University of Miami Law Review

Volume 57 | Number 1 Article 4

10-1-2002

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Recommended Citation
Adam B. Wolf, *Fundamentally Flawed: Tradition and Fundamental Rights*, 57 U. Miami L. Rev. 101 (2002)
Available at: https://repository.law.miami.edu/umlr/vol57/iss1/4

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Fundamentally Flawed: Tradition and Fundamental Rights

ADAM B. WOLF*

American history is longer, larger, more various . . .
and more terrible than anything anyone has ever said about it.

—James Baldwin[1]

History, despite its wrenching pain,
Cannot be unlived, and if faced
With courage, need not be lived again.

—Maya Angelou[2]

I. INTRODUCTION

History has played a famous—and sometimes infamous—role in American jurisprudence. It has loomed prominently in many areas of Constitutional interpretation,[3] though perhaps it has most profoundly affected fundamental rights jurisprudence, where history and tradition[4] are often consulted in order to assess whether a purported right is fundamental.[5] It is surprising, therefore, that legal scholarship has virtually avoided examining the use of history in fundamental rights analysis. While some authors have concentrated on the treatment of history in

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1. James Baldwin, *A Talk To Teachers*, SATURDAY REV., Dec. 21, 1963, *reprinted in* MULTICULTURAL LITERACY 9 (Rick Simonson & Scott Walker eds., 1988).

2. Maya Angelou, *On the Pulse of Morning*, *cited in* JAMES W. LOEWEN, LIES MY TEACHER TOLD ME: EVERYTHING YOUR AMERICAN HISTORY TEXTBOOK GOT WRONG 137 (1996).

3. *See, e.g.*, New York v. United States, 505 U.S. 144, 163-66 (1992); Lee v. Weisman, 505 U.S. 577, 612-18 (1991) (Souter, J., concurring); Harmelin v. Michigan, 501 U.S. 957, 966-75 (1991); Gregory v. Ashcroft, 501 U.S. 452, 457-59 (1991); Dennis v. Higgins, 498 U.S. 439, 452-58 (1991) (Kennedy, J., dissenting). *See generally* Martin S. Flaherty, *History "Lite" in Modern American Constitutionalism*, 95 COLUM. L. REV. 523 (1995).

4. While some commentators differentiate between history and tradition, *see, e.g.*, A.C. Pritchard & Todd J. Zywicki, *Finding the Constitution: An Economic Analysis of Tradition's Role in Constitutional Interpretation*, 77 N.C. L. REV. 409, 420 (1999), I will use the terms interchangeably.

5. *See, e.g.*, Washington v. Glucksberg, 521 U.S. 702 (1997) (plurality opinion); Michael H. v. Gerald D., 491 U.S. 110 (1989); Rebecca L. Brown, *Tradition and Insight*, 103 YALE L.J. 177, 201 (1993) (commenting that "[t]radition has more recently become almost a litmus test—an all but insuperable bar to the litigant who fails to invoke it in support of a new [fundamental right]").

American Constitutional jurisprudence generally[6] and others have analyzed the role played by history in particular fundamental rights cases,[7] almost none has focused on the systematic application of history in fundamental rights doctrine.[8] In this article, I critically analyze the role of tradition in fundamental rights jurisprudence. For six reasons I conclude that a tradition of protecting or denying a purported fundamental right should not be a factor when assessing the alleged fundamentality of the right. First, in a nation in which subjugation has been more the norm than the exception,[9] relying on tradition often legitimizes and perpetuates prior discrimination. This is particularly dramatic in fundamental rights analysis, since purported fundamental rights generally implicate classifications (e.g., race, class, sexual orientation) that have subjected

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6. *See generally* Brown, *supra* note 5; Flaherty, *supra* note 3.

7. *See, e.g.*, Timothy P. Lydon, Note, *If the Parole Board Blunders, Does the Fourteenth Amendment Set the Prisoner Free? Balancing the Liberty Interests of Erroneously Released Prisoners*, 88 GEO. L.J. 565, 576-77 (2000) (describing the role played by tradition in *Glucksberg*).

8. The few articles that have discussed employing tradition in fundamental rights jurisprudence primarily have concluded that it should continue to be used, albeit to a somewhat lesser extent. *See, e.g.*, Edward P. Steegmann, Note, *Of History and Due Process*, 63 IND. L.J. 369, 398 (1988) (concluding that the "evils [of employing tradition to find fundamental rights] are by no means insubstantial—but careful consideration reveals that they are overborne by the immense goods which can flow from a proper resort to tradition"). *But see* LAURENCE H. TRIBE & MICHAEL C. DORF, ON READING THE CONSTITUTION 106 (1991) (stating that "[t]he tradition-bound approach is . . . doomed to fail" and that "even [a] limited claim for the tradition-bound approach seems insupportable"); James E. Fleming, *Fidelity, Basic Liberties, and the Specter of* Lochner, 41 WM. & MARY L. REV. 147, 148 (1999) (choosing the employment of tradition in fundamental rights jurisprudence as the single most important development in American legal history to "extinguish . . . utterly from legal memory").

Recent fundamental rights scholarship has focused on the level of abstraction at which a court should assess a purported fundamental right without much regard for the role tradition should play in the analysis, *see infra* note 139, while the fundamental rights topic that has received the most scholarly attention is whether courts should recognize unenumerated rights at all, *see* David Crump, *How Do the Courts Really Discover Unenumerated Fundamental Rights?: Cataloguing the Methods of Judicial Alchemy*, 19 HARV. J.L. & PUB. POL'Y 795, 801 (1996). I will assume that courts should recognize such rights, for, among other reasons, courts clearly do the same. *See, e.g.*, Sacramento v. Lewis, 523 U.S. 833, 856 (1998) (Kennedy, J., concurring) ("The Court is correct . . . in repeating that the prohibition against deprivations of life, liberty, or property contained in the Due Process Clause of the Fourteenth Amendment extends beyond the command of fair procedures. It can no longer be controverted that due process has a substantive component as well."); Fleming, *supra*, at 152 (commenting that "I should praise the . . . conference for accepting that substantive liberties are here to stay . . . rather than reopening the controversy whether substantive liberties as such are anomalous and illegitimate in our constitutional scheme"). Rather than question whether courts should recognize these rights, I shall press ahead to the more contemporary question of how they should be recognized.

9. *See generally, e.g.*, MARY FRANCES BERRY, THE PIG FARMER'S DAUGHTER AND OTHER TALES OF AMERICAN JUSTICE: EPISODES OF RACISM AND SEXISM IN THE COURTS FROM 1865 TO THE PRESENT (1999); MANNING MARABLE, HOW CAPITALISM UNDERDEVELOPED BLACK AMERICA (2000); HOWARD ZINN, A PEOPLE'S HISTORY OF THE UNITED STATES: 1492–PRESENT (1995).

members of such groups to disproportionate prejudice by the empowered classes.

Second, adhering to tradition contravenes the purposes of the Fourteenth Amendment. The Fourteenth Amendment was enacted to free Americans from the shackles of government-sponsored oppression, not to further past subjugation.[10] To resort to tradition in interpreting the Due Process Clause makes a mockery of the Fourteenth Amendment by adopting discrimination as the paradigm against which the government's actions are to be judged.

Third, relying on tradition often renders the fundamental rights doctrine irrelevant. As a matter of logic, employing tradition gives credence only to those views that society has valued, obviating the need to protect the practices further. If fundamental rights are limited to conduct so entrenched in the nation's history and traditions, then nobody would require a judicial determination to engage in such acts. Providing the force of law to nationally accepted ideas and practices makes the doctrine of fundamental rights immaterial.

Fourth, tradition does not facilitate the objectivity that it ostensibly provides.[11] Rather, relying on tradition sanctions jurists' personal beliefs because the judges, acting as historians, interpret history from the only perspective they know: their own. Their positionality and political ideology necessarily affect their analyses of history and tradition. For instance, the judge as historian should, though she almost never does, ask, "whose history?" As Professor John Hart Ely wondered: "Whose traditions? America's only? Why not the entire world's? (Justice Frankfurter liked to refer to the traditions of the 'English-speaking peoples.') And what is the relevant time frame? All of history? Anteconstitutional? . . . And who is to say that the 'tradition' must have been one endorsed by a majority?"[12] Typically, white, straight, wealthy, male jurists will rely on a white, straight, wealthy, male history and historical perspective.

If we are not to fall into the trap of viewing tradition as "the history of [a nation's] dominant class," as Kwame Nkrumah wrote,[13] tradition must account for the plethora of different cultures in a nation as pluralistic as the United States. This brings us to the fifth point, namely that the

10. Professor James Fleming similarly writes that "the Fourteenth Amendment embodies a scheme of 'aspirational principles' rather than merely being the Burkean deposit of 'historical practices.'" Fleming, *supra* note 8, at 156.

11. For arguments that tradition fosters objectivity and predictability, see *infra* notes 70-71 and accompanying text.

12. John Hart Ely, *Foreword: On Discovering Fundamental Values*, 92 HARV. L. REV. 5, 39 (1978) (footnotes omitted).

13. KWAME NKRUMAH, CONSCIENCISM 63 (1964).

malleability of tradition allows for great abuse in fundamental rights opinions. Jurists may rely on tradition to produce the results that satisfy their sociopolitical leanings. A monolithic interpretation of tradition can support or refute most any cause or, as the case may be, purported fundamental right. While tradition is supposedly a "neutral principle," its use in recognizing fundamental rights breeds the intellectual dishonesty and value-laden decisions that, theoretically, it is supposed to stem. Result-oriented opinions have always dotted the landscape of fundamental rights jurisprudence,[14] and the invocation of tradition as a method for finding fundamental rights has only further infused subjectivity into the doctrine.

Sixth, and finally, using tradition as an analytical tool in fundamental rights opinions perpetuates discrimination in ways that defy an educational purpose of history. That is, blind obedience to history subverts an important objective of history: to learn from it in order to follow (and improve upon) what is worthy of replication and to avoid returning to that which should not be repeated. Not distinguishing between odious and laudatory traditions allows the reinvigoration of oppression that our nation knows intimately.

A survey of fundamental rights cases—mostly Supreme Court opinions, though also lower federal court decisions—will bring to light the aforementioned problems with employing tradition as a methodological tool to assess the fundamentality of purported rights. In Part II, in order to provide context to a tradition-bound fundamental rights framework, I discuss various theories for finding unenumerated rights and document different methodologies for recognizing purported fundamental rights, including reliance on tradition. In Part III, I show how employing a tradition-based methodology to assess fundamental rights could have eviscerated prior findings of such rights. Part III also demonstrates how invoking tradition can legitimize and perpetuate prior discrimination.

Parts IV and V explore how tradition has been used to further the result-oriented mindset of jurists in cases that assess purported fundamental rights. Part IV inquires into the malleability of tradition. Whether due to jurists' result-oriented analyses, notoriously erroneous views of history, or the United States' multicultural traditions, history often yields conflicting results in fundamental rights cases. Part V looks at the uneven application of tradition by individual Justices—that is, how particular Justices employed tradition when they determined it satisfied their sociopolitical viewpoint, but shunned tradition when they believed it did not suit their interests.

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14. *See infra* Parts IV-V.

What the cases reveal is that employing tradition as a methodology to assess fundamental rights most often gives agency to racism, classism, and homophobia, among other forms of discrimination; breeds intellectual dishonesty; permits as many subjective, value-laden fundamental rights opinions as most other analytical tools; and, in the end, effectively reads out substance from the fundamental rights doctrine. To live up to the potential of the Fourteenth Amendment, to heed the warnings of history, to reject the United States' history of discrimination, and, ultimately, to restore legitimacy and relevance to fundamental rights jurisprudence, we must forego a tradition-based analysis in favor of a more honest, manageable, and just fundamental rights methodology.

Offering a substitute framework for recognizing "new" fundamental rights is outside the scope of this article. Many scholars have balked when asked to reconfigure affirmatively the jurisprudence,[15] and opposition to the current doctrine must be lodged before we turn to reshaping it. This article attempts to plant the seed of such resistance, and leaves to another day the task of formulating a jurisprudence that is more congruous, applicable, and equitable than the current tradition-bound approach.

II. "FINDING" FUNDAMENTAL RIGHTS

Before explaining why deference to tradition is inappropriate when assessing a purported fundamental right, I will briefly sketch the history of fundamental rights jurisprudence. Doing so will provide context to the applicability of tradition to fundamental rights analysis, making it even clearer that tradition has no place in the doctrine.

A. *Recognizing Unenumerated Rights*

"Simple clauses," state Professors Laurence Tribe and Michael Dorf, "don't necessarily make easy cases."[16] The Equal Protection and Due Process Clauses of the Fourteenth Amendment[17] have generated as

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15. *See, e.g.*, Cass Sunstein, *The Right to Die*, 106 YALE L.J. 1123, 1136 (1997) ("[W]hat [should be] the source of fundamental rights for purposes of substantive due process? This is one of the largest unanswered questions in American jurisprudence, and it would be foolish to attempt a full answer here."); Ely, *supra* note 12, at 55 (noting that Alexander Bickel concluded that "nothing else works" except "imposing one's own values" when attempting to devise an appropriate fundamental rights methodology).

16. TRIBE & DORF, *supra* note 8, at 33.

17. The Equal Protection and Due Process Clauses provide: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1. While most of the cases discussed in this article involve interpretations of the Due Process Clause, *see, e.g.*, Roe v. Wade, 410 U.S. 113 (1973); Meyer v. Nebraska, 262 U.S. 390 (1923), a few are fundamental

much controversy and uncertainty as any constitutional provision.[18] As one commentator noted, "[e]veryone knows that no one knows what 'substantive due process' really is."[19] What is generally accepted, however, is that there is such a thing as "fundamental rights,"[20] the denial of which must satisfy strict scrutiny in order to pass constitutional muster.[21]

Deciding which asserted "rights" are "fundamental" is no easy task, and it is the methodological framework for "finding" fundamental rights that is the subject of this article. To start, the disparate theories regarding the source of unenumerated rights specifically, and of constitutional interpretation generally, make it nearly impossible to arrive at one unifying principle for assessing the fundamentality of rights. For example, some argue that originalism should guide the approach to finding such rights. According to them, jurists asked to proclaim a "new" fundamental right must look no further than the intent of the ratifiers of the Fourteenth Amendment.[22]

Nonoriginalist approaches run the gamut. While "natural law"—that is, a "higher law" that cannot be codified[23]—is "an obvious candi-

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rights cases that were brought pursuant to the Equal Protection Clause, *see, e.g.*, Loving v. Virginia, 388 U.S. 1 (1967); Harper v. Va. State Bd. of Elections, 383 U.S. 663 (1966).

18. *See* Jason S. Marks, *Beyond Penumbras and Emanations: Fundamental Rights, the Spirit of the Revolution, and the Ninth Amendment*, 5 SETON HALL CONST. L.J. 435, 437-38 (1995) (commenting that the "right of privacy . . . has become perhaps the most prominent topic of contemporary jurisprudence").

19. Jay Michaelson, *On Listening to the Kulturkampf, or, How America Overruled* Bowers v. Hardwick, *Even Though* Romer v. Evans *Didn't*, 49 DUKE L.J. 1559, 1582 (2000).

20. Not everyone accepts the phrase "fundamental rights." *See* Crump, *supra* note 8, at 801 ("Not all of the Justices appear to accept the terminology of fundamental rights . . . . Sometimes the cases refer to interests as 'significant' or use similar designations."). Nonetheless, I will employ the term due to its general acceptance.

21. *See, e.g.*, Clark v. Jeter, 486 U.S. 456, 461 (1988). The only fundamental right not subject to strict scrutiny is the right to abortion. *See* Planned Parenthood of S.E. Pa. v. Casey, 505 U.S. 833, 874 (1992) (plurality opinion) (applying the "undue burden" test to restrictions on a woman's fundamental right to an abortion).

22. *See, e.g.*, RAOUL BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT 363-64, 407-08, 417-18 (1977); ROBERT H. BORK, THE TEMPTING OF AMERICA 264-65 (1989) (commenting that "[w]hen a court strikes down a statute, it always denies the freedom of the people who voted for the representatives who enacted the law. . . . That is what is always involved when constitutional adjudication proceeds by a concern for results rather than by concern for reasoning from original understanding"); Robert H. Bork, *Styles in Constitutional Theory*, 26 S. TEX. L. REV. 383 (1985); Edwin Meese III, *The Supreme Court of the United States: Bulwark of a Limited Constitution*, 27 S. TEX. L. REV. 455 (1985); Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849 (1989). *See generally* Crump, *supra* note 8, at 819-24. Even within originalism—a fairly inflexible methodology—there are different factions. *See* GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 786-87 (3d ed. 1996) (describing the difference between "hard originalists" and "soft originalists"); Crump, *supra* note 8, at 824 (distinguishing between "sophisticated originalists" and "strict originalists").

23. Thomas C. Gray, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703, 716 (1975) ("Thus in the framing of the original American constitution it was widely accepted that

date in the search for a source of values to give content to the Constitution's open-ended provisions,"[24] it is a theory that is ridiculed in all but the most conservative circles.[25] Others advance a "moral" reading of the Constitution, pursuant to which the Constitution is a living document that must change as society evolves. Professor Alexander Bickel wrote:

> [Government] should serve not only what we conceive from time to time to be our immediate material needs but also certain enduring values. . . . [Such values] must be continually derived, enunciated, and seen in relevant application. [Judges] have certain capacities for dealing with matters of principle that legislatures and executives do not possess. . . . Judges have, or should have, the leisure, the training, and the insulation to . . . pursu[e] the ends of government. This is crucial in sorting out the enduring values of a society.[26]

Many other forms of nonoriginalism, such as the representation-reinforcement theory[27] and the constitution-perfecting theory,[28] have been proposed to ground constitutional interpretations. Some attempt to blend originalism and nonoriginalism.[29] A few, such as Professor Ely's representation-reinforcement theory, have received significant critical

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there remained unwritten but still binding principles of higher law."). For an argument that the framers of the Constitution intended for the judiciary to protect people's natural rights, see generally HADLEY ARKES, FIRST THINGS: AN INQUIRY INTO THE FIRST PRINCIPLES OF MORALS AND JUSTICE (1986); Suzanna Sherry, *The Founders' Unwritten Constitution*, 54 U. CHI. L. REV. 1127 (1987).

24. Ely, *supra* note 12, at 23.

25. *See id.* at 29 (commenting that "[i]t . . . has become increasingly evident that the only propositions with a prayer of passing themselves off as 'natural law' are those so uselessly vague that no one will notice"). Ironically, one reason for the downfall of the natural law movement was that it provided no certainty to the interpretation of Constitutional provisions. "Natural law has had as its content whatever the individual in question desired to advocate." *Id.* at 28 (internal quotations omitted) (noting that natural law was "invoked on both sides of the slavery question").

26. ALEXANDER BICKEL, THE LEAST DANGEROUS BRANCH 24-26 (1962).

27. John Hart Ely is the most notable adherent of the representation-reinforcement theory, which seeks to interpret the Constitution in ways that best promote democracy. *See, e.g.*, JOHN HART ELY, DEMOCRACY AND DISTRUST 7-8, 87-88 (1980):

> [Rule] in accord with the consent of a majority is the core of the American governmental system. . . . The tricky task [is to promote] a way [of] protecting minorities from majority tyranny that is not a flagrant contradiction of the principle of majority rule. . . . [T]he [Constitution is] overwhelmingly concerned . . . with ensuring broad participation in the processes [of] government.

