

LEAR’S DAUGHTERS?
UNENUMERATED FUNDAMENTAL RIGHTS AND THE
CONSTITUTION

Thomas Halper*

ABSTRACT

How to determine whether fundamental unenumerated constitutional rights exist, and if so, what they are? The questions are of obvious enormous importance—witness the current controversy over abortion—and yet courts have generally been content to address the issues superficially, sometimes, cavalierly. Their treatment of the most common rationale, an historical/traditional consensus, exemplifies this shallow approach. The underdeveloped character of the argumentation on this topic stubbornly remains one of the most glaring shortfalls of modern constitutional law.

KEYWORDS

unenumerated fundamental constitutional rights, tradition, due process, Bill of Rights.

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* Baruch College & CUNY Graduate Center
Thomas.Halper@Baruch.cuny.edu

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"Nothing will come of nothing," roars Lear.¹ His daughter, Cordelia, has refused to compete with her sisters in declaiming her love for her father. She has nothing to say, and so she gets nothing from him. It all seems obvious to Lear, seductively so. Only later does he understand that it is the other sisters who offered him nothing, empty praise that disguised their disdain, and that only Cordelia offered him something, genuine love. By then, of course, it is much too late. Nothing/something. The apparent simplicity of the distinction so easily misleads us. Nothing—literally, no thing—cannot be true. Even when Genesis 1:1 describes the Earth as formless and empty, it offers us a statement about something that is itself something.

Nothing/something. Courts begin someplace. Decisions do not arise *ab nihilo*. There are always pre-existing constitutional provisions, statutes, regulations, precedents, practices. There are always pre-existing beliefs and opinions as to what is good/bad, legitimate/illegitimate, practical/impractical. There are always pre-existing narratives that purport to explain the past, foretell the future, and assign appropriate roles, rights, and responsibilities to the players. The result is a ceaseless tension, as courts are pulled here toward stability and there toward change, which itself generates hopes and fears among the burgeoning uncertainties. Now, imagine that the controversy stems from something that is not there, Lear's nothing. The problems are magnified and multiplied. Now, imagine that the controversy also stems from something that is there, the Constitution. The doors are swung open and confusion strides in.

In this context, consider fundamental rights, which obligate the state to respect our liberty, for example, to let us speak or worship or not to speak or worship more or less as we choose. If the state wishes to infringe on these rights, it must scale the high hurdle of strict scrutiny, demonstrating that its goal is compelling and its means are narrowly tailored—all to minimize the intrusion into our fundamental rights. When the fundamental rights are expressed in the Constitution—like the right to speak or worship—there at least is an agreed upon place to begin, the text. But suppose the rights are not enumerated? The question as to how courts determine what qualifies as fundamental rights, then, is not merely an intellectual curiosity, but rather has profound practical consequences. How ought courts to determine whether the Constitution guarantees fundamental rights it does not express—when the Constitution itself contains no term called "fundamental rights" and no instructions as to how it should be interpreted?

Are there unenumerated fundamental rights? The most obvious answer is that the absence of evidence is evidence of absence. In short, if the right is not expressed, it does not exist. Supporting this is the commonsense observation that rights, particularly, fundamental rights, are clearly so important that their absence could hardly be dismissed as irrelevant or unimportant. Were the Framers too busy—perhaps, sharpening their quill pens or powdering their wigs—and so simply forgot to include them? But if some fundamental rights may go unexpressed, what is the point of the Constitution's expressing other rights? To the uninitiated, the whole matter of unenumerated rights seems to confuse nothing with something, asking whether rights can be there, when they are not there. It all conjures up the skills of a magician, who in our enlightened age we call an illusionist. Are the

¹ King Lear, act I, sc. 1, line 99.

courts, defying Lear, conjuring up something out of nothing? Where is the authority that grants them this power?

On the other hand, in ordinary speech there is much that is understood though unexpressed. When I ask you to dinner, it is understood that I will not offer you a bowl of Fruit Loops and a cup of day-old coffee; it is also understood that you will not dress like big Bird and spend the evening yodeling. The understandings may be based on experience with me or with societal conventions, but that meanings may be unexpressed is universally regarded as a fact of life. Which is not to deny that the unexpressed nature may be a source of conflict and confusion. Ever since 1897,² the Supreme Court has been reading “liberty” in the Fourteenth Amendment’s due process clause to include various provisions of the Bill of Rights that, though targeting the national government,³ also apply to the states. Thus, as a practical matter, nearly everyone concedes that there are unenumerated fundamental rights in the Constitution. How, then, to determine what they are? Joe Biden, when chair of the Senate Judiciary Committee, thought the problem was more apparent than real. Is there a constitutional right to privacy? Go to a shopping mall and ask the first three or four people you see. “Of course!” they would answer. “And when I asked why [they] all said, ‘The Constitution.’”⁴ QED. Though the method promises quick and decisive answers, for some reason it has not caught on.

I. THE NINTH AMENDMENT

An obvious alternative is the “forgotten Ninth Amendment,”⁵ which, to counter *expressio unius*, provides that “The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people.”⁶ Its rationale, as Madison explained in proposing it, was to rebut the objection that the Bill of Rights, “by enumerating particular exceptions to the grant of power ... would disparage those rights which were not placed in that enumeration; and it might follow by implication that those rights which were not singled out were intended to be assigned into the hands of the general government, and were consequently insecure.”⁷ What are these rights? The key may lie in the relation of the Constitution to the Declaration of Independence. Lincoln proclaimed that the Declaration “has

² Chicago, Burlington & Quincy Railroad v. Chicago, 166 U.S. 226.

³ Barron v. Baltimore, 7 Pet. 243 (1833).

⁴ JOE BIDEN, PROMISES TO KEEP: ON LIFE AND POLITICS (2007).

⁵ BENNETT PATTERSON, THE FORGOTTEN NINTH AMENDMENT: A CALL FOR LEGISLATIVE AND JUDICIAL RECOGNITION OF RIGHTS UNDER THE SOCIAL CONDITIONS OF TODAY (1955). Kurt T. Lash, the leading living authority on the Ninth Amendment, has shown that this familiar label is quite inaccurate. *The Lost Jurisprudence of the Ninth Amendment*, 83 TEX. L. REV. 597 (2005).

⁶ One argument offered at the constitutional convention against a bill of rights was that the delegates might fail to identify all the rights; the listing of some would imply the exclusion of others.

⁷ 1 Ann. of Cong. 439 (Gales & Seaton eds. 1834). Or as perhaps the preeminent historian of early America put it, the purpose of the Ninth Amendment was to ensure “a universe of rights, possessed by the people, latent rights still to be evoked and enacted into law.” BERNARD BAILYN, REMARKS AT THE FIRST MILLENNIUM EVENING AT THE WHITE HOUSE: THE LIVING PAST, COMMITMENTS FOR THE FUTURE (Feb. 11, 1998).

proved an 'apple of gold' to us," and considered the Constitution and the federal union "the picture of silver subsequently framed around it. ... The picture was made for the apple—not the apple for the picture."⁸

This connection became the centerpiece of arguments set down by the Ninth Amendment's most prominent legal advocate, the distinguished Yale law professor, Charles L. Black, Jr. For him, the Declaration of Independence, "a juristic act [that] demolish[ed] one legal authority and set up another,"⁹ had as much legal standing as the Constitution; indeed, the purpose of the Constitution and the Bill of Rights, in particular, was to implement the principles of the Declaration. A key potential means to achieve this implementation, he believed, was the open-ended Ninth Amendment, "a fountain of law,"¹⁰ which he thought imposed an affirmative duty on both the national government and the states, as the rights are "retained by the people."¹¹ He acknowledged that identifying the rights will be "a pack of troubles,"¹² but refusing to try conflicts with the command of the Amendment and must be rejected; "[t]he Ninth Amendment seems to be guarding something."¹³

When the Amendment refers to rights, Black reasoned, it must mean the rights recognized around that time,¹⁴ in other words, the rights declared in the Declaration, including the pursuit of happiness. As the meaning of this right has evolved, Black inferred that "The possession of a decent material basis for life is an indispensable condition ... to the pursuit of happiness;"¹⁵ the result is a constitutional guarantee of a moderate standard of living plus a ban on every kind of discrimination, whether race, gender, or sexual orientation.¹⁶ In Black's eyes, then, the Declaration via the Ninth Amendment granted enormous power to the national government to shape society for the better. The need for this, he believed was obvious, as he considered the Bill of Rights, by itself, "very plainly insufficient to found a system broad and comprehensive enough for a really free people."¹⁷

It is not clear that Black's history is correct. For well over a century, many influential historians have argued that the point of the Constitution was not to make the Declaration's principles real, but instead to frustrate them.¹⁸ If the Constitution

⁸ 4 COLLECTED WORKS OF ABRAHAM LINCOLN 169 (Ray P. Basler ed. 1953).

⁹ CHARLES A. BLACK, JR., A NEW BIRTH OF FREEDOM: HUMAN RIGHTS NAMED AND UNNAMED 6, 9 (1997); Charles L. Black, Jr., *One Nation Indivisible: Human Rights in the States*, 65 ST. JOHN'S L. REV. 17, 27 (1991).

¹⁰ CHARLES A. BLACK, JR., DECISION ACCORDING TO LAW 44 n.47 (1981).

¹¹ BLACK, A New Birth of Freedom, *supra* note 9, at 22.

¹² *Id.* at 13.

¹³ *Id.* at 12.

¹⁴ BLACK, *One Nation Indivisible*, *supra* note 9, at 30.

¹⁵ BLACK, A New Birth of Freedom, *supra* note 9, at 131.

¹⁶ *Id.* ch. 5.

¹⁷ *Id.* at 2.

¹⁸ CHARLES A. BEARD, AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES (1913); ROBERT A. MCGUIRE, TO FORM A MORE PERFECT UNION: A NEW ECONOMIC INTERPRETATION OF THE UNITED STATES CONSTITUTION (2003); Jac C. Heckleman & Keith L. Dougherty, *An Economic Interpretation of the Constitutional Convention of 1787 Revisited*, 67 J. ECO. HIST. 829 (2007). *But cf.*, ROBERT E. BROWN, CHARLES BEARD AND THE CONSTITUTION: A CRITICAL ANALYSIS OF AN ECONOMIC INTERPRETATION OF THE CONSTITUTION (1956); FORREST McDONALD, WE THE PEOPLE: THE ECONOMIC ORIGINS OF THE CONSTITUTION (1958); GORDON WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787 626 (1969).

was meant to enshrine the Declaration's rights, how to explain the Framers' "never seriously considering adopting a bill of rights,"¹⁹ twice voting it down at the constitutional convention;²⁰ and how to explain Madison's proposing the amendments in 1791 not to actualize the principles of the Declaration, but rather to deflate calls for a new constitutional convention made by leaders of the opposition Anti-Federalists?²¹ The broad positive social welfare rights that Black found implicit in the Ninth Amendment, moreover, were clearly foreign to the Framers, who took for granted a system of quite limited government. Black also seemed indifferent to the very substantial cost of these rights, a cost that would deprive taxpayers of money that would otherwise enhance their freedom. Nor did he seem interested in the germane distinction between rights and interests.²² Finally, laying all these criticisms aside, the guidance provided by the Declaration is so vague that it is barely guidance at all.

Accordingly, Justice Scalia examining the text, argued that the Ninth Amendment's "refusal to 'deny or disparage' other rights was 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."²³ As he saw it, the potential of the Ninth Amendment was vastly overblown. Similarly, Russell Caplan, in a careful history, concluded that the Amendment "is not a cornucopia of undefined federal rights," but was merely directed at "the maintenance of rights guaranteed by the laws of the states."²⁴ No wonder Justice Jackson found its meaning "a mystery to me,"²⁵ and John Hart Ely derided it as "that old constitutional jester."²⁶

Given the extreme disagreements on such basic considerations, it is hardly surprising that the Ninth Amendment has not served to justify a major doctrine. When "in perhaps [its] most famous invocation,"²⁷ Justice Goldberg mentioned it in a concurrence to *Griswold v. Connecticut*—he was careful to note that he did not "mean to state that the Ninth Amendment constitutes an independent source of rights"²⁸—it was greeted as an act of "astonishing resuscitation."²⁹ This was premature. As even its most ardent living advocate conceded, "though the Supreme

¹⁹ Paul Finkelman, *James Madison and the Bill of Rights: A Reluctant Paternity*, 1990 SUP. CT. REV. 301, 304.

²⁰ THE RECORDS OF THE FEDERAL CONVENTION OF 1787 587-88 (Max Farrand ed. 1966).

²¹ IRVING BRANT, THE BILL OF RIGHTS: ITS ORIGIN AND MEANING 39 (1965); Kenneth R. Bowling, "A Tub to the Whale": *The Founding Fathers and the Adoption of the Federal Bill of Rights*, 8 J. EARLY REPUB. 223 (1988).

²² STEPHEN HOLMES & CASS R. SUNSTEIN, THE COST OF RIGHTS ch. 6 (1999).

²³ *Troxel v. Granville*, 530 U.S. 57, 91 (2000).

²⁴ *The History and Meaning of the Ninth Amendment*, 69 VA. L. REV. 223, at 227 (1983).

²⁵ ROBERT JACKSON, THE SUPREME COURT IN THE AMERICAN SYSTEM OF GOVERNMENT 75 (1955).

²⁶ JOHN HART ELY, DEMOCRACY AND DISTRUST 33 (1980).

²⁷ Calvin R. Massey, *The Anti-Federalist Ninth Amendment and Its Implications for State Constitutional Law*, 1990 WIS. L. REV. 1229, 1230.

²⁸ 381 U.S. 479, 492 (1965).

²⁹ Alfred H. Kelly, *Clio and the Court: An Illicit Love Affair*, 1965 SUP. CT. REV. 119, 150. Justice Black, dissenting in *Griswold*, chided Goldberg for his "recent discovery" that the Ninth Amendment could be used to protect fundamental rights. *Supra* note 28, at 518. Ely thought "Black's response to the Ninth Amendment was essentially to ignore it." *Supra* note 26, at 38.

