THE RUTGERS UNIVERSITY LAW REVIEW
VOLUME 76 Commentaries Winter 2024

What the *Gluck* Is Going On? A Constitutional Analysis of the History-and-Tradition Test

Max Hermann

ABSTRACT

In Dobbs v. Jackson Women's Health Organization, *the United States Supreme Court overturned* Roe v. Wade *and returned the issue of abortion to the states. Within seven months of the* Dobbs *ruling, more than twenty-four states passed or introduced legislation to outlaw abortions, many of which do not include exceptions for rape or the mother's health. This will return the United States to the days of "back-alley" abortions which compromise the health and safety of mothers, and puts doctors in a precarious position where they risk losing their medical licenses, or even going to jail, in order to uphold their oath of applying all measures required for the benefit of the sick.*

Many scholars have criticized the use of the "history-and-tradition" test, which determines whether an unenumerated fundamental right is deeply rooted in the United States' history and tradition. Up until the decision in Dobbs, *the Supreme Court had never explicitly adopted any specific test in deciding unenumerated rights, citing the immense complications and difficulty in assigning one standard of review to all cases in which unenumerated rights were at issue. A number of different tests have been suggested by the courts and legal scholars over the years, each of which creates its own subset of issues and does not tackle the crux of the issue. In order to properly guard the rights that the Framers did not explicitly include in the Constitution and Bill of Rights, more radical changes must be employed. The proposed solutions found herein include strictly adhering to the concept of originalism or using originalism as a guidepost to adapt the Constitution to contemporary America. More drastic proposed solutions include restructuring the Court, which would protect certain fundamental unenumerated rights from interference by the Court. This Commentary further addresses the impact of* Dobbs *on the landscape of unenumerated rights, discusses the deficiencies and bias apparent in the many*

tests that have been argued for, and provides a solution to ensure that certain rights that the American people have secured over decades of struggle do not fall at the hands of a supermajority on the United States Supreme Court.

TABLE OF CONTENTS

I. INTRODUCTION

Given that those who framed the explicit rights granted in the Constitution chose capricious and non-detailed text, how are later generations able to understand and adjudicate the contours of those rights-granting clauses? How, for example, can the current generation understand and adjudicate what was meant by "liberty" that the Fifth and Fourteenth Amendments protected?[1] The Court has struggled with this dilemma and used different approaches since the ratification of the Bill of Rights.[2] In *Plessy v. Ferguson*, the Supreme Court interpreted the Fourteenth Amendment's liberty interest as one that "could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political equality, or a commingling of the two races upon terms unsatisfactory to either."[3] This interpretation clearly did not withstand scrutiny and was undoubtedly not within the "liberty" interests that the Fourteenth Amendment seeks to protect.[4] Without explicit guidance from the Constitution, each Supreme Court is free to interpret the purposefully open language of the Constitution differently, and Courts have exercised their ability to do just that.[5]

Most recently, the Supreme Court decided *Dobbs v. Jackson Women's Health Organization*[6] using the "history-and-tradition" test extracted from *Washington v. Glucksberg*.[7] The history-and-tradition test requires the Court to determine whether a particular unenumerated right is "so rooted in the traditions and conscience of our people as to be ranked as fundamental."[8] Unenumerated rights, which are rights not explicitly named or granted in the Constitution, have been formulated and

1. *See generally* U.S. CONST. amend. V; U.S. CONST. amend. XIV.

2. *See* Plessy v. Ferguson, 163 U.S. 537, 543–44 (1896) (holding that the Fourteenth Amendment did not prohibit separate but equal treatment amongst different races). This shows the evolving meaning of *liberty* that the Court has applied to unenumerated rights cases since the Fourteenth Amendment was ratified. *Id.*

3. *Id.* at 544.

4. *See* Brown v. Board of Educ., 347 U.S. 483, 495 (1954).

5. *See* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2248 (2022) ("[G]uided by the history and tradition that map the essential components of our Nation's concept of ordered liberty, we must ask what the Fourteenth Amendment means by the term 'liberty.'") (emphasis omitted). This is nothing more than an arbitrary and self-serving statement because the opinion does not seek to define "liberty" as it was understood by the framers, or as it is understood today. Instead, the opinion incorrectly recounts history and determines that since abortion was not legal at the time the Constitution was ratified, it is not understood as part of liberty today. *Id.*

6. *Id.* at 2305.

7. 521 U.S. 702, 721 (1997).

8. *Id.* (quoting Snyder v. Massachusetts, 291 U.S. 97, 105 (1934)).

accepted through a variety of tests over the years.[9] The Federalists envisioned and warned of the existence of unenumerated rights in their ardent opposition to a Bill of Rights specifically listing which rights the people retained.[10] Unenumerated rights exist in a variety of capacities and the arguments pertaining to each have an influence on the acceptance or denial of the next. For example, the unenumerated right to privacy established in *Griswold v. Connecticut* was the driving force behind the Supreme Court's decision in *Lawrence*, where the Court struck down a Texas statute criminalizing homosexual activity on the premise that it invited "unwarranted government intrusion into matters so fundamentally affecting a person."[11] The majority opinion in *Dobbs* not only uses but seeks to establish as the standard the "history-and-tradition" test from *Glucksberg*.[12] This will lead to a massive shift in the Court's Fourteenth Amendment jurisprudence and will more than likely produce dire consequences. As Justice Thomas makes clear on the heels of the *Dobbs* decision, "we should eliminate [substantive due process, which is used to grant unenumerated rights] from our jurisprudence at the earliest opportunity."[13]

This Note will argue that the "history-and-tradition" test is fundamentally flawed and ought to be replaced with a more workable standard that respects the historical significance of the Constitution, while simultaneously allowing the Court to adapt its meaning to ensure that the United States is not constrained by eighteenth-century principles. First, the Note will provide background on the history-and-tradition test. Second, the Note will examine how the test was applied in *Dobbs*. Third, the Note will discuss the benefits and downfalls of the test while also discussing alternative tests that have been proposed. Fourth, the Note will analyze how the test may be used in future cases to both fortify outdated concepts and elicit opinions that are too far outside of

9. *See* Poe v. Ullman, 367 U.S. 497, 541 (1961) (Harlan, J., dissenting); Lawrence v. Texas, 539 U.S. 558, 579 (2003); *Glucksberg*, 521 U.S. at 720.

10. *See* Michael Raven, *Unenumerated Rights, State Supreme Court Decisions and the Ninth Amendment: Toward a New Interpretation of the Inkblot*, 69 U. KAN. L. REV. 647, 647 (2021) (citing Russell L. Caplan, *The History and Meaning of the Ninth Amendment*, 69 VA. L. REV. 223, 239 (1983)) ("The Federalists argued that no exhaustive list of rights was possible, and the danger of a non-exhaustive list was that any rights that were not identified 'would be forfeited to the federal government.'").

11. *Lawrence*, 539 U.S. at 565 (quoting Eisenstadt v. Baird, 405 U.S. 438, 453 (1972)).

12. 142 S. Ct. 2228, 2235–36 (2022).