28. Professor James Fleming has proposed synthesizing various representation-reinforcement theories to achieve a "constitutional constructivism, a Constitution-perfecting theory," which Fleming describes as a "theory of constitutional democracy and trustworthiness, an alternative to Ely's theory of representative democracy and distrust and to [Cass] Sunstein's theory of deliberative democracy and impartiality." James E. Fleming, *Constructing the Substantive Constitution*, 72 TEX. L. REV. 211, 219 (1993).

29. See Lawrence Lessig, *Fidelity in Translation*, 71 TEX. L. REV. 1165, 1173 (1993), for a theory of constitutional interpretation that attempts to blend the ratifiers' intent with the challenges and realities of contemporary society.

attention, while others are less well known.[30]

Naturally, one's theoretical model for constitutional interpretation informs one's methodology for finding fundamental rights. An originalist, for example, is unlikely to rely on her personal notions of liberty or justice when assessing whether a purported right is fundamental. Not surprisingly, then, the methodologies used to find fundamental rights are as varied and distinct as the models of constitutional interpretation upon which they are based.

B. *Tradition and Other Sources of Fundamental Rights*

While tradition is the current, generally accepted methodology for assessing purported fundamental rights, jurists have employed many other analytical frameworks to evaluate the fundamentality of asserted rights. Reviewing a broad spectrum of fundamental rights cases will reveal the myriad methodologies for finding such rights and will chronicle—and perhaps explain—tradition's rise to prominence in fundamental rights jurisprudence.

The earliest fundamental rights opinions date back to an era to which few wish to return: economic substantive due process.[31] The "*Lochner* era"[32] was the Court's first recognition that the Due Process Clause should embrace more than certain procedural safeguards. The Supreme Court, between 1890 and 1937, routinely held that state legislation designed to protect workers against growing capitalistic interests was unconstitutional because it interfered with the liberty of contract protected by the Due Process Clause.[33] Its justification for recognizing a fundamental right to contract, however, is not so clear. The Justices

30. *See, e.g.*, Pritchard & Zywicki, *supra* note 4. Professor Pritchard's and Zywicki's "finding model" looks to the common law and state constitutional law to assess purported unenumerated rights. *See id.* at 409.

31. One commentator described economic substantive due process as a "dark and prickly thicket." Lois Shepherd, *Looking Forward with the Right of Privacy*, 49 U. KAN. L. REV. 251, 254 (2001). *See also, e.g.*, Lucas v. S.C. Coastal Council, 505 U.S. 1002, 1069 (1992) (Stevens, J., dissenting) (voicing concern that the *Lucas* Court's holding "would represent a return to the era of *Lochner*") (quoting PruneYard Shopping Ctr. v. Robins, 447 U.S. 74, 93 (1980) (Marshall, J., concurring)); Eisenstadt v. Baird, 405 U.S. 438, 467 (1972) (Burger, J., dissenting) (criticizing the *Eisenstadt* majority for "hark[ening] back to the heyday of substantive due process").

32. The *Lochner* era derives its name from the most famous economic substantive due process case, *Lochner v. New York*, 198 U.S. 45 (1905).

33. *Mugler v. Kansas*, 123 U.S. 623 (1887), was the first Supreme Court opinion to recognize the substantive component of due process, even though the Court upheld the law in question in *Mugler*. In 1890, the Court explicitly adopted fundamental rights in *Chicago, Milwaukee & St. Paul Ry. Co. v. Minnesota*, 134 U.S. 418 (1890). *See generally* WILLIAM M. WIECEK, LIBERTY UNDER LAW: THE SUPREME COURT IN AMERICAN LIFE 118 (1988) (reviewing these early economic substantive due process opinions). Faced with the threat of President Franklin Delano Roosevelt's court-packing plan, economic substantive due process suffered an ignominous death in 1937. *See* STONE ET AL., *supra* note 22, at 215 (explaining that "the real point of [Roosevelt's]

provided little to no explanation for their reasons for finding this fundamental right, leading some to speculate that the Justices resorted to lofty yet unsupportable notions of liberty, and others to contend that the Justices were motivated by "a sincere commitment to the protection of human liberty."[34]

Due in part to an emerging criticism of *Lochner* and its progeny, jurists sought not to turn their backs on fundamental rights altogether, but rather to leave the arena of economic due process and find other fundamental rights with more certain methodologies than did the *Lochner* Court. *Meyer v. Nebraska*[35] and *Pierce v. Society of Sisters*[36] were the Court's next two major fundamental rights opinions. Holding that parents have a fundamental right to direct the education of their children, the *Meyer* Court relied on American tradition.[37] *Pierce*, somewhat less analytically interesting than *Meyer*, merely relied on *Meyer* to hold that an Oregon law requiring that parents of children between eight and sixteen years send their children to public school violated parents' fundamental right to "direct the upbringing . . . of children."[38] Thus, by 1925, the Court had identified three methodologies to find fundamental rights: abstract notions of liberty, tradition, and precedent.[39]

Two decades later, Justice Frankfurter expanded on *Meyer*'s invocation of tradition. Ruminating on the problems with interpreting the seemingly open-ended Due Process and Equal Protection Clauses, which he termed "phrases of large generalities," Frankfurter stated:

> But they are not generalities of unillumined vagueness; they are gen-

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court-packing plan was to increase the number of justices who would find New Deal legislation constitutional" or to force the Justices to capitulate to the legislation).

34. Shepherd, *supra* note 31, at 255-56; *see also* WIECEK, *supra* note 33, at 114-15 (stating that many judges during the *Lochner* era considered "protect[ing] human liberty as [their] highest goal"). *See generally* Michael Les Benedict, *Laissez-Faire and Liberty: A Re-Evaluation of the Meaning and Origins of Laissez-Faire Constitutionalism*, 3 LAW & HIST. REV. 293 (1985) (explaining that *Lochner*-era judges adhered to a political ideology that eschewed government interference at the expense of human liberty).

35. Meyer v. Nebraska, 262 U.S. 390 (1923).

36. Pierce v. Soc'y of Sisters, 268 U.S. 510 (1925).

37. The Court focused on its contention that "[t]he American people have always regarded education and acquisition of knowledge as matters of supreme importance which should be diligently promoted," and that "establish[ing] a home and bring[ing] up children . . . [was a] privilege long recognized at common law as essential to the orderly pursuit of happiness by free men." *Meyer*, 262 U.S. at 399-400. Later in this article I will discuss how *Meyer* jibes with a host of fundamental rights cases that misinterpret—deliberately or not—American history. *See infra* Part IV.B.1.

38. *Pierce*, 268 U.S. at 534-35 (concluding that "[t]he 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").

39. I distinguish throughout this article between tradition and judicial precedent when the holding of the precedent relied upon is not grounded in tradition or history.

> eralities circumscribed by history and appropriate to the largeness of the problems of government with which they were concerned. . . . The safeguards of "due process of law" and "the equal protection of the laws" summarize the history of freedom of English-speaking peoples running back to [the] Magna Carta and reflected in the constitutional development of our people.[40]

Similarly, in 1934 Cardozo opined that a purported right is fundamental when infringement upon the alleged right would "offend some principle of justice so rooted in the traditions and conscience of our people."[41] At the same time, Cardozo proposed another fundamental rights methodology, one that would be relied upon long after he retired from the bench: whether the purported right is "implicit in the concept of ordered liberty."[42]

As the Court headed toward the second half of the twentieth century, its fundamental rights docket expanded, as did the Justices' methodologies for finding such rights. In 1952, for example, Justice Frankfurter attempted to blend some of the methodologies discussed above. He proposed that judges assessing a purported fundamental right should ask whether proscribing the conduct would "offend those canons of decency and fairness which express the notions of justice of English-speaking peoples," and whether the conduct was "so rooted in the traditions and conscience of our people as to be ranked as fundamental . . . or implicit in the concept or ordered liberty."[43] Attempting to preempt criticism of a methodology that grants jurists nearly unbridled discretion, Frankfurter wrote:

> In dealing not with the machinery of government but with human rights, the absence of formal exactitude, or want of fixity of meaning, is not an unusual or even regrettable attribute of constitutional provisions. . . .
>
> . . . .
>
> The vague contours of the Due Process Clause do not leave judges at large. . . . Even though the concept of due process of law is

40. Malinski v. New York, 324 U.S. 401, 413-14 (1945) (Frankfurter, J., concurring).

41. Snyder v. Massachusetts, 291 U.S. 97, 105 (1934) (holding that a criminal defendant does not possess a fundamental right to be present when the prosecutor takes a field trip with the jury to the scene of the crime because the defendant traditionally has not been present at such a viewing).

42. Palko v. Connecticut, 302 U.S. 319, 325 (1937) (holding that a criminal defendant does not have a fundamental right to be free from the government's appealing a ruling in a criminal case), *overruled on other grounds*, Benton v. Maryland, 395 U.S. 784 (1969). Justice Souter, for example, recently invoked the "concept of ordered liberty" test in *Washington v. Glucksberg*, 521 U.S. 702, 765 (1997) (Souter, J., concurring).

43. Rochin v. California, 342 U.S. 165, 169 (1952) ("[T]he Court's function in the observance of this settled conception of the Due Process Clause does not leave us without adequate guides in subjecting [statutes] to constitutional judgment.") (quoting *Snyder*, 291 U.S. at 105).

not final and fixed, these limits are derived from considerations that are fused in the whole nature of our judicial process.[44]

Such opinions welcoming fundamental rights paved the way for a fundamental rights revolution—an expansion of fundamental rights that eventually resulted in the fundamental rights backlash in which we currently are mired. *Poe v. Ullman*,[45] in which the Court's plurality opinion actually did not reach the fundamental rights issue,[46] kicked off the judiciary's 1960s fundamental rights explosion. Concluding that a Connecticut statute prohibiting the use of contraceptives violated married couples' right to privacy, Justice Douglas's dissent in *Poe* found a right for married individuals to use contraceptives because it was "implicit in the concept of ordered liberty."[47]

Justice Harlan similarly dissented, also concluding that the statute ran afoul of plaintiffs' fundamental right to use contraception. He employed a vastly different methodological framework, however, to assess the fundamentality of the purported right. Concerned that the Due Process Clause "is not self-explanatory" and that "the history of the Amendment also sheds little light on the meaning of the provision," Harlan inquired into "the balance which our Nation, built upon postulates of respect for the liberty of the individual, has struck between that liberty and the demands of organized society."[48] In other words, Harlan returned to tradition as a source of fundamental rights. If the United States has traditionally protected a freedom to use contraceptives, it should be deemed "fundamental"; if it has not been historically recognized, then it should not receive the legal protection of a fundamental right.[49]

Only four years later, in *Griswold v. Connecticut*,[50] the Court reversed course and found that a Connecticut law forbidding the use of contraceptives unconstitutionally intruded on the right of marital privacy. Holding that the law violated married couples' fundamental right

44. *Id.* at 169-70.

45. Poe v. Ullman, 367 U.S. 497 (1961).

46. A plurality of the Court held that the *Poe* plaintiffs' claims were not ripe for adjudication because Connecticut tacitly agreed not to prosecute individuals for violations of the state law. *See id.* at 507-08.

47. *Id.* at 518 n.9 (Douglas, J., dissenting) (quoting OWEN J. ROBERTS, THE COURT AND THE CONSTITUTION 80 (1951)).

48. *Id.* at 542 (adding that "[t]he balance of which I speak is the balance struck by this country, having regard to what history teaches are the traditions from which it developed as well as the traditions from which it broke. That tradition is a living thing").

49. Perhaps not recognizing the significant differences between Harlan's and Douglas's dissents, and not mindful of the import that such differences would have on fundamental rights jurisprudence in the future, Justice Stewart dissented separately, stating that he agreed with both Harlan and Douglas. *See id.* at 555.

50. Griswold v. Connecticut, 381 U.S. 497 (1965).

to use contraception, the Justices employed a variety of methodological frameworks, including precedent,[51] abstract understandings of and respect for marriage,[52] tradition,[53] and the concept of ordered liberty.[54]

Fundamental rights figured prominently on the Supreme Court's docket during the next twenty years. From *Loving v. Virginia*[55] to *Stanley v. Georgia*,[56] *Roe v. Wade*,[57] *San Antonio Independent School District v. Rodriguez*,[58] *Moore v. City of East Cleveland*,[59] and *Zablocki v. Redhail*,[60] fundamental rights was the buzzword at the Court. Nevertheless, the Justices' fundamental rights opinions during this period were marked more by quantity than consistency. Resorting to all of their previous fundamental rights methodologies, the opinions were, at best, a pastiche of constitutional interpretation. While fundamental rights was gaining near-unanimous acceptance, the judiciary lacked a coherent and uniform approach to finding them. Perhaps most disturbing was that the Justices almost never seemed to recognize their analytical differences and the implications of such differences on the jurisprudence.[61]

The Justices' reluctance to acknowledge explicitly their disparate fundamental rights methodologies lasted until 1986. *Bowers v. Hardwick*[62] and *Michael H. v. Gerald D.*[63] brought the issue to the forefront. In each case, the Court's opinion held that the purported right in question was not a fundamental right, and the dissents found a fundamental right. Not surprisingly, the majority opinions grounded their fundamental rights analyses in tradition, while the dissents refused to do so.[64]

51. *See id.* at 484 (plurality opinion), 486-87, 495 (Goldberg, J., concurring).
52. *See id.* at 486 (plurality opinion).
53. *See id.* at 493 (Goldberg, J., concurring), 501 (Harlan, J., concurring).
54. *See id.* at 500 (Harlan, J., concurring).
55. 388 U.S. 1 (1967).
56. 394 U.S. 557 (1969).
57. 410 U.S. 113 (1972).
58. 411 U.S. 1 (1973).
59. 431 U.S. 494 (1977).
60. 434 U.S. 374 (1978).
61. See, for example, *Poe v. Ullman*, 367 U.S. 497, 555 (1961) (Stewart, J., dissenting), discussed *supra* note 46.
62. 478 U.S. 186 (1986).
63. 491 U.S. 110 (1989).
64. *Compare id.* at 123 (plurality opinion) ("insist[ing] that the asserted liberty interest be rooted in history and tradition"), *with id.* at 136-42 (Brennan, J., dissenting) (disavowing the use of tradition to recognize purported fundamental rights); *id.* at 157-58, 161 (White, J., dissenting) (relying on precedent exclusively and stating that there is "no reason to debate the plurality's . . . ancient policy concerns"). *Compare Bowers*, 478 U.S. at 192-94 (emphasizing that "[p]roscriptions against [the alleged fundamental right] have ancient roots"), *id.* at 196-97 (Burger, J., concurring) (adhering to "millennia of moral teaching"), *id.* at 198 n.2 (Powell, J., concurring) ("I cannot say that conduct condemned for hundreds of years has now become a fundamental right."), *with id.* at 210 (Blackmun, J., dissenting) ("I cannot agree that either the length of time a majority has held its convictions or the passions with which it defends them [is

Importantly, and unlike the Court's prior fundamental rights opinions, the dissenting Justices expressly rejected tradition as an analytical tool to assess purported fundamental rights. Justice Blackmun, dissenting in *Bowers*, commented:

> Essentially . . . the Court agree[s] that the fact that the acts [of sodomy] for hundreds of years, if not thousands, have been uniformly condemned as immoral is a sufficient reason to permit a State to ban them today.
>
> I cannot agree that either the length of time a majority has held its convictions or the passions with which it defends them can withdraw legislation from this Court's scrutiny. . . .
>
> . . . .
>
> The assertion that traditional Judeo-Christian values proscribe the conduct involved cannot provide an adequate justification for [criminalizing sodomy]. . . . [M]ere public intolerance or animosity cannot constitutionally justify the deprivation of a person's physical liberty.[65]

Justice Stevens's *Bowers* dissent[66] and Justice Brennan's dissent in *Michael H.*[67] similarly eschewed the Court's reliance on tradition.

With its acceptance by the Court in *Bowers* and *Michael H.*, as well as in its most recent fundamental rights cases,[68] tradition has become the primary—if not the exclusive—fundamental rights methodology.[69] Some view this sub-revolution in fundamental rights jurisprudence as a way for jurists' personal predilections to be displaced by a "neutral principle."[70] These proponents of tradition view it as "disinterested" and

relevant to fundamental rights analysis]."), *id.* at 216 (Stevens, J., dissenting) (commenting that "the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for [not recognizing a fundamental right]").

65. *Bowers*, 478 U.S. at 210-12 (Blackmun, J., dissenting) (internal citations and quotations omitted).

66. *Michael H.*, 491 U.S. at 137 (Brennan, J., dissenting) (concluding that in invoking tradition in its fundamental rights analysis, "the plurality has not found the objective boundary that it seeks").

67. *See id.* at 216 (Stevens, J., dissenting).

68. *See, e.g.*, Washington v. Glucksberg, 521 U.S. 702 (1997) (plurality opinion).

69. In the aftermath of *Bowers* and *Michael H.*, Professor Rebecca Brown noted: "[T]radition has more recently become almost a litmus test—an all but insuperable bar to the litigant who fails to invoke it in support of a new [fundamental right]." Brown, *supra* note 5, at 201.

70. For example, Professor Michael McConnell writes about using tradition in fundamental rights analysis: "In principle, judges of diametrically opposed opinions on the wisdom or justice of the challenged law should reach the same legal conclusion, since the decision will hinge on objective historical fact rather than on normative judgment." Michael W. McConnell, *The Right to Die and the Jurisprudence of Tradition*, 1997 UTAH L. REV. 665, 672. *See also, e.g.*, James Bopp, Jr. & Richard E. Coleson, Webster *and the Future of Substantive Due Process*, 28 DUQ. L. REV. 271, 282 (1990) ("To prevent [result-oriented approaches to purported fundamental rights], the new working majority on the Court has endeavored to establish neutral principles to govern its decisions.").

"objective."[71] Others defend tradition as an avenue for jurists to express the will of the majority.[72]

Nonetheless, employing tradition to assess purported fundamental rights has significant drawbacks. The remainder of this article is devoted to exploring the problems with using tradition in fundamental rights jurisprudence.

III. TRADITION: FUNDAMENTALLY EVISCERATING FUNDAMENTAL RIGHTS

Tradition strips substance from fundamental rights jurisprudence. Among other problems with using tradition as a source for purported fundamental rights (explored in subsequent sections of this article), "judicial insistence that the asserted liberty interest be rooted in history and tradition . . . is a way to reduce dramatically or eliminate altogether the opportunity for litigants to establish a successful claim to constitutional protection."[73] While this point should be obvious, it has been relatively unexplored in judicial case law or scholarly projects.

There are two basic reasons why employing tradition to assess fundamental rights renders the doctrine a nullity. The first was identified by Justice Brennan in *Michael H.*:

> [B]y describing the decisive question as whether [plaintiffs'] interest is one that has been traditionally protected by our society . . . and by suggesting that our sole function is to discern the society's views, the plurality acts as if the only purpose of the Due Process Clause is to confirm the importance of interests already protected by a majority of the States. Transforming the protection afforded by the Due Process Clause into a redundancy mocks those who, with care and purpose, wrote the Fourteenth Amendment.[74]

71. *See, e.g.*, Crump, *supra* note 8, at 860.