Court has identified and enforced unenumerated rights, it has never done so based on its reading of the Ninth Amendment.”³⁰ Indeed, “the modern Supreme Court has studiously avoided the Ninth Amendment despite being prodded by parties before the Court to rely on it.”³¹ Perhaps, it is the very open-ended language of the Amendment that Charles Black found encouraging that has intimidated courts.³² In any case, they have not accepted his challenge.

If the Ninth Amendment has not proved to be a vehicle for unenumerated fundamental rights, what options exist? The current uproar over *Dobbs v. Jackson Women's Health Organization* (2022)³³ and the demise of a woman's fundamental right to choose to have an abortion is merely the latest and most spectacular chapter in a long narrative.

II. EARLY INCORPORATION CASES

Incorporation is the process by which the Supreme Court has taken portions of the Bill of Rights, which originally applied only to the national government,³⁴ and applied them to the states. The mechanism used is the liberty dimension of the Fourteenth Amendment's due process clause.³⁵ Though the rights are expressed in the Constitution and in this sense are enumerated, their application to the states is not expressed, thus justifying the label “unenumerated.” For relying on “liberty” does not solve the problem, but merely changes it to: what rules guide the Court in its determination as to what liberty encompasses?

The first incorporation case was *Chicago, Burlington & Quincy Railroad v. Chicago* (1897), involving the Fifth Amendment's takings clause. In a long, rambling opinion, Justice Harlan cited “a deep and universal sense of ... justice” and “a settled principle of universal law”³⁶ that would be violated if the state took property for public use and provided no compensation. However, he never addressed the question as to why the Court was justified in announcing a right that did not appear in the Fourteenth Amendment.

Gitlow v. New York (1925) applied the First Amendment's free speech and free press guarantees to the states. In an eighteen page opinion, Justice Sanford devoted exactly one sentence to incorporation, writing simply that “For present purposes, we may and do assume” incorporation.³⁷ He took no notice of the Framers' overwhelming rejection of a proposal barring states from “infring[ing] the right of ...freedom of speech.”³⁸ Nor did he seem to notice that *Gitlow's* offense, publishing *The Left-Wing Manifesto*, involved only freedom of the press and not speech. Nor,

³⁰ Lash, *supra* note 5, at 713.

³¹ Kurt T. Lash, *Three Myths of the Ninth Amendment*, 56 DRAKE L. REV. 875 (2008).

³² Black speculates that the Amendment might have been ignored for years because of its implications for slavery. A New Birth of Freedom, *supra* note 9, at 149.
142 S. Ct. 2228.

³⁴ Barron, *supra* note 3.

³⁵ Amend. XIV, sec. 1.

³⁶ *Chicago, Burlington & Quincy*, *supra* note 2, at 238.

³⁷ 268 U.S. 652, 666.

³⁸ DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS OF THE UNITED STATES OF AMERICA: LEGISLATIVE HISTORIES 39 (Charlene Bangs Bedford *et al.* eds. 1986).

finally, did he pause to offer any justification for his ruling.

In *Near v. Minnesota* (1931), which applied the First Amendment's freedom of the press to the states, Chief Justice Hughes spent a paragraph on the topic, citing *Gitlow* and three other cases. "It was impossible to conclude"³⁹ that the states would not be bound by the First Amendment, he wrote, but in fact that was the rule prior to his decision. Again, no justification was offered.

Hamilton v. Regents of the University of California (1934) applied the First Amendment's free exercise of religion right to the states. In a sixteen-page opinion, Justice Butler devoted a paragraph to the topic, refusing even to entertain the notion that a justification was required.⁴⁰

DeJonge v. Oregon (1937) saw the First Amendment's right to assembly and petition applied to the states. In an eleven-page opinion, Hughes declared that "peaceable assembly for lawful discussion cannot be made a crime"⁴¹ and that "explicit mention [in the First Amendment] does not argue exclusion elsewhere. For the right is one that cannot be denied without violating those fundamental principles of liberty and justice which lie at the base of all civil and political institutions."⁴² Thus, the indirect connection to the Constitution was made—assembly is tied to speech (Fourteenth Amendment), which is tied to speech (First Amendment) -- but again there was no effort to demonstrate why courts were authorized to make the connection.

Everson v. Board of Education (1947) applied the First Amendment's religious establishment clause to the states. Justice Black discussed the constitutional question at some length, particularly, in the context of early American history.⁴³ The incorporation of the establishment clause is defended as a corollary of the free exercise clause, which had previously been incorporated. Again, an indirect connection was considered sufficient.

In re Oliver (1948) applied to the states the suspect's right to be notified of the accusations against him. Justice Black again discussed early American history, announcing that the Fourteenth Amendment "guarantee[d] that ... no man's life, liberty, or property be forfeited as a punishment until there has been a charge fairly made and fairly tried in a public tribunal."⁴⁴ The indirect connection was considered adequate.

In light of these seven early incorporation cases, what justifications are offered for applying rights to the states? Sometimes, the answer is none (*Gitlow*, *Hamilton*); sometimes, morality (*Chicago, Burlington & Quincy Railroad*, *Oliver*); sometimes a previous incorporation (*Near*, *DeJonge*, *Everson*, *Oliver*); sometimes, history (*Everson*, *Oliver*); sometimes, public policy (*Chicago, Burlington & Quincy Railroad*, *Everson*). None of the opinions engages with the question as to how the Court justifies rewriting the Bill of Rights. Not even Black, renowned as a textual literalist, addressed the issue or asked why if the framers of the Fourteenth

³⁹ 283 U.S. 697, 707.

⁴⁰ 293 U.S. 245, 262. "There needs be no attempt to enumerate or comprehensively to define what is included in the 'liberty' protected by the due process clause," Butler declared.

⁴¹ 299 U.S. 353, 365

⁴² *Id.* at 364.

⁴³ 330 U.S. 1, 8-16.

⁴⁴ 333 U.S. 257, 273, 278.

Amendment intended to incorporate the Bill of Rights, they did not make their intentions textually explicit.⁴⁵

Granted that it might be good public policy to apply the Bill of Rights to the states, why should courts be the vehicle to accomplish this purpose?

III. LOCHNER V. NEW YORK

While the Court was addressing incorporation, it was also deciding other cases bearing on unenumerated rights, perhaps, most famously, *Lochner v. New York* (1905), which concerned a law that regulated the hours and working conditions of bakers.⁴⁶ In an earlier case, Justice Peckham had referred to the Declaration of Independence's pursuit of happiness,⁴⁷ which he construed as the individual's power to pursue "an ordinary calling or trade"⁴⁸ or as he expressed it a few pages earlier, "to be free in the enjoyment of all his faculties, to be free to use them in all lawful ways, to live and work where he will, to earn his livelihood by any lawful calling, to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary, and essential to his carrying out to a successful conclusion the purposes above mentioned"⁴⁹—in sum, to construct his own life, to map out his own destiny. In pursuing happiness, we soon learn that we can rarely achieve it on our own. Rather, we need to join with others. From this, Peckham infers an inherent right to come together to seek our goals, in a word, to contract.

This is not an unlimited right, but here the burden falls on New York to demonstrate that its abridgement of the right—denying employer and employee the opportunity to determine the conditions of employment—can be justified. Are bakers, unlike other workers, incapable of looking out for themselves?⁵⁰ Is their work "especially unhealthy"?⁵¹ Is there some public benefit, perhaps more "clean and wholesome" bread, the law will produce?⁵² Answering no to these questions, Peckham found the law contrary to the unenumerated right of liberty of contract

⁴⁵ *Id.* at 272, 277. In a high profile dissent, Black researched the legislative history of the Fourteenth Amendment, concluding that the entire Bill of Rights was incorporated under the "liberty" provision of the Fourteenth Amendment's due process clause. *Adamson v. Calif.*, 332 U.S. 46, 71 (1947). His argument was refuted in a much cited article by Charles Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights? The Original Understanding*, 2 STAN. L. REV. 5 (1949). Justice Scalia often condemned the reliance on legislative history as unreliable, easy to manipulate, and, most importantly, not the law. See, e.g., *INS v. Cardozo-Fonseca*, 480 U.S. 421, 452 (1987), *Thompson v. Thompson*, 484 U.S. 174, 191 (1988), *Blanchard v. Bergeron*, 489 U.S. 87, 98 (1989), *Conroy v. Aniskoff*, 507 U.S. 511, 519 (1993).

⁴⁶ N.Y. State labor law, sec. 10.

⁴⁷ *Allgeyer v. Louisiana*, 165 U.S. 578, 590 (1897), qtg. *Bradley, J., Butchers' Union Co. v. Crescent City Co.*, 111 U.S. 746, 762 (1884). This was an ironic precursor to Charles Black's Ninth Amendment argument. The two plainly would have agreed on little else.

⁴⁸ *Id.* at 591.

⁴⁹ *Id.* at 589.

⁵⁰ 198 U.S. 45, 57.

⁵¹ *Id.* at 59.

⁵² *Id.* at 57.

and thus unconstitutional.⁵³ Throughout, he emphasized that “This is not a question of substituting the judgment of the Court for that of the legislature.”⁵⁴

Justice Holmes, in his brief and famous dissent, surely gets the better of the argument. Peckham’s logic may be fine, but as Holmes’ observed a quarter of a century before, “The life of the law has not been logic; it has been experience.”⁵⁵ Holmes, of course, is not pleading that law should be illogical. Instead, he is insisting that law arises as a function of human experience, in the sense that it represents political resolutions of social conflicts and not deductions from abstract principles; the Constitution rests on this common sense observation, and as it was made “for people of fundamentally differing views,”⁵⁶ it “is not intended to embody a particular economic theory, whether of paternalism ... or of laissez faire” that Peckham evidently cherished.⁵⁷

How, then, can Peckham justify this right, liberty of contract, that is not expressed in the Constitution? Holmes, an exponent of judicial self-restraint, declares that he cannot. The “word liberty in the Fourteenth Amendment is perverted when it is held to prevent the natural outcome of a dominant opinion, unless it can be said that a rational and fair man necessarily would admit that the statute proposed would infringe fundamental principles as they have been understood by the traditions of our people and our law.”⁵⁸ The alternative would be unauthorized judicial legislation justified only by the judges’ ideology or policy preferences, neither of which had a basis in the Constitution. Peckham’s claim that the Court had not usurped the legislature’s policy making function was mere self-delusion. In contrast to his abstract argument, Holmes invoked history/tradition as a test to determine the constitutionality of an unenumerated right. Liberty of contract failed the test.

The magic key that Peckham imagined he had found that unlocked liberty of contract was what Justice Thomas recently dismissed as an “oxymoron that lack[s] any basis in the Constitution,”⁵⁹ substantive due process. The Fifth and Fourteenth Amendments provide, *inter alia*, that neither the national nor the state governments may deprive persons of their liberty without due process of law. This means, literally, that they may deprive persons of liberty, provided the procedures be correct; it also means that the substance of a law, regardless of how constitutional its adoption and enforcement, may not arbitrarily abridge liberty.

At least, that is what it means today. An exhaustive study of the original public meaning of due process in the Fifth Amendment, however, suggests a much narrower meaning of the term. Specifically, that “process” simply refers to “a formal document that provides a person notice of legal obligation,” for example, “a criminal defendant may not be deprived of life or liberty without first either person service of process or some legally valid alternative.” The clause, the authors

⁵³ *Id.* at 61.

⁵⁴ *Id.* at 56-57.

⁵⁵ OLIVER WENDELL HOLMES JR., *THE COMMON LAW* 1 (1881).

⁵⁶ *Lochner supra* note 50, at 76.

⁵⁷ *Id.* at 75.

⁵⁸ *Id.* at 76.

⁵⁹ Dobbs, *supra* note 33, at 2301 (2022). John Hart Ely likened substantive due process to “green pastel redness.” *Supra* note 26, at 18. Charles Black called it a “non-concept.” *A New Birth of Freedom, supra* note 9, at 100.

believe, does not even “require that procedures be fair.”⁶⁰ On the other hand, the nineteenth century saw a few cases positing substantive due process under the Fifth Amendment as applicable to the national government, in one, for example, calling due process “a restraint on the legislative as well as the executive and judicial powers of the government.”⁶¹ The infamous *Dred Scott* case also held the clause as negating Congress’ power to undo a slave owner’s property interest in his slave.⁶²

In *Lochner*, Peckham conceived the clause’s “liberty” to include liberty of contract, found the justifications for New York’s infringement to be arbitrary, and thus struck down the law. Holmes countered that conceiving liberty in this fashion was itself arbitrary and unjustified. Though Holmes was no great friend of the working class, his opinion has been widely regarded as providing a powerful constitutional rationale for government legislation workers have supported. Rights, which we normally presume protect the interests of the vulnerable, here protected the interests of the powerful. In his opposition, Holmes denied courts the power to create a right not expressed in the Constitution.

IV. MEYER V. NEBRASKA

Meyer v. Nebraska (1923) concerned laws passed by Nebraska, Iowa, and Ohio requiring all schools to teach only in the English language.⁶³ Adopted in a xenophobic anti-German atmosphere accompanying World War I and reflecting a longstanding commitment to “Americanize” immigrants, the laws were defended by the states as reasonable means to inculcate patriotism and a sense of national identity. By 1923, thirty-one states had similar laws.⁶⁴ Robert Meyer, a teacher at an Evangelical Lutheran Church school in rural Nebraska, had violated the law by reading a ten year old student portions of Martin Luther’s Bible in German during recess. Convicted, Meyer was fined \$25.

Justice McReynolds, speaking for a seven-to-two Supreme Court majority, held that the statute exceeded “the limitations upon the power of the state and conflict[ed] with rights assured to [Meyer].”⁶⁵ He conceded that the “desire of the legislature to foster a homogeneous people with American ideals ... is easy to appreciate,” but thought that the mere “knowledge of the German language cannot reasonably be regarded as harmful.”⁶⁶ The law could “interfere with the calling of modern language teachers, with the opportunities of pupils to acquire knowledge,

⁶⁰ Max Crema & Lawrence B. Solum, *The Original Meaning of “Due Process of Law” in the Fifth Amendment*, 108 VA. L. REV. 447, 451, 452, 453 (2022). The authors “take no position” as to whether their conclusions apply to the Fourteenth Amendment’s due process clause. *Id.* at 528. Ryan C. Williams, however, maintains that though the Fifth Amendment’s clause did not embody substantive rights, the Fourteenth Amendment’s did.. *The One and Only Substantive Due Process Clause*, 120 YALE L. J. 408, 416 (2010).