13. *Id.* at 2304 (Thomas, J., concurring). This would be an easy task for the Court if "history and tradition" serves as its guidepost since the Constitution was ratified at a time when women, African-Americans, and homosexuals were seen as inferior to White, land-owning men. It would be child's play for the Court to find that gay marriage and interracial marriage are not part of the nation's history and tradition, and newly enumerated rights would be thrown out the window.

established modern ideologies. In the same section, the Note will discuss how countless other, more uncontroversial, unenumerated rights exist without question that would have never withstood the test. Finally, the Note will consider how this test may challenge the legitimacy of the Supreme Court and recommend a more workable test moving forward. This Note seeks to bring awareness to the fragility of unenumerated rights in the era of the history-and-tradition test.

II. WASHINGTON V. GLUCKSBERG & THE "HISTORY-AND-TRADITION" TEST

In *Glucksberg*, the Court used a novel two-step process to decide whether an asserted unenumerated right was so fundamental that the government was forbidden from interfering with its exercise.[14] This new process would come to be known as the history-and-tradition test.[15]

A. Washington v. Glucksberg *Analysis*

Dr. Glucksberg brought suit against the State of Washington to challenge the constitutionality of WASH. REV. CODE 9A.36.060(1), which provides "[a] person is guilty of promoting a suicide attempt when he or she knowingly causes or aids another person to attempt suicide."[16] Respondent plaintiffs implored the Court to accept "the existence of a liberty interest protected by the Fourteenth Amendment which extends to a personal choice made by a mentally competent, terminally ill adult to commit physician-assisted suicide."[17]

The first section of the *Glucksberg* opinion provides an extensive overview of the history of assisted suicide in the United States, dating back more than 700 years to the thirteenth century.[18] Despite acknowledging the shifting attitudes of those that they represent, the Court analyzed this challenge against the backdrop of history and tradition both in the United States and abroad.[19] This is precisely the issue with using "history and tradition" as guideposts for future rights; if the United States has never recognized that right, it essentially becomes impossible for the Court to uphold it.

---

14. *See* 521 U.S. at 720–21.

15. *Id.* While the practice of looking to history to determine unenumerated rights was not a novel concept at the time of the *Glucksberg* opinion, the case represented the current rendition of the test that was employed in *Dobbs*. *See generally* Dobbs v. Jackson Women's Health Org., 142 S. Ct 2228 (2022).

16. *Glucksberg*, 521 at 708; WASH. REV. CODE § 9A.36.060(1) (1994).

17. *Glucksberg*, 521 U.S. at 708 (citing Compassion in Dying v. Washington, 850 F. Supp. 1454, 1459 (W.D. Wash. 1994)).

18. *See id.* at 711–17.

19. *See id.*

Using this depiction of history, the Court overturned the Ninth Circuit on a finding that "[t]he history of the law's treatment of assisted suicide in this country has been and continues to be one of the rejection of nearly all efforts to permit it."[20] Further, the Court found Washington's asserted purposes of preserving life, preventing suicide, and protecting the integrity of the medical profession as being related to a legitimate government interest.[21] While this does appear to evidence a strong government interest, the Court paid little to no attention to the fact that Respondents treat terminally-ill, suffering patients, all three of whom passed away before litigation even began.[22] After determining that history and tradition have explicitly banned this practice and finding a rational nexus to legitimate government interests, the Court concluded that the right to assistance in committing suicide is not protected by the Due Process Clause.[23]

B. The "History-and-Tradition" Test as Articulated in Glucksberg

The Court articulated the "history-and-tradition" test as a two-part analysis in which justices are trusted with the determination of whether a particular right is rooted in the nation's history and tradition, followed by a framing portion where justices decide exactly what the right in question is.[24]

The first prong of the test determines whether fundamental rights and liberties are, *objectively*, "deeply rooted in this Nation's history and tradition."[25] The Court's asserted justification for this prong of the test is that it "tends to rein in the subjective elements that are necessarily present in due-process judicial review."[26]

Next, the Court requires a "careful description" of the asserted fundamental liberty interest.[27] This represents the framing portion of the test where the outcome is largely determined by how the issue is framed.

---

20. *Id.* at 728.
21. *See id.*
22. *See id.* at 707.
23. *See id.* at 728.
24. *See id.* at 720–21.
25. *Id.* at 721 (citing Moore v. East Cleveland, 431 U.S. 494 (1977)). Other decisions have utilized different phrasing to express the same idea. *See, e.g.*, Snyder v. Massachusetts, 291 U.S. 97, 105 (1934) ("[S]o rooted in the traditions and conscience of our people as to be ranked as fundamental."); Palko v. Connecticut, 302 U.S. 319, 325–26 (1937) ("[N]either liberty nor justice would exist if they were sacrificed.").
26. *Glucksberg*, 521 U.S. at 722 ("In addition, by establishing a threshold requirement—that a challenged state action implicate a fundamental right—before requiring more than a reasonable relation to a legitimate state interest to justify the action, it avoids the need for complex balancing of competing interests in every case.").
27. *Id.* at 721.

In *Glucksberg*, the doctors framed the issue as a liberty to make end-of-life decisions free from government interference while the Court framed the issue to ask whether the protections in the Due Process Clause include a right to commit suicide with the assistance of another party.[28] While both framings pertain to the issue, their meanings are the difference between lightning and a lightning bug.

The issue with using historical analysis to determine whether a right is "deeply rooted in this Nation's history" is that it does not provide context as to why certain rights are or are not a part of such history. For example, the reason that abortions were "banned" in the early history of the United States was due in large part to the anti-abortion movement in which doctors feared such practices would become obsolete as more abortions were performed at home without medical supervision.[29] Abortions, and the proffered justifications for banning them, performed in the eighteenth and nineteenth centuries are so far removed from how and why they are performed today that it is nearly impossible to even compare them. The "history-and-tradition" test fails to provide the inner logic of the observed history and fails to point out *why* a certain practice or liberty interest was banned at the time. Further, the framing portion of the test renders it completely unstable. Proponents of the test argue that its primary benefit is removing unfettered judicial discretion, yet seemingly underestimate the reintroduction of stealth judicial discretion in which the recognition or rejection of a right depends on how broadly or narrowly the Court frames an issue.[30]

III. APPLICATION OF THE "HISTORY-AND-TRADITION" TEST IN *DOBBS V. JACKSON WOMEN'S HEALTH ORGANIZATION*

Despite the Court having never expressly adopted the "history-and-tradition" test as its standard in all unenumerated rights cases, Justice Alito uses this test to arrive at a result that leaves most readers of the opinion questioning the logic and effectiveness of its application. The *Dobbs* decision thoroughly highlights the inherent subjectivity and irreconcilable opinions that the test lends itself to.

28. *See id.* at 724.
29. *See infra* Section III.B.
30. *See infra* Section IV.A.