72. *See, e.g.*, McConnell, *supra* note 70, at 667, 672 (commenting that "courts have no authority to displace the decisions of the representatives of the people" and that "[t]he effect [of relying on tradition] is to allow the democratic, decentralized institutions of the country to continue to ponder the issue"); Gregory C. Cook, Note, *Footnote 6: Justice Scalia's Attempt to Impose a Rule of Law on Substantive Due Process*, 14 HARV. J.L. & PUB. POL'Y 853, 869 (1991) ("Perhaps the strongest argument for the Supreme Court's use of tradition is its inherently democratic character.").

73. Brown, *supra* note 5, at 202 (quoting Michael H. v. Gerald D., 491 U.S. 110, 123 (1989)) (internal quotations omitted); *see also* TRIBE & DORF, *supra* note 8, at 104; Fleming, *supra* note 8, at 160 ("Through his [tradition-based] methodology, Rehnquist, like Scalia, is engaging in damage control; his concerns are not merely to decline to extend [fundamental rights] cases, but also to gut the cases of any vitality or generative force."); Robin West, *The Ideal of Liberty: A Comment on* Michael H. v. Gerald D., 139 U. PA. L. REV. 1373, 1375 (1991) ("Scalia's position, if accepted, would undermine not only *Michael H.* but also virtually every major substantive due process case of the last twenty years.").

74. *Michael H.*, 491 U.S. at 140-41 (Brennan, J., dissenting) (internal citations, emphasis, and quotation omitted).

There is no need for a court to recognize fundamental rights, of course, if they are restricted to rights that society always has protected.[75] Rather, it is precisely because the practice in question has not been traditionally recognized that it would need the protection accorded fundamental rights.[76]

Second, in a nation whose history is riddled with oppression,[77] relying on tradition often only reinforces such injustice. In other words, resorting to tradition in assessing fundamental rights usually works to ratify prior discrimination. It perpetuates racism, classism, and misogyny, among other forms of discrimination, a result that nullifies the countermajoritarian purpose of the Fourteenth Amendment.

The following examination of fundamental rights cases reveals the discriminatory effect of using tradition to assess fundamental rights. It further demonstrates how using tradition as an analytical tool to assess fundamental rights strips fundamental rights of meaning and violates the spirit of the Fourteenth Amendment. These opinions, in which the Supreme Court or lower courts found fundamental rights without resorting to tradition, likely would have reached opposite conclusions had the courts used tradition to assess the fundamental rights at issue.[78]

A. *Right to Marriage*

Loving and *Zablocki* establish a fundamental right to marry.[79] Yet, in finding such a right, neither opinion assessed whether marriage is deeply rooted in tradition and history. There is a good reason that the Court did not conduct such an examination; subjecting the right to marry to the "tradition test" would possibly have compelled a finding that there is no such fundamental right. *Zablocki* struck down a Wisconsin law

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75. Professor Brown expressed the same idea in more forgiving terms: "reliance on tradition as a basis for the definition of constitutional protection is a societal statement of complacency." Brown, *supra* note 5, at 204.

76. *See, e.g.*, Lynn Marie Kohm, *Liberty and Marriage*—Baehr *and Beyond: Due Process in 1998*, 12 BYU J. PUB. L. 253, 268 (1998) (arguing for a fundamental right for same-sex marriage and claiming that precisely "[b]ecause same-sex marriage is not deeply rooted in history and tradition . . . , a new fundamental right must be recognized").

77. *See supra* note 9.

78. The fact that prior fundamental rights cases probably would have been decided differently had the courts relied on tradition to assess the fundamentality of the right in question is not a novel observation. *See, e.g.*, Bowers v. Hardwick, 478 U.S. 186, 210 (1986) (Blackmun, J., dissenting) (recognizing that the Court would not have found a fundamental right in *Roe v. Wade*, 410 U.S. 113 (1973), and *Loving v. Virginia*, 388 U.S. 1 (1967), had the Court assessed the fundamentality of the right in question in light of tradition); *id.* at 216 (Stevens, J., dissenting) (referring to *Loving* and commenting that "neither history nor tradition could save a law prohibiting miscegenation from constitutional attack").

79. *See* Zablocki v. Redhail, 434 U.S. 374, 383-87 (1978); *Loving*, 388 U.S. at 12. While the Supreme Court has found a fundamental right to marry, it is worth noting that the right is, in fact, not extended to all people (e.g., lesbians and gay men). *See, e.g.*, *infra* note 83.

that prohibited certain individuals from obtaining a marriage license because it violated their fundamental right to marry.[80] While the Court wrote that "the right to marry is of fundamental importance" and that "[m]arriage is one of the 'basic civil rights of man,'"[81] it did not explore how tradition supports the fundamentality of marriage.

United States history is replete with examples of the systematic denial of the right to marry. Most obviously, Black Americans have been refused the right to marry for far longer than they have known the freedom to marry; Black slaves in the United States were prohibited from marrying.[82] Moreover, lesbians and gay men traditionally have never been allowed to marry, and, in almost every state, they continue to be unable to enter into marriage.[83] Furthermore, throughout this nation's history, some states have prohibited marriage to certain individuals, such as "genetic undesirables,"[84] based on other immutable characteristics.

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80. *See Zablocki*, 434 U.S. at 388-91.

81. *Id.* at 383 (quoting *Loving*, 388 U.S. at 12 (quoting Skinner v. Oklahoma, 316 U.S. 535, 541 (1942))).

82. *See* Laura F. Edwards, *"The Marriage Covenant Is at the Foundation of All Our Rights": The Politics of Slave Marriages in North Carolina After Emancipation*, 14 L. & HIST. REV. 81, 90 (1996) (explaining that in North Carolina, "[t]he law had not recognized slave marriages, and emancipation did not make them legal"); Ariela Gross, *Beyond Black and White: Cultural Approaches to Race and Slavery*, 101 COLUM. L. REV. 640, 660 n.82 (2001) (noting that "there [was] no legally-sanctioned marriage between slaves," notwithstanding the misnomer "slave marriage," which merely represented "cohabitation" between male and female slaves); Andrew E. Taslitz, *Hate Crimes, Free Speech, and the Contract of Mutual Indifference*, 80 B.U. L. REV. 1283, 1330 n.333 (2000) (pointing out that "slave marriage" was not legally recognized).

83. *See, e.g.*, Baehr v. Lewin, 852 P.2d 44, 57 (Haw. 1993) (concluding that "we do not believe that a right to same-sex marriage is so rooted in the traditions and collective conscience of our people"); Dean v. District of Columbia, 653 A.2d 307, 331 (D.C. 1995) (holding that "same-sex marriage is not a 'fundamental right' . . . because that kind of relationship is not 'deeply rooted in this Nation's history and tradition'") (citation omitted); Jones v. Hallahan, 501 S.W.2d 588, 589 (Ky. 1973) ("[M]arriage has always been considered as the union of a man and a woman . . . ."); Baker v. Nelson, 191 N.W.2d 185, 186-87 (Minn. 1971) (finding that while "[t]he institution of marriage as a union of man and woman . . . is as old as the book of Genesis," there is no support in the traditions of the United States to support a fundamental right to marriage between people of the same gender). In addition to judicial precedent and statutes, dictionary definitions of "marriage" similarly exclude the possibility of a same-sex marriage. *See* BLACK'S LAW DICTIONARY 972 (6th ed. 1990) (defining "marriage" as the "[l]egal union of one man and one woman as husband and wife"); WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1384 (Phillip Babcock Grove et al. eds., 1993) (defining "marriage" as "the state of being united to a person of the opposite sex as husband or wife"); BLACK'S LAW DICTIONARY 762 (2d ed. 1910) (defining "marriage" as "the civil status of one man and one woman united in law for life"); WEBSTER'S MODERN DICTIONARY 281 (1902) (defining "marriage" as "unit[ing] in wedlock or matrimony; join[ing], as a man and woman, for life; mak[ing] man and wife"). *But see* An Act Relating to Civil Unions, 2000 Vt. Acts & Resolves 91 (granting same-sex couples many, but not all, of the rights of marriage).

84. Adam B. Wolf, *What Money Cannot Buy: A Legislative Response to CRACK*, 33 U. MICH. J.L. REFORM 173, 188 (1999-2000) (quoting George P. Smith II, *Genetics, Eugenics, and Public Policy*, 1985 S. ILL. U. L.J. 435, 439-44).

Loving is even more dubious in light of tradition. The *Loving* Court held unconstitutional a Virginia statute prohibiting miscegenation because under the Due Process Clause, "the freedom to marry or not marry a person of another race resides with the individual and cannot be infringed by the State."[85] While *Loving* acknowledged some degree of tradition contrary to its holding,[86] the Court did not recognize the vast traditional support for anti-miscegenation laws. Dozens of states have had, at one time or another, miscegenation statutes,[87] and, as the *Loving* Court acknowledged, thirty states had outlawed miscegenation as recently as fifteen years before *Loving* was issued.[88]

Interestingly, as Justice Stevens pointed out in his dissent in *Bowers*, "miscegenation was once treated as a crime similar to sodomy."[89] While the *Bowers* Court used this prior discrimination to subjugate lesbians and gay men further, holding that there is no fundamental right to engage in homosexual sodomy,[90] neither the *Loving* Court nor the *Zablocki* Court was motivated by such prior discrimination. Thus, the latter cases established the fundamental right to marry.

B. *Right to Procreate*

In 1942, in *Skinner v. Oklahoma*,[91] the Court held that the right to procreate is a fundamental right. The *Skinner* Court concluded that Oklahoma's Habitual Criminal Act, which authorized mandatory surgical sterilization for individuals convicted of two or more crimes involving "moral turpitude," was unconstitutional because it infringed on the right to procreate.[92] The Court provided almost no authority, however, let alone evidence of tradition, to support its holding that the right to

85. *Loving*, 388 U.S. at 12.

86. *See id.* at 6 ("Virginia is now one of 16 States which prohibit and punish marriages on the basis of racial classifications. Penalties for miscegenation arose as an incident to slavery and have been common in Virginia since the colonial period.").

87. *See* Michaelson, *supra* note 19, at 1569.

88. *See Loving*, 388 U.S. at 6 n.5. For a history of the Virginia anti-miscegenation statute, VA. CODE ANN. § 20-58 (1967), see generally A. Leon Higginbotham, Jr. & Barbara K. Kopytoff, *Racial Purity and Interracial Sex in the Law of Colonial and Antebellum Virginia*, 77 GEO. L.J. 1967 (1989); Walter Wadlington, *The* Loving *Case: Virginia's Anti-Miscegenation Statute in Historical Perspective*, 52 VA. L. REV. 1189 (1966). Others also have commented that tradition does not support one's fundamental right to marry an individual of a different race. *See, e.g.*, Compassion in Dying v. Washington, 79 F.3d 790, 805 n.20 (9th Cir. 1996) ("Had the Court applied a rigid, originalist view of constitutional interpretation, a married couple consisting of a black husband and a white wife (or vice-versa) would be unable to live in the state of Virginia today.").

89. Bowers v. Hardwick, 478 U.S. 186, 216 n.9 (1986) (Stevens, J., dissenting) (citing JOHN G. HAWLEY & MALCOLM MCGREGOR, THE CRIMINAL LAW 287, 288 (3d ed. 1899)).

90. *See id.* at 192.

91. Skinner v. Oklahoma, 316 U.S. 535, 541 (1942).

92. *See id.* at 536-37, 541.

procreate is fundamental.[93]

An inquiry into the history of procreation likely would have yielded a very different result. The eugenics movement, which had been growing since the late nineteenth century, was thriving in the United States in 1942.[94] By 1935, approximately 20,000 forced eugenical sterilizations had been performed in the United States.[95] Many of these were carried out pursuant to thirty-two state statutes mandating eugenical sterilizations.[96] In 1927, the Supreme Court explicitly held that these statutes were constitutional.[97] Upholding involuntary sterilizations, the Court stated that "[i]t is better for all the world, if . . . society can prevent those who are manifestly unfit from continuing their kind. . . . Three generations of imbeciles are enough."[98]

Moreover, the United States has an infamous history of denying procreative autonomy to Black Americans. Slavemasters owned the reproductive abilities of their slaves and arranged for their slaves to have intercourse, also known as "slave breeding," in order to perpetuate the institution of slavery and to further dehumanize their slaves.[99] Sexual coercion and forced procreation have been bedrocks of the Black American experience.[100] Such denials of reproductive autonomy were authorized explicitly by state statutes and validated by judicial decrees.[101]

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93. *See id.* at 541.

94. *See* Wolf, *supra* note 84, at 188. *See generally* HARRY H. LAUGHLIN, THE LEGAL STATUS OF EUGENICAL STERILIZATION (1929).

95. *See* Stephen Jay Gould, *Carrie Buck's Daughter*, 2 CONST. COMMENT. 331, 332 (1985). Involuntary eugenical sterilizations were performed well after 1935, as well. For example, Fannie Lou Hamer, one of America's most passionate, effective, and visible political organizers, checked into a hospital in 1961 to have a uterine tumor removed. Only after leaving the hospital was she informed that she was given a hysterectomy, notwithstanding a lack of prior notification or consent. *See* KAY MILLS, THIS LITTLE LIGHT OF MINE: THE LIFE OF FANNIE LOU HAMER 21-22 (1994).

96. *See* Wolf, *supra* note 84, at 188.

97. *See* Buck v. Bell, 274 U.S. 200, 207 (1927).

98. *Id.* Incidentally, though Carrie Buck was sterilized pursuant to a state statute that required the sterilization of the mentally retarded, she was later discovered to possess normal intelligence. *See* Gould, *supra* note 95, at 336.

99. *See generally* Pamela D. Bridgewater, *Un/Re/Dis Covering Slave Breeding in Thirteenth Amendment Jurisprudence*, 7 WASH. & LEE RACE & ETHNIC ANCESTRY L.J. 11, 11-23 (2001) [hereinafter Bridgewater, *Slave Breeding*]; *see also* Pamela D. Bridgewater, *Reproductive Freedom as Civil Freedom: The Thirteenth Amendment's Role in the Struggle for Reproductive Rights*, 3 J. GENDER RACE & JUST. 401, 413-15 (2000). *Cf.* ANGELA Y. DAVIS, WOMEN, RACE, AND CLASS 3-4 (1983) (recognizing the disappointing and profound ignorance of historians about the experiences of female slaves).

100. *See* Bridgewater, *Slave Breeding*, *supra* note 99, at 12 ("[S]lave breeding was an integral aspect of what it meant to be a slave during this era."). This is not to say, however, that slaves were complacent about their sexual exploitation. On the contrary, slaves—particularly female slaves—developed complex forms of resistance to their owners' sexual oppression. *See id.* at 26-29.

101. *See id.* at 24-26.

The same could be said of the Native American experience. As part of the Bureau of Indian Affairs' strategy to "destroy all things Indian," the United States government has forced Native Americans to undergo sterilization procedures.[102] The eugenical sterilization of Native Americans has not abated, either. As recently as 1975, approximately 25,000 Native American women were permanently sterilized, "many after being coerced, misinformed, or threatened."[103]

Thus, notwithstanding the facts that the country was experiencing a burgeoning eugenics movements, that a majority of the states required eugenical sterilizations by statute, that such statutes had the explicit imprimatur of the Supreme Court, and that Black Americans and Native Americans, among others, had been systematically denied the freedom to exercise procreative autonomy, the *Skinner* Court found a fundamental right to procreate. Had it relied on tradition, it is likely that no such fundamental right would have been found.

C. *Right to Use Contraception*

Neither of the seminal contraception opinions, *Eisenstadt v. Baird*[104] and *Griswold v. Connecticut*,[105] employed tradition to assess the fundamental nature of the right to use contraception. *Griswold* relied on precedent and a lofty understanding of marriage to establish the fundamentality of the right of married couples to use contraception.[106] Though the *Griswold* Court commented that "the right of privacy" is "older than the Bill of Rights—older than our political parties, older than our school system,"[107] it did not seek to establish that the right to use contraception similarly was grounded in tradition. *Eisenstadt* expanded on *Griswold*, finding a fundamental right for anyone—married or not—to use and distribute contraceptives.[108] Like *Griswold*, *Eisenstadt* relied on precedent, not tradition, to find the fundamental right.[109]

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102. Lindsay Glauner, *The Need For Accountability and Reparation: 1830–1976 The United States Government's Role in the Promotion, Implementation, and Execution of the Crime of Genocide Against Native Americans*, 51 DEPAUL L. REV. 911, 911 (2002); *see also* Nancy Ehrenreich, *The Colonization of the Womb*, 43 DUKE L.J. 492, 515 (1993) (commenting that "Native American women[ ] were subjected to forced sterilization in appalling numbers up through the 1970s, a practice that continues in 'milder' forms today").

103. *Coerced Sterilization of Native American Women*, Native American Political Issues, *at* http://www.geocities.com/CapitolHill/9118/mike.html (last visited Feb. 14, 2003).

104. Eisenstadt v. Baird, 405 U.S. 438 (1972).

105. Griswold v. Connecticut, 381 U.S. 479 (1965).

106. *See id.* at 485-86.

107. *Id.*

108. *See Eisenstadt*, 405 U.S. at 453.

109. *See id.*

History probably does not support such a right. Historically, misogynistic attitudes have proscribed the availability of contraceptives.[110] Such attitudes often were codified by statute, including the very laws held unconstitutional in *Eisenstadt* and *Griswold*, which were on the books for more than eighty and ninety years, respectively.[111] The Catholic Church, a significant force in dictating our nation's public policy, historically has played a substantial role in prohibiting access to contraceptives.[112]

Instead of relying on our nation's misogynistic past, the Court used other methodological tools to find a fundamental right to use contraception. Had the Court felt beholden to accept such past discrimination, there might be no such fundamental right.

D. *Right to Interstate Travel*

The Court declared a fundamental right to travel in *United States v. Guest*.[113] While the *Guest* Court found that the "constitutional right to travel from one State to another . . . occupies a position fundamental to the concept of our Federal Union," the Court relied almost exclusively on precedent.[114]

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110. *See* Reva Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 STAN. L. REV. 261, 356 (1992) ("Laws criminalizing contraception . . . were explicitly premised on the view that women are 'childrearers,' and that 'the female is destined solely for the home and the rearing of the family, and . . . the male for the marketplace and the world of ideas.'") (quoting Miss. Univ. for Women v. Hogan, 458 U.S. 718, 726 n.11 (1982) (quoting Stanton v. Stanton, 421 U.S. 7, 14-15 (1975))).

111. *See* Mark Strasser, *Domestic Relations Jurisprudence and the Great, Slumbering Baehr: On Definitional Preclusion, Equal Protection, and Fundamental Interests*, 64 FORD. L. REV. 921, 972 (1995) (commenting that "contraception has a history of being criminalized by the states" and noting that "at the time that *Griswold* . . . was decided, Connecticut had criminalized the use of contraception for over eighty years" and that "[w]hen *Eisenstadt* . . . was decided, Massachusetts had criminalized the distribution of contraceptives for over ninety years"); *see also id.* at 971-72 (1995) (stating that if the *Eisenstadt* and *Griswold* Courts would have relied on tradition to assess the fundamental right to use contraceptives, then the use of contraceptives would "be proscribable"). *Accord* Mark Strasser, *Toleration, Approval, and the Right to Marry: On Constitutional Limitations and Preferential Treatment*, 35 LOY. L.A. L. REV. 65, 92 & n.148 (2001) (noting that tradition does not support a right to use contraception); Mark Strasser, *Sex, Law, and the Sacred Precincts of the Marital Bedroom: On State and Federal Right to Privacy Jurisprudence*, 14 NOTRE DAME J.L. ETHICS & PUB. POL'Y 753, 755 (2000).

