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SUGGESTED UNIFORM SUBSTANTIVE DUE  
PROCESS STANDARD

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# MAKING SENSE OF *OBERGEFELL*: A SUGGESTED UNIFORM SUBSTANTIVE DUE PROCESS STANDARD

Dave Rodkey\*

## INTRODUCTION

Few decisions have had such an immediate impact or generated as much public attention as the landmark 2015 case *Obergefell v. Hodges*.<sup>1</sup> However, somewhat lost in the hubbub surrounding the national legalization of same-sex marriage is what the decision means for how the Court analyzes fundamental rights moving forward.<sup>2</sup> Did the ruling create a new methodology for finding a fundamental right in the Due Process Clause of the Fourteenth Amendment? If so, what is it, and how should it be applied in future cases? This Note argues that although *Obergefell* is ill-suited for a wholesale application to future cases, its rejection of a rigid legal framework opens the door for the Court to craft a test that cures the notable ills of previous methodologies while still providing an objective judicial analysis that is firmly grounded in precedent.<sup>3</sup>

Part I of this Note analyzes the fundamental rights test put forth in the 1997 case *Washington v. Glucksberg*.<sup>4</sup> Part II analyzes the framework used to assess the

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<sup>1</sup> *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015); see also Adam Liptak, *Equal Dignity*, N.Y. TIMES, June 27, 2015, at A1.

<sup>2</sup> See Kenji Yoshino, *The Supreme Court 2014 Term: Comment: A New Birth of Freedom?: Obergefell v. Hodges*, 129 HARV. L. REV. 147 (2015).

<sup>3</sup> See *infra* Parts III and IV.

<sup>4</sup> *Washington v. Glucksberg*, 521 U.S. 702, 719–20 (1997).

right at issue in *Obergefell v. Hodges*.<sup>5</sup> Part III argues that both the *Glucksberg* and *Obergefell* methodologies have clear flaws that should be addressed moving forward. Part IV considers the meritorious portions of both *Glucksberg* and *Obergefell* and argues that future courts assessing the existence of a fundamental right should consider the asserted right's place in this nation's history and tradition<sup>6</sup> and in the Court's fundamental rights jurisprudence.<sup>7</sup> The Court should then more closely consider the government's reason for restricting the right against the strength of the liberty interest.<sup>8</sup>

## I. THE GLUCKSBERG TEST

Substantive due process is one of the most highly contested issues in American law.<sup>9</sup> Under the doctrine, the Court may find an implied right in the Due Process Clause of the Fourteenth Amendment,<sup>10</sup> and when a right is found, that right grants liberty from "certain government actions regardless of the fairness of the procedures used to implement them."<sup>11</sup> Therefore, despite deriving from a "process" clause, the found liberty interest is substantive, and freedom from government interference for engaging in that right becomes constitutional, regardless of whether the legislature legalized the at-issue act.<sup>12</sup> As such, when an implied right<sup>13</sup> is held to exist,

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<sup>5</sup> *Obergefell*, 135 S. Ct. at 2584.

<sup>6</sup> *Glucksberg*, 521 U.S. at 721.

<sup>7</sup> *Obergefell*, 135 S. Ct. at 2595.

<sup>8</sup> See *infra* Part IV.

<sup>9</sup> Erwin Chemerinsky, *Substantive Due Process*, 15 *TOURO L. REV.* 1501 (1999) ("There is no concept in American law that is more elusive or more controversial than substantive due process.").

<sup>10</sup> U.S. CONST. amend. XIV, § 1 ("nor shall any state deprive any person of life, liberty, or property, without due process of law").

<sup>11</sup> *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997) (quoting *Daniels v. Williams*, 474 U.S. 327, 331 (1986)); see also *Obergefell*, 135 S. Ct. at 2584 (Roberts, C.J., dissenting) ("There is, after all, no 'Companionship and Understanding' or 'Nobility and Dignity' Clause in the Constitution . . . They argue instead that the laws violate a right implied by the Fourteenth Amendment's requirement that 'liberty' may not be deprived without 'due process of law.'").

<sup>12</sup> *Obergefell*, 135 S. Ct. at 2605 ("The dynamic of our constitutional system is that individuals need not await legislative action before asserting a fundamental right. The Nation's courts are open to injured individuals who come to them to vindicate their own direct, personal stake in our basic charter. An individual can invoke a right to constitutional protection when he or she is harmed, even if the broader public disagrees and even if the legislature refuses to act.").