⁶¹ *Murray’s Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. 272, 276 (1856).

⁶² *Dred Scott v. Sanford*, 60 U.S. 393, 450 (1857).

⁶³ Nebr. Laws 1919, c. 249.

⁶⁴ I.N. Edwards, *The Legal Status of Foreign Languages in the School*, 24 ELEMENTARY SCH. J. 270, 273 (1923).

⁶⁵ 262 U.S. 390, at 402.

⁶⁶ *Id.* at 402, 400.

and with the power of parents to control the education of their own.”⁶⁷ McReynolds, echoing Peckham in *Allgeyer*, went on in dicta to declare that substantive due process also includes the right “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.”⁶⁸ Some of these rights were quite irrelevant to the issues at hand.

McReynolds then returned to the controversy before him. “The American people,” he wrote, “have always regarded education and the acquisition of knowledge as matters of supreme importance which should be diligently promoted,” referencing the Ordinance of 1787.⁶⁹ Like Holmes in *Lochner*, McReynolds in a single sentence prescribes a rule for determining the constitutionality of rights not mentioned in the Constitution: an historical/traditional legal consensus.

McReynolds is not usually held in high regard today. Holmes thought him “a savage,”⁷⁰ Brandeis called him “an infantile moron,”⁷¹ and Taft said he was “fuller of prejudice than any man I have ever known.”⁷² Even by the relaxed standards of his time, he was notorious for bigotry. He routinely turned his back on Justice Cardozo because he was Jewish,⁷³ he turned his back when Black lawyers argued before the Court,⁷⁴ and when women lawyers appeared he would remark, “I see the female is here” and leave the courtroom.⁷⁵ More to the point, McReynolds was no friend of immigrants.⁷⁶ To put it diplomatically, he was the “improbable author” of *Meyer*.⁷⁷ Yet his brief, rough formulation of an historical/traditional basis for unenumerated

⁶⁷ *Id.* at 401.

⁶⁸ *Id.* at 399. McReynolds also rooted his decision in property rights: Meyer’s right to teach and the parents’ right to “engage him so to instruct their children.” *Id.* at 400.

⁶⁹ *Id.*

⁷⁰ Qtd. in ALEXANDER M. BICKEL, *THE UNPUBLISHED OPINIONS OF MR. JUSTICE BRANDEIS* 204 (1957).

⁷¹ PHILIPPA STRUM, *LOUIS D. BRANDEIS: JUSTICE FOR THE PEOPLE* 371 (1988).

⁷² ALPHEUS T. MASON, *WILLIAM HOWARD TAFT: CHIEF JUSTICE* 217 (1965).

⁷³ HENRY J. ABRAHAM, *THE JUDICIAL PROCESS* 197 (6th ed. 1993).

⁷⁴ Robert L. Carter, *Freedom of Association*, in *REASON AND PASSION: JUSTICE BRENNAN’S ENDURING INFLUENCE* 73 (Joshua Rosencranz & Bernard Schwartz eds. 1997).

⁷⁵ JAMES E. BOND, *I DISSENT: THE LEGACY OF JAMES CLARK McREYNOLDS* 10 (1994); Calvin P. Jones, *Kentucky’s irascible Conservative: Supreme Court Justice James C. McReynolds*, 57 *FILSON CLUB HIST. Q.* 20, 24 (1983).

⁷⁶ *United States v. Manzi*, 276 U.S. 463, 467 (1928); *Chang Chan v. Nagle*, 268 U.S. 346, 353 (1925); *United States v. Ginsberg*, 243 U.S. 472, 475 (1917).

⁷⁷ Louise Weinberg, *Fear and Federalism*, 23 *OHIO N. U. L. REV.* 1295, 1334 (1997). Elsewhere, Weinberg speculated that McReynolds may have been driven by a policy goal of facilitating child labor. *The McReynolds Mystery Solved*, 89 *DENVER U. L. REV.* 133, 157-60 (2011). See also Steven J. Macias, who saw McReynolds embedded in “a socially static landscape, one in which the state should not artificially save and prolong the unfit children of immigrants and the poor by schooling them with the better-off and teaching them English.” *The Huck Finn Syndrome in History and Theory: The Origins of Family Privacy*, 12 *J. L. FAM. STUD.* 87, 150 (2010). On the other hand, William G. Ross concluded that McReynolds’ “magisterial prose” established that his motivation was safeguarding the “rights of parents and students.” *A Judicial Janus: Meyer v. Nebraska in Historical Perspective*, 57 *U. CIN. L. REV.* 125, 186 (1988).

rights has proven influential. *Meyer* has received nearly 3000 precedential citations, including such prominent cases as *Obergefell v. Hodges*,⁷⁸ *McDonald v. Chicago*,⁷⁹ *Lawrence v. Texas*,⁸⁰ *Washington v. Glucksberg*,⁸¹ *Planned Parenthood v. Casey*,⁸² *Cruzan v. Director, Missouri Department of Health*,⁸³ *Roberts v. Jaycees*,⁸⁴ and *Roe v. Wade*.⁸⁵

Meyer illustrates a level of analysis conundrum that has often bedeviled the issue of substantive due process. At the literal level, it is obvious that *Meyer*'s instruction does not fit the historical/traditional legal consensus rationale very snugly, for it is certainly doubtful that a consensus existed to the effect that teachers have a right to teach in a foreign language, that pupils have a right to take courses in a foreign language or that parents have a right to have their children educated in a foreign language. On the contrary, there surely were many schools that did not offer courses in German, as there were schools that did not offer courses in many other subjects. Nor, at a broader level of abstraction, is it clear that a consensus favored the interests of teachers and students over the social goal of assimilation. Indeed, as with *Lochner*, which *McReynolds* cited as precedent,⁸⁶ what is striking is the absence of a consensus on the matter, which explains how these pedagogical laws came to be adopted in the first place. Nor is it clear how conflicts arising from the parental right should be resolved. Suppose parents differed, for example, one claiming a right to have her child raised to admire her country and another to view it as a bastion of racism and sexism. Would this require that both points of view be taught, confusing the students and leaving the parents dissatisfied? Would each view require its own class? Suppose a third parent believed the Framers were Martians, and wanted his children to be taught this narrative. If the level of generality is raised sufficiently, say, to the abstractions *McReynolds* voiced, the historical/traditional contentions might seem more plausible. How to determine which level of generality fits best? *McReynolds* offered no guidance.

V. *PIERCE V. SOCIETY OF SISTERS*

Two years later, *Pierce v. Society of Sisters* (1925) saw *McReynolds*, this time speaking for a unanimous Court, address another state law targeting schools. Here, Oregon required all children ages eight to sixteen to attend public schools, in effect banning private and parochial schools.⁸⁷ Backed by the populist governor, Walter Pierce, the law was intended to help assimilate immigrants and counter the influence of the Roman Catholic Church.

⁷⁸ 576 U.S. 644, at 668 (2015).

⁷⁹ 561 U.S. 742, 793 (2010).

⁸⁰ 539 U.S. 558, 593 (2003).

⁸¹ 521 U.S. 702, 720 (1997).

⁸² 505 U.S. 833, 848 (1992).

⁸³ 497 U.S. 261, 342 (1990).

⁸⁴ 468 U.S. 609, 618 (1984).

⁸⁵ *Roe v. Wade*, 410 U.S. 113, 152-53 (1973).

⁸⁶ *Meyer*, *supra* note 65, at 399-400. *McReynolds* cited thirteen other cases, but none related to parental rights. *McReynolds*, a bachelor, was childless.

⁸⁷ *Oreg. Ls.*, sec. 5259.

Though McReynolds conceded that the law infringed upon the school's property rights, he again emphasized that it "unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control."⁸⁸ In support of this, he 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."⁸⁹ The only reference to history/tradition was a clause noting that the work of religious schools had been "long regarded as useful and meritorious."⁹⁰

But if the state can standardize so much else in education—curriculum, textbooks, teacher certification, building certificates of occupancy—why draw the line here? For there is a substantial, irreducible element of coercion in education: students are not free to learn only the subjects that appeal to them or even to speak when they feel like it in class. What, also, exactly is meant by "fundamental theory of liberty"? Is it merely a rhetorical flourish? Of *Meyer* and *Pierce*, Justice Brennan wrote, "I think I am safe in saying that no one doubts the wisdom or validity of those decisions."⁹¹ Yet some doubt, at least about the reasoning, remains. Again, history/tradition, mentioned fleetingly in passing, provides a very thin rationale.

VI. SKINNER V. OKLAHOMA *EX REL.* WILLIAMSON

Skinner v. Oklahoma ex rel. Williamson (1942) concerned Oklahoma's Habitual Criminal Sterilization Act that required the sterilization of persons convicted two or more times of "felonies involving moral turpitude," except "violations of the prohibitory laws, revenue acts, embezzlement, or political offenses."⁹² Jack T. Skinner, convicted twice of armed robbery and once of stealing six chickens, was ordered to undergo a vasectomy.

Justice Douglas' majority opinion for the Supreme Court struck down the law as violating the Fourteenth Amendment's equal protection clause; treating embezzlers and chicken thieves differently constitutes "a clear, pointed, unmistakable discrimination."⁹³ But Douglas did not stop here. The very first sentence of his opinion highlights "a sensitive and important area of human rights," namely, "the right to have offspring."⁹⁴ Later, he speaks of "the basic civil rights of man," marriage and procreation,⁹⁵ without pausing to indicate the contours of these rights. If I have a right to marry, can the state charge me for exercising that right by compelling me to purchase a marriage license? Can it force me to take a blood test? Or ban me

⁸⁸ *Pierce v. Society of Sisters*, 268 U.S. 510, at 534-35 (1925). McReynolds comes perilously close to asserting that parents owned their children. See Barbara Bennett Woodhouse, "Who Owns the Child?" *Meyer and Pierce and the Child as Property*, 33 WM. & MARY L. REV. 995, at 1041-50 (1992).

⁸⁹ *Pierce*, *supra* note 88, at 535.

⁹⁰ *Id.* at 534.

⁹¹ *Michael H. v. Gerald D.*, 491 U.S. 110, at 142 (1989).

⁹² Okla. Stat. Ann. Tit. 57, sec. 171 *et seq.*

⁹³ 316 U.S. 535, at 541.

⁹⁴ *Id.* at 536.

⁹⁵ *Id.* On this basis, Douglas announces that the statute will be subjected to strict scrutiny, though he never spells out what this entails, perhaps because the concept was so new that it was little more a turn of phrase.

from marrying members of my family? Is it obliged to subsidize my membership in Tinder.com, if I am unable to find a spouse on my own? Is marriage, a legal construct conferring formal benefits and obligations, actually indistinguishable from, say, freedom of speech, which does not require certification by the state? Why, in any event, refer to marriage, inasmuch as Oklahoma is not preventing Skinner from marrying? As to procreation, is this a positive right in the sense that if I have difficulty, the state is obliged to help me, for example, by funding appropriate medical procedures? Does a right to procreate imply a right not to procreate, that is, to state supplied contraception and abortion? Can a man sentenced to life in prison claim a right to impregnate his wife via artificial insemination?⁹⁶

There is something gratuitous about the inclusion of these unenumerated rights, reminiscent of a cook tossing leftover vegetables into a stew.⁹⁷ Were they, as McReynolds would have it, based on historical practice or understanding? Douglas saw no need to pursue the question.

VII. POE V. ULLMAN

Justice Harlan addressed the question of unenumerated rights in some detail in his “influential”⁹⁸ dissenting opinion in *Poe v. Ullman* (1961), a case involving Connecticut’s ban on contraceptives that the Court dismissed as nonjusticiable on account of its absence of ripeness. It is his discussion of substantive due process that accounts for the considerable interest it has continued to attract.⁹⁹

Audaciously, Harlan’s focus is not on the literal text of the Constitution, “as if we had a tax statute before us,” for the due process clause is “not self-explanatory.”¹⁰⁰ Instead, he proceeds from the assumption that the Constitution is “the basic charter of our society, setting out in spare but meaningful terms the principles of government.”¹⁰¹ From this perspective, Harlan argues that “Each new claim to constitutional protection must be considered against a background of constitutional purpose, as they have been rationally perceived and historically developed.”¹⁰² Hence, the due process clause should be interpreted in light of the Constitution’s basic principles and purposes, in this instance, the “postulates of respect for the liberty of the individual”¹⁰³ that rule out “all substantial arbitrary impositions and purposeless restraints.”¹⁰⁴

Harlan proposed a two-part test. First, is the liberty abridged fundamental, that is, does it offend “the traditions from which it developed as well as the traditions

⁹⁶ Gerber v. Hickman, 264 F. 3d 882 (9th Cir. 2001).

⁹⁷ On the other hand, Douglas ignored the opportunity to reverse the notorious pro-eugenics *Buck v. Bell* and even implied that had Oklahoma avoided the equal protection defect, the statute might have been upheld. The opinion, in short, was both reckless and timid.

⁹⁸ Obergefell, *supra* note 78 at 701 (Roberts, C.J., dissenting); Washington *supra* note 81, at 721 n. 17.

⁹⁹ The case has been cited 665 times in federal courts and 213 times in state courts.

¹⁰⁰ 367 U.S. 497, at 540.

¹⁰¹ *Id.* at 539-40.

¹⁰² *Id.* at 544.

¹⁰³ *Id.* at 542.

¹⁰⁴ *Id.* at 543.

from which it broke”?¹⁰⁵ If the answer is yes (as it was in this case), Harlan would raise a second question, can the state’s act meet the strict scrutiny test? Here, the answer was no: the Connecticut statute was “an intolerable and unjustifiable invasion of privacy in the conduct of the most intimate concerns of an individual’s personal life.”¹⁰⁶

Harlan’s treatment of history/tradition, like a river with currents running this way and that, is no simple thing. Though he asserts that “history sheds little light” on the meaning of due process,¹⁰⁷ he refers to the traditions from which it developed,” and cites fourteen cases, two of which preceded the adoption of the Fourteenth Amendment, in support of the legitimacy of substantive due process, as well as the Framers’ views on the right to privacy implicit in the Third and Fourth Amendments.¹⁰⁸ At the same time, he insists that “tradition is a living thing,” and instructs us to look to “the traditions from which it broke. A decision of the Court which radically departs from [this living tradition] could not long survive, while a decision which builds on what has survived is likely to be sound.”¹⁰⁹ In his eyes, “liberty” is not “a series of isolated points [but] a rational continuum.”¹¹⁰ With this, Harlan cannily refers simultaneously both to the past and the present.