112. *See, e.g.*, *High Court to Review Law on Contraceptives*, S.F. CHRON. Sept. 27, 2001, at A14 (stating that Catholic Charities of Sacramento, California, filed a lawsuit claiming that a state law requiring companies that offer prescription drug coverage to their workers to include female contraceptives is unconstitutional). *See generally* JOHN T. NOONAN, JR., CONTRACEPTION: A HISTORY OF ITS TREATMENT BY CATHOLIC THEOLOGIANS AND CANONISTS (1986).

113. United States v. Guest, 383 U.S. 745, 757 (1966).

114. *Id.* at 757-59. The Court did point to two historical references to bolster its finding a fundamental right to travel. First, it quoted a passage from the Articles of Confederation: "the people of each State shall have free ingress and regress to and from any other State." *Id.* at 758 (internal quotations omitted) (citing Articles of Confederation, Art. IV). Second, it claimed that

Tradition reveals a different story. Due to legal proscriptions and practical considerations, many Americans traditionally have not enjoyed a right to interstate travel. Black Americans and poor Americans, among others, have been prohibited, by operation of law, from traveling between states. For example, an 1845 Illinois statute provided that "No black or mulatto person shall be permitted to reside in this State, until such person shall produce to the county commissioners' court where he or she is desirous of settling, a certificate of his or her freedom," and shall post a $1,000 bond "conditioned that such person will not, at any time, become a charge to said county, or any other county of this State, as a poor person."[115] This law targeted all "blacks and mulattos," not just slaves, as well as the indigent.

Such race- and class-based restrictions on interstate travel were the norm, not the exception. Antebellum Kentucky, for example, employed a certificate system, which prohibited any indigent person from traveling to Kentucky from another state unless the individual's home state certified that it would post sufficient money for the person's upkeep.[116] Through the mid-nineteenth century, a plethora of other state laws imposed similar race- and/or class-based restrictions on interstate travel.[117]

None but wealthy white Americans have traditionally enjoyed the right to interstate travel. Relying on history—giving agency to such race- and class-based traditions—likely would have prohibited finding a fundamental right to interstate travel.

E. *Right to Vote for Free*

Building on *Reynolds v. Sims*,[118] the Court held in *Harper v. Vir-*

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the right to interstate travel "goes back at least as far as 1904." *Id.* at 759. Nonetheless, the *Guest* Court's references to tradition are dwarfed by its reliance on precedent.

115. 1845 Illinois Revised Statutes, ch. LXXIV, at 387-91 (Mar. 3, 1845), *cited in* William P. Quigley, *The Quicksands of the Poor Law: Poor Relief Legislation in a Growing Nation, 1790-1820*, 18 N. ILL. U. L. REV. 1, 40 (1997).

116. *See* Quigley, *supra* note 115, at 82 n.571 (citing 1795 Ky. Acts, ch. 55, § 6, at 87-88). This certificate system was also used in America's Northwest Territory. *See id.* (citing "A law for relief of the poor," § 17-28 (June 19, 1795), 1 Laws of the North-West Territory, at 136-45 (Theodore Pease ed.)).

117. *See* Seth F. Kreimer, *Law of Choice and Choice of Law: Abortion, the Right to Travel, and Extraterritorial Regulation in American* Federalism, 67 N.Y.U. L. REV. 451, 501-02 (1992). *See, e.g.*, Ohio Acts of 1828, § 1 at 53 (Feb. 12, 1829) (prohibiting Black and Mulatto persons from gaining legal settlement in Ohio), *cited in* Quigley, *supra* note 115, at 80 n.566; "An Act concerning Free Negroes and Mulattoes, Servants and Slaves," 1831 Indiana Revised Statutes, ch. 66, § 1, at 375 (Feb. 10, 1831) (prohibiting all "black and mulatto" persons from entering Indiana until they posted a five hundred dollar bond "conditioned that such person shall not at any time become a charge to the said county"), *cited in* Quigley, *supra* note 115, at 81 & n.569.

118. 377 U.S. 533 (1964).

ginia State Board of Elections[119] that there is a fundamental right to vote for free. The Court relied exclusively on precedent (*Reynolds*) in assessing the plaintiff's fundamental rights argument.[120] It explicitly rejected a historical inquiry: "[The Fourteenth Amendment] is not shackled to the political theory of a particular era. In determining what lines are constitutionally discriminatory, we have never been confined to historic notions of equality . . . ."[121]

Of course, the Court needed to disclaim the use of tradition because tradition flatly does not support the fundamental right to vote for free, a point not lost on Justices Black, Harlan, and Stewart, who dissented. Black was troubled that the Court would invalidate the "long-standing beliefs that making the payment of a tax a prerequisite to voting" is permissible.[122] Harlan and Stewart provided evidence to support Black's appeal to tradition. They relied on the fact that "[p]roperty qualifications and poll taxes have been a traditional part of our political structure."[123] An overwhelming majority of the American colonies imposed poll taxes, and many states exacted such taxes for most of their histories.[124] Meanwhile, two states, Mississippi and Virginia, continued to impose a poll tax at the time the *Harper* Court issued its opinion,[125] and Vermont rescinded its poll tax only one month before *Harper*.[126] District courts declared Alabama's and Texas's poll taxes unconstitutional three weeks and six weeks earlier, respectively.[127] The dissents also pointed to arguments by Aristotle, Tocqueville, and representatives at the Constitutional Convention to buttress their claim that tradition does not support a fundamental right to vote for free.[128]

Asked to rely on this classist tradition, the *Harper* Court felt compelled not to perpetuate such injustice. While the upper-class-biased tradition of the United States dictates that only wealthy individuals should vote, the Court repudiated such discrimination, finding it inappropriate to infuse such subjugation into its fundamental rights jurisprudence.

119. 383 U.S. 663, 670 (1966).

120. *See id.*

121. *Id.* at 669.

122. *Id.* at 677.

123. *Id.* at 684.

124. *See id.* (citing FREDERIC D. OGDEN, THE POLL TAX IN THE SOUTH 2 (1958); 1 FRANCES NEWTON THORPE, A CONSTITUTIONAL HISTORY OF THE AMERICAN PEOPLE: 1776-1850, at 92-98 (1898); Chilton Williamson, American Suffrage from Property to Democracy: 1760-1860, at 1-4 (1960)).

125. *See* Harper v. Va. State Bd. of Educ., 383 U.S. 663, 666 (citing statutes); *id.* at 680 n.1 (Harlan, J., dissenting).

126. *See id.* at 666 n.4.

127. *See* United States v. Texas, 252 F. Supp. 234, 255 (W.D. Tex. 1966); United States v. Alabama, 252 F. Supp. 95 (D.D.C. 1966).

128. *See Harper*, 383 U.S. at 685 n.9 (Harlan, J., dissenting).

F. *Two Fundamental Rights Recognized by Lower Courts*

The Supreme Court's fundamental rights opinions are significantly more nuanced than similar lower court opinions. While this article focuses on Supreme Court rulings, it is important to note that lower courts' fundamental rights opinions are as erratic, if not more so, than those issued by the Supreme Court. The following lower court decisions, like the Supreme Court opinions above, probably would have reached a different outcome had the courts relied on tradition.

1. RIGHT TO TECHNOLOGICAL PROCREATION

Emerging technology throws another wrench into the use of tradition in assessing purported fundamental rights. *Gerber v. Hickman*[129] and *Lifchez v. Hartigan*[130] both involved the problem of how to "update" the right of privacy to account for technological advances.

In *Lifchez*, the Northern District of Illinois struck down a state law providing that "[n]o person shall sell or experiment upon a fetus . . . unless such experimentation is therapeutic to the fetus. . . . "[131] Relying exclusively on precedent, the court held that the law "impermissibly restricts a woman's fundamental right of privacy, in particular, her right to make reproductive choices free of governmental interference with those choices."[132] The court found that a woman's right to embryo transfer and chorionic villi sampling are protected fundamental rights by finding the conduct subsumed under the Supreme Court's reproductive freedom cases, such as *Roe v. Wade*.[133] The *Lifchez* court noted that embryo transfer and chorionic villi sampling, for example, are punishable by Illinois' statute even though they fit within the "cluster of constitutional choices" guaranteed by the Due Process and Equal Protection Clauses.[134]

Gerber found, for the first time, a fundamental right for a life-term prisoner to father a child by artificially inseminating his wife.[135] According to the dissent, the court found a fundamental right of a pris-

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129. Gerber v. Hickman, 264 F.3d 882 (9th Cir. 2001), *rev'd*, 291 F.3d 617 (9th Cir. 2002) (en banc). The *Gerber* en banc majority opinion held that a prisoner does not have a fundamental right to procreate while incarcerated because procreation is "inconsistent with incarceration." *Gerber*, 291 F.3d at 623.

130. Lifchez v. Hartigan, 735 F. Supp. 1361 (N.D. Ill. 1990).

131. *Id.* at 1363 (citing Ill. Rev. Stat., Ch. 38 ¶ 81-26, § 6(7) (1989) ("Illinois Abortion Law")). The Illinois Abortion Law expressly exempted in vitro fertilization. *See id.*

132. *Id.* at 1376 (citing Carey v. Population Servs. Int'l, 431 U.S. 678 (1977); Planned Parenthood of Mo. v. Danforth, 428 U.S. 52 (1976); Eisenstadt v. Baird, 405 U.S. 438 (1972); Griswold v. Connecticut, 381 U.S. 479 (1965)).

133. *Id.* at 1377.

134. *Id.*

135. Gerber v. Hickman, 264 F.3d 882, 890 (9th Cir. 2001).

oner "to mail his semen from prison so that his wife can be artificially inseminated," or a fundamental "right to procreate from prison via FedEx."[136] The *Gerber* court relied exclusively on precedent, extending *Carey v. Population Services, International*[137] and *Stanley v. Illinois*,[138] among others, to prisoners.[139]

Neither court would have found the respective fundamental rights had they relied on tradition to assess the fundamentality of those rights. First, and most obviously, the technology involved in such procedures (e.g., embryo transfer, chorionic villi sampling, and artificial insemination by donor) are of recent vintage.[140] If the reviewing court is to assess the purported fundamental right at its greatest specificity, as the Supreme Court has hinted it must,[141] then such rights cannot survive the tradition test. Moreover, to the extent that such procedures have been available, they have been accessible only to the wealthiest of Americans. The vast majority of Americans have not and do not have the option of receiving an embryo transfer, for example, because it is prohibitively expensive[142] and because most insurance policies do not cover such a

136. *Id.* at 893 (Silverman, J., dissenting).

137. 431 U.S. 678 (1977).

138. 405 U.S. 645 (1972).

139. *See Gerber*, 264 F.3d at 887.

140. For a discussion of chorionic villi sampling and other new procedures that implicate reproductive rights, see generally Lori B. Andrews & Nanette Elster, *Regulating Reproductive Technologies*, 21 J. LEGAL MED. 35 (2000); David T. Morris, *Cost Containment and Reproductive Autonomy: Prenatal Genetic Screening and the American Health Security Act of 1993*, 20 AM. J.L. & MED. 295 (1994).

141. *See, e.g.*, Michael H. v. Gerald D., 491 U.S. 110, 127-28 n.6 ("Though the dissent has no basis for the level of generality it would select, we do: We refer to the most specific level at which a relevant tradition protecting, or denying protection to, the asserted right can be identified."). *But see* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1428 (2d ed. 1988) ("[I]n asking whether an alleged right forms part of a [fundamental right], it is crucial to define the [right] at a high enough level of generality to permit unconventional variants to claim protection along with mainstream versions of protected conduct."). Footnote six of Justice Scalia's opinion for the Court in *Michael H.* has received significant attention. *See, e.g.*, TRIBE & DORF, supra note 8, at 97-98 ("Justice Scalia's footnote 6 . . . seems destined to take its place alongside Justice Stone's famous footnote 4 [in *United States v. Carolene Products Co.*, 304 U.S. 144, 152-53 n.4 (1938)] as one of constitutional law's most provocative aides . . . ."); Crump, *supra* note 8, at 859-60. *See generally* Laurence H. Tribe & Michael C. Dorf, *Levels of Generality in the Definition of Rights*, 57 U. CHI. L. REV. 1057 (1990). It should be noted that even Justice Scalia himself has not always adhered to assessing the purported fundamental right at the "most specific level." *See* Crump, *supra* note 8, at 870-71 ("Unlike his analysis of rights at the most specific level of definition, Justice Scalia's opinion in *Cruzan* did not analyze this tradition of state power at the most specific level. Instead, he considered a general power of suicide prevention.") (citing Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261, 294-300 (1990)).

142. *See* Catherine DeLair, *Ethical, Moral, Economic, and Legal Barriers to Assisted Reproductive Technologies Employed by Gay Men and Lesbian Women*, 4 DEPAUL J. HEALTH CARE L. 147, 160 (2000); Aaron C. McKee, *The American Dream—2.5 Kids and a White Picket Fence: The Need for Federal Legislation to Protect the Insurance Rights of Infertile Couples*, 41

procedure.[143] Thus, it cannot be said that, even if historically technically available, such procedures, and therefore the fundamental right to undergo such procedures, are deeply rooted in the nation's traditions.

2. RIGHT TO ACUPUNCTURE

While the right to abortion and the right to use contraceptives are well-known fundamental rights, there are many lesser-known fundamental rights. The right to acupuncture treatment is one such example. The Southern District of Texas, in *Andrews v. Ballard*,[144] held that a Texas State Board of Medical Examiners Rule providing that only licensed physicians can practice acupuncture violated the plaintiffs' fundamental right to obtain acupuncture treatment.[145]

The court's methodology for recognizing such a right was unclear. The court stated that purported rights must satisfy two criteria in order to be deemed fundamental: "First, they must be 'personal decisions.' . . . Second, they must be 'important decisions.'"[146] Though the court ostensibly derived this test from *Carey*, it admitted that "these criteria are not expressed as such in *Carey*."[147]

Nowhere did *Andrews* mention tradition, and with good reason. American tradition does not support the fundamental right to receive acupuncture treatment. The *Andrews* court admitted, while explaining acupuncture, that acupuncture is relatively unknown to the "Western scientific community."[148] While acupuncture has a 5,000-year history, it has been relegated to "experimental" status in the United States due to the ethnocentrism of the medical community,[149] which often considers acupuncture, like other alternative medical techniques, to be "dubious," "fraudulent," and "quackery."[150] *Andrews* did not soil its reasoning with prejudice, however. Had it done so—had tradition been its guide—there would be no fundamental right to such medical treatment.

The *Andrews* court was one of many that refused to legitimize prior

WASHBURN L.J. 191, 195 (2001) (noting that "high-tech artificial reproductive technologies . . . are expensive," approximately $10,000 per attempt).

143. *See* McKee, *supra* note 142, at 195.

144. Andrews v. Ballard, 498 F. Supp. 1038 (S.D. Tex. 1980).

145. *See id.* at 1048 (commenting that "the decision to obtain acupuncture treatment is . . . encompassed by the right of privacy").

146. *Id.* at 1046 (quoting Carey v. Population Servs. Int'l, 431 U.S. 678, 685, 684 (1977)).

147. *Id.*

148. *Id.* at 1043. *See also* Michael H. Cohen, *Holistic Health Care: Including Alternative and Complementary Medicine in Insurance and Regulatory Schemes*, 38 ARIZ. L. REV. 83, 108 (1996) (explaining that acupuncture is considered "experimental" in the United States because it "do[es] not share the basic assumptions of Western medicine").

149. *See* Cohen, *supra* note 148, at 108.

150. Aimee Doyle, *Alternative Medicine and Medical Malpractice*, 22 J. LEGAL MED. 533, 536-37 (2001).

discrimination. Instead of injecting a discriminatory past into their analyses, these courts resorted to alternative methods for assessing purported fundamental rights. Relying on tradition would not only have given agency to prior discrimination, it would have, as shown above, negated much of our fundamental rights doctrine. Perhaps this is the intention of members of the judiciary who employ tradition to assess fundamental rights.[151] For this reason, among others explored below, legal advocates and jurists must resist the call to rely on tradition in fundamental rights jurisprudence.

IV. TRADITION'S INHERENT PLASTICITY

Whether done consciously or not, judges frequently rely on historical analyses that are either likely incorrect or, at a minimum, subject to multiple inconsistent interpretations. This is not a novel observation. As one commentator subtly quipped, "the Supreme Court is not known for its historical meticulousness."[152] While some historical inaccuracies can surely be ascribed to innocent misinterpretations or historical sloppiness, a more cynical explanation perhaps undergirds the judiciary's dubious interpretations of tradition. That is, history is subject to many interpretations, especially in a nation as diverse as the United States, and judges may pick and choose historical interpretations to suit their personal and political ideologies. A critical evaluation of jurists' historical interpretations, much like an honest assessment of American history texts, would reveal that they "choose [their] history, or more accurately, . . . select those vistas of history . . . which promise [them] the greatest satisfaction."[153]

Another obvious though overlooked point is that judges, like historians or any of us, often interpret history from the only perspective they know: their own. What matters in a profound way for the present inquiry is that such biases are naturally reflected in fundamental rights assessments when such rights are dependent on tradition. Jurists, who

151. Professor Brown has asserted that "this use of tradition is but a thinly-veiled effort to cut off all possibility of progressive interpretation of the past." Brown, *supra* note 5, at 202. *See also* TRIBE & DORF, *supra* note 8, at 104 ("Justice Scalia is aware that his tradition-bound approach to constitutional interpretation would severely curtail the Supreme Court's role in protecting individual liberties . . . . [S]uch a curtailment would seem to be the purpose of his method."); Robin West, *The Ideal of Liberty: A Comment on* Michael H. v. Gerald D., 139 U. PA. L. REV. 1373, 1375 (1991) (commenting that employing tradition as an exclusive tool to assess purported fundamental rights "would undermine . . . virtually every major substantive due process case of the last twenty years").

152. Brown, *supra* note 5, at 191. *See also* TRIBE & DORF, *supra* note 8, at 98, 99 (commenting that "historical traditions are susceptible to even greater manipulation than are legal precedents" and referring to the "manipulability of historical traditions").

153. SAMUEL D. MARBLE, BEFORE COLUMBUS 25 (1989).

are historically white, wealthy, straight men,[154] are frequently asked in fundamental rights opinions to interpret traditions concerning race, class, sexual orientation, gender, and other areas about which they often possess a rather monolithic understanding. Jurists' dominant positionality is thus usually reflected in judicial opinions in ways that perpetuate such dominance.