<sup>13</sup> An implied right under substantive due process is used interchangeably with the term "unenumerated" right, i.e., the constitution does not specifically mention that right. See *Glucksberg*, 521 U.S. at 755–56

legislatures are generally powerless to pass any law that would infringe upon that right.<sup>14</sup> Thus, fundamental due process is open to criticism as undemocratic, illegitimate judicial overreach.<sup>15</sup>

Justices have always differed about how and to what extent fundamental due process should be invoked.<sup>16</sup> At least one Justice has openly questioned whether the doctrine should exist at all.<sup>17</sup> In 1997 in *Washington v. Glucksberg*, Chief Justice Rehnquist outlined what many considered<sup>18</sup> the modern test for finding a fundamental right in the Due Process Clause of the Fourteenth Amendment.<sup>19</sup> The test looked to whether the right was “objectively, deeply rooted in this Nation’s history and tradition,”<sup>20</sup> and “implicit in the concept of ordered liberty” such that

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(Souter, J., concurring) (“Thus, we are dealing with a claim to one of those rights sometimes described as rights of substantive due process and sometimes as unenumerated rights.”).

<sup>14</sup> *Glucksberg*, 521 U.S. at 720 (“By extending constitutional protection to an asserted right or liberty interest, we, to a great extent, place the matter outside the arena of public debate and legislative action.”); *Obergefell*, 135 S. Ct. at 2584 (2015) (Roberts, C.J., dissenting) (“By empowering judges to elevate their own policy judgments to the status of constitutionally protected ‘liberty,’ the *Lochner* line of cases left ‘no alternative to regarding the court as a . . . legislative chamber.’” (quoting LEARNED HAND, *THE BILL OF RIGHTS* 42 (Harv. Univ. Press 1958)). *But see* *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 844 (1992) (affirming the right to get an abortion exists, but also holding that legislatures only act impermissibly when they impose an “undue burden” on a woman’s ability to make the decision).

<sup>15</sup> *Obergefell*, 135 S. Ct. at 2584 (Roberts, C.J., dissenting) (“[F]or those who believe in a government of laws, not of men, the majority’s approach is deeply disheartening. Supporters of same-sex marriage have achieved considerable success persuading their fellow citizens—through the democratic process—to adopt their view. That ends today. Five lawyers have closed the debate and enacted their own vision of marriage as a matter of constitutional law. Stealing this issue from the people will for many cast a cloud over same-sex marriage, making a dramatic social change that much more difficult to accept.”); *see also Casey*, 505 U.S. at 953 (Rehnquist, C.J., dissenting in part) (“The Court . . . comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution.”) (quoting *Bowers v. Hardwick*, 478 U.S. 186, 194 (1986)).

<sup>16</sup> For a detailed explanation of the history of substantive due process and why it is a matter for the judiciary, *see Glucksberg*, 521 U.S. at 755–73 (Souter, J., concurring).

<sup>17</sup> *Nelson v. Colorado*, 137 S. Ct. 1249, 1265 (2017) (Thomas, J., dissenting) (“[T]he Due Process Clause confers no substantive rights.” (citing *McDonald v. City of Chicago*, 561 U.S. 742, 811 (2010) (Thomas, J., concurring in part and concurring in judgment))).

<sup>18</sup> *Obergefell*, 135 S. Ct. at 2621 (Roberts, C.J., dissenting) (“It is revealing that the majority’s position requires it to effectively overrule *Glucksberg*, the leading modern case setting the bounds of substantive due process.”).

<sup>19</sup> *Glucksberg*, 521 U.S. at 719–20 (1997).

<sup>20</sup> *Id.* at 720 (citing *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977) (plurality opinion)).

“neither liberty nor justice would exist if they were sacrificed.”<sup>21</sup> The test also required a “careful description” of the asserted liberty interest in order to grant protection.<sup>22</sup> Therefore, the test had essentially two components—a fundamental right must be rooted in history and tradition and it must be considered in its most specific form.<sup>23</sup> Further, a right is more likely to warrant protection if it is a negative right, i.e. freedom from a government burden as opposed to a freedom to a government benefit.<sup>24</sup> Once a fundamental right is found, the analysis shifts to whether the governmental infringement is “narrowly tailored” enough to “serve a compelling state interest.”<sup>25</sup> If the state interest is not compelling enough, the law fails.<sup>26</sup>

In *Glucksberg*, three terminally ill patients, five physicians, and the activism group Compassion in Dying challenged a Washington statute that stated, “[a] person is guilty of promoting a suicide attempt when he knowingly causes or aids another person to attempt suicide.”<sup>27</sup> The patients wanted to receive drugs that would allow them to die quickly and painlessly, thus ending their suffering from debilitating illness.<sup>28</sup> The doctors felt they had a duty to administer the medication, but state laws prohibited them from doing so.<sup>29</sup> Under the statute, “promoting” a suicide was a

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<sup>21</sup> *Id.* (citing *Palko v. Connecticut*, 302 U.S. 319, 325, 326 (1937)).