How to answer both questions? Remarkably, Harlan did not try to hide the personal element, but began his dissent with “I”¹¹¹ and used the word no fewer than thirty-nine times and “me” six times. Was this to suggest that he be our guide? Or merely that we must rely on justices doing their best (whatever that means)?

His dissent is a powerful counter argument to the textualism often paraded by Justice Black. Yet it has an unfinished quality, for it left practical questions unaddressed. If history sheds little light and tradition is a living thing, how can they be rigid enough to provide sufficient guidance? How to reply to differing subjective judgments?

VIII. GRISWOLD V. CONNECTICUT

Griswold v. Connecticut (1965) saw Justice Douglas address the same Connecticut law that now was ripe, thanks to a prosecution of Estelle Griswold, the executive director of Planned Parenthood in Connecticut, who gave contraceptive information and counseling to married couples, and was convicted of violating the law and fined \$100.

Justice Douglas began his consideration of the merits, announcing, “We do not sit as a super-legislature to determine the wisdom, need, and propriety of laws that touch ... social conditions.”¹¹² He then argued that the Constitution embodies

¹⁰⁵ *Id.* at 542.

¹⁰⁶ *Id.* at 539.

¹⁰⁷ *Id.* at 540.

¹⁰⁸ *Id.* at 551.

¹⁰⁹ *Id.* at 542. Similarly, in *Griswold* Harlan stated that successful uses of substantive due process depended upon “continual insistence upon respect for the teachings of history.” *Supra* note 28, at 501.

¹¹⁰ Poe, *supra* note 100, at 543.

¹¹¹ *Id.* at 522.

¹¹² *Griswold*, *supra* note 28, at 482.

certain rights not expressly mentioned, illustrating his point with nine precedents. These “peripheral rights,”¹¹³ implied by the expressed rights, “suggest that specific guarantees in the Bill of Rights have penumbras, formed by emanations from these guarantees that help give them life and substance.”¹¹⁴ He closed the case by arguing that the First (the right to associate), Third (the right to be free from being forced to quarter soldiers in one’s home during peace time), Fourth (the right to be secure in one’s person and to be free from unreasonable searches and seizures), Fifth (the privilege against self-incrimination), and Ninth (the Constitution’s enumeration of rights is not necessarily exclusive) Amendments, taken together, create a zone of privacy protected by the Constitution.¹¹⁵ At this point, Douglas turned to the fact that *Griswold* had been counseling married couples. “Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives?” he asked, following with a paean to marriage as “an association for as noble a purpose as any involved in our prior decisions.”¹¹⁶ Douglas’ justification of the unenumerated right is almost entirely abstract. His sole historical reference is a clause stating, “We deal with a right of [marital] privacy older than the Bill of Rights.”¹¹⁷

The disconnect between Douglas’ argument and the facts of the case is hard to ignore. In the first place, none of the amendments or the precedents cited had the slightest relation to contraceptive counseling. Nor is running classes counseling couples obviously a private act. Nor is it clear what the “sacred precincts of marital bedrooms” refers to, for they have never been thought to constitute off limit sanctuaries barring searches for, say, contraband or weapons.¹¹⁸

No wonder Justice Black, dissenting, wrote that though he found the Connecticut law “offensive” and liked “my privacy as well as the next one ... I am nevertheless compelled to admit that government has a right to invade it unless prohibited by some specific constitutional provision.”¹¹⁹ In foreswearing what Black called the “old fashioned” amending process,¹²⁰ Douglas left the right untethered to a constitutional text and denied it a legislative history, both of which might have offered useful guidance to future courts. When Black predicted that Douglas’ privacy was “a broad, abstract, and ambiguous concept which can easily be shrunken [or expanded] in meaning,”¹²¹ he foretold its use in abortion and right to die cases as a synonym for autonomy, a rather different notion.¹²² Such acts of discontinuity might seem to require unusually comprehensive justification, but for

¹¹³ *Id.* at 483.

¹¹⁴ *Id.* at 484.

¹¹⁵ *Id.*

¹¹⁶ *Id.* at 485, 486. Feldman observes that “Douglas, after all, loved the institution [of marriage] so much he entered into it four times.” NOAH FELDMAN, SCORPION: THE BATTLES AND TRIUMPHS OF FDR’S GREAT SUPREME COURT JUSTICES 427 (2010).

¹¹⁷ *Griswold supra* note 28, at 486.

¹¹⁸ The Court abandoned the marriage rationale in *Eisenstadt v. Baird*, 405 U.S. 438 (1972), even extending the right to contraceptives to minors, *Carey v. Pop. Servs. Int’l.*, 431 U.S. 678 (1977).

¹¹⁹ *Griswold supra* note 28, at 510.

¹²⁰ *Id.* at 522.

¹²¹ *Id.* at 509.

¹²² Thomas Halper, *Privacy and Autonomy: From Warren and Brandeis to Roe and Cruzan*, 21 J. MED. & PHIL. 121 (1996).

Douglas, the paragraph on penumbras and emanations seemed quite sufficient. He made no effort to rebut contrary views, for example, that the absence of a general privacy right indicates that the Constitution recognizes only the narrow privacy rights expressed in the amendments—that is, that the emanations produced no penumbra.¹²³

IX. *IN RE* WINSHIP

In re Winship (1970) addressed a New York law that provided that minors could be convicted of certain crimes if the preponderance of evidence was against them. Winship, a twelve-year-old boy, was on this basis convicted of stealing \$112 and sent to a juvenile training school. In considering the law, Justice Brennan, speaking for a six to three majority, began by observing that “The requirement that guilt of a criminal charge be established by proof beyond a reasonable doubt dates at least from our early years as a nation,”¹²⁴ also referring to its place in the common law.¹²⁵ The requirement, he added, “is a prime instrument for reducing the risk of convictions resting on factual error.”¹²⁶ The undoubted presence of an historical/traditional consensus suggested that the standard is required by the Constitution, and Brennan saw no reason why the same logic would not apply both to adults and juveniles, though he provided no historical/traditional rationale for this position.¹²⁷ Here, at least, one might assume that at last a traditional/historical consensus has been found.

But no, says Justice Black, dissenting, who pointed out that the Court “had never clearly held ... that proof beyond a reasonable doubt is either expressly or impliedly commanded by any provision of the Constitution.”¹²⁸ He went on to say, “The Constitution ... goes into some detail to spell out what kind of trial a defendant charged with crime should have, and I believe the Court has no power to add to or subtract from the procedures set forth by the Founders. I realize that it is far easier to substitute individual judges’ ideas of ‘fairness’ for the fairness prescribed by the Constitution, but I shall not at any time surrender my belief that the document itself should be our guide, not our own concept of what is fair, decent and right.”¹²⁹ For Black, “the only correct meaning of [due process] is that our government must proceed according to the ‘law of the land’—that is, according to written constitutional and statutory provisions as interpreted by court decisions.”¹³⁰ The alternative to the law of the land was “the law of the judges,” which is counter to the principle of democratic self-government. He does not dispute the value of

¹²³ As “penumbra” refers to partial shadows, as from an eclipse, it is not clear that even metaphorically it could give anything life. In his chambers, Justice Thomas has a plaque reading, “Please don’t emanate in the penumbra.” David J. Garrow, *The Tragedy of William O. Douglas*, NATION, March 27, 2003.

¹²⁴ 397 U.S. 358, 361.

¹²⁵ *Id.* at 362.

¹²⁶ *Id.* at 363.

¹²⁷ *Id.* at 365.

¹²⁸ *Id.* at 377.

¹²⁹ *Id.*

¹³⁰ *Id.* at 382.

the standard of proof, but merely denies that a court can enforce its opinion on the country. If there were no consensus on this question, where would it be found?

X. ROE V. WADE

Roe v. Wade (1973) famously saw the right to choose to have an abortion as an unenumerated fundamental right. Norma McCorvey, single, pregnant, and a resident of Texas, wanted an abortion, but Texas permitted abortions only if necessary to save the life of the mother.¹³¹ Justice Blackmun, speaking for the majority, put history at the center of his argument, first, that abortions had been treated leniently under the law, especially before quickening,¹³² and second, that “person” as used in the Constitution does not include the unborn.¹³³ From this, he concluded that the right to choose to have an abortion is a fundamental right that implicates the strict scrutiny test, though he did not always make it clear whether the right is possessed by the woman or her doctor.¹³⁴

Justices Rehnquist and White, dissenting, also focused on history/tradition, pointing to states restricting abortion and to the framers of the Fourteenth Amendment as silent on the issue. In Rehnquist’s words, “To reach its result, the Court necessarily has had to find within the scope of the Fourteenth Amendment a right that was apparently completely unknown to the drafters of the amendment.”¹³⁵ Thus, while the conclusion of *Roe* was in dispute, both sides acknowledged the centrality of the historical/traditional rationale and treated it in far more detail than had earlier courts.

¹³¹ Texas Penal Code, arts. 1191-94, 1196.

¹³² *Roe*, *supra* note 85, at 132-36.

¹³³ *Id.* at 158.

¹³⁴ In the second paragraph, Blackmun says that abortion is the subject of vigorous debate among physicians, and then details the history of medical opinion, with special attention paid to the views of the American Medical Association (*Id.* at 141) and the American Public Health Association (*Id.* at 144-45). Sometimes, he writes that the woman will decide after consulting her doctor; sometimes, he writes that the doctor will decide after consulting the woman. Mostly, he seems to favor the doctor because the decision is “inherently and primarily a medical decision” (*Id.* at 166). In a key passage, he writes, “The decision vindicates the right of the physician to administer medical treatment according to his professional judgment” (*Id.* at 165). In transferring authority from the state to the doctor, Blackmun seems oblivious to the dignity issue of having others, usually men, empowered to make potentially transformative and deeply personal decisions for women. Before becoming a judge, Blackmun had served for nine years as general counsel at the elite Mayo Clinic, and later called these the best years of his professional career. He directed that a portion of his cremated ashes be scattered at the clinic upon his death. LINDA GREENHOUSE, *BECOMING JUSTICE BLACKMUN: HARRY BLACKMUN’S SUPREME COURT JOURNEY* 248 (2005). For a contrary view, see Nan D. Hunter, *Justice Blackmun, Abortion, and the Myth of Medical Independence*, 72 *BROOK. L. REV.* 147 (2006).

¹³⁵ *Roe*, *supra* note 85, at 174.

XI. TROXEL V. GRANVILLE

Troxel v. Granville (2000) concerned the visitation rights of grandparents. Tommie Granville and Brad Troxel, an unmarried couple, had two children. They separated but the children regularly spent weekends with the grandparents; Troxel died; Granville told his parents that they could visit the children once a month and under Washington law, they were awarded more generous terms; Granville married and her husband adopted the children; they challenged the ruling; and the Washington supreme court found for Granville, asserting a fundamental right of parents to control the raising of their children.

Justice O'Connor, writing for a plurality of the Supreme Court, conceded that grandparents played an increasing role in the upbringing of their grandchildren, but thought "the interest of parents in the care, custody, and control of their children [are] perhaps the oldest of the fundamental liberty interests recognized by this Court."¹³⁶ She considered the Washington law "breathtakingly broad," and, as there was no evidence that Granville was an unfit parent, an infringement on this fundamental right.¹³⁷ The basis for the right was a series of precedents, including *Meyer* and *Pierce*, among others.

Justices Souter and Thomas, each concurring, agreed that the parental right was well established, like O'Connor, citing a number of precedents.¹³⁸

Justice Scalia, dissenting, resisted "the instinct against overregularizing decisions about personal relations" on the ground of "mere tradition," as "intimate associations are complex."¹³⁹ The cases on which the parental right rests, chiefly *Meyer* and *Pierce*, have "small claim to *stare decisis* protection," and he would not extend their theory to cover this case, and thereby alter family law.¹⁴⁰ Though Scalia referred in passing to "tradition," it was given no elucidation.

Justice Kennedy, dissenting, thought the majority ignored evolving family patterns and unwisely rejected "the best interests of the child standard [which] has been recognized for many years as a basic tool of domestic relations law in visitation proceedings."¹⁴¹ Thus, his opinion seemed simultaneously to look both forward and backward in time.

XII. DOBBS V. JACKSON WOMEN'S HEALTH ORGANIZATION

Which brings us to *Dobbs v. Jackson Women's Health Organization* (2022). A Mississippi law banned virtually all abortions after the fifteenth week of pregnancy, except for medical emergencies and severe fetal abnormalities; there were no exceptions for rape or incest. The point was to challenge *Roe v. Wade*'s holding that the right to choose to have an abortion is a fundamental unenumerated right protected by the Constitution.

¹³⁶ Troxel, *supra* note 23, at 57, 65,

¹³⁷ *Id.* at 67.

¹³⁸ *Id.* at 77, 80.

¹³⁹ *Id.* at 91.

¹⁴⁰ *Id.* at 92.

¹⁴¹ *Id.* at 99.