In short, contrary to the exhortations of the proponents of using tradition in fundamental rights jurisprudence, tradition does not provide a "neutral principle."[155] The words of the preeminent American historian and professor, Howard Zinn, are worth noting:

> It is not possible [to be an objective historian] . . . . What you get in a history lecture is a selection by the writer . . . and that selection is made according to that . . . writer's bias, and there's no way of avoiding that. What I always tell my students from the outset is that they're not going to get an objective history because they're going to get my point of view . . . .[156]

A serious examination of the use of tradition in fundamental rights jurisprudence therefore raises important questions regarding whose tradition is relevant to the fundamental rights analysis. Even if we are to accept that the relevant tradition is that of the United States,[157] we are still left with myriad traditions upon which to base our fundamental rights analysis. The tradition led by Jefferson Davis is certainly different from that blazed by Angela Davis. Is the tradition inspired by the Black Panthers any less legitimate than that epitomized by the White Knights? Why should we recognize the tradition of the English-only movement any more than that of the American Indian movement? It seems inappropriate to give more credence to one tradition than another only because it had a greater following, regardless of the relative moral-

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154. *See, e.g.*, Janet Cooper Alexander, *Judges' Self-Interest and Procedural Rules: Comment on Macey*, 23 J. LEGAL STUD. 647, 662 (1994) (exploring the unconscious biases of jurists due to their "overwhelming" positionality as "white, male, middle-aged or older, and wealthy"); Frank B. Cross, *The Error of Positive Rights*, 48 UCLA L. REV. 857, 914 (2001) (noting that "judges are almost exclusively male, white, and wealthy") (internal quotation omitted).

155. For arguments that tradition injects a "neutral principle" into fundamental rights jurisprudence, see, for example, Bopp & Coleson, *supra* note 70, at 282 (characterizing tradition as "objective" and a "neutral principle"); McConnell, *supra* note 70, at 672 (referring to "*objective* historical fact") (emphasis added). For an analysis of "neutral principles" in general, see Mark V. Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781 (1983).

156. Audio tape: Howard Zinn interview on KPFK, 90.7 FM, Los Angeles, Cal. (on file with author).

157. *But see* Washington v. Glucksberg, 521 U.S. 702, 711-12 (1997) (plurality opinion) (relying on the "Anglo-American common law tradition"); Bowers v. Hardwick, 478 U.S. 186, 197-98 (1986) (Burger, J., concurring) (citing European traditions); Rochin v. California, 342 U.S. 165, 169 (1952) (inquiring into the traditions of "English-speaking peoples"); Snyder v. Massachusetts, 291 U.S. 97, 111-12 (1934) (citing English and Welsh traditions).

ity of the traditions.[158]

What these questions evince is that, contrary to the claims of the proponents of employing tradition in fundamental rights analysis, invoking tradition does not provide certainty. Rather, it subjects fundamental rights to the whims of judges' accounts of history, which often, though not always, denigrates fundamental rights analysis into a recitation of the "polemics of the victor."[159] While advocates of employing tradition in fundamental rights jurisprudence claim that tradition serves to constrain jurists, it often does no such thing.

The following fundamental rights cases are examples of tradition possibly being interpreted "incorrectly"—to the extent that there is an "incorrect" historical interpretation—to arrive at a certain holding. The opinions demonstrate the malleability and subjectivity of tradition, including the importance of jurists' positionality in issuing a tradition-based fundamental rights opinion.

A. *Both Sides of the Coin*

In these cases, the majority and dissenting opinions each rely on tradition to bolster their fundamental rights analyses. In such instances, tradition is invoked both to find a fundamental right and to find that there is no such right, providing examples of the pliability of tradition.

1. RIGHT TO PHYSICIAN-ASSISTED SUICIDE

The Second Circuit, Ninth Circuit, and Supreme Court all have ruled on whether one possesses a fundamental right to physician-assisted suicide. All three courts have used tradition to assess the fundamentality of physician-assisted suicide, with the Supreme Court and Second Circuit finding that tradition does not support such a right, and the Ninth

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158. *See* Ely, *supra* note 12, at 39-40 (footnotes omitted):

> There is obvious room to maneuver, along continua of both space and time, on the subject of which tradition to invoke. Whose traditions? . . . And who is to say that the "tradition" must have been one endorsed by a majority? Is Henry David Thoreau an invocable part of American tradition? John Brown? John Calhoun? Jesus Christ? It is hard to see why not. Top all of this off with the tremendous uncertainties in ascertaining anything very concrete about the intellectual or moral climates of ages passed, and one is in a position to prove almost anything to those who are predisposed to have it proved or, more candidly, to admit that tradition does not really generate an answer . . . .

See also L. Benjamin Young, Jr., Note, *Justice Scalia's History and Tradition: The Chief Nightmare in Professor Tribe's Anxiety Closet*, 78 VA. L. REV. 581, 596 (1992) ("Inherent in a methodology grounded in history and tradition is the choice of which history and whose tradition.").

159. LOEWEN, *supra* note 2, at 38 (referring to accounts of history in general) (citation omitted). *See also* GEORGE ORWELL, 1984, at 35 (1949) (commenting that "[w]ho controls the present controls the past").

Circuit, sitting en banc, using tradition to find that the right to physician-assisted suicide is fundamental.

In *Compassion in Dying v. Washington*,[160] the Ninth Circuit stated that "historical evidence alone is not a sufficient basis for rejecting a claimed liberty interest,"[161] and simultaneously provided a historical analysis supporting a fundamental right to physician-assisted suicide. The court first pointed to the fact that "[e]ven when prohibited [by law], . . . assisted-suicides flourished in back alleys, in small street-side clinics, and in the privacy of the bedroom."[162] It also found it relevant that "suicide was often considered commendable" in the Greek and Roman empires,[163] and further bolstered its historical conclusion with the Old Testament and writings of European philosophers, including Montesquieu, Voltaire, Hume, Donne, and Sir Thomas More.[164] Finally, the court examined the American tradition, noting that nearly half of the original colonies had decriminalized suicide by 1798, that "[t]here is no evidence that any court ever imposed a punishment for suicide or attempted suicide under common law in post-revolutionary America," and that in 1868, when the Fourteenth Amendment was ratified, less than one-quarter of the states proscribed assisted-suicide.[165]

The Ninth Circuit opinion is not the only published work that has recognized tradition's support of physician-assisted suicide. For instance, some commentators have acknowledged that the Bible does not condemn suicide and that the Greeks and Romans explicitly approved of it in certain circumstances.[166] Moreover, there is widespread acceptance that suicide was encouraged in certain East Asian cultures.[167]

As the Ninth Circuit admitted, though, the historical record is not conclusive,[168] and the Supreme Court and the Second Circuit, as well as

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160. Compassion in Dying v. Washington, 79 F.3d 790 (9th Cir. 1996) (en banc).

161. *Id.* at 805. At other times, the court proclaimed that "[t]here is no litmus test for courts to apply when deciding whether or not a liberty interest exists under the Due Process Clause," *id.* at 802, and that "the limits of the substantive reach of the Due Process Clause are not frozen at any point in time." *Id.* at 804.

162. *Id.* at 801.

163. *Id.* at 806. The court cited Greek mythology, Socrates, Plato, the Stoics, and Roman law. *See id.* at 806-08.

164. *See id.* at 808.

165. *See id.* at 809.

166. *See* Mark K. Frederick, *Physician Assisted Suicide: A Personal Right?*, 21 S.U. L. REV. 59, 62-63 (1994).

167. *See* SUICIDE IN DIFFERENT CULTURES 257-60 (Norman L. Farberow ed., 1975), *cited in* Frederick, *supra* note 166, at 664 n.14. Suicide in Japan was encouraged in order to salvage honor in the face of failure, to show bravery and honor, to serve a master in the after-life, and to appease the gods of war. *See id.*

168. *See Compassion in Dying*, 79 F.3d at 801, 806 (noting that the "historical record is . . . checkered").

a dissenting opinion in *Compassion in Dying*, all relied upon tradition to find that there is no fundamental right to physician-assisted suicide. In *Washington v. Glucksberg*,[169] the Supreme Court claimed that existing state statutory prohibitions against assisted suicide are "longstanding expressions of the States' commitment to the protection and preservation of all human life," and cited "over 700 years [of] Anglo-American common law tradition."[170] The Court then engaged in an exhaustive analysis of the American colonies' and states' histories of prohibiting assisted suicide, concluding that such a tradition has been recently "reaffirmed."[171]

The Court cited the dissenting opinion in *Compassion in Dying*,[172] an opinion that engaged in its own lengthy discussion of the tradition of assisted suicide.[173] The Ninth Circuit dissent borrowed from the usual suspects, including Plato, Aristotle, de Bracton, Locke, Sir Edward Coke, and Blackstone, in order to find that there should be no fundamental right to assisted suicide.[174] It also looked to criminal proscriptions against suicide in the United States in the colonial era, the late nineteenth century, and the modern era.[175]

The Second Circuit, in *Quill v. Vacco*,[176] undertook a similar examination, relying on English common law and American statutory prohibitions of suicide to find that assisted suicide is not "deeply rooted in the nation's traditions and history."[177] Each of these opinions, *Glucksberg*, *Quill*, and the Ninth Circuit's en banc opinion and dissent in *Compassion in Dying*, looked to the "same" tradition, yet came up with disparate results. Far from providing certainty, tradition yielded conflicting opinions, requiring the Supreme Court to resolve the split between the Second and Ninth Circuits.

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169. Washington v. Glucksberg, 521 U.S. 702 (1997).

170. *Id.* at 710-11. The Court cited Henry de Bracton, Blackstone's Commentaries, and a 1561-1562 English case, among other sources. *See id.* at 711-12 & n.10.

171. *Id.* at 712-16. The Court did not rest merely on such a tradition in the United States and Europe. It also found that the Canadian Supreme Court denied a claim that there is a fundamental right to assisted suicide and that Australia rejected a proposed "Death with Dignity Bill." *Id.* at 718 n.16. The Court noted, however, that Colombia's Constitutional Court had recently "legalized voluntary euthanasia for terminally ill people." *Id.*

172. *See id.* at 710 n.8.

173. *See Compassion in Dying*, 79 F.3d at 845-50 (Beezer, J., dissenting).

174. *See id.* at 845-46.

175. *See id.* at 846-47.

176. Quill v. Vacco, 80 F.3d 716 (2d Cir. 1996).

177. *Id.* at 724. The court also consulted a number of scholarly examinations of assisted suicide, including Mark E. Chopko & Michael F. Moses, *Assisted Suicide: Still a Wonderful Life?*, 70 NOTRE DAME L. REV. 519 (1995), and Thomas J. Marzen et al., *Suicide: A Constitutional Right?*, 24 DUQ. L. REV. 1 (1985).

2. RIGHT TO ABORTION

Roe v. Wade, perhaps the most famous fundamental rights opinion, is notable for a number of reasons, not the least of which is its employment of tradition. At the time it was issued, *Roe* involved the most extensive analysis of tradition of any fundamental rights opinion—and possibly the most exhaustive historical analysis in American jurisprudence. It is also noteworthy because both the Court's majority opinion and the dissent used tradition to bolster their opposing fundamental rights conclusions.

While the majority opinion in *Roe* never explicitly stated that it was relying on tradition to find the fundamental right to an abortion, its nearly twenty-page discussion of the history of abortion precedes its finding that there is such a fundamental right.[178] The Court examined ancient attitudes toward abortion, the Hippocratic Oath, the common law, English statutory law, American law, the position of the American Medical Association, and the policy of the American Public Health Association.[179] While the Court's rendition of the tradition of abortion is far too lengthy and nuanced to recount here, suffice it to say that the analysis was comprehensive, beginning with societal attitudes in the Persian Empire and in the Greek and Roman eras, and ending in 1972, one year before the opinion was issued.[180]

Nevertheless, Justice Rehnquist, dissenting in *Roe*, used tradition to find that there should be no fundamental right to an abortion. His historical analysis consisted primarily of reciting state statutes that criminalized abortion:

> The fact that a majority of the States reflecting, after all the majority sentiment in those States, have had restrictions on abortions for at least a century is a strong indication, it seems to me, that the asserted right to an abortion is not "so rooted in the traditions and conscience of our people as to be ranked as fundamental."[181]

Rehnquist also found it relevant that the drafters of the Fourteenth Amendment did not contemplate the right to abortion, noting that at the time of the ratification of the Fourteenth Amendment, thirty-six American states or territories had enacted laws prohibiting abortion, twenty-one of which were still on the books when *Roe* was issued.[182]

While Rehnquist theorized that "the only conclusion possible from

178. Roe v. Wade, 410 U.S. 113, 155 (1973).

179. *See id.* at 129-47.

180. *See id.* at 130, 140, & n.37.

181. *Id.* at 174 (Rehnquist, J., dissenting) (quoting Snyder v. Massachusetts, 291 U.S. 97, 105 (1934)).

182. *See id.* at 174-75 & nn.1, 2 (listing the state and territory statutes).

this history" is that there should be no fundamental right to abortion,[183] the majority opinion reached the opposite conclusion. Following the most exhaustive examination of tradition to date, the best that could be said was that "[t]he historical record on the issue of abortion appears to be one of rough equipoise—and of considerable ambiguity—hardly the raw material from which clear fundamental rights can be fashioned."[184]

3. RIGHT TO HAVE VOTES COUNTED EQUALLY

Reynolds v. Sims established the fundamental right to have votes counted equally. As with the cases assessing a right to assisted suicide and a right to abortion, however, tradition was employed both to find that the right should and should not exist. The majority's opinion relied on a history of "a continuing expansion of the scope of the right to suffrage."[185] The majority noted that "[t]he Fifteenth, Seventeenth, Nineteenth, Twenty-third, and Twenty-fourth Amendments to the Federal Constitution all involve expansions of the right of suffrage,"[186] that "the right to elect legislators in a free and unimpaired fashion is a bedrock of our political system,"[187] and that granting unequal weight to votes "run[s] counter to our fundamental ideas of democratic government."[188]

Nonetheless, the dissenting Justices recognized that tradition may be interpreted to militate in favor of not finding a fundamental right to have one's vote counted equally.[189] Justice Harlan's dissent in *Reynolds* seized on such a historical interpretation. While admitting that "the political history and practices of this country from its earliest beginnings leave wide room for debate,"[190] Harlan looked to the debate surrounding the proposal and ratification of the Fourteenth Amendment, concluding that the Fourteenth Amendment was not meant to upset "the power of

183. *Id.* at 177.

184. Steegmann, *supra* note 8, at 394.

185. Reynolds v. Sims, 377 U.S. 533, 555 (1964).

186. *Id.* at 555 n.28.

187. *Id.* at 562.

188. *Id.* at 564. The Court quoted James Wilson, a delegate to the Constitutional Convention and later a Supreme Court Justice: "[A]ll elections ought to be equal. Elections are equal, when a . . . proportion of the representatives and of the constituents will remain invariably the same." *Id.* at 564 n.41 (quoting Wesberry v. Sanders, 376 U.S. 1, 17 (1964) (quoting 2 WORKS OF JAMES WILSON (James D. Andrews ed., 1896))).

189. *See id.* at 565 (commenting that American "society [is] *ostensibly* grounded on representative government") (emphasis added); *id.* at 579 ("History indicates, however, that many States have deviated [from proportional representation]."). The Court, perhaps admitting the weakness in its historical analysis, cautioned that "history alone" should not "justify disparities from population-based representation." *Id.* at 579-80.

190. *Id.* at 590.

the States to apportion their legislatures as they saw fit."[191] He also detailed the tradition of states counting votes unequally.[192]

Basically, it is immaterial for the present purpose which side was "correct" if, indeed, there is a "correct" historical position. What is pertinent here is that tradition was employed to support both the majority's finding of a fundamental right and the dissent's opinion that there should be no fundamental right. Tradition provided neither meaningful guidance nor certainty in assessing the fundamental right to have votes counted equally.

B. *The Wrong Side of the Coin*

In other cases, the majority's fundamental rights conclusions were based on dubious, though unchallenged, interpretations of tradition. While the dissents, if any, did not rely on tradition in the following cases, the majorities' historical conclusions are certainly subject to criticism. Tradition could very well have supported the dissenting opinions.

1. RIGHT TO DIRECT THE EDUCATION OF ONE'S CHILDREN

The Court declared in *Meyer v. Nebraska* that parents have a fundamental right to direct the education of their children.[193] The *Meyer* Court found this fundamental right by focusing on the American tradition of exercising such a right.[194] Specifically, the Court proclaimed that it is a "privilege long recognized at common law"[195] and that "[t]he American people have always"[196] held dear their right to direct the education of their children, including providing their "children education suitable to their station in life."[197] The Court pointed to The Ordinance of 1787, among other sources, to support its analysis of American tradition.[198]

The *Meyer* understanding of tradition could be attacked from myriad angles. The obvious example is the restrictions placed upon Black Americans throughout history. During slavery, Black American parents were often prohibited by their white owners from teaching their children to read or write, or from otherwise facilitating their children's educa-

191. *Id.* at 595. *See also id.* at 601-02 (claiming that the Fourteenth Amendment was not supposed to "interfer[e] with the right of the States to regulate the elective franchise").

192. *See id.* at 603-10.

193. *See* Myerson v. Nebraska, 262 U.S. 390, 401 (1923).

194. *Id.* at 400.

195. *Id.* at 399.

196. *Id.* at 400.

197. *Id.* at 399-400.

198. *See id.* at 400.

tion.[199] In fact, their children's illiteracy often was mandated by law.[200] Long after emancipation, moreover, Black youths were automatically refused admittance to most educational institutions, and they continue to face a relative lack of educational opportunities.[201]

The Native American experience also belies the alleged tradition announced in *Meyer*. Native Americans' right to direct the education of their children was restricted severely by the government. For example, throughout much of American history, Native Americans were prohibited from attending schools.[202] Many states even criminalized teaching Native Americans to read and write.[203]

Of course, parents traditionally were not permitted to educate their daughters in the same manner as their sons. Girls generally were prohibited from attending elementary or secondary school until the twentieth century, and post-secondary education, in particular, traditionally has been restricted to males.[204] In sum, "the withholding of education and literacy from girls" has been a hallmark of Western society.[205]

Perhaps the *Meyer* Court was concerned solely with the rights of parents of rich, white boys when it found that tradition supports the fundamental right of parents to direct the education of their children. At the very least, notwithstanding the Court's reliance on tradition, a strong argument can be made that tradition does not support the right at issue in *Meyer*.

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199. *See* Donald P. Judges, *Bayonets for the Wounded: Constitutional Paradigms and Disadvantaged Neighborhoods*, 19 HASTINGS CONST. L.Q. 599, 680 (1992) (referring to such restrictions as "masters' rules"). Frederick Douglass explained such laws:

> To educate a slave was to make him discontented with slavery . . . and to invest in him a power which could open the treasuries of freedom. Thus, . . . since the object of the master was to maintain control over the slave, constant vigilance was exercised to prevent anything which would militate against or endanger the stability of his authority.

Id.

200. *See* Neil Weinstock Netanel, *Copyright and a Democratic Civil Society*, 106 YALE L.J. 283, 356 n.333 (1996); Judges, *supra* note 199, at 680 (noting that state laws codified the masters' rules).

201. *See, e.g.*, Robert L. Hayman, Jr., *Re-Cognizing Inequality: Rebellion, Redemption, and the Struggle for Transcendence in the Equal Protection of the Law*, 27 HARV. C.R.-C.L. L. REV. 9, 49 n.168 (1991) (referring to "the gross disparities in educational opportunities afforded to lower-income Americans and to minorities"). *See generally* JONATHAN KOZOL, SAVAGE INEQUALITIES: CHILDREN IN AMERICA'S SCHOOLS (1991).

202. *See* JAMES COLEMAN, EQUALITY AND ACHIEVEMENT IN EDUCATION 19 (1990).