<sup>22</sup> *Id.* at 719–20 (citing *Reno v. Flores*, 507 U.S. 292, 301–02 (1993)).

<sup>23</sup> *Id.* at 720.

<sup>24</sup> This distinction is not directly fleshed out in *Glucksberg* but becomes clearer in *Obergefell*. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2634 (2015) (Thomas, J., dissenting) (“Since well before 1787, liberty has been understood as freedom from government action, not entitlement to government benefits.”). For a discussion of negative liberties from *Glucksberg* to *Obergefell*, see Yoshino, *supra* note 2, at 167–70.

<sup>25</sup> *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997) (quoting *Reno v. Flores*, 507 U.S. 292, 302 (1993)).

<sup>26</sup> Even in the absence of finding a fundamental right, a law still must be rationally related to a legitimate interest. *Id.* at 728 (“The Constitution also requires, however, that Washington’s assisted-suicide ban be rationally related to a legitimate government interest.”). However, overturning a law without the finding of a fundamental right is exceptionally rare. See *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432 (1985).

<sup>27</sup> *Glucksberg*, 521 U.S. at 707 (citing WASH. REV. CODE § 9A.36.060(1) (1994)).

<sup>28</sup> *Id.* at 707.

<sup>29</sup> *Id.*

felony, punishable by up to five years in prison.<sup>30</sup> The patients had all died well before the challenge reached the Supreme Court.<sup>31</sup>

Chief Justice Rehnquist framed the right at issue in *Glucksberg* as “whether the ‘liberty’ specially protected by the Due Process Clause includes a right to commit suicide which includes a right to assistance in doing so.”<sup>32</sup> The Court accordingly traced the history of the practice as stated, finding that “for over 700 years, the Anglo-American common-law tradition has punished or otherwise disapproved of both suicide and assisting suicide.”<sup>33</sup> The Chief Justice noted that Blackstone categorized people who commit suicide as “self-murderer[ing] . . . coward[s] . . . who destroyed themselves to avoid those ills which they had not the fortitude to endure” and that he ranked suicide itself “among the highest crimes.”<sup>34</sup> The Court did not find the right to commit suicide to be deeply rooted in this nation’s traditions.<sup>35</sup>

The Respondents’ proposed categorization of the issue was whether the terminally ill had the “liberty to choose how to die” or “the right to choose a humane, dignified death.”<sup>36</sup> For legal support of that right, the Respondents primarily looked to *Cruzan v. Director, Mo. Dept. of Health*, which held that the terminally ill have the fundamental right to reject lifesaving food or water.<sup>37</sup> They argued that the primary liberty interest in both cases is “self-sovereignty” and “personal autonomy,” and that the issues should be treated similarly.<sup>38</sup> The Court rejected the similarities by saying “[t]hat many of the rights and liberties protected by the Due Process Clause sound in personal autonomy does not warrant the sweeping conclusion that any and all important, intimate, and personal decisions are so protected.”<sup>39</sup>

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<sup>30</sup> *Id.*

<sup>31</sup> *Glucksberg*, 521 U.S. at 707.

<sup>32</sup> *Id.* at 723.

<sup>33</sup> *Id.* at 711 (citing *Cruzan v. Director, Mo. Dept. of Health*, 497 U.S. 261, 294–95 (1990) (Scalia, J., concurring)).

<sup>34</sup> *Id.* at 712 (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES 189 (1765)).

<sup>35</sup> *Id.* at 723.

<sup>36</sup> *Id.* at 722.

<sup>37</sup> *Cruzan*, 497 U.S. at 261.

<sup>38</sup> *Glucksberg*, 521 U.S. at 727.

<sup>39</sup> *Id.* at 728 (citing *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 33–35 (1973)).

The Court's framing of the issue as a "*right to commit suicide*"<sup>40</sup> further distinguishes it from the "*right to refuse* lifesaving hydration and nutrition"<sup>41</sup> found in *Cruzan* in that the suicide right is framed positively (a right to do something) as opposed to negatively (freedom from something).<sup>42</sup> The right in question in *Cruzan* was about the "freedom from" being forced to live rather than the "freedom to" choose to die and is therefore a negative right.<sup>43</sup> For many Justices, this distinction is crucial when granting a liberty right.<sup>44</sup>

The five concurring Justices in *Glucksberg* all agreed there is no constitutional right to commit suicide.<sup>45</sup> Justice O'Connor joined the majority opinion but felt there was no need to approach the narrower question, "whether a mentally competent person who is experiencing great suffering has a constitutionally cognizable interest in controlling the circumstances of his or her imminent death."<sup>46</sup> However, Justice Stevens and Justice Souter pointed out alternative approaches to a substantive due process analysis, both couched in prior decisions, and both somewhat resembling the rationale later used in *Obergefell*.<sup>47</sup>

Justice Stevens wrote separately because "there are situations in which an interest in hastening death is legitimate . . . there are times when it is entitled to constitutional protection."<sup>48</sup> More importantly, though, his concurrence, without

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<sup>40</sup> *Id.* (citing *Compassion in Dying v. State of Washington*, 79 F.3d. 790, 816 (9th Cir. 1996)) (emphasis added).