Justice Alito, speaking for the Court, began with the unexceptional observation that “Constitutional analysis must begin with ‘the language of the instrument.’”¹⁴² *Roe* asserted that the right to choose to have an abortion is a fundamental right. How can we test that claim? Fundamental rights, he declared, must either appear in the Constitution or be deeply rooted in the nation’s history and essential to the concept of ordered liberty.¹⁴³ Noting that the “Constitution makes no reference to abortion”¹⁴⁴—indeed, *Roe* derived it from the right to privacy, which is also not mentioned—Alito inquires as to whether it was deeply rooted in the nation’s history. From the 1200s to 1960, no statute, no English case, no state case, no federal case, no legal treatise, and no law review article spoke of an abortion right, except to prevent maternal death or serious bodily injury.¹⁴⁵ The “most important historical fact,” he added, was “how the states regulated abortion when the Fourteenth Amendment was adopted,”¹⁴⁶ for *Roe* had rested on the Amendment’s due process clause; “28 out of 37 had enacted statutes making abortion a crime even if it was performed before quickening.”¹⁴⁷ Nor is abortion implicit in the concept of ordered liberty; different states may view the matter differently.¹⁴⁸ *Roe* and its revision, *Planned Parenthood v. Casey* (1992),¹⁴⁹ both poorly reasoned, failed to acknowledge that the asserted right failed the test, and should be overturned; “egregiously wrong”¹⁵⁰ precedents should not be allowed to stand. As abortion does not involve a fundamental right, states may regulate it, provided only that they meet the standard rational basis test, ordinarily, a low barrier.

Alito rejected the notion that overruling *Roe* and *Casey* put decisions on contraception (*Griswold*), same sex intimacy (*Lawrence*), and same sex marriage (*Obergefell*) in jeopardy.¹⁵¹ Unlike them, *Dobbs* involved “critical moral questions”¹⁵² of life and death and affected a non-consenting third party.¹⁵³

Chief Justice Roberts, concurring, would have upheld the law, but left the question of rejecting *Roe* “for another day.”¹⁵⁴ The right to terminate a pregnancy should extend far enough to ensure a reasonable opportunity to choose—and

¹⁴² *Dobbs*, *supra* note 33, at 2244. This suggests that the opinion will be originalist, but actually it says almost nothing about the text’s original public meaning, instead focusing on history.

¹⁴³ *Id.* at 2246.

¹⁴⁴ *Id.* at 2242. He repeats this finding six other times in his opinion.

¹⁴⁵ *Id.* at 2248-57. This is strikingly similar to the Court’s argument against a constitutional right to consensual sodomy in *Bowers v. Hardwick*, 478 U.S. 186, 192-94 (1986), overruled by *Lawrence*, *supra* note 80.

¹⁴⁶ *Dobbs*, *supra* note 33, at 2267.

¹⁴⁷ *Id.*, at 2253. In his concurrence, Kavanaugh also found the states’ positions at the time of the adoption of the Fourteenth Amendment “dispositive.” On the other hand, that a quarter of the states permitted abortion may indicate that it remained an open question.

¹⁴⁸ *Dobbs*, *supra* note 33, at 2257.

¹⁴⁹ *Casey*, *supra* note 82.

¹⁵⁰ *Dobbs*, *supra* note 33, at 2265.

¹⁵¹ *Id.* at 2243.

¹⁵² *Id.* at 2258.

¹⁵³ If the criteria are history/tradition and ordered liberty, it is hard to understand why precedents in these areas warrant a waiver. Alito’s response, which introduces a pair of entirely different criteria, is really no response at all, but instead merely a means to avoid further controversy.

¹⁵⁴ *Id.* at 2314.

Mississippi offers this opportunity—but need not extend any further. Thus, he would replace *Roe* and *Casey*’s insistence on the right to choose an abortion before fetal viability with a much more pro-life standard, but the precedents would not be entirely abandoned. The right to choose an abortion would continue to be acknowledged and protected, but its application and effect would be considerably narrowed. A defender of judicial minimalism, Roberts generally favors curtailing the occasions for reversing precedents, as deferring to democratically elected lawmakers and as safeguarding the legitimacy of the Court.¹⁵⁵ However, the majority perhaps regarded this as a political compromise that was constitutionally both inadequate and unnecessary.¹⁵⁶

Justice Kavanaugh, concurring, thought that the Constitution was “neutral” on abortion, and, therefore, that the Court must be “scrupulously neutral,” too.¹⁵⁷ He emphasized that the Court had not outlawed abortion, but instead had left the question to the people and their representatives. He also reiterated Alito’s point that the ruling does not cast doubt on *Griswold* or *Obergefell*, and he thought it clear that states cannot ban residents from travelling to another state to obtain an abortion.¹⁵⁸

The concurring opinion of Justice Thomas attracted by far the most attention, apart from Alito’s. He thought the due process clause “at most guarantees process,”¹⁵⁹ and urged the Court to “reject substantive due process entirely.”¹⁶⁰ He also believed that *Griswold*, *Lawrence*, and *Obergefell* should be reconsidered.¹⁶¹ However, Thomas did not fully confront the enormous and far reaching consequences of jettisoning substantive due process, consequences that would impact numerous issues in addition to abortion. Indeed, the revolutionary implications of his opinion recalled the comments of Thomas’s friend and colleague, Justice Scalia: Thomas “doesn’t believe in stare decisis, period If a constitutional line of authority is wrong, he would say, ‘let’s get it right.’ I wouldn’t do that.”¹⁶² Scalia, who called

¹⁵⁵ Roberts has not always practiced what he preached. For example, he wrote for the Court in *Citizens United*, a high profile case that overruled precedents and generated substantial criticism from officials, pundits, academics, and others. *Citizens United v. FEC*, 558 U.S. 310 (2010).

¹⁵⁶ A well-respected reporter covering the Court has written that Roberts tried to persuade Kavanaugh and Barrett to decide for Mississippi but uphold *Roe*. She doubts he would have succeeded, but believes that leaking Alito’s opinion made it all but impossible. Joan Biskupic, *The Inside Story of How John Roberts Failed to Save Abortion Rights*, CNN (July 26, 2020).

¹⁵⁷ Dobbs, *supra* note 33, at 2305.

¹⁵⁸ *Id.* at 2309. Where Alito was angry and caustic in his treatment of *Roe* and *Casey*, Kavanaugh said that he had “deep and unyielding respect for the justices who wrote the *Casey* plurality opinion.”

¹⁵⁹ *Id.* at 2301.

¹⁶⁰ *Id.* at 2304.

¹⁶¹ Dobbs, *supra* note 33, at 2302. This generated fears that reversals were on the Court’s unacknowledged agenda. See, e.g., Amy Gajda, *How Dobbs Threatens to Torpedo Privacy Rights in the US.*, WIRED, June 29 2022, 11:09; Olivia Goldhill, *Supreme Court Decision Suggests the Legal Right to Contraception Is Also Under Threat*, STAT, June 14, 2022; Silvia Foster-Frau, *LGBTQ Community Braces for Rollback of Rights After Abortion Ruling*, WASH. POST, June, 24, 2022.

¹⁶² Douglas T. Kendall, *The Big Question about Clarence Thomas*, WASH. POST, Oct. 4, 2004 p. A31, qtg. Ken Fosskett, *JUDGING THOMAS: THE LIFE AND TIMES OF CLARENCE THOMAS*. (2004). Thomas, who is married to a white woman, did not suggest that Loving

himself a “faint-hearted” originalist,¹⁶³ would accept precedents that conflicted with the original public meaning of a constitutional provision or statute in order to avoid disruptions that generated uncertainty and instability; Thomas would not.

Justices Breyer, Kagan, and Sotomayor, in a sixty page dissent, maintained that the Constitution put fundamental rights like abortion “off limits to majority rule.”¹⁶⁴ They rejected Kavanaugh’s claim of neutrality, charging that the decision was a “no compromise refusal to recognize a woman’s right to choose.”¹⁶⁵ They also feared that the same logic could be used to threaten the rights to contraception, same sex intimacy, and same sex marriage, and believed that “it undermines the Court’s legitimacy.”¹⁶⁶

By insisting that an unenumerated fundamental right must be both deeply rooted in the nation’s traditions and essential to a scheme of ordered liberty, Alito hoped to preserve substantive due process from attacks like Thomas’, while preventing it from being used to constitutionalize subjective judicial preferences. By requiring both these tests to be met, he placed a heavy burden on rights advocates that mirrored the burden that government faced, when it sought to limit enumerated fundamental rights. He was careful to make it clear that *both* tests must be met; there might be a deeply rooted right to eat hamburgers or watch football games, but these are not essential to a scheme of ordered liberty, a phrase he borrowed from Justice Cardozo’s much cited opinion on Bill of Rights incorporation in *Palko v. Connecticut* (1937).¹⁶⁷

However, Alito’s argument was undercut by his failure to analyze the very concept of ordered liberty that he pronounced essential. At one point, he indicated that the way to proceed would be to ask what the Fourteenth Amendment “means by the term.”¹⁶⁸ But instead of proceeding, he simply returned to the history that he thought demonstrated that abortion rights were “not deeply rooted.”¹⁶⁹ Cardozo had defined rights under the scheme of ordered liberty to mean that “neither liberty nor justice would exist if they were sacrificed,”¹⁷⁰ but Alito did not even bother to quote the words. Thus, the much vaunted “ordered liberty” test, once stated, was ignored.

Another obvious problem with the tests is that while Alito repeatedly emphasized the importance of the constitutional text, his two criteria were entirely judge-created and had no textual foundation. There is nothing odd about this. For example, the notion that fundamental rights implicate strict scrutiny is well accepted, though it also has no textual justification. More broadly, judicial review, which the Court exercised here, and the concept of fundamental rights itself also

v. Virginia (1967), a precedent banning states from outlawing interracial marriage, ought to be reconsidered.

¹⁶³ *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849 862 (1989). Later, Scalia repudiated this label, favoring “honest originalist.” Jennifer Senior, *In Conversation: Antonin Scalia*, NEW YORK MAGAZINE, Oct. 14, 2013.

¹⁶⁴ Dobbs *supra* note 33, at 2320.

¹⁶⁵ *Id.* at 2328.

¹⁶⁶ *Id.* at 2350. Though Justices do not ordinarily venture opinions on issues not raised in the cases before them, in Dobbs Alito, Kavanaugh, Thomas, and Kagan all addressed topics for potential future litigation.

¹⁶⁷ 302 U.S. 319, 325.

¹⁶⁸ Dobbs, *supra* note 33, at 2248.

¹⁶⁹ *Id.* at 2253.

¹⁷⁰ *Palko*, *supra* note 167, at 326.

have no explicit textual basis. Alito, despite his celebration of textualism, could not avoid the snares of judicial doctrine any more than the justices he criticized.

Alito clearly believed that he was acting in the tradition of judicial self-restraint. Unelected, democratically unaccountable courts should not make policy, particularly, when the issue is morally controversial.¹⁷¹ Substantive due process had sometimes been used by justices to write their own policy preferences and ideological beliefs into the Constitution, he thought. Indeed, *Roe*, “exceptionally weak,”¹⁷² imposed on the people a particular theory about when the rights of personhood begin; it “required states to regard a fetus as lacking even the most basic right, the right to live, until an arbitrary point in a pregnancy has passed.”¹⁷³

Thus, Alito lined up with fetal protection laws that include fetuses as rights-bearing persons, though obviously unable to exercise such fundamental rights as freedom of speech or of religion.¹⁷⁴ Arguably, fetal personhood would implicate both the due process and equal protection clauses, rendering abortion unconstitutional. Kavanaugh in his concurrence declared that this radical argument was “wrong as a constitutional matter,”¹⁷⁵ but no other justice voiced agreement with this position, perhaps implying that it remains a live option.

“Liberty,” Alito wrote, is so “capacious”¹⁷⁶ a term that it invites judges to read their own preferences into it, but the temptation should be resisted. Yet his

¹⁷¹ Ironically, though the majority boasted that returning abortion to the states was a victory for democracy (e.g., Dobbs, *supra* note 33, at 2237, 2243, 2279, 2284 [Alito, J.]; 2228, 2304, 2305, 2306, 2309 [Kavanaugh, J.]), it had earlier declined to promote democracy within states by addressing partisan gerrymandering. *Rucho v. Common Cause*, 139 S. Ct. 2484 (2019). Nor had it deferred to Congress in the high profile cases of *Shelby County v. Holder*, 570 U.S. 529 (2013), concerning the Voting Rights Act, and *Janus v. AFSCME*, 138 S. Ct. 2448 (2018), concerning right-to-work laws. The Court’s opposition to judicial activism appears to be selective.

¹⁷² Dobbs, *supra* note 33, at 2243.

¹⁷³ *Id.* at 2261.

¹⁷⁴ On this basis, from 1973-2005 in some 413 cases pregnancy was an essential factor leading to criminal prosecution of women. Lynn M. Paltrow & Jeanne Flavin, *Arrests of and Forced Interventions on Pregnant Women in the United States, 1973-2005: Implications for Women’s Legal Status and Public Health*, 38 J. HEALTH POL., POLICY & LAW 299 (2013). Nearly twenty years before Dobbs, the South Carolina supreme court upheld the conviction of homicide by child abuse of a woman who used cocaine during pregnancy and experienced a still birth. *State v. McKnight*, 576 S.E. 2d 168 (2003), *cert. denied*, 540 U.S. 819 (2003). A fetus whose parents were injured in an auto accident caused by negligence could sue the offending driver for loss of parental consortium. *Angelini v. OMD Corp.*, 575 N.E. 2d 41, 43-44 (Mass. 1991). The assumption was that the life of the fetus trumped the interests of the pregnant mother, even when the fetus was a product of rape or incest. Michele Goodwin, *If Embryos and Fetuses Have Rights*, 11 J. L. & ETHICS HUM. RTS. 188, 197-98 (2017). Fetal protection statutes are found not only at the state level, but also at the federal level in the Unborn Victims of Violence Act, which defines a fetus as a “member of the species homo sapiens, at any stage of development, who is carried in the womb.” 18 U.S.C. sec. 1841 (2004). On the other hand, that fetuses should be counted as persons in the decennial census was rejected in the 1870 Census that followed the adoption of the Fourteenth Amendment by less than two years. Michael J. Rosin, *Congress Has Never Considered Fetuses Persons within the Meaning of the Fourteenth Amendment*, SLATE, June 9, 2022.

¹⁷⁵ Dobbs, *supra* note 33, at 2305.