A. Justice Alito's Preamble Regarding Unenumerated Rights in Supreme Court Jurisprudence

Justice Alito begins by denouncing *Roe v. Wade* and condemning the majority opinion's breadth of history, criticizing that it "ranged from the constitutionally irrelevant (e.g., its discussion of abortion in antiquity) to the plainly incorrect."[31] Given that Justice Alito's opinion in *Dobbs* included references to the thirteenth century, it is interesting that he would discuss the scope of history used by the majority in *Roe*. Justice Alito further explains that "Americans continue to hold passionate and widely divergent views on abortion," which seems to exaggerate Americans' true feelings on the issue.[32] The opinion then provides, and accepts, Mississippi's primary argument for defending the statute at issue and holds that *Roe* ought to be overturned since neither the Constitution nor the Due Process Clause of the Fourteenth Amendment explicitly confers a right to abortion.[33]

Justice Alito then discusses the standard for evaluating unenumerated rights and declares, "any such right [not mentioned in the Constitution] must be 'deeply rooted in this Nation's history and tradition' and 'implicit in the concept of ordered liberty.'"[34] Thus, the test formulated in *Glucksberg* is expressly adopted, and it is quickly determined that abortion does not fall within "this Nation's history and tradition," paving the way for the opinion to overturn *Roe* and abrogate a woman's right to have an abortion.[35]

This represents a stark departure from the test utilized in *Obergefell v. Hodges* just seven years earlier where the Court determined that identification of unenumerated rights requires "courts to exercise reasoned judgment in identifying interests of the person so fundamental that the State must accord them its respect."[36] The Court in *Obergefell*,

31. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2240 (2022).

32. *Id.* at 2242; Hannah Hartig, *About Six-in-Ten Americans Say Abortion Should be Legal in All or Most Cases*, PEW RSCH. CTR. (June 13, 2022), https://www.pewresearch.org/fact-tank/2022/06/13/about-six-in-ten-americans-say-abortion-should-be-legal-in-all-or-most-cases-2/ (finding sixty-one percent of Americans believe abortion should be legal in all or most cases, with eighty percent of democrat or democrat-leaning voters saying abortion should be legal in all or most cases).

33. *See Dobbs*, 142 S. Ct. at 2284. Mississippi's primary argument is simply that the Court should reconsider and overturn *Roe* and *Casey* and return the determination of the legality of abortion to the individual states. Little mention is given to protecting women's health or harboring life, the State simply argues that the *Roe* Court overstepped their powers. *See id.*

34. *Id.* at 2242 (citing Washington v. Glucksberg, 521 U.S. 702, 721 (1997)).

35. *Id.*

36. Obergefell v. Hodges, 576 U.S. 644, 664 (2015); *see also* Poe v. Ullman, 367 U.S. 497, 542 (1961) (discussing the difficulty in evaluating unenumerated rights and expressing

of which six out of nine justices remained on the bench for the *Dobbs* decision, expressly rejected the "history-and-tradition" test.[37] In *Dobbs*, Justice Alito does exactly what the *Glucksberg* majority cautioned against: "[W]e must . . . exercise the utmost care whenever we are asked to break new ground in this field, lest the liberty protected by the Due Process Clause be subtly transformed into the policy preferences of the Members of this Court."[38]

B. Justice Alito's Historical Analysis Regarding the Right to Abortion

Justice Alito's thorough analysis of his hand-picked historical records concludes that both the common law and American history confer absolutely no right to abortion.[39] The basic issues with Justice Alito's historical analysis in *Dobbs* are that it includes cherry-picked history, it is read in a slanted way that does not consider the circumstances surrounding the history, and it uses extremely specific framing that essentially decides the case before it even begins.[40]

Justice Alito starts by referencing common-law authority written by Blackstone, Coke, and Hale who all regarded abortion a criminal act when it occurred after quickening, the first felt movement of a fetus in the womb.[41] Distinguishing between pre- and post-quickening abortions, Justice Alito supports the argument against pre-quickening abortions using the proto-felony-murder rule.[42] Under this rule, "if a physician gave a woman 'with child' a 'potion' to cause an abortion, and the woman died, it was 'murder' because the potion was given '*unlawfully* to destroy her child within her.'"[43] While this may have been the law at the time, a distinction hardly needs to be drawn between "potion" abortions and the

that "[d]ue process has not been reduced to any formula . . . . No formula could serve as a substitute, in this area, for judgment and restraint").

37. *Obergefell*, 576 U.S. at 664 ("The generations that wrote and ratified the Bill of Rights and the Fourteenth Amendment did not presume to know the extent of freedom in all of its dimensions, and so they entrusted to future generations a charter protecting the right of all persons to enjoy liberty as we learn its meaning.").

38. *Dobbs*, 142 S. Ct. at 2247–48 (quoting *Glucksberg*, 521 U.S. at 720).

39. *Id.* at 2278–79.

40. Robert Spitzer, *Originalism, History, and Religiosity Are the Faults of Alito's Reasoning in Dobbs*, HISTORY NEWS NETWORK (May 29, 2022), https://historynewsnetwork.org/article/183250 ("Justice Alito manages to get the history wrong. Alito says . . . that states operated under 'an unbroken tradition of prohibiting abortion on pain of criminal punishment' from its earliest days up to the 1973 *Roe v. Wade* decision legalizing abortion. Yet that is simply untrue.").

41. *See Dobbs*, 142 S. Ct. at 2249–53.

42. *See id.* at 2250–51.

43. *Id.* at 2250.

regulated, advanced procedure of abortion in the twenty-first century.[44] His focus then turns to the early colonial period, with "the few cases" confirming that abortion was a crime.[45] Finally, and swiftly, Justice Alito turns to the nineteenth century to confirm that the vast majority of states criminalized abortion at all stages of pregnancy.[46] This statement completely glosses over the exceptions multiple states had in place in which abortion was permitted to save the life of the mother.[47] In conducting his personally well-tailored historical analysis of abortion in the past 400 years, Justice Alito highlights the deficiencies and heinous results that the history-and-tradition test warrants.

Justice Alito's analysis is not only narrowly tailored to support his policy preferences, but also plainly wrong in some respects.[48] Justice Alito mentions the fact that at the time the Fourteenth Amendment was ratified, three quarters of the States criminalized abortion at all stages of pregnancy.[49] While true, it is important to realize that this was also a time in which slavery had been expressly outlawed just three years prior and women were still viewed as inferior to men.[50] While granting eight

44. A referenced case from 1732, forty-three years prior to the American Revolution and fifty-seven years before the U.S. Constitution was ratified, convicted Eleanor Beare of "destroying the [fetus] in the womb" and sentenced her to three years imprisonment. *Id.* at 2249–50. He then references another case from 1602 which mentions the practice of abortion as "pernicious" and "against the peace of our Lady the Queen, her crown and dignity." *Id.* at 2250. These two examples are so far removed from society's current understanding and viewpoints of abortion that it is almost laughable how outdated they are. It is doubtful that anyone in contemporary America would oppose abortion on the argument that it offends the peace of the Queen.

45. *Id.* at 2251. In just two paragraphs, Justice Alito references, without explanation or detail of any of the seventeenth-century cases provided, that "courts frequently explained that the common law made abortion of a quick child a crime." *Id.*

46. *Id.* at 2252–53 (explaining, however, in the same paragraph that by the 1950s, all but four States had prohibited abortion "however and whenever performed, *unless done to save or preserve the life of the mother*") (emphasis added).