<sup>41</sup> *Cruzan*, 497 U.S. at 278 (emphasis added).

<sup>42</sup> See Yoshino, *supra* note 2, at 167–70 (discussing the distinction between negative and positive rights in the context of *Glucksberg* and *Obergefell*).

<sup>43</sup> *Cruzan*, 497 U.S. at 278.

<sup>44</sup> See, e.g., *Obergefell v. Hodges*, 135 S. Ct. 2584, 2636–37 (2015) (Thomas, J., dissenting) (citing *Loving v. Virginia*, 388 U.S. 1, 18 (1967)). In his dissent, Justice Thomas distinguishes *Obergefell* from *Loving* in that the posture of the case in *Loving* is that Virginia attempted to prosecute what it saw as an impermissible interracial marriage. Therefore, the individuals asserting the right wanted freedom from a negative government action. In *Obergefell*, no such prosecution was present, so the individuals were seeking a positive government benefit. *Id.*

<sup>45</sup> *Washington v. Glucksberg*, 521 U.S. 702, 797 (1997) (O'Connor, J., concurring) ("I agree there is no generalized right to commit suicide.").

<sup>46</sup> *Id.* at 798. Justice Ginsburg joined Justice O'Connor's concurrence but refused to join the majority. *Id.* at 789.

<sup>47</sup> *Glucksberg*, 521 U.S. at 739 (Stevens, J., concurring). *Id.* at 752 (Souter, J., concurring).

<sup>48</sup> *Id.* at 741–42.

specifically deconstructing the majority's framework, points out that couching a decision based only in a "careful description" of a historic right misses the crucial "liberty" component that makes a right important in the first place. He does this by giving his take of *Cruzan*.<sup>49</sup> The majority, in distinguishing assisted suicide from refusing life-saving nutrition, said that force feeding has always been impermissible because it is tantamount to unconsented touching and hence constitutes a common law battery.<sup>50</sup> Justice Stevens points out that *Cruzan* is based on "not just a common-law rule" but on "a far broader and more basic concept of freedom that is older than the common law."<sup>51</sup> He further noted, "[t]he now-deceased plaintiffs in this action may in fact have had a liberty interest stronger than [the plaintiff in *Cruzan*] because not only were they terminally ill, they were suffering constant and severe pain."<sup>52</sup>

Justice Souter also concurs to refute the majority's analysis.<sup>53</sup> Justice Souter would instead analyze the right under Justice Harlan's dissent in *Poe v. Ullman* and look to "whether the statute sets up one of those 'arbitrary impositions' or 'purposeless restraints' at odds with the Due Process Clause of the Fourteenth Amendment."<sup>54</sup> In his view, an analysis of unenumerated rights should "avoid[] the absolutist failing of many older cases without embracing the opposite pole of equating reasonableness with past practice described at a very specific level."<sup>55</sup> In other words, it is an error for a judge to find a fundamental right based purely on subjective decision-making,<sup>56</sup> but looking only to a very specific historical practice when assessing whether a constitutionally protected liberty exists is a similarly flawed methodology.<sup>57</sup>

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<sup>49</sup> *Id.* at 743 (citing *Cruzan v. Director, Mo. Dept. of Health*, 497 U.S. 261, 278 (1990)).

<sup>50</sup> *Id.* at 724.

<sup>51</sup> *Glucksberg*, 521 U.S. at 745.

<sup>52</sup> *Id.*

<sup>53</sup> *Id.* at 752 (Souter, J., concurring) ("I write separately to give my reasons for analyzing the substantive due process claims as I do, and for rejecting this one.")

<sup>54</sup> *Id.* at 762 (citing *Poe v. Ullman*, 367 U.S. 497, 543 (1961) (Harlan, J., dissenting)).

<sup>55</sup> *Glucksberg*, 521 U.S. at 765 (Souter, J., concurring).

<sup>56</sup> *See, e.g., Lochner v. New York*, 198 U.S. 45, 61 (1905).

<sup>57</sup> *Glucksberg*, 521 U.S. at 719–20.