¹⁷⁶ *Id.* at 2247.

self-restraint that entailed upholding the Mississippi statute also ironically entailed threatening well established decades old precedents, which could not be defended as embodying rights “deeply rooted” in the nation’s history.¹⁷⁷ Supreme Court precedents strictly bind lower courts, but *stare decisis* is only a “soft rule”¹⁷⁸ binding the Supreme Court itself, particularly, in constitutional cases.¹⁷⁹ Accordingly, Alito noted that the rule of precedent is plainly “not an inexorable command.”¹⁸⁰ Indeed, on occasion (as in *Brown*), the Court has been widely applauded for reversals. From 1789-2020, the Court reversed its precedents 145 times (about .5% of its total cases); the Roberts Court has actually overturned at a lower rate than the preceding Warren, Burger, and Rehnquist Courts¹⁸¹ -- notwithstanding the fact that originalism may have disruptive effects.¹⁸²

It is hard to avoid the feeling that Alito was responding not simply to a jurisprudence he believed to be profoundly flawed, but also to the social forces it seemed to embody and promote. From this perspective, the days when marriage and family were taken for granted as central supports to society are inexorably drifting away. Rates of marriage¹⁸³ and childbirth¹⁸⁴ continue to decline; rates of adults living alone continue to rise;¹⁸⁵ individualistic rights continue to be celebrated at the expense of community obligations; abortion, a facilitator of these unhealthy developments, is defended in moral terms, but in the end it is all about its liberating impact on selfish lifestyles.

For the dissenters, however, reversing precedents in *Dobbs* collided with substantial reliance interests, for literally millions of people had trusted the precedents as they made extremely important personal decisions over a half century. From this perspective, the rule of precedent serves one of the law’s chief goals, stability/predictability,¹⁸⁶ by offering “assurance against untoward surprise.”¹⁸⁷ To

¹⁷⁷ E.g., *Griswold*, *Loving*, *Lawrence*, *Obergefell*, *Bostock*.

¹⁷⁸ Amy Coney Barrett, *Precedent and Jurisprudential Disagreement*, 91 TEX. L. REV. 1711, 1713 (2013).

¹⁷⁹ But cf., Frank Easterbrook, *Stability and Reliability in Judicial Decisions*, 73 CORN. L. REV. 422, at 431 (1988).

¹⁸⁰ *Dobbs*, *supra* note 33, at 2261.

¹⁸¹ DAVID SCHULTZ, CONSTITUTIONAL PRECEDENT IN UNITED STATES SUPREME COURT Reasoning (2022). The Library of Congress counted 232 cases, still a tiny percentage. *A Short History of Overturned Supreme Court Landmark Decisions*, Constitution Annotated (2022).

¹⁸² ADAM VERMEULE, COMMON GOOD CONSTITUTIONALISM 113 (2022). He believes that disruption was “baked into originalism from the beginning,” as its purpose was “to unsettle the evolving doctrine of the Warren and Burger Courts, which conservatives despised.” *Id.* at 93.

¹⁸³ Marriage rates dropped from 9.8/1000 in 1990 to 5.1 in 2020. Erin Duffin, *Marriage Rates in the United States from 1990 to 2020*, STATISTICA, Sep. 30, 2022.

¹⁸⁴ Birth rates dropped from 15.573/1000 in 1990 to 12.012 in 2021. MACROTRENDS, *U.S. Birth Rate 1950-2022* (2022).

¹⁸⁵ Rates grew from 12.8% (23.2 million) in 1990 to 14.4% (36.2 million) in 2020. U.S. CENSUS, *Historical Living Arrangements of Adults* (Nov. 2021).

¹⁸⁶ *Bendix Autolite Corp. v. Midweco Enters.*, 486 U. S. 888, 897-98 (1988); David Lyons, *Formal Justice and Judicial Precedent*, 38 VAND. L. REV. 495, 496 (1985); Earl M. Maltz, *The Nature of Precedent*, N.C. L. REV. 367, 368 (1988).

¹⁸⁷ *Moragne v. States Marine Lines*, 398 U.S. 375, at 403 (1970).

the extent that parties feel that their “legitimate expectations”¹⁸⁸ have been misled, overturning precedents cannot escape the impression of unfairness.¹⁸⁹ As Justice Brandeis put it, “in most matters it is more important that the applicable rule of law be settled than that it be settled right.”¹⁹⁰ If originalism played into Alito’s hands, fidelity to precedent decidedly did not.

The implication of the reliance interests was that the goals of stability/predictability may sometimes be so socially valuable that they justify upholding flawed precedents.¹⁹¹ Is abortion one of these instances? In *Casey*, Kennedy observed that “people have organized intimate relationships and made choices that define their views of themselves and their places in society, in reliance on the availability of abortion in the event that contraception should fail.” He saw a “promise of constancy” in the decision’s granting the “ability of women to participate equally in the social and economic life of the nation [as] facilitated by their ability to control their reproductive lives;”¹⁹² dissenting, Rehnquist thought constitutional law was much less important as a contributor to women’s progress than improved education and increased acceptance by men.¹⁹³ In *Dobbs*, Alito minimized the impact of reliance, indicating that it was not comparable to the tangible commercial interests bound up in property or contract rules; he also considered it hard for the Court to assess the impact of abortion rights on women’s lives. Reliance is implicated in situations “when advance planning of great precision is most obviously a necessity;”¹⁹⁴ abortions, however, result from unplanned activity.¹⁹⁵ In short, Alito

¹⁸⁸ Randy J. Kozel, *Stare Decisis as Judicial Doctrine*, 67 WASH. & LEE L. REV. 411, 415 (2010).

¹⁸⁹ “Legislatures are constantly creating new legal rules,” one analyst observed, “yet no one thinks that this somehow gives those aggrieved by the new rule some vested legal right in the continuation of the prior legal regime.” Michael Stokes Paulsen, *Does the Supreme Court’s Current Doctrine of Stare Decisis Require Adherence to the Supreme Court’s Current Doctrine of Stare Decisis?* 86 N.C. L. REV. 1165, 1178 (2008).

¹⁹⁰ *Burnet v. Colorado Oil & Gas Co.*, 285 U.S. 393, 405 (1932). Brandeis could hardly have been referring to a topic as weighty and controversial as abortion.

¹⁹¹ An example would be the *Slaughterhouse Cases*, almost universally reviled, yet a century and a half later not overturned. 83 U.S. 36 (1873). As Scalia demanded during oral argument, “Why are you asking us to overrule 150, 140 years of prior law, when you can reach your result under substantive due process.?” Transcript of Oral Argument, at 6, *McDonald v. Chicago*, 561 U.S. 742 (2010). By closing off the privileges and immunities path, this case was critical in the application of substantive due process to the states. Justice Thomas, like Charles Black, would prefer reversing *Slaughterhouse* and substantive due process in favor of privileges and immunities, one of their few areas of agreement. Thomas, *supra* note 33, at 2302; BLACK, *A New Birth of Freedom*, *supra* note 9. On overruling venerable precedents, see Matthew H. Kramer, *Hoary Precedents*, University of Cambridge Legal Studies Research Paper no. 3/2022 (March, 2022).

¹⁹² *Casey*, *supra* note 82, at 856.

¹⁹³ *Id.* at 956–57.

¹⁹⁴ *Dobbs*, *supra* note 33, at 2276, qtg. *Casey*, at 856.

¹⁹⁵ Rehnquist had argued in *Casey* that women who lacked access to abortions could take care that they did not become pregnant. *Casey*, *supra* note 80, at 956. Yet whether or not women have planned to become pregnant, the pregnancy may radically interfere with other major life plans. Why should they be banned from changing their mind or correcting what they consider a mistake merely on account of planning?

relied on history to demonstrate an absence of constitutional support for abortion, but dismissed history when it constituted an argument from reliance.¹⁹⁶

XIII.DOBBS' PRECEDENTS

Meanwhile, amidst a barrage of abstract issues, an empirical concern was overlooked: is there a viable basis for Alito's two-pronged test or did he simply conjure it from the ether? Consider the three precedents he cited. *Moore v. East Cleveland* (1977) concerned a zoning ordinance that limits occupancy in a home to family members. Inez Moore lived with her son and her two grandsons, of whom one joined her upon his mother's death. East Cleveland's ordinance featured a narrow definition of "family" that excluded grandsons. Mrs. Moore was convicted of violating the ordinance.

Justice Powell wrote for the plurality. "When a city undertakes such intrusive regulation of the family," he wrote, "the usual deference to the legislature is inappropriate."¹⁹⁷ As "the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this nation's history and tradition,"¹⁹⁸ Powell does not confine the term to "members of the nuclear family,"¹⁹⁹ but concludes that "the Constitution prevents East Cleveland from standardizing its children—and its adults—by forcing all to live in certain narrowly defined family patterns."²⁰⁰ Nowhere does Powell present empirical evidence beyond *Meyer* and *Pierce* to show that the Constitution protects the family or that "family" should be interpreted rather broadly. There is no investigation as to the original public meaning of the due process clause or its legislative history. As "tradition is a living thing,"²⁰¹ Powell seems to be highlighting that the meaning of "family" continues to evolve. As marriage rates are in a steep decline—the 5.1 per 1000 population rate in 2020 was nearly 40% below the 2000 rate²⁰² and less than a third of the post-World War II rate—does this have constitutional implications? Should unmarried persons living together be included as "family"? Should caretakers unrelated by

¹⁹⁶ A non-representative online panel surveyed before and after Alito's draft opinion was leaked to the press revealed that respondents perceived Americans to be more supportive of abortion following the leak, and that social liberals trusted the Court less. Opinions on abortion were unchanged. Chelsey S. Clark & Elizabeth Levy Paluck, *The Supreme Court Overturned Roe. Will American' Views toward Abortion Change?* Behavioral Scientist (June 28, 2022). See also Pew Research Center, Majority of Public Disapproves of Supreme Court's Decision to Overturn Roe v. Wade (July 8, 2022).

¹⁹⁷ 413 U.S. 494, 499.

¹⁹⁸ *Id.* at 503.

¹⁹⁹ *Id.* at 504.

²⁰⁰ *Id.* at 506. Justice Brennan concurred, seeing the ordinance as arbitrary, insensitive, and especially burdensome to Black families. He did not discuss the historic roots of family rights, but instead described how families have evolved. Justice Stevens, concurring, considered the ordinance an unjustifiable intrusion into Moore's right "to use her own property as she sees fit." *Id.* at 513. He also did not refer to historic roots. The dissents by Chief Justice Burger, Justice Stewart, and Justice White also did not refer to historic roots.

²⁰¹ *Id.* at 501.

²⁰² Nat'l Vital Stat. Sys. (2022).

blood and law? If constitutional rights attach to family membership, should states be permitted to continue their practice of differential family legislation, reflecting their differences in history and tradition? None of these questions is resolved in Powell's casual usage, which naturally weakens the utility of the test. As to Alito's "implicit in the concept of ordered liberty," this goes entirely unmentioned.

Michael H. v. Gerald D. (1989) was the second precedent cited by Alito in *Dobbs*. Carole D. was married to Gerald D., but they separated and she had an affair with Michael H. and gave birth to Victoria. Blood tests established a 98.07% probability that Michael was the father. Carole and Gerald reconciled, and Gerald took on the father's role. California law conclusively presumed that a child born into a family where the husband is neither sterile nor impotent is the husband's child, with no right to a hearing. Michael sued, contending that he had a due process liberty interest as a fundamental right in his parental relationship that California failed to recognize.

Justice Scalia, speaking for a plurality, rejected Michael's claim because he failed to show that his alleged fundamental right was "an interest traditionally protected by our society."²⁰³ Had "persons in the situation of Michael and Victoria ... been treated as a protective family unit under the historical practices of our society"?²⁰⁴ The answer was no: "our traditions have protected the marital family ... against the sort of claim Michael asserts."²⁰⁵ The common law as well as statutes back California's practice supporting the integrity of the family, and the presumption of legitimacy is a fundamental principle of the common law.²⁰⁶ The liberty interest of an "adulterous biological father" to assert parental rights, when the child's mother is married to someone else, has never been recognized.²⁰⁷ On the contrary, the presumption generally followed is the presumption of legitimacy. Since it is not a fundamental right, Michael's claim does not implicate the due process clause, and there is no reason for the Court to balance the competing claims of Michael and Gerald, who find themselves in a zero-sum situation. Rather, it is left to California to balance the claims through the ordinary political process.²⁰⁸

The level of analysis is critical here; Scalia's literal reading focused on the historically traditional rights of an adulterous natural father; had he instead spoken of parenthood, family relationships or emotional attachments, the result might have been different.²⁰⁹ But Scalia's point was that the most specific tradition would be the most useful, as its applicability would be most obvious and the judicial discretion it permitted would be minimized. Utilizing a higher level of generality would "permit judges to dictate rather than discern society's views."²¹⁰ The narrow literalness of Scalia's tradition represented his effort to enhance the utility of the concept. His opposition was not to change, he insisted, but rather to Supreme Court driven change, which he regarded as undemocratic.²¹¹ However, in his heavy focus on

²⁰³ Michael H., *supra* note 91, at 122.

²⁰⁴ *Id.* at 124.

²⁰⁵ *Id.*

²⁰⁶ *Id.* at 124.

²⁰⁷ *Id.* at 125.

²⁰⁸ *Id.* at 130.

²⁰⁹ *Id.* at 127 note 6.

²¹⁰ *Id.*

²¹¹ *Burnham v. Superior Court*, 495 U.S. 604, at 626 (1990).

history/tradition,²¹² nowhere did he speak of concepts essential to ordered liberty, despite Alito's citations.

Justice Brennan, dissenting, thought Michael entitled to a hearing, and presented an extensive attack on Scalia's reliance on history/tradition. He thought the concept "malleable" and elusive, and rejected the notion that it could be located by "poring through dusty volumes on American history."²¹³ Reasonable people, he wrote, "can disagree about the content of particular traditions [and] even about which traditions are relevant to the definition of 'liberty.'"²¹⁴ There was also the question as to when "a tradition becomes firm enough to be relevant to our definition and the moment at which it becomes too obsolete to be relevant any longer."²¹⁵ He also charged Scalia with omitting precedents that did not fit into his traditional narrative, and saw a grave level of analysis error: Scalia had asked not "whether parenthood is an interest that historically has received our attention and protection [but] whether the specific variety of parenthood—a natural father's relationship with a child whose mother is married to another—has enjoyed such protection."²¹⁶ He pointed to earlier decisions, which protected the rights of fathers to maintain relationships with their children, even when they were born out of wedlock.