47. *See id.*

48. Leslie J. Reagan, *What Alito Gets Wrong About the History of Abortion in America*, POLITICO (June 2, 2022, 04:30 AM), https://www.politico.com/news/magazine/2022/06/02/alitos-anti-roe-argument-wrong-00036174; Ksenia Andryuschenko, *The Most Effective Way to Destroy People: Propaganda about Propaganda*, NOVASIA (Apr. 8, 2018), http://novasiagsis.com/effective-way-destroy-people-propaganda-propaganda/ ("The most effective way to destroy people is to deny and obliterate their own understanding of their history.").

49. *Dobbs*, 142 S. Ct. at 2252–53.

50. *See* Carrie N. Baker, *The History of Abortion Law in the United States*, OUR BODIES OURSELVES TODAY (Aug. 2022), https://www.ourbodiesourselves.org/health-info/u-s-abortion-history/ ("The history of abortion law is intertwined with racism; slaves were subject to the rule of their owners, who generally wanted their enslaved captives to produce as many children as possible . . . . [R]estricting abortion became part of an effort to control women and confine them to a traditional childbearing role.").

pages to pre-1868 historical analysis, Justice Alito glosses over history post-1868 in just one paragraph, limiting constitutional protections to rights recognized in the infancy of the United States.[51] Abortions had historically been performed at home and not under the supervision of doctors, which gave rise to the physicians' anti-abortion movement designed to curb the use of "irregular" practitioners.[52] The new laws passed during this time contained a key exception that Justice Alito fails to mention: abortions were legal when the doctors who pushed the movement forward were the ones performing them.[53] This critical distinction is found nowhere in the *Dobbs* opinion and leaves the reader with the false notion that all abortions, under any circumstances, have been banned in the United States since its inception. This is simply not the reality.

IV. BENEFITS AND DOWNFALLS OF THE "HISTORY-AND-TRADITION" TEST & THE PROPOSED ALTERNATIVES

A. The "History-and-Tradition" Test

The "history-and-tradition" test's negative consequences and potential for abuse far outweigh its benefits. The proposed benefits to the test are far too general to serve as a legitimate rationale for the government to begin repealing unenumerated rights.

Those in favor of the test argue that it remains faithful to the Constitution in its focus on the actual words of the text by determining how a particular right was understood when the Amendment was ratified.[54] The issue is that "history" may be evidence of a consensus which provides the Court with the false notion that their decision derives from a democratic source. Another proposed rationale for the test is that it provides clarity and consistency to areas of law that have been

51. *Explaining SCOTUS's Abortion Decision in Dobbs v. Jackson Women's Health Organization*, LEAGUE OF WOMEN VOTERS (July 22, 2022), https://www.lwv.org/blog/explaining-scotuss-abortion-decision-dobbs-v-jackson-womens-health-organization ("No amount of societal change, scientific advancement, or recognition of past injustices would allow Americans any rights beyond those that a small group of white, property-owning men explicitly awarded them 200 years ago.").

52. Reagan, *supra* note 48.

53. *See id.*

54. *See generally* Joseph Greenlee, *Text, History, and Tradition: A Workable Test that Stays True to the Constitution*, DUKE CTR. FOR FIREARMS LAW (May 4, 2022), https://firearmslaw.duke.edu/2022/05/text-history-and-tradition-a-workable-test-that-stays-true-to-the-constitution/.

notoriously confused and inconsistent.[55] Aside from these broad generalizations, no source offers a clear argument for why the "history-and-tradition" test should be the de-facto standard; instead, it appears to be used because others have failed, making it the lesser of two evils in most cases.[56] Another purported rationale is that it limits judicial discretion.[57] Even if weight is given to this argument, the imputation of the test itself is a matter of judicial discretion.[58]

The "history-and-tradition" test is riddled with negative effects that leave our fundamental liberties up to interpretation by nine unelected officials.[59] The drafters of the Constitution wrote and ratified it intending for it to remain in effect forever and adapt to future advances.[60] The limited scope of the test frustrates the Court's ability to allow the Constitution to evolve.[61]

Another issue with this test is its inherent subjectivity.[62] The practices inherent in the test have been denounced as "law-office history" where judges use a "results-oriented method in which evidence is cherry-picked and interpreted to reach a preordained conclusion."[63] This is

55. *Contra* Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2450 (2022) (Sotomayor, J., dissenting) ("The Court reserves any meaningful explanation of its history-and-tradition test for another day, content for now to disguise it as established law and move on. . . . The problems with elevating history and tradition over purpose and precedent are well documented.").

56. *See* John C. Toro, *The Charade of Tradition-Based Substantive Due Process*, 4 N.Y.U. J.L. & LIBERTY 172, 177–78 (2009).

57. *See id.* at 177.

58. *See id.* at 208 (discussing that various tests have been offered in determining how to decide unenumerated rights cases with none ever having received express consent by the members of the Court).

59. *See* Erwin Chemerinsky, *History, Tradition, the Supreme Court, and the First Amendment*, 44 HASTINGS L.J. 901, 901 (1990) ("Interpreting the Constitution primarily based on history allows the meaning of an antimajoritarian document to depend on the historical practices followed by majoritarian institutions.").

60. *See* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2325 (2022) (Breyer, J., dissenting) ("The Framers (both in 1788 and 1868) understood that the world changes. So they did not define rights by reference to the specific practices existing at the time. Instead, the Framers defined rights in general terms, to permit future evolution in their scope and meaning.").

61. *See* Chemerinsky, *supra* note 59, at 901 ("Tying the Constitution to past practices inhibits the Constitution's growth and prevents essential constitutional evolution.").

62. *See* Dave Rodkey, *Making Sense of* Obergefell*: A Suggested Uniform Substantive Due Process Standard*, 79 U. PITT. L. REV. 753, 771–72 (2018) ("The conflicting views of history given within that opinion facially illustrate the subjective nature of historic analysis, especially as an objective basis of constitutional interpretation.").

63. Hassan Kanu, *Supreme Court's 'History and Tradition' Test Corrodes Church-State Barrier,* REUTERS (Oct. 5, 2022, 6:58 PM), https://www.reuters.com/legal/government/supreme-courts-history-and-tradition-test-corrodes-church-state-barrier-2022-10-05/.

exactly what was discussed earlier regarding *Dobbs*, where Justice Alito was able to hand-select specific instances and time-periods in which abortion was disallowed, while ignoring years of history in which abortion was legal and only banned to strengthen the position of practicing doctors who felt their importance and profession were in danger.[64] Justice Breyer was skeptical of the "history-and-tradition" test in his dissent in *N.Y. State Rifle & Pistol Ass'n v. Bruen*, when he asked, "will the Court's approach permit judges to reach the outcomes they prefer and then cloak [these] outcomes in the language of history?"[65]

The second prong, which focuses on the subjective framing of the issue, creates inconsistencies in the Court's framing versus those of the respective parties. In most situations, the framing of the issue is what determines the outcome of the case.[66]

In addition to *Dobbs*, *Bowers v. Hardwick* and *Lawrence v. Texas* provide other examples of the framing issue. In *Bowers,* the Court framed the issue as "whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy."[67] It is easy to see how the Court ruled no in this case, looking to the text of the Constitution. Decades later, in *Lawrence*, the Court revisited the issue and changed the framing of the question to ask "whether the petitioners were free as adults to engage in the private conduct in the exercise of their liberty under the Due Process Clause?"[68] These questions would leave most readers to assume that the Court was deciding two completely unrelated questions, despite the fact that it was essentially the same question.