203. *See, e.g.*, Shirley Blancke & Cjigkitoonuppa John Peters Slow Turtle, *The Teaching of the Past of the Native Peoples of North America in U.S. Schools*, *in* THE EXCLUDED PAST 123 (Peter Stone & Robert MacKenzie eds., 1990) (discussing a 1789 Massachusetts statute that criminalized Native American literacy "under penalty of death"); *see also* LOEWEN, *supra* note 2, at 129.

204. *See, e.g.*, JUDITH A. BAER, WOMEN IN AMERICAN LAW: THE STRUGGLE TOWARD EQUALITY FROM THE NEW DEAL TO THE PRESENT 221-22 (1991).

205. Anita Bernstein, *Engendered By Technology*, 80 N.C. L. REV. 1, 59 (2001).

2. RIGHT TO LIVE WITH FAMILY MEMBERS

In *Moore v. City of East Cleveland*, the Court relied extensively on tradition to find a fundamental right to live with family members, including members of one's extended family. Although the Court initially proclaimed that "[d]ue process has not been reduced to any formula,"[206] it resorted to tradition almost exclusively in finding such a right. *Moore* described as "venerable" the nation's tradition of nonnuclear family members living together, stating specifically that "[o]ver the years, millions of our citizens have grown up in just such an environment."[207]

Justice Brennan's concurrence highlighted the "cultural myopia"[208] of the East Cleveland ordinance that limited the number of unrelated people who could live in the same dwelling and narrowly defined the term "unrelated."[209] His opinion explored the "tradition of the American home that has been a feature of our society since our beginning as a Nation,"[210] claiming that the "'extended family' . . . remains . . . a pervasive living pattern . . . ."[211] Brennan focused on black households, in which he claimed that living with extended family was "especially familiar."[212] He concluded that living with extended family "remains a vital tenet of our society" and "historically ha[s] been central, and today remain[s] central, to a large proportion of our population."[213]

Brennan's focus on black families is curious in light of history. Black Americans have spent a majority of their time in the United States subjugated under slavery, the nation's most systematic breakup of the family. Slavery, which depended on the separate sales of children and parents, "forcibly disrupted . . . slave families,"[214] essentially institution-

206. Moore v. City of E. Cleveland, 431 U.S. 494, 501 (1977) (plurality opinion).

207. *Id.* at 504-05 (citing, among others, BETTY YORBURG, THE CHANGING FAMILY (1973)).

208. *Id.* at 507.

209. *See id.* at 496 n.2 (citing the relevant provisions of the East Cleveland code).

210. *Id.* at 507.

211. *Id.* at 508 (citing HERBERT J. GANS, THE URBAN VILLAGERS: GROUP AND CLASS IN THE LIFE OF ITALIAN-AMERICANS 45-73, 245-49 (1962)).

212. *Moore*, 431 U.S. at 509 (citing, among others, YORBURG, *supra* note 207, at 108; ROBERT B. HILL, THE STRENGTHS OF BLACK FAMILIES 5 (1972); J. SCANZONI, THE BLACK FAMILY IN MODERN SOCIETY 134 (1971); Anderson, *The Pains and Pleasures of Old Black Folks*, EBONY, Mar. 1973, at 123, 128-30)).

213. *Id.* at 510 (citing, among others, NATHAN GLAZER & DANIEL PATRICK MOYNIHAN, BEYOND THE MELTING POT 50-53 (1970)). It should be noted, however, that Moynihan has been severely criticized for his paternalistic and condescending views about black families, particularly his understanding of the "weakness in the black family." NICHOLAS LEMANN, THE PROMISED LAND: THE GREAT MIGRATION AND HOW IT CHANGED AMERICA 175 (1992). Moynihan's report, "The Negro Family: The Case for National Action," stirred a national debate and infuriated most progressive-minded individuals, such as Bayard Rustin and James Farmer. *See id.* at 172-78 (summarizing that Moynihan's tactic was to "blame the victim").

214. DAVIS, *supra* note 99, at 14. *See also* Christine L. Kerian, *Surrogacy: A Last Resort*

alizing the breakup of black families. As with many of the odious traditions referenced in this article, the law condoned this history.[215]

Of course, Blacks are not the only group that systematically has been discouraged from or denied the opportunity to live with non-nuclear family members. Native Americans also were enslaved[216] and subjected to the same forced break-up of the family unit that was experienced by Black Americans. Moreover, the United States historically has not accepted the sexual orientation of lesbians and gay men,[217] let alone their cohabitation. Thus, while Brennan's attempt at a culturally pluralistic opinion is to be applauded, his historical interpretation is, at the very least, disputable, and more likely incorrect.

3. RIGHT TO KILL PROTECTED WILDLIFE

Not all fundamental rights opinions garner the attention commanded by *Glucksberg*, *Reynolds*, or *Roe*; most fundamental rights opinions, many of which are issued by lower courts, do not involve the spotlight-grabbing rights such as assisted suicide, voting, or abortion. Nevertheless, these opinions can provide important examples of and insights into the malleability of tradition.

Christy v. Hodel[218] is one such opinion. In *Christy*, the Ninth Circuit held that there is no fundamental right to kill federally protected wildlife in defense of property.[219] The court so held after finding that the purported right was not "deeply rooted in this Nation's history and tradition."[220] Unfortunately, the court did not reference the sources it consulted in arriving at its conclusion.

An historical inquiry could yield a different result, namely that a right to kill federally protected wildlife in defense of property has been "well established."[221] Tradition dating back to the Roman Empire and

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Alternative for Infertile Women or a Commodification of Women's Bodies and Children?, 12 WIS. WOMEN'S L.J. 113, 153 (1997) (commenting that "the involuntary breakup of a family unit is at the heart of what many Americans found most repulsive about slavery").

215. *See generally* Thomas D. Russell, *Articles Sell Best Singly: The Disruption of Slave Families at Court Sales*, 1996 UTAH L. REV. 1161, 1162 (concluding that "court sales disrupted markedly more slave families than noncourt or commercial sales").

216. *See, e.g.*, Tayyab Mahmud, *Migration, Identity, and the Colonial Encounter*, 76 OR. L. REV. 633, 640 n.23 (1997) ("Native American slavery was the first large-scale system in the history of capitalism to exploit the workers of conquered territories outside of Europe. In terms of its scale and destructive significance, it exceeded the later enslavement of the African people."). *See generally* WILBUR R. JACOBS, DISPOSSESSING THE AMERICAN INDIAN (1972).

217. *See supra* note 83.

218. Christy v. Hodel, 857 F.2d 1324 (9th Cir. 1988).

219. *See id.* at 1330.

220. *Id.*

221. J.C. Vance, Annotation, *Right to Kill Game in Defense of Person or Property*, 93 A.L.R.2d 1366, 1368 (1964); *see also* David S. Klain, Note, *Does the Endangered Species Act*

extending "through Western history" can be interpreted to support a landowner's right to kill whatever wildlife enters her land.[222]

Perhaps *Christy* highlights another problem with relying on tradition to assess fundamental rights. As we have seen, tradition analysis requires significant research and energy. Lower courts are not well-equipped to engage in such analysis, considering their relatively short deadlines and docket congestion. They rarely have the luxury of relying on amicus briefs, which are much more commonly submitted to the Supreme Court than to lower courts. In short, tradition is an especially difficult methodological tool for lower courts to employ.

Regardless of whether the Supreme Court or a lower court is issuing the opinion, using tradition as a methodological tool to assess purported fundamental rights has resulted in dubious fundamental rights opinions. At the very least, the inherent plasticity of tradition prevents the certainty and neutrality that history theoretically provides. In other words, tradition often does not constrain jurists. Rather, it permits contestable fundamental rights rulings that are frequently dependant on the positionality and political will of the jurist assessing the purported fundamental right.

V. TRADITION: A RESULT-ORIENTED APPLICATION

While tradition is supposed to bring stability and certainty to fundamental rights jurisprudence, it has produced the opposite result. Along with the reasons discussed above, this is due, in part, to its uneven, result-oriented application by jurists.[223] When a jurist believes that employing tradition may support the desired outcome, she often will rely on tradition extensively; when she determines that tradition dictates a less desirable outcome, she usually will avoid tradition entirely.

Thus, almost all Justices are consonant with respect to one aspect of their use of tradition in fundamental rights analyses: inconsistent employment of tradition. In fact, only one Justice in the last twenty years, Justice Scalia, has held uniformly to his convictions regarding the (non-)applicability of tradition in fundamental rights cases.[224] Clearly,

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Deprive an Owner of Fundamental Constitutional Rights: Christy v. Hodel, 12 GEO. MASON L. REV. 421, 429 (1990) (referring to a "long-standing, historical tradition in this country that establishes that such a right exists").

222. Deborah G. Musiker et al., *The Public Interest and Parens Patriae Doctrines: Protecting Wildlife in Uncertain Political Times*, 16 PUB. LAND L. REV. 87, 87 n.3 (1995).

223. Fundamental rights is not the only doctrine in which tradition is used unevenly to satisfy a jurist's result-oriented outcome. Professor Rebecca Brown, discussing the erratic application of tradition generally by the judiciary, stated, "[f]or . . . the vast majority, tradition is a powerful rhetorical device to be brought out when it is favorable (and only to the extent that it is favorable) to the writer's conclusions." Brown, *supra* note 5, at 178.

224. *See, e.g.*, Planned Parenthood of S.E. Pa. v. Casey, 505 U.S. 833, 979 (1992) (Scalia, J.,

the use and abuse of tradition in fundamental rights jurisprudence is not simply an issue of liberals versus conservatives. Justices covering a broad spectrum of political ideology have employed or neglected tradition in order to support their desired fundamental rights outcomes.

Of course, such uneven application does not prove that tradition is a categorically inappropriate methodological tool; Parts III and IV make that argument. Nonetheless, it reveals three important points: 1) Justices are ambivalent about employing tradition; 2) tradition, as applied, does not ensure the certainty that the methodology is supposed to provide; and 3) Justices use tradition as a result-oriented method to further their own political agendas. These observations are borne out when reviewing the Justices' fundamental rights opinions. They also hopefully provide some context to and assist in explaining the following Justices' inconsistent fundamental rights analyses.

A. *Justice McReynolds*

It is fitting that the Justice credited with introducing tradition as a methodological tool into non-economic fundamental rights analysis himself employed tradition erratically. Setting the stage for the uneven application of tradition, Justice McReynolds was the first Justice to invoke tradition in non-economic fundamental rights analysis and, only two years later, became the first Justice to ignore tradition in non-economic fundamental rights analysis.

In 1923, McReynolds ushered non-economic fundamental rights into American jurisprudence with *Meyer*. While the *Meyer* opinion never explicitly used the term "tradition" and mentioned the phrase "fundamental right" only once, it was revolutionary in that it successfully employed these concepts in a non-economic fundamental rights case. Concluding that citizens have certain "fundamental rights which must be respected," to wit, parents' right to control the education of their children, the Court held that a Nebraska statute that prohibited teaching any language other than English in certain schools violated plaintiffs' fundamental right to direct their children's education.[225] Without using the words "tradition" or "history," McReynolds grounded his fundamental rights analysis in tradition, finding the right to be fundamental because it was a "privilege long recognized at common law,"[226] and because "[t]he American people have always regarded [such a right] as

concurring in part and dissenting in part) (relying on tradition to assess the purported fundamental right); Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261, 292 (1990) (Scalia, J., concurring) (same); Michael H. v. Gerald D., 491 U.S. 110 (1989) (same).

225. Meyer v. Nebraska, 262 U.S. 390, 401, 403 (1923).

226. *Id.* at 399.

[a] matter of supreme importance."[227]

A mere two years later, McReynolds reversed course, opting to ignore tradition in another important fundamental rights opinion. In *Pierce v. Society of Sisters*, McReynolds, again writing for the Court, held that a state statute violated parents' fundamental right to direct the upbringing of their children.[228] Failing to heed his former respect for tradition in assessing fundamental rights, McReynolds relied solely on precedent (*Meyer*)[229] and a lofty understanding of "liberty"[230] in finding the fundamental right. McReynolds's vacillation between reverence for and exclusion of tradition as a methodological tool for assessing purported fundamental rights opened the door for other Justices' similar result-oriented, uneven application of tradition in fundamental rights cases. From Cardozo to Stevens, and nearly all Justices in between, jurists similarly have utilized tradition only when they have believed that it supported their desired outcome.

B. *Justice Cardozo*

Justice Cardozo's fundamental rights opinions span the spectrum of the uneven application of tradition. *Snyder v. Massachusetts*,[231] when issued in 1934, provided the most detailed tradition analysis of any fundamental rights opinion. Holding that a criminal defendant does not possess a fundamental right to accompany the prosecutor when the prosecutor takes the jury on a field trip to view the scene of the crime, Cardozo relied on tradition extensively. Commencing with a statement that tradition-conscious Justices have repeated often, Cardozo theorized that a purported right is not fundamental unless restricting it "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental."[232] First generalizing that "[t]he Fourteenth Amendment has not displaced the procedure of the ages,"[233] the *Snyder* opinion engaged in a thorough examination of history regarding "showing" the crime scene to the jury. Commenting that "the viewpoint of history" was dispositive to whether the purported right

227. *Id.* at 400. McReynolds provided examples from American and world history, *see id.* at 401-02, which are discussed *supra* Part IV.B.1.

228. Pierce v. Soc'y of Sisters, 268 U.S. 510, 534-35 (1925).

229. *See id.* at 534-35.

230. *See id.* at 535 ("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.").

231. Snyder v. Massachusetts, 291 U.S. 97 (1934).

232. *Id.* at 105. For other opinions that have borrowed this phrase, see, for example, Montana v. Egelhoff, 518 U.S. 37, 43 (1996); Reno v. Flores, 507 U.S. 292, 303 (1993); United States v. Salerno, 481 U.S. 739, 751 (1987); Schall v. Martin, 467 U.S. 253, 268 (1984).

233. *Sydner*, 291 U.S. at 111.

was fundamental,[234] the Court cited authority dating back to 1747.[235] Moreover, though Cardozo referred to the "traditions and conscience of our people,"[236] he devoted more analysis to "showings" in Europe than in the United States, buttressing his tradition analysis by citing a bevy of old English cases, statutes, and commentaries.[237] Tradition was the sole methodological tool used by the *Snyder* Court to assess the fundamentality of the purported fundamental right.

Cardozo wrote the majority opinion three years later in *Palko v. Connecticut.*[238] The fundamental rights analysis in *Palko* could not have been more different from that in *Snyder.* While *Snyder* was saturated with references to American and British traditions, *Palko* never referenced a relevant tradition. Assessing whether a criminal defendant has a fundamental right for the state not to appeal a verdict in a criminal case, the Court asked solely whether the purported right was "implicit in the concept of ordered liberty."[239] The Court concluded that such a right was not fundamental because it was "not of the very essence of a scheme of ordered liberty."[240] Without providing any insight into how the Court inquired into what constitutes "ordered liberty," it summarily concluded that "[f]ew would be so narrow or provincial as to maintain that a fair and enlightened system of justice would be impossible" if the state were permitted to appeal a verdict in a criminal case.[241]

Snyder and *Palko* could not be further apart in their methodological framework for determining the fundamentality of rights. The two opinions are analytically irreconcilable and reflect both a result-oriented approach and the uneasiness of jurists to employ tradition as an analytical tool to assess fundamental rights.

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234. *Id.* at 113.

235. *See id.* at 111.

236. *See id.* at 105.

237. *See, e.g., id.* at 111 (citing English and Welsh statutes); *id.* at 112 (citing, inter alia, an early English case and an 1828 British treatise); *id.* at 114 (citing Act of 6 George IV, c. 50, §§ 23, 24 (1825)).

238. Palko v. Connecticut, 302 U.S. 319 (1937), *overruled by* Benton v. Maryland, 395 U.S. 784 (1969).

239. *Palko*, 302 U.S. at 325. The Court "assumed for the purpose of the case" that a statute allowing the federal government to appeal the verdict of a criminal case would violate the Double Jeopardy Clause of the Fifth Amendment. *Id.* at 323.

240. *Id.* Cardozo's reference to the "'essence of a scheme of ordered liberty' . . . became the basis for the incorporation of most of the Bill of Rights into the Fourteenth Amendment and eventuated in making those provisions applicable to the states." THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES 127 (Kermit L. Hall ed., 1992). While the opinion cited *Snyder* for the proposition that a court assessing a purported fundamental right must also ask whether the right is "so rooted in the traditions and conscience of our people as to be ranked as fundamental," *Palko*, 302 U.S. at 325 (quoting, inter alia, *Snyder*, 291 U.S. at 105), the *Palko* Court did not conduct any such tradition analysis.

241. *Palko*, 302 U.S. at 325.

C. *Justice Harlan*

Justice Harlan, similarly erratic with respect to his fundamental rights methodology, introduced a third variable: in addition to employing tradition exclusively and avoiding it entirely, it can be utilized as a non-dispositive tool along with other methods. Amazingly, Harlan invoked all three approaches in five different fundamental rights opinions over the span of eight years.

It was the first of these five opinions, in 1961, in which Justice Harlan adopted his most nuanced fundamental rights analysis. Dissenting in *Poe v. Ullman*, Harlan stated an oft-quoted passage:

> Due process has not been reduced to any formula; its content cannot be determined by reference to any code. The best that can be said is that through the course of this Court's decisions it has represented the balance which our Nation, built upon postulates of respect for the liberty of the individual, has struck between that liberty and the demands of organized society. If the supplying of content to this Constitutional concept has of necessity been a rational process, it certainly has not been one where judges have felt free to roam where unguided speculation might take them. The balance of which I speak is the balance struck by this country, having regard to what history teaches are the traditions from which it developed as well as the traditions from which it broke. That tradition is a living thing. A decision of this Court which radically departs from it could not long survive, while a decision which builds on what has survived is likely to be sound. No formula could serve as a substitute, in this area, for judgment and restraint.[242]

Adhering to his belief that no one method could be decisive in assessing a purported fundamental right, Harlan looked to precedent,[243] his personal understanding of the "private realm of family life" and the

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242. Poe v. Ullman, 367 U.S. 497, 542 (1961). Many opinions, including *Washington v. Glucksberg*, 521 U.S. 702, 765-66 (1997) (Souter, J., concurring); *Planned Parenthood of S.E. Pa. v. Casey*, 505 U.S. 833, 849-50 (1992) (plurality opinion); and *Moore v. City of E. Cleveland*, 431 U.S. 494, 501 (1977) (plurality opinion), have cited at least portions of this passage. Later in his dissent, Harlan, quoting *Rochin v. California*, 342 U.S. 165, 170-71 (1952), wrote:

> The vague contours of the Due Process Clause do not leave judges at large. We may not draw on our merely personal and private notions and disregard the limits that bind judges in their judicial function. Even though the concept of due process of law is not final and fixed, these limits are derived from considerations that are fused in the whole nature of our judicial process. . . . These are considerations deeply rooted in reason and in the compelling traditions of the legal profession.

Poe, 367 U.S. at 544-45.