Brennan not only found tradition misapplied; he also thought that it was so inherently backward looking that it discounted important changes in society, in particular, echoing Powell, that "family" and "parenthood" have evolved and now contain a "freedom not to conform,"²¹⁷ as well as Scalia's "cramped vision."²¹⁸ "The plurality ... squashes this freedom by requiring specific approval from history before protecting anything in the name of liberty."²¹⁹ Scalia, in Brennan's eyes, "does not recognize that times change, does not see that sometimes a practice or rule outlives its foundations,"²²⁰ Brennan's general hostility to the history/tradition criterion was partially undermined by his own use of history in the form of precedents and practices.

Washington v. Glucksberg (1997), the third precedent heavily relied upon by Alito in *Dobbs*, asked whether mentally competent, terminally ill adult patients possessed a substantive due process fundamental right to commit physician assisted suicide. Harold Glucksberg and three others wished to assist the suicide of terminally ill patients in constant pain, in violation of Washington law.²²¹ The case produced a unanimous result, oddly splintered by five concurrences.

Chief Justice Rehnquist, speaking for the Court, announced that "Our established method of substantive due process analysis ... protects those fundamental rights and liberties which are, objectively, 'deeply rooted in this nation's history

²¹² Scalia explicitly address the issue of historical methodology. Michael H., *supra* note 89, at 132, footnote 6.

²¹³ *Id.* at 110.

²¹⁴ *Id.* at 137.

²¹⁵ *Id.* at 138. Barnett and Bernick suggest thirty years. RANDY E. BARNETT & EVAN D. BERNICK, *THE ORIGINAL MEANING OF THE FOURTEENTH AMENDMENT* 239 (2021).

²¹⁶ Michael H., *supra* note 91, at 139.

²¹⁷ *Id.* at 141.

²¹⁸ *Id.* at 157.

²¹⁹ *Id.* at 141.

²²⁰ *Id.*

²²¹ Wash. Rev. Code sec. 9A.36.060(10).

and tradition' ... and 'implicit in the concept of ordered liberty.'"²²² As to history and tradition, he presented six pages covering over 700 years of Anglo-American history to show that "opposition to and condemnation of suicide—and, therefore, of assisting suicide—are consistent and enduring themes of our philosophical, legal, and cultural heritages."²²³ These were followed by three pages listing contemporary state legislation that also condemn the practice.²²⁴ The purpose of the history/tradition requirement was to "rein in the subjective elements that are necessarily present in due process judicial review."²²⁵ As with *Michael H.*, the level of analysis was very specific, covering not the broad liberty to choose how and when to die, but instead the right to physician assisted suicide.²²⁶

Rehnquist conceded that doctors could withdraw life sustaining treatment and let nature take its course, but insisted on a distinction between killing and letting die (or what some philosophers have termed passive or active euthanasia²²⁷). The ruling "permits the debate to continue, as it should in a democratic society."²²⁸ What Alito failed to mention is that Rehnquist accepted abortion under the history/tradition and ordered liberty standards.²²⁹

Rehnquist's second criterion, implicit in the concept of ordered liberty, was completely undeveloped²³⁰ (perhaps because the failure of the history criterion rendered it superfluous) and consisted simply of a citation to *Palko*.²³¹ With the failure to establish assisted suicide as a fundamental right, no balancing test was implicated. Yet Rehnquist noted no fewer than a half dozen interests the state had in opposing the practice, which overwhelmed any interests on the other side. All this may help to explain why the Court in *Obergefell v. Hodges*, the famous same sex marriage case, announced that the *Glucksberg* reliance on history "is inconsistent with the approach this Court has used in discussing other fundamental rights."²³²

In short, none of the three cases cited by Alito as precedents for his two-pronged test in *Dobbs* are supportive. In *Moore* and *Michael H.*, history and tradition were rather briefly touched on; in *Glucksberg*, they were discussed in some depth;

²²² Washington, *supra* note 81, at 721.

²²³ *Id.* at 711.

²²⁴ *Id.* at 716-18.

²²⁵ *Id.* at 722.

²²⁶ *Id.* at 722-23.

²²⁷ James Rachels, *Active and Passive Euthanasia*, 292 NEW ENG. J. MED. 78 (1975). As both types of euthanasia result in the death of the patient, some regard the argument as a distinction without a difference.

²²⁸ Washington, *supra* note 81, at 735.

²²⁹ *Id.* at 727. Nor did he mention the concurrence of Justice O'Connor, who implicitly differentiated physician assisted suicide from abortion by noting, "Every one of us at some point may be affected by our own or a family member's terminal illness." *Id.* at 737. O'Connor's retirement was hastened by the dementia of her husband. Joan Biskupic, *O'Connor Takes Private Ordeal Public*, USA TODAY, May 14, 2008.

²³⁰ The case's syllabus claims that the "various descriptions of the interest here at stake -- e.g., a right to "determin[e] the time and manner of one's death," the "right to die," a "liberty to choose how to die," a right to "control one's final days," "the right to choose a humane, dignified death," and "the liberty to shape death"—run counter to that second requirement." *Supra* note 81, at 703. Without more, it is simply not clear why this should be so.

²³¹ *Id.* at 721.

²³² *Obergefell*, *supra* note 78, at 671.

however, in none of them was the second criterion, ordered liberty, explored. The three precedents, in sum, do not satisfactorily validate Alito's approach in *Dobbs*.

XIV. THE FUTURE?

Those considering the future might pay attention to *Tiwari v. Friedlander*, a Kentucky case involving Nepali immigrants seeking official permission in the form of a certificate of need to open a home care agency for Nepali speakers.²³³ Tiwari argued that the point of the procedure was to create a barrier to entry with the purpose of protecting pre-existing providers, and that it unconstitutionally deprived him and his colleagues of their Fourteenth Amendment due process liberty right to earn a living.

A federal district court in Kentucky clearly thought the policy indefensible, noting competition driven innovations it would discourage; even if a facility would cut patient costs or improve patient outcomes, it could be barred from opening. Congress had dropped its certificate of need mandate and consultants hired by Kentucky had urged the same, but the system continued. Here, there was an obvious need for a Nepali speaking agency, as Louisville had a sizable Nepali community, who were not well served by the pre-existing agencies. Applying the rational basis standard, the court asked whether the law "makes worse the very interest it purports to serve, as well as any other legitimate interest."²³⁴ As the law increased costs and reduced access and quality, the court found that the law failed the test. Tiwari satisfactorily stated a claim for relief under the due process clause.

Later, however, the district court, now with a new judge, ruled that Kentucky had met the rational basis standard, whereupon Tiwari appealed to the Sixth Circuit Court of Appeals, which ruled that the program "passes, perhaps with a low grade but with a pass all the same."²³⁵ The law may fail to meet its goals, but this is insufficient to require a judicial correction "Our custom instead is to assume that democracy will eventually fix the problem."²³⁶ Whether there is a right to earn a living "is for the U.S. Supreme Court, not our court, to make."²³⁷ The Supreme Court subsequently denied certiorari.²³⁸

The right to earn a living has decided discredited *Lochner* echoes; on the other hand, it will also find some supporters, particularly among libertarians. What will be in play is whether such an unenumerated right exists. If the answer is yes, the contours of the right would need to be spelled out in future cases. Innumerable statutes and regulations involving licensing, wages, and working conditions might impinge on this right and thus be grounds for litigation. Is the prospect so daunting that courts would simply refuse to concede the right? Or would they nonetheless press ahead?

²³³ Ky. Rev. Stat. sec. 216B.061(1) and sec. 216B.020.

²³⁴ Civil Action No. 3:19-CV-884-JRW-CHL.

²³⁵ *Tiwari v. Friedlander*, 26 F. 4th 355, 363 (2022).

²³⁶ *Id.* at 365.

²³⁷ *Id.* at 369.

²³⁸ *Tiwari v. Friedlandfer*, 143 S. Ct. 444 (2022).

XV. SOME CONCLUSIONS

The Constitution, as an astute observer once observed, “was born of prudent compromise rather than principle, ... derived more from experience than from doctrine, and ... was received with an ambivalence in no small part attributable to its ambiguities.”²³⁹ Disagreement thus was guaranteed, not only as to what provisions mean but more basically, how the meaning was to be ascertained. Plainly, the matter cannot simply be left to the good graces of well-meaning judges sitting as Platonic philosopher-kings. It is obvious, then, that courts require some principle to guide their determination of unenumerated fundamental rights. The most frequently applied criterion is a deeply rooted historical/traditional consensus, which is thought to provide a strong, stable, and satisfactory criterion. The fact of consensus naturally minimizes the likelihood of controversy, always a major plus in designating fundamental rights.

Though the justices do not mention it, the criterion itself is deeply rooted in Western intellectual history and tradition. In considering the bases of authority, for example, Max Weber assigned the pride of place to “an established belief in the sanctity of immemorial traditions and the legitimacy of those exercising authority under them.”²⁴⁰ Longstanding cultural patterns, likely unwritten, legitimate the exercise of power, generating an emotional respect that is validated by the venerability of the practice itself. Is it unthinking habit or the deliberate adherence to exemplary norms? It hardly matters. The momentum generated by tradition is strong, indeed, sometimes unstoppable.

The Anglo-Irish politician, Edmund Burke, considered history/tradition not only an important source of legitimacy, but also, in general, a social blessing. Thus, he wrote of the British constitution that its “sole authority is that it has existed time out of mind,”²⁴¹ as this indicated that multiple generations had found it, overall, useful and appropriate. A nation is not created and ruled by pure reason, he observed, but represents “a partnership not only between those who are living, but between those who are living, those who are dead and those who are to be born.”²⁴² The ties of obligation go both backward and forward; the purpose of change is preservation. A constitution, thus, is a product of “many minds in many ages. It is no simple, no superficial thing, nor to be estimated by superficial understandings”²⁴³ [because] a nation ... is an idea of continuity, which extends in time [and] is made by the peculiar circumstances, occasions, tempers, dispositions, and moral, civil, and social habitudes of the people, which disclose themselves only in a long space of time.”²⁴⁴

²³⁹ Philip B. Kurland, *The Rise and Fall of the "Doctrine" of Separation of Powers*, 85 MICH. L. REV. 592 (1986).

²⁴⁰ MAX WEBER, *ECONOMY AND SOCIETY: AN OUTLINE OF INTERPRETIVE SOCIOLOGY* 215 (Guenther Roth & Claus Wittich eds. 1968).

²⁴¹ EDMUND BURKE, 10 *THE WORKS OF THE RIGHT HONOURABLE EDMUND BURKE* 96 (new ed. 1812).

²⁴² EDMUND BURKE, *REFLECTIONS ON THE REVOLUTION IN FRANCE 1790-95* (Conor Cruise O'Brien ed. 1969/1790).

²⁴³ EDMUND BURKE, 3 *THE WORKS OF EDMUND BURKE* 452 (1839).

²⁴⁴ EDMUND BURKE, 6 *WORKS* 146-147 (Bohn ed. 1886).

Burke was especially impressed by the argument from prudence, which he considered “not only first in rank of the virtues political and moral, but [...] the director, the regulator, the standard of them all.”²⁴⁵ He felt “a presumption in favor of any settled scheme of government,”²⁴⁶ fearing that disregarding history in preference to theoretical rumination may result in unanticipated consequences that bring with them serious harm; abstract disputations may call into question the most profound matters, perhaps opening the door to demagogues or authoritarians. Modest incremental change drawing on history/tradition is the prudent path.

Burke’s views point to a certain incoherence in Alito’s argument. Like Burke, he is impressed with history/tradition as a legitimator and teacher. Relatedly, he might think it an unrealistic act of hubris to imagine that Hamilton’s judiciary, “the least dangerous branch,”²⁴⁷ can be the chief engine of social progress. Yet unlike Burke, he seems blind to the advantages of incrementalism, as exhibited in his dismissal of Roberts’ position. In this, Alito may mirror larger patterns in judicial behavior. It is true that apparently revolutionary rulings in hindsight may be seen as culminating a lengthy incremental process. The famous *Brown* desegregation case,²⁴⁸ for example, which struck the country as a bolt from the blue,²⁴⁹ actually followed inevitably and logically from a series of low visibility rulings.²⁵⁰ But sometimes the Court opts for abrupt change. *Miranda v. Illinois* (1966) reversed police practice dating back to colonial days in requiring that criminal suspects be informed of their rights;²⁵¹ *New York Times v. Sullivan* (1964) rewrote a considerable portion of the venerable law of libel.²⁵² *Roe* changed abortion law overnight, and *Dobbs* changed it back. The case for a history/tradition-based incrementalism has thus not always been accepted by the Court. Alito, supremely confident, swept it away like crumbs on a tablecloth.

Alito made it clear that the practical consequences of the ruling were not properly his charge, retorting that “how our political system or society will respond to [the] decision” is not the Court’s concern.²⁵³ The justices must “only do [their] job ... to interpret the law.”²⁵⁴ In this, he seemed to resemble Weber’s politician

²⁴⁵ BURKE, *supra* note 240, at 1:498.

²⁴⁶ *Id.* at 7:94.

²⁴⁷ THE FEDERALIST 78, at 465 (Alexander Hamilton) (Clinton Rossiter ed. 1961/1787). Hamilton also cautioned, “To avoid an arbitrary discretion in the courts [judges] should be bound down by strict rules and precedents, which serve to define and point out their duty in every particular case that comes before them.”

²⁴⁸ *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

²⁴⁹ DANIEL A. FARBER & SUZANNA SHERRY, JUDGMENT CALLS: PRINCIPLE AND POLITICS IN CONSTITUTIONAL LAW 106 (2009).

²⁵⁰ *E.g.*, *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337 (1938); *Sipuel v. Bd. of Regents*, 332 U.S. 631 (1948); *McLaurin v. Okla. State Regents*, 339 U.S. 637 (1950); *Sweatt v. Painter*, 339 U.S. 629 (1950).

²⁵¹ 384 U.S. 436.

²⁵² 376 U.S. 254.