B. Proposed Alternative Tests: Griswold*,* Roe*, &* Meyer

1. Justice Harlan in *Griswold*

Justice Harlan's test in the concurrence of *Griswold v. Connecticut* is more workable but comes with its own issues. Justice Harlan argues that the proper inquiry is to determine whether enactment of the challenged act, statute, or right "violates basic values 'implicit in the concept of

64. *See supra* Section III.B.

65. N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2177 (2022) (Breyer, J., dissenting) (further questioning, "[w]hat historical regulations and decisions qualify as representative analogues to modern laws?").

66. *See* Ronald Turner, *Same-Sex Marriage and Due Process Traditionalism*, 49 U. RICH. L. REV. 579, 580–81 (2015) ("As a judge enjoys discretion in framing the due process inquiry and in choosing the appropriate generalization to characterize a right, the framing and generality determinations can be outcome-influential, if not outcome determinative.").

67. *Id.* at 581 (citing Bowers v. Hardwick, 478 U.S. 186 (1986)).

68. *Id.* at 611 (citing Lawrence v. Texas, 539 U.S. 558 (2003)).

ordered liberty.'"[69] In this regard, Justice Harlan's proposed test allows for a much more robust analysis of the right in question by expanding the analysis to consider the right as it stands today, not how it was thought about hundreds of years ago. Justice Harlan recognizes the "personal" interpretation necessary of due process rights in order to keep the Constitution alive and in tune with the times.[70]

Many of the problems that exist under the "history-and-tradition" test have the potential to permeate Justice Harlan's preferred analysis as well. For example, determining whether a proposed act "violates basic values implicit in the concept of ordered liberty," retains the inherent subjectivity of the "history-and-tradition" test where justices are trusted to impute their own judgment in determining whether the right falls within these construed categories. Further, Justice Harlan's test relies heavily on the "privacy" language of the Fourth Amendment to incorporate liberty in private decisions which may not always be applicable in determining the constitutionality of unenumerated rights.[71]

2. Justice Blackmun in *Roe*

Roe v. Wade, whose decision and legal reasoning have now been overruled by *Dobbs*, expanded on the majority opinion in *Griswold* to create a substantive due process test that is guarded by a "zone of privacy."[72] The Court cites to a number of cases which have established a "zone of privacy" using various amendments and the general penumbras in the Bill of Rights.[73] All of these cases contain a common element: the fact that the Framers understood and highly valued the American people's right to be free from unwarranted government intrusion into personal matters affecting an individual's liberty. The

69. Griswold v. Connecticut, 381 U.S. 479, 500 (1965) (Harlan, J., concurring) (quoting Palko v. Connecticut, 302 U.S. 319, 325 (1937)).

70. *Id.* at 501 ("'Specific' provisions of the Constitution, no less than 'due process,' lend themselves as readily to 'personal' interpretations by judges whose constitutional outlook is simply to keep the Constitution in supposed 'tune with the times.'").

71. *Id.*

72. *See* Roe v Wade, 410 U.S. 113, 152 (1973).

73. *See generally* Stanley v. Georgia, 394 U.S. 557, 564 (1969) (explaining the First Amendment covers the right to privacy); Terry v. Ohio, 392 U.S. 1, 9 (1968) (quoting Katz v. United States, 389 U.S. 347, 361 (1967) (Harlan, J., concurring) (expanding on the Fourth and Fifth Amendments' coverage of privacy); *Griswold*, 381 U.S. at 488–89 (Goldberg, J., concurring) (discussing the importance of the Ninth Amendment's coverage of privacy); Meyer v. Nebraska, 262 U.S. 390, 399 (1923) (describing how the Fourteenth Amendment's guarantee of liberty contributes to establishing a zone of privacy); *Griswold*, 381 U.S. at 484 (majority) (encapsulating all of the above discussed rights to highlight the Framers' intent to protect American's privacy through various guarantees which create a zone of privacy).

Court in *Roe* explicitly held that the right of personal privacy includes the right of a woman to make decisions concerning abortion.[74]

The issue inherent in this method of analyzing fundamental rights is that the "zone of privacy" had been crafted using several different amendments, none of which explicitly mentioned a right of privacy and were immediately attacked by originalists and textualists. The analysis in *Roe* was simply too loose to pass judicial scrutiny and was admonished for its inability to find support in the text of the Constitution.

3. Justice McReynolds in *Meyer*

Meyer attempts to articulate the final test in which unenumerated rights and fundamental liberties are analyzed as "those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men."[75] This test appears the least subjective of the three and focuses on the right of individuals, rather than a broad analysis of the right as applied to the Nation.

While the test formulated in *Meyer* cures some of the issues apparent in the "history-and-tradition" test, it still maintains some historical analysis as its primary decision-making source. To determine whether a right is "essential to the orderly pursuit of happiness by free men," Justices are forced to conduct an historical analysis.[76] Additionally, some very important unenumerated rights may not be considered essential to the "pursuit of happiness" and would not be subject to the Court's analysis.

V. APPLICATION OF THE "HISTORY-AND-TRADITION" TEST TODAY

Among others, there are two significant concerns that will result from the current Supreme Court's adoption of the "history-and-tradition" test in unenumerated rights cases.

A. Fortifying Outdated Concepts in Unenumerated Rights Cases

Nearly all newly formulated or discovered unenumerated rights will likely be unable to satisfy the standard set out in the "history-and-tradition" test. The Court is often tasked with analyzing or formulating

74. *Roe*, 410 U.S. at 154 (explaining that whether covered under the Fourteenth Amendment, Ninth Amendment, or the penumbras in the Bill of Rights, the right of privacy is broad enough to encompass a woman's personal decision of whether or not to terminate her pregnancy).

75. 262 U.S. at 399.

76. *See id.*

unenumerated rights that are the product of technological, societal, or political advances.[77] In essence, it becomes nearly impossible to establish that a right is deeply rooted in our nation's history and tradition if that right couldn't have possibly existed at the time the Constitution was ratified.

The Ninth Amendment provides, "[t]he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."[78] This language seems to represent the exact opposite premise to that which the "history-and-tradition" test is predicated upon. For instance, the Ninth Amendment does not say, "any right not in the Constitution must be bound by history and tradition." The Framers drafted the Ninth Amendment under the assumption that it would be used to curtail overregulation by the government in denying fundamental rights retained by the people.[79] Justice Goldberg discussed the Court's practice of seemingly ignoring the text of the Ninth Amendment by explaining, "[t]o hold that a right so basic and fundamental and so deeprooted in our society as the right of privacy . . . may be infringed because that right is not guaranteed in so many words by the first eight amendments to the Constitution is to ignore the Ninth Amendment and to give it no effect whatsoever."[80]

B. Turning Back Established Unenumerated Rights

Under the current iteration of the "history-and-tradition" test, most unenumerated rights currently existing in the United States are in grave danger as the Court may now go back and find that none of these rights are deeply rooted in our Nation's history. In *Dobbs*, Justice Alito emphatically states that abortion stands alone and the Court wants

77. *See* Carpenter v. United States, 138 S. Ct 2206, 2214 (2018), which held that the government could not obtain cell-site location information without a warrant because "the retrospective quality of the data here gives police access to a category of information otherwise unknowable. In the past, attempts to reconstruct a person's movements were limited by a dearth of records and the frailties of recollection." This is an example of the Court evolving the Constitution to cover issues that were unimaginable at the time of ratification. Clearly, the Framers did not have cell-site location searches in mind when they drafted the Fourth Amendment, yet the Court here properly analyzed the scope of the Amendment to allow its adaptation in the twenty-first century.