243. *See id.* at 550-51 (stating that "the sweep of the Court's decisions . . . amply shows that the Constitution protects the privacy of the home against all unreasonable intrusion of whatever character").

intimacy of "marital relations,"[244] and tradition[245] to find that a Connecticut statute forbidding the use of contraceptives violated the fundamental right of married couples to use contraception.[246]

Harlan again applied the hybrid methodology in *Griswold v. Connecticut.* Concluding, as he did in *Poe*, that Connecticut's anti-contraception statute violated married couples' fundamental right to use contraception,[247] Harlan found such a fundamental right by consulting "the teachings of history, . . . the basic values that underlie our society, and . . . the great roles that the doctrines of federalism and separation of powers have played in establishing and preserving American freedoms."[248] According to Harlan, adherence to these analytical tools and respect for "the concept of ordered liberty"[249] would suffice to keep "most judges from roaming at large in the constitutional field . . . of the Due Process Clause."[250]

Sandwiched between *Poe* and *Griswold* was *Reynolds v. Sims.* Dissenting from the Court's opinion that there is a fundamental right to have one's vote counted equally with others' votes, Harlan contended that there was no such fundamental right.[251] Although he admitted that tradition would not yield a clear-cut answer with respect to whether such a fundamental right existed,[252] Harlan's fundamental rights analysis in *Reynolds* was informed completely by tradition. He grounded his analysis in the history of the Fourteenth Amendment's ratification,[253] as well as in the actions of the individual states prior to and after their adopting the Fourteenth Amendment.[254]

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244. *Id.* at 552 ("Of this whole 'private realm of family life' it is difficult to imagine what is more private or more intimate than a husband and wife's marital relations.").

245. *See id.* at 554-56.

246. *See id.* at 539. Harlan later commented that the Connecticut statute was "the most egregiously unconstitutional act that I have seen since being on the Court." Henry S. Cohen, Book Review, *The Supreme Court in Conference (1940-1985): The Private Discussions Behind Nearly 300 Supreme Court Decisions*, 48 FED. LAW. 57 (2001) (reviewing THE SUPREME COURT IN CONFERENCE (1940-1985): THE PRIVATE DISCUSSIONS BEHIND NEARLY 300 SUPREME COURT DECISIONS (Del Dickson ed., 2001)).

247. Griswold v. Connecticut, 381 U.S. 479, 500 (1965) (Harlan, J., concurring).

248. *Id.* at 501.

249. *Id.* at 500 (quoting Palko v. Connecticut, 302 U.S. 319, 325 (1937), *overruled by* Benton v. Maryland, 395 U.S. 784 (1969)).

250. *Id.* at 502.

251. Reynolds v. Sims, 377 U.S. 533, 614-15 (1964).

252. *See id.* at 590.

253. *See id.* at 595-608.

254. *See id.* at 602-10. In addition, Harlan provided a passing reference to states' voting schemes in 1964, when *Reynolds* was issued. *See id.* at 610-11 (commenting that "it is scarcely necessary to comment on the situation in the States today"). Moreover, while Harlan included a subsection entitled "Other Factors," this was merely an afterthought to the tradition subsections, which were basically dispositive to his fundamental rights analysis. *See id.* at 611-14.

Two years later, in another voting rights case, Harlan again dissented from the Court's finding of a fundamental right. This time, in *Harper v. Virginia State Board of Elections*, Harlan found that there was no fundamental right to vote for free.[255] Chastising the majority for "revert[ing] to the highly subjective judicial approach manifested by *Reynolds*,"[256] Harlan again resorted exclusively to tradition.[257]

After eight years of employing history to different extents, Harlan rounded out his inconsistent application of fundamental right methodologies in *Shapiro v. Thompson*.[258] Dissenting in *Shapiro*, Harlan concluded that there should be a fundamental right to interstate travel, notwithstanding his apparent distaste for the doctrine of fundamental rights.[259] Quixotically, though, he so held only by assessing the purported fundamental right in light of precedent.[260]

It is virtually impossible to make sense of Harlan's erratic employment of tradition in finding fundamental rights. Over a span of eight years, Harlan's fundamental rights opinions run the gamut of methodological tools to assess purported fundamental rights. Such uneven application not only evinced his result-oriented approach in such opinions and his ambivalence toward tradition, but also contributed to the uncertainty in fundamental rights jurisprudence in the 1960s.

D. *Justice Powell*

By 1973, when Justice Powell wrote the *Rodriguez* opinion, tradition had been accepted unequivocally as a methodological tool to assess purported fundamental rights. It was also clear by 1973 that the Justices were free to seize upon or ignore tradition without explanation. Thus, it should come as no surprise that Powell, like so many Justices prior to his joining the Court and after his retirement, used tradition sporadically and without justification.

Rodriguez is a perplexing fundamental rights opinion for many reasons,[261] one of which is that it is nearly impossible to discern Powell's

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255. Harper v. Va. State Bd. of Elections, 383 U.S. 663, 686 (1966) (Harlan, J., dissenting).

256. *Id.* at 683.

257. *See id.* at 684-85 (commenting that "[p]roperty qualifications and poll taxes have been a traditional part of our political structure" and citing such pre-Revolutionary requirements).

258. 394 U.S. 618 (1969).

259. *See id.* at 661 (referring to fundamental rights doctrine as "particularly unfortunate and unnecessary").

260. *See id.* at 669-71.

261. For other critiques of *Rodriguez*, see, for example, *Developments in the Law–The Interpretation of State Constitutional Rights; v. Privacy and Education: The Two Faces of Fundamental Rights*, 95 HARV. L. REV. 1429, 1458-59 (1982) (noting a criticism of *Rodriguez* is its "textual determinism as a prelude to ruling in favor of plaintiffs"); Susan H. Bitensky, *Theoretical Foundations for a Right to Education Under the U.S. Constitution: A Beginning to the*

fundamental rights analysis. Powell's uneasiness with fundamental rights was apparent in *Rodriguez*:

> It is not the province of this Court to create substantive constitutional rights in the name of guaranteeing equal protection of the laws. Thus, the key to discovering whether education is "fundamental" is not to be found in comparisons of the relative societal significance of education as opposed to subsistence or housing. Nor is it to be found by weighing whether education is as important as the right to travel. Rather, the answer lies in assessing whether there is a right to education explicitly or implicitly guaranteed by the Constitution.[262]

After acknowledging that the United States Constitution does not explicitly recognize a fundamental right to education, the remainder of the *Rodriguez* Court's plurality opinion provides no guidance with respect to how to assess whether a right is implicitly guaranteed by the Constitution.[263]

Subsequently, Powell not only adopted tradition as a methodological tool to assess whether a purported fundamental right is implicitly protected by the Constitution, he adopted it, at least momentarily, as his exclusive analytical tool. In *Moore*, Powell again wrote the plurality opinion for the Court. In finding a fundamental right to live with extended family members, Powell departed drastically from his analysis in *Rodriguez*, relying on tradition to find the fundamental right. First theorizing that "[a]ppropriate limits on substantive due process come . . . from careful 'respect for the teachings of history (and) solid recognition of the basic values that underlie our society,'"[264] Powell focused on his

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End of the National Education Crisis, 86 Nw. U. L. REV. 550, 565 (1992) (explaining why the *Rodriguez* Court's analysis is a "most unsatisfying way of disposing of the issue"); and Penelope A. Preovolos, Rodriguez *Revisited: Federalism, Meaningful Access, and the Right to Adequate Education*, 20 SANTA CLARA L. REV. 75, 103-13 (1980) (providing four reasons that the *Rodriguez* Court should have held that education is a fundamental right).

262. San Antonio Sch. Dist. v. Rodriguez, 411 U.S. 1, 33 (1973) (citations omitted).

263. *Rodriguez* relied somewhat on federalism, stating that recognizing a fundamental right to education would intrude on states' rights. *See id.* at 40. The decision was also motivated by an understanding that the judiciary is not the most skilled branch to deal with matters of education:

> In addition to matters of fiscal policy, this case also involves the most persistent and difficult questions of educational policy, another area in which this Court's lack of specialized knowledge and experience counsels against premature interference with the informed judgments made at the state and local levels. Education . . . presents a myriad of intractable economic, social, and even philosophical problems.

Id. at 42 (citations and quotation marks omitted). Perhaps Powell's opinion in *Rodriguez* was informed by his experiences as president of the Richmond School Board. *See* Victoria J. Dodd, *The Education Justice: The Honorable Lewis Franklin Powell*, 29 FORDHAM URB. L.J. 683, 688 (2001) ("Justice Powell in *Rodriguez* was concerned with local stability, the same principles that apparently guided him in his stewardship of the Richmond school board during desegregation.").

264. Moore v. City of E. Cleveland, 431 U.S. 494, 503 (1977) (quoting Griswold v. Connecticut, 381 U.S. 479, 501 (1965) (Harlan, J., concurring)).

understanding that "the institution of the family is deeply rooted in this Nation's history and tradition."[265]

Powell continued his reliance on tradition in assessing purported fundamental rights in his concurrence in *Zablocki v. Redhail*. Nevertheless, Powell's reiteration in *Zablocki* that a right is fundamental only if violating it "is contrary to deeply rooted traditions"[266] was the last time, except for in a footnote in his concurrence in *Bowers v. Hardwick*,[267] that he would rely on tradition in a fundamental rights case. The only other fundamental rights opinion Powell would write after *Zablocki* was as a retired Justice sitting by designation for the Eleventh Circuit. In *Picou v. Gillum*,[268] Powell held for the Eleventh Circuit that a motorcyclist did not possess a fundamental right to ride unencumbered by headgear.[269] Though Powell indicated that a court assessing the fundamentality of a right should consider history, policy, and "logic,"[270] he engaged in no such analysis in *Picou*. Instead, reverting to *Rodriguez*-style analysis, Powell lets the reader guess why he found no such fundamental right.[271] Perhaps it is because of his discomfort with fundamental rights in general that Powell was ultimately unwilling to adopt an analytical framework to assess purported fundamental rights. Nonetheless, if he seriously believed that "an approach grounded in history imposes limits on the judiciary that are more meaningful than any based on [an] abstract formula,"[272] his avoidance of history is problematic, and evinces a result-oriented approach to fundamental rights.

E. *Chief Justice Warren*

As discussed above, the Warren Court welcomed fundamental rights into mainstream jurisprudence. While the Warren Court produced some of the most memorable fundamental rights opinions, it also fostered the uneven application of tradition in assessing alleged fundamental rights. It is therefore not surprising that Chief Justice Warren himself was not immune from invoking tradition only when he believed it suited his interests.

Warren wrote *Loving v. Virginia*, a landmark Warren Court opin-

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265. *Id.* at 503.

266. Zablocki v. Redhail, 434 U.S. 374, 399 (1978) (quoting *Moore*, 431 U.S. at 499, 503-04).

267. *See* Bowers v. Hardwick, 478 U.S. at 198 n.2 ("I cannot say that conduct condemned for hundreds of years has now become a fundamental right.").

268. Picou v. Gillum, 874 F.2d 1519 (11th Cir. 1989).

269. *See id.* at 1521-22.

270. *See id.* at 1522.

271. The only readily discernible interpretive tool employed by Powell in *Picou* is federalism. *See id.* (commenting that "the desirability of laws such as the Florida helmet requirement is a matter for citizens and their elected representatives to decide").

272. Moore v. City of E. Cleveland, 431 U.S. 494, 504 n.12 (1977) (plurality opinion).

ion. A blend of liberal rhetoric and unsupported presumptions, the two-paragraph fundamental rights opinion was nearly devoid of analysis. Recognizing one's fundamental right to marry a person of another race, *Loving* relied solely on judicial precedent and Warren's personal outrage regarding Virginia's anti-miscegenation statute.[273]

Two years later, in *Shapiro v. Thompson*, Warren's dissenting opinion was as analytically puzzling as his *Loving* opinion. Departing from all of the methodologies discussed above, Warren, assessing the purported fundamental right to interstate travel, asserted that "[t]he core inquiry is the extent of the governmental restriction imposed and the extent of the necessity for the restriction."[274] Warren then weighed the government's restriction imposed on the alleged right against the possible legislative justifications for the restrictions.[275]

It should hardly be surprising, given the Justices' predictably inconstant applications of tradition in assessing fundamental rights, that Warren's analysis in his other major fundamental rights opinion relies heavily on tradition. Finding a fundamental right to have one's vote count equally with others' votes, Warren, writing for the Court in *Reynolds*, focused mostly on tradition in assessing the purported right.[276] Referring to "[t]he original constitutions of 36 of our States," the Northwest Ordinance, and the musings of Thomas Jefferson, among others, Warren's fundamental rights analysis in *Reynolds* was saturated with historical facts.[277]

Again, with these three opinions issued by Warren within five years of each other, it is hard to conclude that Warren's ignoring or invoking tradition was evidence of anything but a result-driven application of tradition and a personal uneasiness with tradition itself.

F. *Chief Justice Burger*

Much like his predecessor, Chief Justice Burger engaged in a

273. *See* Loving v. Virginia, 388 U.S. 1 (1967). After quoting *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942), Warren summarily concluded: "Under our Constitution, the freedom to marry or not marry a person of another race resides with the individual and cannot be infringed by the State." *Loving*, 388 U.S. at 12.

274. Shapiro v. Thompson, 394 U.S. 618, 650 (1969) (Warren, C.J., dissenting) (citation omitted).

275. *See id.* Warren also relied on precedent. *See id.* at 652-53 (commenting that "the Court's opinion . . . seems to have departed from our precedents" and examining some of these precedents in light of the *Shapiro* Court's holding).

276. The *Reynolds* Court relied secondarily on precedent. *See* Reynolds v. Sims, 377 U.S. 533, 560-61 (1964). Countering much of the *Reynolds* opinion, Warren later admits that "history alone" is not a "permissible facto[r] in attempting to justify disparities from population-based representation." *Id.* at 579-80.

277. *See id.* at 573. For a discussion of the Court's historical interpretation in *Reynolds*, see *supra* Part IV.A.3.

result-oriented, inconsistent application of tradition in his fundamental rights opinions. His first such opinion, dissenting in *Eisenstadt v. Baird*, concluded that there should not be a general fundamental right to use contraception.[278] The dissent was marked by Burger's antipathy for fundamental rights, lamenting at one point that the Court was "regrettably hark[ing] back to the heyday of substantive due process."[279] Refusing to engage in any systematic fundamental rights analysis, Burger pithily stated, "I see nothing in the Fourteenth Amendment or any other part of the Constitution that even vaguely suggests that these medicinal forms of contraceptives must be available in the open market."[280] His analysis—what little there was of it—focused on states' rights to regulate health issues.[281]

Burger's only other significant fundamental rights opinion was, analytically speaking, 180 degrees different from his approach in *Eisenstadt*. In his concurrence in *Bowers*, Burger adopted a clear approach to assess fundamental rights: almost every word of his concurrence reflected his new-found reverence for tradition.[282] Underscoring that "proscriptions against sodomy have very 'ancient roots,'" Burger cited Judeo-Christian moral and ethical codes, a statute enacted during the English Reformation, Blackstone's Commentaries of English law, and practices in the American colonies.[283] The most current source he cited was an 1816 Georgia statute.[284]

It is certainly possible that Burger awoke to a fundamental rights epiphany sometime between 1972 and 1986, when *Eisenstadt* and *Bowers*, respectively, were issued. Nevertheless, tradition as a methodological tool to assess purported fundamental rights was, as discussed above, invoked many times prior to 1972. His ignoring it in *Eisenstadt* and employing it in *Bowers* mimics the analyses of the Justices mentioned above and below, who used tradition sporadically to suit their desired result.

278. Eisenstadt v. Baird, 405 U.S. 438, 471-72 (1972) (Burger, C.J., dissenting).

279. *Id.* at 467.

280. *Id.* at 471-72.

281. Burger commented that the Court's opinion "seriously invade[s] the constitutional prerogatives of the States . . . ." *Id.* at 467. The remainder of Burger's dissent focused on the right of Massachusetts to "seek to protect health by regulating contraceptives." *Id.* at 469.

282. The last two sentences of his concurrence did, however, refer to states' rights. *See* Bowers v. Hardwick, 478 U.S. 186, 197 (1986) (Burger, C.J., concurring). Nonetheless, the references to states' rights were but an afterthought to the long paragraph preceding it, which dealt exclusively with tradition. *See id* at 196-97.

283. Along with the statute mentioned in the text accompanying *infra* note 284, this list constitutes the entire authority on which Burger based his opinion. *See id.*

284. *See id.* at 197.

G. *Justice Marshall*

Justice Marshall wrote far fewer fundamental rights opinions than one might expect. The few that he did write, however, were analytically vastly different from one other.

Marshall's first foray into fundamental rights was in *Stanley v. Georgia*. Holding that there is a fundamental right to possess obscene material, *Stanley* relied on little more than vague notions of "our scheme of individual liberty."[285] Without bolstering the central holding of *Stanley* with any citation, Marshall concluded for the Court that "the right to be free . . . from unwanted governmental intrusions into one's privacy" is fundamental, and that "a State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch."[286]

Marshall did not mention tradition in *Zablocki* any more than he did in *Stanley*. Finding a fundamental right to marry, Marshall grounded his fundamental rights analysis solely in precedent.[287] Considering the conspicuous absence of tradition in *Zablocki* and *Stanley*, it is curious that Marshall's dissent in *Rodriguez*, which was issued between *Zablocki* and *Stanley*, relies on tradition. Finding a fundamental right to education, Marshall, dissenting, chided the Court for "retreat[ing] from our historic commitment to equality of educational opportunity,"[288] and based his fundamental rights analysis on, among other things, "the unique status" traditionally accorded education by our society.[289]

This flirtation with history is particularly surprising in Marshall's case, since he has explicitly distanced himself from tradition in his non-judicial writing.[290] It further highlights the unevenness of Marshall's methodological approach to fundamental rights and shows the extent to which Justices will employ tradition when they determine it best suits their interests.[291]

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285. Stanley v. Georgia, 394 U.S. 557, 568 (1969).

286. *Id.* at 564, 565.

287. *See* Zablocki v. Redhail, 434 U.S. 374, 383-84 (1978) (citing, among others, Loving v. Virginia, 388 U.S. 1 (1967); Griswold v. Connecticut, 381 U.S. 479 (1965); Skinner v. Oklahoma, 316 U.S. 535, 541 (1942); Meyer v. Nebraska, 262 U.S. 390 (1923)).

288. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 70-71 (1973) (Marshall, J., dissenting). Marshall augmented his employment of tradition with other analytical tools to find fundamental rights. *See, e.g., id.* at 102 (asserting that fundamental rights analysis should be grounded in the text of the Constitution and "the extent to which constitutionally guaranteed rights are dependent on interests not mentioned in the Constitution"); *id.* at 111 (looking to precedent and "the close relationship between education and some of our most basic constitutional values" to assess the purported fundamental right to education).

289. *Id.* at 111.

290. *See generally* Thurgood Marshall, *Reflections on the Bicentennial of the United States Constitution*, 101 HARV. L. REV. 1 (1987).

291. While scrutinizing the opinions that the Justices joined is outside the scope of this article,

H. *Justice White*

Justice White's employment of tradition in fundamental rights analysis is confusing at best. While he wrote significant fundamental rights opinions that directly confronted the proper role of tradition when assessing purported fundamental rights, his own uneasiness with employing history exemplifies the Court's ambivalence toward such a methodology.