²⁵³ *Dobbs*, *supra* note 33, at 2279

²⁵⁴ *Id.* Similarly, a year earlier Justice Gorsuch wrote, “raw consequentialist calculation plays no role in our decision...no amount of policy talk can overcome a plain statutory command.” *Niz-Chavez v. Garland*, 141 S. Ct. 1474, 1486 (2021). Alito was dismissive of the talk in *Casey* about the Court’s legitimacy, but an opinion survey revealed that its rating among the public was the lowest in more than three decades. Pew Research Center, *Positive Views of Supreme Court Decline Sharply Following Abortion Ruling* (Sep. 1, 2022).

adopting an ethic of ultimate ends, who will do what is right and “leave the results to the Lord.” Weber contrasts this approach with an ethic of responsibility, which must take “account of the foreseeable results of one’s actions.”²⁵⁵ The problem with Alito’s ethic of ultimate ends is that as rights are not absolute, determining their limitations inescapably entails considering the practical results of the law. Thus, an empirical analysis of all the cases decided by the Court in the 2020-2021 term “found that Justices who decry consequentialism or pragmatism often ended up making consequentialist arguments themselves.”²⁵⁶ Alito might grant the power of Weber’s distinction, but add a pair of points in rebuttal, first, that it applies to politicians, not to judges; and second, that it ignores the difference between a choice that is merely morally disagreeable and one that is morally criminal.²⁵⁷ For Alito, it is plain that choosing abortion is morally criminal. Thus, his declaration: “we cannot embrace a narrow ground of decision simply because it is narrow; it must also be right.”²⁵⁸

Does Alito’s emphasis on history/tradition impede the updating of the Constitution? The difficulty with the passive voice, of course, is that the actor is omitted. The Constitution does not update itself, but instead, must be updated by unelected and therefore democratically unaccountable judges. When they change the meaning of statutes or regulations, they effectively change the law; in other words, they assume a function the Constitution reserves for the openly political branches. Occasionally, this may be justified to avoid an absurdity. Article II designates the President commander in chief of the army and navy; it would be bizarre to insist on a constitutional amendment to include the air force. Similarly, when the Third Amendment refers to quartering soldiers without the consent of the owner of the house, it is hard to imagine that it does not also apply to sailors. But these absurdities are rare and usually easy to identify. As Justice Thomas put it, “Reliance on history to inform the meaning of constitutional text is more legitimate, and more administrable, than asking judges to make difficult empirical judgments.”²⁵⁹

Yet in the end, the reliance on history/tradition fails to persuade. For one thing, the worship of the past seems an odd preoccupation in a country that has always celebrated The New. Lacking the ancient roots of Britain, America from the earliest days has focused on the future, seeing tomorrow more as opportunity than as snare. Recall Crèvecoeur’s American man: self-reliant, practical, hopeful.²⁶⁰ What to traditionalists has seemed good common sense has frequently seemed to many

²⁵⁵ From MAX WEBER: ESSAYS IN SOCIOLOGY 120 (H.H. Gerth & C. Wright Mills eds. 1946).

²⁵⁶ VICTORIA NOURSE, THE PROMISE AND PARADOX OF A UNIFIED JUDICIAL PHILOSOPHY: AN EMPIRICAL STUDY OF THE NEW SUPREME COURT, 2020-2022 30 (SSRN 4179654 2022). Of the unanimous decisions, 17% engaged in consequentialist arguments; of the non-unanimous decisions, 75% engaged. *Id.* at 36-37.

²⁵⁷ Bernard Williams, *Political and Moral Character*, in PUBLIC AND PRIVATE MORALITY 55, at 71 (Stuart Hampshire ed. 1977).

²⁵⁸ Dobbs, *supra* note 33, at 2305. Thus, Alito avoids the problem of dirty hands, when immoral means are used in the service of a greater good. Michael Walzer, *Political Action: The Problem of Dirty Hands*, 2 PHIL. & PUB. AFFS. 160 (1973).

²⁵⁹ N.Y. State Rifle & Pistol Ass’n. v. Bruen, 142 S. Ct. 2111, 2130 (2022). Thomas does not notice that relying on history itself involves judges making difficult empirical judgments.

²⁶⁰ J. HECTOR ST. JOHN CREVECOEUR, LETTERS FROM AN AMERICAN FARMER (Albert E. Stone ed. 1981/1782).

Americans a communitarian romanticism blocking individual-driven progress, the work of fuddy-duddies with nothing but vapid nostalgia to offer.

For relying on a historical/traditional consensus is by definition backward looking and subject to the defects of such an approach. It may, for example, entail relying on decisions taken when large segments of society were effectively excluded from the political process, and is thus inherently biased against these people. To answer whether abortion is a right in the context of the Fourteenth Amendment, for instance, is to anchor it to a time dominated by the view that women are properly subordinate to and dependent on men, who alone could satisfactorily represent their interests, a view that denied women the vote and attenuated their political influence. Thus, the views of women on a supremely important issue that affects only them directly is made quite irrelevant. On the other hand, to tie abortion rights to the feminist tradition, which may be connected to the equal protection clause, will yield an emphatically different result.²⁶¹ An originalist focusing on the original public meaning of the text of the Fourteenth Amendment might favor the more literal first tradition, but there will be many who believe it has been superseded by the second, which seems to them clearly more robust today. How to choose between competing traditions?

In short, the plea to rely on history/tradition must partly rise or fall on the particular history/tradition selected. When the white South invoked it on behalf of slavery or later on behalf of segregation (or The Southern Way of Life), it was eventually properly rejected. The apparent historical/traditional consensus, at least among the white population, was dismissed as irrelevant. Today's justices naturally do not propose reverting to a brazenly racist past, but taking history/tradition as a legitimating variable will leave them open to embracing a range of problematic arguments. As one careful analyst noted, "Judges working within a traditionalist framework will often narrow or broaden a tradition with the aim either to exclude or include the practice being reviewed."²⁶² In order to avoid this fate, justices are forced to pick and choose among the various histories/traditions proffered, enshrining an element of subjectivity and discretion that calls into question the entire enterprise.

It is also plain that a Burkean argument for history/tradition-based incrementalism comes perilously close to an argument for the status quo; formalizing the consensus on rights may minimize conflict and confusion, but it will change things so little that it may hardly be worth the trouble. As Justice Brennan put it, "if the only purpose of the due process clause is to confirm the importance of interests already protected," it becomes a "redundancy [that] mocks those who ... wrote the Fourteenth Amendment."²⁶³ With this narrow reading, the due process clause will offer scant protection to nonconformists, protecting mainly those who need no protection. Put differently, Alito would have the Court safeguard rights generally accepted and not endangered, rather than generate new ones.²⁶⁴

²⁶¹ Ruth Bader Ginsberg, *Speaking in a Judicial Voice*, 67 N.Y.U. L. REV. 1185, 1200-5 (1992). Also see Reva Siegel et al., *Equal Protection in Dobbs and Beyond: How States Protect Life Inside and Outside of the Abortion Context*, 43 COLUM. J. OF GENDER & L. 67 (2023).

²⁶² Marc O. DeGirolami, *The Traditions of American Constitutional Law*, 95 NOTRE DAME L. REV. 1123, 1162 (2020).

²⁶³ Michael H, *supra* note 91, at 140-41.

²⁶⁴ Progressive constitutionalists, on the other hand, "view the power and normative authority

Of course, Alito's point is not that he is opposed to change but merely to an unaccountable, undemocratic Supreme Court as the driver of change. If the goal is to be flexible and accommodating, he might ask, why have a constitution, which can only be an obstacle to change? Why not follow the British model and grant all power to the legislature? All of which is to rehearse familiar arguments for a living Constitution able to adapt to change and free society from the dead hand of the past.

There are also technical questions concerning the historical/traditional consensus. Why assume that a consensus supporting a practice is indistinguishable from one viewing it as a judicially enforceable fundamental constitutional right? The consensus may be merely permissive, not mandatory, and the right may not rise to the level of fundamental. There is a consensus supporting driving on the right side of the road, but it is hard to imagine it as a constitutional right. Why assume that if a state has not outlawed a practice, it recognizes it as a right? Perhaps it was simply an oversight. Or a sign of indifference.

There is also the level of analysis problem. A historical/traditional consensus covering the literal facts of the case may seem the most persuasive, but its wider application will necessarily be problematical, undercutting its significance. If *Meyer v. Nebraska* were taken to concern only the right to teach from a German text, we might hardly notice it. On the other hand, a more abstract level may promise wider application, but may also house vague, ambiguous or inconsistent elements that undermine its utility by generating unwanted consequences. Pro-choice advocates, for example, often chant, "My body, my choice." Do they also mean to support an unlimited right to sell one's organs, serve as a surrogate parent or engage in incest? Determining the appropriate level of analysis unavoidably is also an invitation to subjectivity, which in constitutional questions we naturally prefer to minimize.

Too, complications inhere in the historical enterprise itself, which Eliot famously found "mixing memory and desire."²⁶⁵ Thus, in one of his last opinions, Justice Breyer catalogued a series of practical problems that, together, left the emphasis on historical/traditional consensus in tatters.²⁶⁶ Judges are not historians, he pointed out, suggesting that their law office history will too often be inadequate, perhaps merely the uncritically accepted work of *amici* advocates aiming at winning, not at truth.²⁶⁷ The history they read and the history they proffer reflects advocacy, not disinterested scholarship. As the co-editor of a multi-volume collection of historical documents conceded, "we cannot definitively read the minds of the Founders except, usually, to create a choice of severable possible meanings ... Indeed, evidence of different meanings likely can be garnered for almost every

of some social groups over others as the fruit of illegitimate private hierarchy. And regard the Constitution as one important mechanism for challenging those entrenched private orders." Robin West, *Progressive and Conservative Constitutionalism*, 88 MICH. L. REV. 641, 644 (1990).

²⁶⁵ T.S. ELIOT, *THE WASTE LAND* 9 (1922).

²⁶⁶ N.Y. Rifle & Pistol Ass'n., Inc., *supra* note 253, at 2177-81 (2022).

²⁶⁷ For example, three medieval historians have charged that Alito's opinion in *Dobbs* misunderstood some key terms used by English lawyers in the thirteenth century. Karl Shoemaker, Mireille Pardon & Sara McDougall, "Abortion Was a Crime?" *THE DOCKET: LAW & HIST. REV.* (June 14, 2022). Similarly, another study found that Alito erred in his claim that three-quarters of the states banned abortion at the time that the Fourteenth Amendment was adopted. Aaron Tang, *After Dobbs: History, Tradition, and the Uncertain Future of a Nationwide Abortion Ban*, 75 STAN. L. REV. 1091 (2023).

disputable proposition.”²⁶⁸ Relying on history is especially problematic with lower courts, which may lack the necessary resources and face a heavy work load, but all courts run the risk of cherry-picking supporting evidence and ignoring the rest. Even if courts avoid these perils, they cannot always rely on experts, who will often disagree among themselves or be unable to provide clear and useful answers. Thus, Alito’s history lesson in *Dobbs* seems only partially persuasive; for example, it is true that following the Civil War, abortion was widely criminalized, but prior to that time under the common law abortion was generally permitted before quickening, which at from sixteen to twenty weeks was a very substantial loophole.

Thus far, history and tradition have been literally joined by a slash, for the justices have generally treated them as essentially the same. However, “history” and “tradition” are not synonyms, though the words are obviously related and would seem to overlap. If history, very roughly speaking, refers to what happened, tradition refers to the narrative we have constructed about what we believe happened, often a narrative with a normative point.²⁶⁹ These narratives may help to shape our opinions, beliefs, and values, as well as our very identities. Thus, while there may be only one objective history, there will always be a plethora of traditions reflecting differences in perspectives, self-interest, memories, and numerous other factors.

Yet Alito and others on the Court persist in ignoring all this messiness, addressing history and tradition, typically the centerpieces of unenumerated rights analysis, in a stunningly casual manner. Sometimes, in fact, “history and tradition” seems like an example of a hendiadys, a figure of speech in which words joined by a conjunction convey a single meaning, like “nice and easy.” Omitting or muddying the distinctions between history and tradition and treating them as unidimensional and linear have the practical advantage of simplifying the task of argumentation. But the price is high, for this approach downplays the differences, the multiple dimensions, the zigging and zagging, and to that extent may be seriously unrealistic and misleading. What is absent from the argumentation is precisely what demands emphasis, and these considerations are not peripheral or trivial, but clearly basic. If the Court has not confronted these questions, it is hard to take seriously its repeated reassurances that it will be guided by history/tradition, concepts that it has barely begun to investigate. As Tallulah Bankhead reported in a very different context, “There is less in this than meets the eye.”²⁷⁰

In sum, though historical/traditional consensus sounds commonsensical, it does not take much effort to reveal its shortcomings. Which raises the question as to its alternatives; the old cliché is that you can’t beat something with nothing. The chief alternative seems to be citing cases that are presented as pertinent. There is a circularity here, as the Court justifies a finding in terms of prior findings by the Court, which themselves may have hardly had justifications worth discussing.

²⁶⁸ Philip B. Kurland, *The Origins of the Religious Clauses of the Constitution*, 27 WM. & MARY L. REV. 839, 841 (1986).

²⁶⁹ Marc O. DeGirolami believes that “when the Court interprets traditionally, it signals the presumptive influence of political and cultural practices of substantial duration.” *Supra* note 256, at 1125. In excluding judicial precedents and doctrines, however, he may be granting the term more precision than its rather sloppy judicial use warrants.

²⁷⁰ Qtd. in ALEXANDER WOOLCOTT, *SHOUTS AND MURMURS* (1922).

At other times, the Court, in imitation of the introduction of the Ten Commandments, has simply announced that certain unenumerated rights exist. To those seeking justifications, the Court in its silence appears to echo Ring Lardner's riposte: "Shut up, he explained."²⁷¹

If the bases of unenumerated rights were merely of antiquarian interest, none of these problems would matter much. But, of course, the situation is entirely the reverse. Many of the most high profile, impactful, and controversial cases of the past few decades have pivoted on exactly this concept. Commentators focusing on the product, not the process, have often lost sight of this. But that the notion of unenumerated rights remains so intellectually undeveloped in the light of its obvious importance is one of the most glaring shortfalls in modern constitutional law.

²⁷¹ RING LARDNER, SHUT UP, HE EXPLAINED: A RING LARDNER SELECTION (Babette Rosmond & Henry Morgan eds. 1962/1920).