78. U.S. CONST. amend. IX.

79. *Griswold*, 381 U.S. at 488 (Goldberg, J., concurring) ("The language and history of the Ninth Amendment reveal that the Framers of the Constitution believed that there are additional fundamental rights, protected from governmental infringement, which exist alongside those fundamental rights specifically mentioned in the first eight constitutional amendments.").

80. *Id.* at 491.

nothing to do with other unenumerated rights.[81] However, Justice Thomas directly refutes this premise in his concurrence and attacks all substantive due process rights.[82] It is illogical to assume that a particular opinion has no bearing on other similar cases.[83] There is no telling how far this could go, as the Court can now go back and overturn all unenumerated rights not deeply rooted in our nation's history.[84]

Furthermore, an entirely different category of unenumerated rights exist and are now in danger of reversal in light of *Dobbs*. This category consists of many less controversial rights that exist without question and would have never passed the "history-and-tradition" test. For example, women and minority voting would certainly not pass the test and could be subject to reversal. However, these rights have been codified through constitutional amendments, with the legislative branch recognizing their importance in American society.[85] The First Amendment is clear and concise in the rights it bestows, yet the Court has expanded it to include the right to receive and distribute information and burn flags.[86] In both cases, the Court departed from the plain language of the First Amendment and expanded its coverage to acts not explicitly protected.

---

81. Justice Alito wrote:

None of the other decisions cited by *Roe* and *Casey* involved the critical moral question posed by abortion. They are therefore inapposite. They do not support the right to obtain an abortion, and by the same token, our conclusion that the Constitution does not confer such a right does not undermine them in any way.

Dobbs v. Jackson Women's Health Organization, 142 S. Ct. 2228, 2258 (2022).

82. *Id.* at 2301 (Thomas, J., concurring) ("[I]n future cases, we should reconsider all of this Court's substantive due process precedents, including *Griswold, Lawrence,* and *Obergefell*. Because any substantive due process decision is 'demonstrably erroneous.'").

83. *See* Kenji Yoshino, *A Retro Reading of the Constitution Imperils Many Rights Beyond Abortion*, L.A. TIMES (May 6, 2022, 10:11 AM), https://www.latimes.com/opinion/story/2022-05-06/abortion-roe-supreme-court-draft-decision-unenumerated-rights ("The resurrected idea that unenumerated rights must be 'deeply rooted in this Nation's history and tradition' is obviously not limited to abortion alone.").

84. *See generally* Loving v. Virginia, 388 U.S. 1 (1967) (interracial marriage); Lawrence v. Texas, 539 U.S. 558 (2003) (same-sex sexual activity); Obergefell v. Hodges, 576 U.S. 644 (2015) (same-sex marriage); *Griswold* v. Connecticut, 381 U.S. 479, 480 (1965) (married people to buy and use contraceptives); Stanley v. Illinois, 405 U.S. 645 (1972) (children born out of wedlock); Eisenstadt v. Baird, 405 U.S. 438 (1972) (unmarried people to possess contraceptives).

85. U.S. CONST. amend. XV; U.S. CONST. amend. XIX.

86. *See* Stanley v. Georgia, 394 U.S. 557, 564 (1969) ("It is now well established that the Constitution protects the right to receive information and ideas."); Texas v. Johnson, 491 U.S. 397, 404 (1989) (quoting Spence v. Washington, 418 U.S. 405, 409 (1974)) ("The First Amendment literally forbids the abridgement only of 'speech,' but we have long recognized that its protection does not end at the spoken or written word. . . . [W]e have acknowledged that conduct may be 'sufficiently imbued with elements of communication to fall within the scope of the First and Fourteenth Amendments.'").

Professor Ronald Dworkin expands on this premise by arguing "the Constitution does not 'mention' flag burning or gender discrimination either. The right to burn a flag and the right against gender-discrimination are supported by the best interpretation of a more general or abstract right that is 'mentioned.'"[87]

VI. THE "HISTORY-AND-TRADITION" TEST'S EFFECT ON THE COURT & A NEW STANDARD MOVING FORWARD

A. Challenging the Legitimacy of the U.S. Supreme Court

The "history-and-tradition" test could seriously challenge and undermine the legitimacy of the Supreme Court. The United States is riddled with its own "history and tradition" that ought not serve as guideposts for future generations, in fear of reliving some of the worst atrocities the United States is responsible for.[88] Ideological differences on the Court will be amplified as Democrat and Republican appointees will continue to vote along partisan lines as they hand-select what history and whose tradition is relevant to certain unenumerated rights.[89]

With confidence in the Court reaching historic lows in 2022, Americans, regardless of their political affiliations, gender, or race, no longer see it as a check on other branches of government, but rather as an insulated institution where the meaning of constitutionality shifts on a case-by-case basis.[90] Because the Supreme Court is the "highest Court

87. Ronald Dworkin, *The Concept of Unenumerated Rights: Unenumerated Rights: Whether and How* Roe *Should be Overruled*, 59 U. CHI. L. REV. 381, 389 (1992) ("But it hardly follows that those concrete rights–including the right to abortion—are more remote from their textual beginnings than are concrete rights–such as the right to burn a flag–that are derived by arguments that do not employ names for rights of middling abstraction.").

88. *See* Henry Gass, *Supreme Court Turns to History: How Does Past Speak to the Present?,* CHRISTIAN SCI. MONITOR (July 11, 2022), https://www.csmonitor.com/USA/Justice/2022/0711/Supreme-Court-turns-to-history-How-does-past-speak-to-the-present ("As one historian puts it: 'What do we mean by history and tradition? Whose history? Whose tradition?'").

89. *See* Douglas Keith, *A Legitimacy Crisis of the Supreme Court's Own Making,* BRENNAN CTR. FOR JUST. (Sept. 15, 2022), https://www.brennancenter.org/our-work/analysis-opinion/legitimacy-crisis-supreme-courts-own-making ("By deciding questions it doesn't have to, making major decisions via unexplained orders, and tainting key rulings with ethical lapses, last term's decisions give the public reason to think the Court is not saying what the law is, but what the justices personally prefer it to be.").