## II. THE *OBERGEFELL* METHODOLOGY

When comparing the *Obergefell* majority opinion to the *Glucksberg* majority, two things are immediately apparent. First, that a fundamental right be “carefully descri[bed]” and rooted in “history and tradition”<sup>58</sup> is not only not controlling, it is barely informative to the ultimate judgment.<sup>59</sup> Second, the methodology used by Justice Kennedy has more in common with the *Glucksberg* concurrences written by Justices Stevens and Souter than it does with the majority opinion. That is to say that the right to same-sex marriage found in *Obergefell* seems to derive from a “far broader and more basic concept of freedom”<sup>60</sup> than what would be permitted under the *Glucksberg* test, and that methodology harkens back to Justice Harlan’s assertion that finding a fundamental right “has not been reduced to any formula.”<sup>61</sup>

*Obergefell* has drawn its fair share of critics claiming that it substituted the concrete *Glucksberg* test<sup>62</sup> for a charged, rights-based argument proclaimed in sweeping rhetorical flashes with very little actual constitutional support.<sup>63</sup> Therefore, it is useful to analyze the differences between *Obergefell* and *Glucksberg* by contrasting the two opinions using *Glucksberg*’s more apparent structure.<sup>64</sup> First, consider the “careful description” of the asserted liberty interest in *Obergefell*. Justice Kennedy defines the right asserted as the “right to marry in its comprehensive sense.”<sup>65</sup> Under *Glucksberg*, the right asserted would require a high degree of specificity, such as whether individuals have a constitutionally protected right to

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<sup>58</sup> *Id.* at 721.

<sup>59</sup> See *Obergefell v. Hodges*, 135 S. Ct. 2584, 2621 (2015) (Roberts, C.J., dissenting) (“[T]he majority’s position requires it to effectively overrule *Glucksberg*.”).

<sup>60</sup> *Glucksberg*, 521 U.S. at 745 (Stevens, J., concurring).

<sup>61</sup> *Poe v. Ullman*, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting); see also *Glucksberg*, 521 U.S. at 765 (Souter, J., concurring).

<sup>62</sup> *Glucksberg*, 521 U.S. at 719–20.

<sup>63</sup> *Obergefell*, 135 S. Ct. at 2630 (Scalia, J., dissenting) (“The Supreme Court of the United States has descended from the disciplined legal reasoning of John Marshall and Joseph Story to the mystical aphorisms of the fortune cookie.”).

<sup>64</sup> Constitutional law scholar Kenji Yoshino took a largely similar approach in that he analyzed *Obergefell* using the components laid out in other substantive due process cases, including and especially *Glucksberg*. Yoshino, *supra* note 2, at 151–70.

<sup>65</sup> *Obergefell*, 135 S. Ct. at 2602.

marry others who are the same sex.<sup>66</sup> Kennedy distinguishes the two cases by simply stating that the text applied in *Glucksberg* “may have been appropriate” to those facts.<sup>67</sup> Viewing the issue as the more general “right to marry” allows Justice Kennedy to place it squarely with the entire line of cases finding fundamental right to marriage.<sup>68</sup> This generality is essential to his “principles and traditions” analysis.<sup>69</sup>

As to the historical component, Justice Kennedy concedes that same-sex marriage itself is not deeply rooted in this nation’s tradition.<sup>70</sup> Nevertheless, the opinion begins by giving a general history of marriage and then moving more specifically to the historical treatment of same-sex couples.<sup>71</sup> Through the first half of the twentieth century, homosexuality was considered a psychiatric disorder.<sup>72</sup> Homosexual acts themselves were illegal in many states until just twelve years earlier.<sup>73</sup> The Defense of Marriage Act, passed by Congress in 1996, which had defined marriage as a legal union between a man and a woman, had only been struck down two terms earlier.<sup>74</sup> Under a *Glucksberg* analysis, the acknowledged historical precedent against same-sex marriage would have ended the inquiry.<sup>75</sup> But, Justice Kennedy wrote, “[h]istory and tradition guide and discipline the inquiry but do not set its outer boundaries.”<sup>76</sup> Rather than looking to history, “the Court must respect the basic reasons why the right to marry has been long protected.”<sup>77</sup> This line of reasoning effectively shifts what under *Glucksberg* would have been a legally

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<sup>66</sup> *Glucksberg*, 521 U.S. at 723 (framing the issue as “whether the ‘liberty’ specially protected by the Due Process Clause includes a right to commit suicide which includes a right to assistance in doing so”).

<sup>67</sup> *Obergefell*, 135 S. Ct. at 2602.

<sup>68</sup> See, e.g., *Loving v. Virginia*, 388 U.S. 1 (1967).

<sup>69</sup> *Obergefell*, 135 S. Ct. at 2599. This framework is explained later in this Part, *infra* notes 81–99 and accompanying text.