Three of White's opinions span the spectrum of tradition's use in fundamental rights analysis. First, White's methodology for assessing the fundamental right at stake in *Michael H. v. Gerald D.* is difficult to discern. While Justice Scalia and Justice Brennan sparred over the propriety of the use of tradition in finding a purported fundamental right, White avoided the fray, neither acknowledging the debate over tradition nor providing insight into what he thought was the proper methodology to assess the fundamentality of a purported right.[292]

White did join the debate over tradition in two other opinions. In *Moore*, White relied solely on precedent and the *Palko* test: a purported right is fundamental if "neither liberty nor justice would exist if (it) were sacrificed."[293] Interestingly, he explicitly rejected the methodology used by Justice Powell, who, writing for the plurality, claimed that the Court should assess whether the purported right is deeply rooted in tradition.[294] White explained:

> For me, this suggests . . . a far less meaningful and less confining guiding principle than Mr. Justice Stewart would use for serious substantive due process review. What the deeply rooted traditions of the country are is arguable; which of them deserve the protection of the Due Process Clause is even more debatable.[295]

Amazingly, White wrote the majority opinion in *Bowers*, which relied nearly exclusively on tradition to find there is no fundamental

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Marshall's inconsistent employment of tradition is starker when one considers the opinions he joined. *Compare* Michael H. v. Gerald D., 491 U.S. 110, 136, 137-42 (1989) (Brennan, J., dissenting) (joining Justice Brennan's dissent that explicitly rejects tradition as a tool to assess fundamental rights), *with* Washington v. Harper, 494 U.S. 210, 237, 238 (Stevens, J., dissenting) (joining Justice Stevens's dissent that employs tradition to assess fundamental rights); *and* Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261, 301, 304-05 (1990) (Brennan, J., dissenting) (joining Justice Brennan's dissent that relies almost exclusively on tradition).

292. *See Michael H.*, 491 U.S. at 157-60 (White, J., dissenting). White relied on precedent somewhat in *Michael H.*, although he never was explicit with respect to his choice of fundamental rights methodologies. *See id.*

293. Moore v. City of E. Cleveland, 431 U.S. 494, 549 (1977) (White, J., dissenting) (quoting Palko v. Connecticut, 302 U.S. 319, 326 (1937)).

294. *See id.*

295. *Id.* White also argued that invoking tradition would "broaden enormously the horizons of the Clause," a befuddling claim for which he neither provided support nor explained in further detail. *Id.* at 549-50.

right to engage in homosexual sodomy.[296] Even more fantastic is that White cited Powell's plurality opinion in *Moore* to support his reliance on tradition.[297] The obvious explanation for this erratic application of tradition is that tradition supported White's desired outcome in *Bowers*, but did not support it in *Moore*.[298]

I. *Justice Brennan*

Justice Brennan exhibited the strongest love-hate relationship with tradition in the fundamental rights context. Brennan found a fundamental right in each of the seven major fundamental rights opinions he authored, and he employed tradition when he thought it supported finding a fundamental right. He ignored tradition, however, and even explicitly rejected tradition, when he believed it did not justify the fundamental right he wished to recognize.[299]

Brennan's most celebrated discussion of the use of tradition in fundamental rights analysis appears in *Michael H.* Unlike most Justices who have chosen not to apply tradition when assessing a fundamental right, Brennan confronted tradition explicitly in *Michael H.*, chiding the majority for invoking it. Prior to delineating his qualms with using tradition as a tool to assess fundamental rights, Brennan remarked, "because the plurality's opinion's exclusively historical analysis portends a significant and unfortunate departure from our prior cases and from sound constitutional decisionmaking, I devote a substantial portion of my discussion to it."[300] He then identified a number of problems with invoking tradition as a means to assess fundamental rights: it is not objective, it dictates results that contradict prior fundamental rights holdings, it strips the Fourteenth Amendment of its potency, and it perpetuates prior discrimination.[301] In lieu of tradition, Brennan argued that the "better approach" to finding fundamental rights is to assess whether the

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296. *See* Bowers v. Hardwick, 478 U.S. 186, 190-96 (1986).

297. *See id.* at 192.

298. Another commentator has arrived at the same conclusion:

> One major factor distinguishes the Court's use of history in *Moore* from that in *Bowers*. In the former case, history served to expand the universe of fundamental rights rising under the due process clause, while the latter declines to use history in such a way. The Court's historical analysis in *Bowers* leads to its refusal to expand the field of fundamental rights. This maintenance of the substantive due process status quo appears to be a paramount consideration for Justice White.

Steegmann, *supra* note 8, at 394.

299. *See also* Frank I. Michelman, *Super Liberal Romance, Community, and Tradition in William J. Brennan, Jr.'s Constitutional Thought*, 77 VA. L. REV. 1261, 1312-20 (1991) (recognizing Brennan's inconsistent use of tradition in fundamental rights opinions).

300. Michael H. v. Gerald D., 491 U.S. 110, 137 (1989) (Brennan, J., dissenting).

301. *See id.* at 137-41. Brennan did not elaborate on some of these concepts, all of which are discussed in detail *infra* Parts III-IV.

purported right is "close enough to the interests that we already have protected [in judicial opinions]."[302]

In four opinions issued prior to *Michael H.*, Brennan similarly refused to invoke tradition in fundamental rights analysis, albeit somewhat less boldly. In *Shapiro*, *Eisenstadt*, and *Carey*, in which Brennan authored the opinions of the Court, Brennan used precedent that was not exclusively based on tradition to assess the purported fundamental right at issue.[303] Only in his *Rodriguez* dissent did Brennan stray from using precedent, asking instead whether the right at issue was "linked" to other constitutional rights, or whether it was important to "the effectuation of those rights which are in fact constitutionally guaranteed."[304]

In light of these four opinions and, most obviously, Brennan's attack on tradition in *Michael H.*, it is inexplicable that he relied nearly exclusively on tradition in two seminal cases: *Moore* and *Cruzan v. Director, Missouri Department of Health*.[305] Assessing the purported fundamental right in *Moore*, Brennan looked to the "rights that historically have been central, and today remain central, to a large proportion of our population."[306] Dissenting in *Cruzan*, Brennan relied extensively on tradition to find a "fundamental right to be free of unwanted artificial nutrition and hydration."[307] Impersonating Justice Scalia, Brennan asked whether the purported right had been "firmly entrenched in American tort law" and "the earliest common law."[308]

What sets apart Brennan's uneven application of tradition from that of his colleagues, save Justices White[309] and Stevens,[310] is that instead of merely ignoring tradition when he determined that it did not support his desired result, he explicitly rejected it, finding it unsuitable for fundamental rights analysis. Thus, while the result-oriented nature of Brennan's reliance on tradition is unremarkable, it is the transparency of his result-oriented application that is distinctive.

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302. *Id.* at 142. He also argued that the plaintiff's interest must be weighed against the state's interest in limiting the purported fundamental right. *See id.* at 145.

303. *See* Carey v. Population Servs. Int'l, 431 U.S. 678, 684-85 (1977); Eisenstadt v. Baird, 405 U.S. 438, 453-54 (1972); Shapiro v. Thompson, 394 U.S. 618, 629-33 (1969).

304. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 62, 63 (1973).

305. Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261 (1990).

306. Moore v. City of E. Cleveland, 431 U.S. 494, 510 (1977) (Brennan, J., concurring). In another passage, Brennan viewed the purported right "in . . . light of the tradition of the American home that has been a feature of our society since our beginning as a Nation . . . ." *Id.* at 507. A brief portion of Brennan's concurrence also assessed whether precedent supported the fundamental right. *See id.* at 510-11.

307. *Cruzan*, 497 U.S. at 302.

308. *Id.* at 305.

309. *See supra* Part V.H.

310. *See infra* Part V.J.

J. *Justice Stevens*

Justice Stevens's use of tradition to find fundamental rights mimics White's and Brennan's invocation of tradition in one significant way: he explicitly rejected tradition in one case, even though he used it extensively elsewhere.

The Justices in *Bowers*, as in *Michael H.*, squarely confronted tradition as an analytical tool. Responding to the *Bowers* majority, which relied on tradition, Stevens's dissent stated that "the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice."[311] Instead, Stevens resorted to judicial precedent that was not grounded in tradition to find a fundamental right to engage in sodomy.[312]

However, Stevens's fundamental rights analysis in no less than three fundamental rights cases is incongruous with his explicit denunciation of tradition in *Bowers*. His concurrence in *Washington v. Glucksberg*, his most recent fundamental rights opinion, is illustrative. In *Glucksberg*, Stevens concluded that "[h]istory and tradition provide ample support for refusing to recognize an open-ended constitutional right to commit suicide."[313] Similarly, in *Cruzan*, while not exclusively relying on tradition, Stevens was unequivocal in his opinion that tradition is an indispensable tool to assess purported fundamental rights. Quoting Lincoln's Gettysburg Address, Nathan Hale, and Patrick Henry, among other aged sources,[314] Stevens assessed whether the asserted fundamental right was "so rooted in the traditions and conscience of our people as to be ranked as fundamental."[315]

Lastly, in *Moore*, Stevens resorted to practices that existed "[l]ong before the original States adopted the Constitution" to determine whether the purported right was fundamental.[316] Such an adherence to tradition is, on the surface, irreconcilable with his unequivocal repudiation of tradition in *Bowers*. One explanation, though, is that his rejection of tradition in *Bowers* is rooted in the fact that tradition could not have supported the fundamental right he found in *Bowers*,[317] whereas he

311. Bowers v. Hardwick, 478 U.S. 186, 216 (1986).

312. *See id.* at 216-18.

313. Washington v. Glucksberg, 521 U.S. 702, 740 (1997).

314. *See* Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261, 343-44 (1990) (Stevens, J., dissenting).

315. *Id.* at 343.

316. Moore v. City of E. Cleveland, 431 U.S. 494, 513 (1977) (Stevens, J., concurring). Stevens also relied on precedent to find a fundamental right in *Moore*. *See id.* at 516-17.

317. *See, e.g., Bowers*, 478 U.S. at 214 (Stevens, J., dissenting) (admitting that "[s]odomy was condemned as an odious and sinful type of behavior during the formative period of the common

believed that tradition supported the fundamental right he found in *Moore*.

Analyzing inconsistent applications of tradition by the same Justices in different opinions reveals that, as applied, employing tradition has permitted the same result-oriented approach that has always plagued fundamental rights doctrine.[318] Most Justices invoke tradition to "serv[e] as [a] post hoc rationalization for results reached on ahistorical bases."[319] It is through this lens that jurists act like mathematicians solving a proof—starting with the result and only later filling in the middle steps—selectively using or eliding tradition.

VI. CONCLUSION

Fundamental rights jurisprudence has always been controversial. The notion of fundamental rights—particularly due process having a substantive component—provoked John Hart Ely to contemplate the meaning of "green pastel redness."[320] But, accepting that fundamental rights should be a lasting aspect of American jurisprudence, we must ask a more probing question—one that Professor Ely admitted is among the "hardest questions" to answer:[321] how do we find fundamental rights?

Reexamining how we recognize fundamental rights is particularly important now, when the current dominant method for finding fundamental rights—adhering to tradition—often renders the doctrine a nullity. To protect as a fundamental right only those activities that have

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law"); *Survey on the Constitutional Right to Privacy in the Context of Homosexual Activity*, 40 U. MIAMI L. REV. 521, 525 (1986) (concluding that sodomy has traditionally been prohibited in nearly all cultures). *But see* Norman C. Simon, *The "Evolution" of Lesbian and Gay Rights: Reconceptualizing Homosexuality and* Bowers v. Hardwick *from a Sociobiological Perspective*, 1996 Ann. Surv. Am. L. 105, 136 (arguing that "the historical proscriptions against homosexual conduct that the majority in *Bowers* cited are flawed").

318. Another way of approaching the inconsistent, result-oriented application of tradition in fundamental rights jurisprudence would be to review the many instances where one jurist used tradition in a specific opinion, and another jurist avoided employing tradition altogether in the same case. *See, e.g.*, Carey v. Population Servs. Int'l, 431 U.S. 678 (1977) (plurality opinion) (relying upon judicial precedent to find the fundamental right, while Justice Powell, concurring, finds no fundamental right based on tradition); People v. Kevorkian, 527 N.W.2d 714 (Mich. 1994) (holding that there is no fundamental right to physician-assisted suicide primarily by resorting to tradition, while Justices Levin and Mallett, dissenting in part, find, without relying on tradition, that there should be such a fundamental right); People v. Onofre, 415 N.E.2d 936 (N.Y. 1980) (holding, without invoking tradition, that there is a fundamental right to engage in homosexual sodomy, while Judge Gabrielli, dissenting in part, concluded that there should not be such a fundamental right after relying nearly exclusively on tradition).

319. Steegmann, *supra* note 8, at 395 (adding that such an approach creates an "appearance of disingenuousness").

320. Ely, *supra* note 12, at 18; *see also, e.g.*, John Harrison, *Substantive Due Process and the Constitutional Text*, 83 VA. L. REV. 493, 502 (1997) (referring to the "textual conundrum of substantive due process").

321. Ely, *supra* note 12, at 5.

been traditionally respected undermines the usefulness of the fundamental rights doctrine. There is no need, for example, to recognize a fundamental right to breathe.

Nevertheless, as we have seen, it is not always so clear how to assess a purported fundamental right in light of tradition. In a nation as culturally diverse as the United States, jurists interpreting tradition are forced to pick and choose among traditions, lest judicial opinions turn into ethnic studies tomes. In other words, jurists must ask themselves, "Whose tradition matters?" The question is seldom asked, and the answer is not readily apparent.

Predictably, jurists most often focus on their own traditions—usually the history and historical perspective of straight, white, wealthy males. This raises yet another problem: the history of straight, white, wealthy males is often a history of the oppressor. As such, relying on tradition frequently legitimizes and perpetuates prior discrimination, an odious result in and of itself, but also one that is at odds with the letter and spirit of the Fourteenth Amendment.

Nevertheless, this is, as we have also seen, not always the case. Sometimes jurists move past their positionality, and they rely on a tradition outside of their personal experience. In addition, some jurists' interpretations of tradition conflict with the fundamental rights holdings they desire, and they either gloss over tradition analysis or refuse to acknowledge tradition in their opinions altogether. Moreover, as has been pointed out elsewhere, jurists' interpretations of history are often wrong, insofar as a historical interpretation can be incorrect. Therefore, employing tradition to assess a purported fundamental right does not lend to the jurisprudence the certainty or objectivity it is supposed to provide. It frequently does not constrain jurists in the manner that proponents of a tradition methodology claim it does. For all of these reasons, borne out in the judicial opinions discussed above, tradition should not be used to assess "new" fundamental rights.

Some tempered advocates for a tradition-based methodology have attempted to side-step the aforementioned problems with using tradition as an analytical tool. They argue that employing tradition is neither too backward-looking nor discriminatory when jurists account for changing traditions.[322] Doing so, they contend, effectively "updates" or "modernizes" fundamental rights jurisprudence, rooting out the consideration of

322. *See, e.g.*, Washington v. Glucksberg, 521 U.S. 702, 765-66 (1997) (Souter, J., concurring) (urging the Court to assess purported fundamental rights with respect to what "history teaches are the traditions from which it developed as well as the traditions from which it broke" and commenting that "tradition is a living thing") (quoting Poe v. Ullman, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting)); Moore v. City of E. Cleveland, 431 U.S. 494, 501 (1977) (plurality opinion) (same). This fundamental rights methodology is grounded in the "moral consensus"

antiquated discriminatory practices from fundamental rights analysis. To some degree, this approach seems plausible, as tradition, indeed, is always changing.[323]

Note, though, that there are many deficiencies with the "living history" approach to finding fundamental rights. First, and most simply, it does not account for the existence of contemporary discrimination. Just as "separate but equal" was the dominant practice in 1896 and onward,[324] there are surely aspects of twenty-first century "American culture"—whatever that is—that will be considered discriminatory in the future.

Second, it raises a further vexing question, namely how to decide what is the current societal practice. In other words, when does a tradition end? Third, eradicating injustice from our nation's traditions is a painfully slow process. Why should we patiently wait to root out racism, classism, homophobia, misogyny, and xenophobia, among other forms of discrimination, from our society before excising it from our jurisprudence?

Fourth, relying on a "living history" does not, in fact, address most of the problems with a tradition-based methodology that have been discussed in this article. An updated-tradition approach still injects discrimination into fundamental rights jurisprudence, still permits substantial subjectivity, still disrespects the countermajoritarian purpose of the Fourteenth Amendment, and still may render the fundamental rights doctrine moot. Even this somewhat restrained tradition-based analytical framework is both unmanageable and untenable.

Where does this leave us? After all, we obviously need guidelines to determine whether a "right" should be deemed fundamental.[325] If tra-

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theory of constitutional interpretation. *See, e.g.*, Harry H. Wellington, *Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication*, 83 YALE L.J. 221, 284 (1973).

323. *See, e.g.*, Michael Albert, *WTO/Seattle/Mumia*, *available at* http://www.zmag.org/CrisesCurEvts/Mumia/wtomumia.htm ("[W]hat history really shows is that today's empire is tomorrow's ashes, that nothing lasts forever . . . .") (quoting Mumia Abu-Jamal).

324. *See* Plessy v. Ferguson, 163 U.S. 537 (1896) (holding that a law mandating that Blacks and whites use "separate but equal" facilities was constitutional).

325. *Lindsey v. Normet*, 405 U.S. 56 (1972), is a good example of the pitfall of assessing the fundamentality of an asserted right without employing any discernible fundamental rights methodology. In *Lindsey*, the majority of the Court held that there was no fundamental right to adequate housing, *see id.* at 73-74 (commenting that "the Constitution . . . [does not provide] any . . . guarantee of access to dwellings of a particular quality"), while Justice Douglas's dissent opined that there should be such a fundamental right, *see id.* at 89-90 (stating that "the right is so fundamental as the tenant's claim to his home . . . . To put him into the street when the slum landlord, not the slum tenant, is the real culprit deprives the tenant of a fundamental right"). Regrettably, because neither the majority nor Douglas set forth analytical frameworks, *Lindsey* provides little to no guidance with respect to how it may be used as precedent or how to assess a purported fundamental right in the future.

dition is an inappropriate methodology to assess purported fundamental rights, how should we conduct our fundamental rights inquiry?

As mentioned in the Introduction, this article does not propose a substitute methodology to assess the fundamentality of purported rights. It would be premature to essay an alternative analytical framework prior to the mounting of significant opposition to the role played by tradition in recognizing "new" fundamental rights. Accordingly, this article hopefully will spark resistance to the current tradition-bound approach.

When that time comes—when there is sufficient criticism of a tradition-minded fundamental rights jurisprudence—and we begin to search for a new model to assess purported fundamental rights, perhaps we will keep in mind *Casey*, which did not engage in any examination of tradition. Instead, a plurality of the Court in *Casey*, after commenting that fundamental rights is "not susceptible of expression as a simple rule"[326] and "has not been reduced to any formula,"[327] asked to what extent the right to an abortion was "central to personal dignity and autonomy."[328]

More opinions rejecting a tradition-bound methodology are possible, but only if jurists, scholars, and practitioners are willing to seriously reexamine the use of tradition to assess purported fundamental rights. Without such a critical reflection, the status quo—invoking tradition, however sporadically—will continue to strip substance from fundamental rights jurisprudence.

326. Planned Parenthood of S.E. Pa. v. Casey, 505 U.S. 833, 849 (1992).
327. *Id.* (quoting *Poe*, 367 U.S. at 542 (Harlan, J., dissenting)).
328. *Id.* at 851.