90. *See* Jeffrey M. Jones, *Confidence in U.S. Supreme Court Sinks to Historic Low*, GALLUP (June 23, 2022), https://news.gallup.com/poll/394103/confidence-supreme-court-sinks-historic-low.aspx. Notably, this poll was conducted before the Court rendered its decision in *Dobbs*, likely bringing these levels even lower. At the time of the poll, just twenty-five percent of Americans responded to having a "great deal" of confidence in the Court. *Id.*

in the land," a society questioning the institution's legitimacy and fairness may dwindle the public's confidence in the entire legal field.[91]

B. A More Workable Standard

To maintain the legitimacy of the United States' highest Court, the "history-and-tradition" test must be replaced with a more workable standard. The Supreme Court was intended to reflect and protect the will of the people in a trusted body, separate from the other two branches of government.[92] However, the Court does exactly what Hamilton warned about by returning the issue of abortion to state legislatures despite a clear *will* of the people otherwise. The Court has tried, and failed, over several decades to determine a fair standard of analysis for unenumerated rights.[93] This Commentary offers four solutions to this issue.

1. Disregarding Originalism

The first option is to disregard originalism by framing and examining the right in *today's society*, instead of looking to see how the right was thought about in the 1700's.[94] Originalism is a process in which supporting justices argue, "the constitutional text ought to be given the original public meaning that it would have had at the time that it became

91. *See* Daniel Epps & Ganesh Sitaraman, *How to Save the Supreme Court*, 129 YALE L.J. 148, 151 (2019) ("[P]ublic confidence in the Supreme Court is impossible to disentangle from public confidence in the very idea of law itself, as an enterprise separate from politics. And a democracy that loses its confidence in law may not long survive.").

92. *See The Court and Constitutional Interpretation,* SUP. CT. OF THE U.S., https://www.supremecourt.gov/about/constitutional.aspx (last visited Oct. 27, 2023) ("Hamilton had written that through the practice of judicial review the Court ensured that the *will of the whole people*, as expressed in their Constitution, would be supreme over the will of a legislature, whose statutes might express only the temporary will of part of the people.") (emphasis added).

93. *See* Daniel O. Conkle, *Three Theories of Substantive Due Process*, 85 N.C. L. REV. 63, 63, 145 (2006) (describing three competing theories of substantive due process analysis.) The first standard involves a history-and-tradition analysis using an array of language which seemingly arrives to similar conclusions and allows judges to pick which history to include; the second involves reasoned judgment, where the Court engages in a form of political-moral reasoning, exposing the analysis to justices' personal philosophies; the third involves evolving national values, where the Court uses substantive due process to protect values that have garnered widespread support through legal developments and societal beliefs. *See id.* These three standards have been employed in an inconsistent, cherry-picked manner depending on the right at issue and the incumbent Court's political make-up.

94. *See* Obergefell v. Hodges, 576 U.S. 644, 671–72 ("[B]ut rights come not from ancient sources alone. They rise, too, from a better informed understanding of how constitutional imperatives define a liberty that remains urgent in our own era.").

law."[95] However, this method inherently maintains a level of partisan subjectivity that leaves exposed all rights not falling within the "original public meaning" of the Constitution's text.[96] All unenumerated rights concern an *individual's* ability to make *personal* decisions that should not be confined to a survey of eighteenth-century American history. Disregarding originalism entirely would help expand the breadth of the survey of unenumerated rights but would still provide judges with immense discretion to determine whether a right should be granted. The Founders intended for the Constitution to last indefinitely; originalism keeps America grounded in the past and significantly limits the Court's ability to keep up with the immense changes that have occurred since the Constitution's ratification 250 years ago.[97] Thomas Jefferson foresaw the issues that an indefinite constitution poses and, in a letter written to James Madison in 1789, explained that "[e]very constitution then, & every law, naturally expires at the end of 19 years. If it be enforced longer, it is an act of force, & not of right."[98]

On that note, many of the rights or terms necessary to analyze fundamental rights did not exist at the time the Constitution was written and thus create ambiguities and inconsistencies in decision making, depending entirely on the make-up of the Court at the time of the decision.[99]

---

95. Steven G. Calabresi, *On Originalism In Constitutional Interpretation*, NAT'L CONST. CTR., https://constitutioncenter.org/the-constitution/white-papers/on-originalism-in-constitutional-interpretation (last visited Oct. 27, 2023).

96. Tom McCarthy, *Amy Coney Barrett Is a Constitutional 'Originalist' – But What Does it Mean?*, GUARDIAN (Oct. 26, 2020 8:15 PM), https://www.theguardian.com/us-news/2020/oct/26/amy-coney-barrett-originalist-but-what-does-it-mean ("[Originalism] purports to be something that is moving outside politics, but it is – in its origins, and in the way that it has been applied in the courts – it is tightly linked to a particular partisan political orientation.").

97. *See* Lawrence Goldstone, *The Original(ist) Gender Problem*, FULCRUM (Oct. 5, 2022), https://thefulcrum.us/Government/Judicial/constitutional-originalism ("It is difficult to see how a document whose meaning is frozen in time, that cannot adapt or be adapted to the drastic changes that time and progress inevitably engender, can be an instrument for any age except the one in which it was written.").

98. Letter from Thomas Jefferson, Secretary of State, to James Madison, Congressman (Sept. 6, 1789) (on file with Founders Online) ("[I]t may be proved that no society can make a perpetual constitution, or even a perpetual law. The earth belongs always to the living generation.").

> Going back to the founders, we find them telling us to focus on our twenty-first century problems and to stop using them [the founders] as an excuse for our inaction. The stable original intent we can most likely take from them is that we all must be keenly alive to our duty to be thoughtful, compassionate citizens.

Andrew Shankman, *What Would the Founding Fathers Make of Originalism? Not Much.,* HIST. NEWS NETWORK (Mar. 19, 2017), https://historynewsnetwork.org/article/165374.

99. *See* Ken Levy, *The Problems with Originalism*, N.Y. TIMES (Mar. 22, 2017), https://www.nytimes.com/2017/03/22/opinion/the-problems-with-originalism.html ("Even if

2. Originalism as a Guidepost

The next, and the preferred option of this Commentary, is to maintain originalism as a starting point and nothing more, thereby allowing the Court to understand the original meaning of the law and then expand its coverage into twenty-first century issues. This theory of judicial philosophy is most-closely aligned with loose constructionism or the Constitution-as-a-living-document ideology. These theories allow the Court to read the Constitution expansively and do not limit justices to explicit constitutional statements. The rights analysis inquiry begins with, and is guided by, the text of the Constitution. The Court then has the power to interpret the Constitution broadly and grant rights to people that were not covered in the non-exhaustive lists of the Constitution. Justice Brennan argued for this position when he postulated, "[w]e look to the history of the time of framing and to the intervening history of interpretation. But the ultimate question must be, what do the words of the text mean in our time."[100]

The Constitution's purpose was to grant rights to the people to protect them from a too-prevailing police power attempting to curtail personal rights.[101] By understanding this purpose, the Court could determine whether, today, a new set of "Founders" would include this as right deserving protection from the Government. This standard allows the Court to maintain its respect for past decisions and *stare decisis*, while simultaneously allowing the Constitution to expand coverage to new rights, as the Founders intended.[102] Times change, and with that

---

we could find clear definitions of these terms in a dictionary, current or historical, applying these definitions to cases that the founders did not anticipate only expands the range of ambiguity (and therefore interpretive possibilities).").

