3062. Or, as he might say to Justice Scalia if he were a U.S. Marine: Acquiesce? "We just got here!" Saying attributed to Capt. Lloyd W. Williams, USMC, at the Battle of Belleau Wood, June 1, 1918, at which Capt. Williams died. See MARTIN MARIX EVANS, RETREAT, HELL! WE JUST GOT HERE!: THE AMERICAN EXPEDITIONARY FORCE IN FRANCE 1917–1918, at 44 (1998).

<sup>164</sup> See *McDonald*, 130 S. Ct. at 3062–63 (Thomas, J., concurring in part and concurring in the judgment); *Troxel*, 530 U.S. at 80 (Thomas, J., concurring).

<sup>165</sup> *McDonald*, 130 S. Ct. at 3063 (Thomas, J., concurring in part and concurring in the judgment).

parents' rights to have languages taught (*Meyer*),<sup>166</sup> or the right to travel (*Saenz*)<sup>167</sup>—never mind the rights grounded in “the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life”<sup>168</sup> or the “liberty of the person both in its spatial and in its more transcendent dimensions.”<sup>169</sup> Textual anchoring of the right at issue so that the only problem is finding the correct vehicle within the Fourteenth Amendment for incorporating it against the states greatly lessens the burden of proof that Justice Thomas had to carry in his *McDonald* concurrence. But that does not advance the ball in terms of the issue under discussion here. In fact, it deliberately avoids advancing it.

### CONCLUSION

So, could the *Meyer-Pierce* doctrine of parental rights—though never mentioned in the Constitution, but only in Court precedent, and protected from some forms of government intrusion due to their status as fundamental rights deeply rooted in our history and tradition—ever be protected by the Court as privileges and/or immunities of citizenship? Justice Thomas’s call for proof of fundamentality under the Privileges or Immunities Clause is no less rigorous (nor, to anticipate critics, more so) than the one called for by Justice Scalia in Footnote Six of *Michael H.* with regard to the Due Process Clause.<sup>170</sup> Both Justices recognize the danger of either the Due Process Clause or Privileges or Immunities Clause becoming (or, in the case of the Due Process Clause, remaining) a “Bertie Bott’s Every-Flavour Beans”<sup>171</sup> jar of rights-claims. It may be fairly said, though, that substantive due process has in fact been the bean jar since 1887<sup>172</sup> with some time off between 1937<sup>173</sup> and 1965.<sup>174</sup>

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<sup>166</sup> *Meyer v. Nebraska*, 262 U.S. 390, 399–401 (1923) (“The problem for our determination is whether the statute as construed and applied unreasonably infringes the liberty guaranteed to the plaintiff in error by the Fourteenth Amendment. . . . The challenged statute forbids the teaching in school of any subject except in English.”).

<sup>167</sup> *Saenz v. Roe*, 526 U.S. 489, 502 (1999) (“What is at issue in this case, then, is this third aspect of the right to travel—the right of the newly arrived citizen to the same privileges and immunities enjoyed by other citizens of the same State. That right is protected not only by the new arrival’s status as a state citizen, but also by her status as a citizen of the United States.” (citing the Privileges or Immunities Clause of the United States Constitution, U.S. CONST. amend. XIV, § 1, cl. 2)).

<sup>168</sup> *Planned Parenthood v. Casey*, 505 U.S. 833, 851 (1992).

<sup>169</sup> *Lawrence v. Texas*, 539 U.S. 558, 562 (2003).

<sup>170</sup> To be precise, the inquiry in *Michael H.* is rooted in American legal history and tradition rather than the status of being “fundamental,” though this is really a difference of words and not of meaning. See *Michael H. v. Gerald D.*, 491 U.S. 110, 127–28 n.6 (1989).

<sup>171</sup> J. K. ROWLING, *HARRY POTTER AND THE PHILOSOPHER’S STONE* 76 (1997).