<sup>70</sup> *Id.* (noting that Massachusetts was the first state to legalize through a judicial ruling in 2003. *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941 (Mass. 2003)).

<sup>71</sup> *Id.* at 2593–97.

<sup>72</sup> *Id.* at 2596.

<sup>73</sup> *Id.*

<sup>74</sup> *Id.* at 2589 (citing *United States v. Windsor*, 133 S. Ct. 2675 (2013)).

<sup>75</sup> *Id.* at 2594 (“[H]istory is the beginning of these cases. The respondents say it should be the end as well.”).

<sup>76</sup> *Id.* at 2598 (citing *Lawrence v. Texas*, 539 U.S. 558, 572 (2003)).

<sup>77</sup> *Id.* at 2599.

dispositive rejection of a right because that right lacked a basis in history and tradition to an analysis that looks to whether the right being sought is similar to one that the Court has granted in the past.<sup>78</sup>

The *Obergefell* analysis begins by grounding itself in something overtly rejected by the *Glucksberg* majority.<sup>79</sup> It invokes Justice Harlan's *Poe* dissent, which "requires courts to exercise reasoned judgment in identifying interests of the person so fundamental that the State must accord them its respect."<sup>80</sup> Using this notion as a springboard, Justice Kennedy then looks to four "principles and traditions"<sup>81</sup> to find why the already established right to marriage "appl[ies] with equal force to same-sex couples."<sup>82</sup>

First, "the right to personal choice regarding marriage is inherent in the concept of individual autonomy."<sup>83</sup> This "abiding connection between marriage and liberty"<sup>84</sup> is why *Loving v. Virginia*<sup>85</sup> was decided under the Due Process Clause, and this rationale holds "true for all persons, whatever their sexual orientation."<sup>86</sup> Second, "the right to marry is fundamental because it supports a two-person union unlike any other in its importance to the committed individuals."<sup>87</sup> Justice Kennedy cites the assertion from *Griswold v. Connecticut* that marriage is "older than the Bill of Rights,"<sup>88</sup> and the assertion from *Lawrence v. Texas* that sexual contact "can be but one element in a personal bond that is more enduring."<sup>89</sup> This principle dictates

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<sup>78</sup> *Id.* at 2589 (introducing the "principles and traditions" methodology as laid out below).

<sup>79</sup> *Washington v. Glucksberg*, 521 U.S. 702, 721–22 (1997).

<sup>80</sup> *Obergefell*, 135 S. Ct. at 2598 (quoting *Poe v. Ullman*, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting)).

<sup>81</sup> *Id.* at 2589.

<sup>82</sup> Yoshino, *supra* note 2, at 164 ("Rather than pursuing the tradition supporting or undermining a particular right, the *Obergefell* Court look to a confluence of various traditions.").

<sup>83</sup> *Obergefell v. Hodges*, 135 S. Ct. 2584, 2599 (2015).

<sup>84</sup> *Id.*

<sup>85</sup> *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (invalidating prohibitions on interracial marriage).

<sup>86</sup> *Obergefell*, 135 S. Ct. at 2599.

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

<sup>88</sup> *Id.* (citing *Griswold v. Connecticut*, 381 U.S. at 479, 485 (1965) (invalidating a law prohibiting married partners from procuring contraception)).

<sup>89</sup> *Id.* at 2600 (citing *Lawrence v. Texas*, 539 U.S. 558, 567 (2003) (invalidating sodomy laws)).

that the established right of marriage combined with the established right of privacy that invalidated anti-sodomy laws must logically flow to protect the right to same-sex marriage because for same-sex couples, “[o]utlaw to outcast may be a step forward, but it does not achieve the full promise of liberty.”<sup>90</sup> Third, marriage “safeguards children and families and thus draws meaning from related rights of childrearing, procreation, and education.”<sup>91</sup> This basis looks to the numerous fundamental rights surrounding the family, including that “the right to ‘marry, establish a home and bring up children’ is a central part of the liberty protected by the Due Process Clause.”<sup>92</sup> Because so many same-sex couples provide “loving and nurturing home[s] to children,” denying them the right of marriage “conflicts with the central right to marry.”<sup>93</sup> Finally, “marriage is a keystone of our social order.”<sup>94</sup> This basis looks to the general proposition that marriage is the “foundation of the family and of society, without which there would be neither civilization nor progress”<sup>95</sup> and “[t]here is no difference between same- and opposite-sex couples with respect to this principle.”<sup>96</sup> The principles that prevented legalized same-sex marriage in the past<sup>97</sup> have given way to modern society’s “knowledge,” and to deny the right of marriage to same-sex couple would “impose stigma and injury of the kind prohibited by our basic charter.”<sup>98</sup> Considered cumulatively, Justice Kennedy looks to the Court’s fundamental rights jurisprudence in order to find the four principles and traditions that grant the right of same-sex marriage.<sup>99</sup>

As a further deviation from the *Glucksberg* framework, Justice Kennedy next looks to the Equal Protection Clause holding that the right of same-sex couples to be treated as opposite-sex couples in the institution of marriage is derived from the equal protection of the laws.<sup>100</sup> The logical relation between the two clauses in this case

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<sup>90</sup> *Id.*

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

<sup>92</sup> *Id.* (citing *Zablocki v. Redhail*, 434 U.S. 374, 384 (1978)).