100. William J. Brennan, Jr., Supreme Court Justice, Speech at Georgetown University to the Text and Teaching Symposium: The Great Debate (Oct. 12, 1985) ("For the genius of the Constitution rests not in any static meaning it might have had in a world that is dead and gone, but in the adaptability of its great principles to cope with current problems and current needs.").

101. *The Constitution,* WHITE HOUSE, https://www.whitehouse.gov/about-the-white-house/our-government/the-constitution/#:~:text=A%20chief%20aim%20of%20the,rights%20would%20be%20at%20risk. (last visited Oct. 27, 2023) ("A chief aim of the Constitution as drafted by the Convention was to create a government with enough power to act on a national level, but without so much power that fundamental rights would be at risk.").

102. *See* Brennan, *supra* note 100. As Justice Brennan stated:

> We current Justices read the Constitution in the only way that we can: as Twentieth Century Americans. We look to the history of the time of framing and to the intervening history of interpretation. But the ultimate question must be, what do the words of the text mean in our time. For the genius of the Constitution rests not in any static meaning it might have had in a world that is dead and gone, but

opinions change; strictly adhering to originalism narrows the Court's ability to recognize evolving societal views, even from those who were once the staunchest of opponents to particular rights.[103]

3. Restructuring the Court

Some issues simply can't be fixed with temporary solutions or by choosing the lesser of two evils. Instead, to protect unenumerated rights there needs to be major process changes in the Court's structure.

In terms of the Court's structure, term limits are one possible solution that would allow for changing viewpoints to sit on the bench so as not to cause partisan domination by one side for several years. As legal scholar Alexander M. Bickel warned in recognizing the lasting effects of judicial appointments, "[y]ou shoot an arrow into a far-distant future when you appoint a [Supreme Court] justice, and not the man himself can tell you what he will think about some of the problems that he will face."[104] In direct opposition to those justices who fear that upholding rights not explicitly mentioned in the Constitution will weaken the Constitution and tear down the walls of the separation of powers, the Constitution makes no mention of life appointment for Supreme Court justices.[105] Those seeking to impose term-limits on the justices, as is argued here, cite concerns regarding advanced age hindering justices' ability to perform their obligations, coupled with an inevitable disconnect from modern societal norms.[106] Those against term limits argue that removing lifetime appointments would frustrate

---

in the adaptability of its great principles to cope with current problems and current needs.

Id. Here lies the dilemma. Any making-the-Constitution-more-workable-in-the-present function entails some level of judicial discretion, yet any rejection of a standard that makes the Constitution more-workable-in-the-present undermines the Court and Constitution. Allowing the Court to adapt the Constitution to adjudicate present-day issues is a better solution than allowing American society to continue distrusting the nation's highest court.

103. *See* Tamarra Kemsley & Peggy Fletcher Stack, *In a Stunning Move, LDS Church Comes Out for Bill that Recognizes Same-Sex Marriage,* SALT LAKE TRIB. (Nov. 15, 2022, 5:27 PM), https://www.sltrib.com/religion/2022/11/15/lds-church-comes-out-federal/ ("In an unexpected move, The Church of Latter-day Saints gave its support Tuesday to a proposed federal law that would codify marriages between same-sex couples . . . . Dating as far back as the 1970s . . . the faith has combated efforts to legalize same-sex marriage . . . .").

104. HENRY J. ABRAHAM, A HISTORY OF THE U.S. SUPREME COURT APPOINTMENTS FROM WASHINGTON TO CLINTON 51 (1999).

105. U.S. CONST. art. III, § 1 ("The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour . . . .").

106. *See* Maggie Jo Buchanan, *The Need for Supreme Court Term Limits*, CAP (Aug. 3, 2020), https://www.americanprogress.org/article/need-supreme-court-term-limits/*; see also Lifetime Appointment for Supreme Court Justices*, J. MARSHALL CTR. FOR CONST. HIST. & CIVICS, https://johnmarshallcenter.org/pop-civ-13-supreme-court-lifetime-appointments/.

judiciary efficiency and significantly diminish the Court's independent function.[107] However, there is no evidence or support to substantiate this idea.

Given the immense power of unelected Supreme Court justices, and the apparent feasibility of life appointments in the eighteenth century, justices continue serving and making nation-altering decisions well into the latter stages of their lives, benefiting from an appointment system that was implemented in the eighteenth century and enjoying the immense power of their positions for longer than ever.[108] American justices now serve longer than they have, on average, at any point in U.S. history and exploit the system by retiring only when an ideologically similar president is in office.[109] Imposing a term limit of say fifteen to twenty years would actually return justice tenures to those which dominated between 1789 and 1970, where justices served an average of 14.9 years.[110] Interestingly, in an October 3, 1983, memo regarding term limits for the justices, the current Chief Justice expressly assented to this idea.[111] A rotating panel of justices would allow for fresh, eager minds to grace the bench—minds more in tune with the results of democratic elections and the will of the people.

---

107. *See* Buchanan *supra* note 106.

108. Steven G. Calabresi & James Lindgren, *Term Limits for the Supreme Court: Life Tenure Reconsidered*, 29 HARV. J.L. & PUB. POL'Y 769, 772 (2006).

> A regime that allows high government officials to exercise great power, totally unchecked, for period of thirty to forty years, is essentially a relic of pre-democratic times. Although life tenure for Supreme Court Justices may have made sense in the eighteenth-century world of the Framers, it is particularly inappropriate now, given the enormous power that Supreme Court Justices have come to wield.

Id.

109. *See Term Limits,* FIX THE COURT, https://fixthecourt.com/fix/term-limits/ (last visited Nov. 21, 2023).

> It's no longer a priority to find the best candidate for the job who will serve with integrity and who has broad life experience. Instead, the party in charge scrambles to find the youngest, often most ideological nominee . . . in order to control the seat for decades to come.

Id.

110. Calabresi & Lindgren, *supra* note 108, at 772 ("[This] would guarantee that vacancies on the Court would open up on average every two years, with no eleven-year periods without a vacancy as has happened between 1994 and 2005.").

111. Memorandum from John G. Roberts on DOJ Proposed Report on S.J. Res. 39 (Oct. 3, 1983) ("Setting a term of, say, fifteen years would ensure that federal judges would not lose all touch with reality through decades of ivory tower existence. It would also provide a more regular and greater degree of turnover among the judges. Both developments would, in my view, be healthy ones.").

VII. CONCLUSION

As with any issue of constitutional interpretation, there are those in support and those against the recognition of certain rights. This Commentary does not argue for the recognition of certain rights. Instead, it recognizes that, under the current "history-and-tradition" test, very few unenumerated rights will pass judicial scrutiny. There is no perfect solution to this issue, as evidenced by the fact that the Court has been unable to agree on a working standard for over a century. The most practical solution is to use originalism as a guidepost to understand the Framers' intent when the Constitution was ratified, and then determine whether the contested "liberty" would be protected in the twenty-first century. Regardless, unenumerated rights are under attack in the United States. Without the proper safeguards and mechanisms to limit the Court, the current six-three majority has the potential to strip all its unenumerated rights jurisprudence.

Whether this change comes in the form of one of the proposed solutions in this Commentary, or on recommendation from other sources, it is crucial that change comes quickly before Americans lose more rights that many now see as part of our nation's "history and tradition."