<sup>172</sup> *Mugler v. Kansas*, 123 U.S. 623 (1887). *Mugler* was a property-rights complaint against Kansas’s newly enacted “dry” laws and is often cast in the role of substantive due process’s inaugurator, not because it accepted the plaintiffs’ claims—it did not—but



Even if *Meyer* and *Pierce* themselves are good flavors, they have yielded up more than their share of “vomit” and “earwax.”<sup>175</sup>

Is the problem only that the Supreme Court has not accepted Justice Scalia’s advice in *Michael H.*, that is, to limit substantive due process to historically-grounded rights-claims defined specifically enough to allow for historically-informed discernment as to whether our legal traditions support or oppose that claim? Or, could it just be that the problem comes from looking in the wrong jar? And if the latter, does Justice Thomas’s methodology for restraining privileges and immunities as pre-state rights rather than state-created ones, per his *Saenz* dissent, solve the Bertie Botts problem—or perhaps I should say, the judicial activism problem?

The next stage in answering this problem lies in further and closer analysis of the history and original meaning of “privileges” and/or “immunities,” an ongoing endeavor in which Professors Michael Kent Curtis<sup>176</sup> and John Harrison<sup>177</sup> were pioneers, albeit disagreeing.<sup>178</sup> “For another day,” as Justice Thomas remarked in *Troxel*.<sup>179</sup>

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because in dicta it left the door open to assessing the fairness of laws under the Fourteenth Amendment Due Process Clause. *Id.* at 653, 660–61. Of course, a precedent of sorts had been set in *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 450–52 (1856), in which the Court held that the federal government had violated the Due Process Clause of the Fifth Amendment by allowing the emancipation of a slave when that slave was taken into a free state or territory. This, the Court claimed, was a violation of the slaveholder’s Fifth Amendment right not to have his “property” taken without due process. *Id.* at 450.

<sup>173</sup> *West Coast Hotel Co. v. Parrish* is widely considered the signature case for the Court’s retreat from substantive due process, at any rate of the “economic” kind. 300 U.S. 379, 391 (1937). Although, *Nebbia v. New York* deserves mention in this regard as well. 291 U.S. 502, 531–32 (1934).

<sup>174</sup> In *Griswold v. Connecticut*, Justice Douglas’s opinion for the Court studiously avoided substantive due process, finding a protected zone of privacy in the penumbras of the specific guarantees of the Bill of Rights. 381 U.S. 479, 482–84 (1965). Justice Harlan’s concurrence, however, advocated it. *Id.* at 499–500 (Harlan, J., concurring). *Griswold* has since been seen as the inaugurator of a “new” substantive due process era that culminates in *Planned Parenthood v. Casey* and *Lawrence v. Texas*, though with cautious halts along the way such as *Washington v. Glucksberg*. See Laurence H. Tribe, *Lawrence v. Texas: The “Fundamental Right” That Dare Not Speak Its Name*, 117 HARV. L. REV. 1893, 1937–45 (2004) (discussing the history of substantive due process up to and including *Lawrence*).

<sup>175</sup> ROWLING, *supra* note 171, at 217–18.

<sup>176</sup> MICHAEL KENT CURTIS, NO STATE SHALL ABRIDGE 2 (1986) (“A reasonable reader might conclude that the Fourteenth Amendment was intended to change things so that states could no longer violate rights in the federal Bill of Rights . . . [and that] this was what was intended by . . . the privileges or immunities [clause] . . . . I believe that the reader would be right.”).

<sup>177</sup> John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 YALE L.J. 1385, 1387–88 (1992).

<sup>178</sup> In his *McDonald* concurrence, Justice Thomas mentions yet another, more recent analysis, Kurt T. Lash, *The Origins of the Privileges or Immunities Clause, Part I:*

A student who looks for candy beans in an empty jar, or who, to keep this already-strained metaphor going, looks for substantive candy beans in a jar marked “process,” is likely to come up empty-handed. But when you are on the Supreme Court and you have at least four other votes, you can rule that you have *found* a substantive bean. Perhaps what you have really found is—spinach! Which, ironically, is a Bertie Botts flavor.<sup>180</sup>

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*“Privileges and Immunities” as an Antebellum Term of Art*, 98 GEO. L.J. 1241 (2010).  
McDonald v. City of Chicago, 130 S. Ct. 3020, 3064 (2010) (Thomas, J., concurring).

<sup>179</sup> Troxel v. Granville, 530 U.S. 57, 80 (2000) (Thomas, J., concurring).

<sup>180</sup> ROWLING, *supra* note 171, at 78.