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

<sup>94</sup> *Id.* at 2601.

<sup>95</sup> *Id.* (citing *Maynard v. Hill*, 125 U.S. 190, 211 (1888)).

<sup>96</sup> *Id.*

<sup>97</sup> See, e.g., *Baker v. Nelson*, 191 N.W.2d 185 (Minn. 1971), *appeal dismissed*, 409 U.S. 810 (1972).

<sup>98</sup> *Obergefell*, 135 S. Ct. at 2601.

<sup>99</sup> *Id.* at 2598–603.

<sup>100</sup> *Id.* at 2602.

comes from there being both a liberty interest in marriage and an equality interest in not having same-sex couples suffer unequal treatment.<sup>101</sup> The merger of the two clauses eliminates any concerns regarding a negative and positive liberties distinction,<sup>102</sup> ensuring that same-sex couples have both a negative right to be free from state interference in their marriages from the Due Process Clause and a positive right to reap the benefits of marriage under the Equal Protection Clause.<sup>103</sup>

Finally, Justice Kennedy addresses the broader question of whether a court should even decide to do something like legalize same-sex marriage.<sup>104</sup> Here, in another notable break from *Glucksberg*, Justice Kennedy looked at the parties before the Court,<sup>105</sup> stating that their “stories make clear the urgency of the issue they presented to the court”<sup>106</sup> and “individual[s] can involve a right to constitutional protection when he or she is harmed, even if the broader public disagrees and even if the legislature refuses to act.”<sup>107</sup>

### III. FLAWS IN THE *OBERGEFELL* AND *GLUCKSBERG* APPROACHES

The *Obergefell* majority’s stark shift from the *Glucksberg* test drew a strong reaction from the dissenting Justices, prompting all four to write separately.<sup>108</sup> Their wide-range of criticisms focused not just on the majority’s methodology but also on

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<sup>101</sup> *Id.* at 2603 (citing *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (invalidating a ban on interracial marriage using a similar rationale)).

<sup>102</sup> See Yoshino, *supra* note 2, at 167–70.

<sup>103</sup> Had *Obergefell* been decided exclusively as an equal protection case, states could have decided to stop issuing marriage licenses for all couples as an act of protest, and same-sex couples would have no cause of action because their treatment would be equal to that of everyone else. See *Lawrence v. Texas*, 539 U.S. 558, 582 (2003) (noting that the Texas sodomy law at issue could be overturned under the Equal Protection Clause because it only applies to same-sex acts).

<sup>104</sup> *Obergefell*, 135 S. Ct. at 2605 (“[I]ndividuals need not await legislative action before asserting a fundamental right.”).

<sup>105</sup> Note that in *Glucksberg*, the plaintiffs were doctors who felt it was their medical duty to assist terminally ill patients to die painlessly and patients who were certain to live out their remaining days in such pain that they preferred death. The court’s framing of the issue as a general right to help someone commit suicide, completely ignores the parties before it. *Washington v. Glucksberg*, 521 U.S. 702, 723 (1997).

<sup>106</sup> *Obergefell*, 135 S. Ct. at 2606.

<sup>107</sup> *Id.* at 2605.

<sup>108</sup> *Id.* at 2611–43.

the larger conversation of substantive due process in general.<sup>109</sup> However, for the sake of analyzing the flaws in the *Obergefell* methodology, Chief Justice Roberts's dissent is most helpful because he systematically walks through the majority opinion in order to bolster his overarching point that the decision is an exercise in subjective judicial overreach with no legitimate constitutional basis.<sup>110</sup> The Chief Justice begins by striking at the heart of the four "principles and traditions" methodology used to find the fundamental right to same-sex marriage, asserting, "[s]tripped of its shiny rhetorical gloss, the majority's argument is that the Due Process Clause gives same-sex couples a fundamental right to marry because it will be good for them and for society."<sup>111</sup> He further asserts that the *Obergefell* approach is not just subjective, flawed, and confusing,<sup>112</sup> but the strong break from precedent could mark a return to the much-maligned *Lochner* era of undemocratic judicial decision-making.<sup>113</sup>

In *Lochner v. New York* the Court used the Due Process Clause of the Fourteenth Amendment to invalidate a statute limiting bakers to a maximum 60-hour work week because the legislation caused "undue interference with liberty of person and freedom of contract."<sup>114</sup> *Lochner* is widely considered to be one of the worst

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<sup>109</sup> See, e.g., *id.* at 2632 (Thomas, J., dissenting) ("Even if the doctrine of substantive due process were somehow defensible—it is not—petitioners still would have no claim.").

<sup>110</sup> *Id.* at 2612 (Roberts, C.J., dissenting) ("Five lawyers have closed the debate and enacted their own vision of marriage as a matter of constitutional law."). Part IV of Chief Justice Roberts's dissent deviates from his systemic deconstruction of the majority, putting forth a more emotionally-charged argument that granting a constitutional right to same-sex marriage infringes upon others' religious liberty. This argument mirrors the emotionally charged rhetoric of the majority. "Many good and decent people oppose same-sex marriage as a tenet of their faith, and their freedom to exercise religion is—unlike the right imagined by the majority—actually spelled out in the Constitution." *Id.* at 2625. However, the implication that religious groups can suppress the rights of others because exercising those rights pose a generalized offense to their religious beliefs is the exact practice the drafters of the Constitution were trying to eliminate. James Madison's initial draft of the First Amendment began "[t]he civil rights of none shall be abridged on account of religious belief or worship[.]" 1 ANNALS OF CONG. 434 (1789) (James Madison ed., 1789).

<sup>111</sup> *Obergefell*, 135 S. Ct. at 2611 (Roberts, C.J., dissenting) ("[T]his court is not a legislature. Whether same-sex marriage is a good idea should be of no concern to us.").

<sup>112</sup> *Id.* at 2623 (Roberts, C.J., dissenting) (calling the equal protection part of the opinion "difficult to follow").

<sup>113</sup> *Id.* at 2618 ("The majority's approach has no basis in principle or tradition, except for the unprincipled tradition of judicial policymaking that characterized and discredited decisions such as *Lochner*[.]") (citing *Lochner v. New York*, 198 U.S. 45 (1905)).

<sup>114</sup> *Lochner v. New York*, 198 U.S. 45, 61 (1905).

decisions in constitutional law,<sup>115</sup> not just because it is a clear example of judicial overreach<sup>116</sup> but because of the harm that overreach caused.<sup>117</sup> By invoking *Lochner* Chief Justice Roberts not only digs at the flaws in the majority's analysis, he implicitly suggests that despite the majority's celebratory tone and soaring prose, its reasoning could later usher in an era of oppression.<sup>118</sup>

Leading scholars have offered defenses of *Obergefell* that address Chief Justice Roberts's *Lochner* concerns.<sup>119</sup> For instance, Kenji Yoshino outlined what he calls "antissubordination liberty."<sup>120</sup> The basic idea is that *Obergefell* granted the right to same-sex marriage based in the Supreme Court's fundamental rights common law, and "one of the major inputs into any such analysis will be the impact of granting or denying such liberties to historically subordinated groups."<sup>121</sup> Under this reading of *Obergefell*, a result like *Lochner* would not be possible because the bakers were clearly the subordinated party.<sup>122</sup> However, even if antissubordination liberty can effectively prevent oppression, it only serves as an underlying maxim, not a concrete legal test that can be easily applied to future cases. Further, antissubordination does not actually address the problem of subjectivity in judicial decision making—it merely serves as a guiding principle that prevents decisions from running contrary

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<sup>115</sup> See BERNARD H. SIEGAN, *ECONOMIC LIBERTIES AND THE CONSTITUTION* 23 (Univ. of Chicago Press 1980) (describing *Lochner* as "one of the most condemned cases in United States history").

<sup>116</sup> See Robert H. Bork, *The Judge's Role in Law and Culture*, 1 AVE MARIA L. REV. 19 (2003) (calling *Lochner* a "quintessence of judicial usurpation of power").

<sup>117</sup> See, e.g., Cass R. Sunstein, *Lochner's Legacy*, 87 COLUM. L. REV. 873, 880 (1987) ("In the *Lochner* era itself, of course, the police power could not be used to help those unable to protect themselves in the marketplace.").

<sup>118</sup> *Obergefell v. Hodges*, 135 S. Ct. 2584, 2617 (2015) (Roberts, C.J., dissenting) ("In the decades after *Lochner*, the Court struck down nearly 200 laws as violations of individual liberty, often over strong dissents contending that '[t]he criterion of constitutionality is not whether we believe the law to be for the public good.'") (quoting *Adkins v. Children's Hospital of D.C.*, 261 U.S. 525, 570 (1923) (opinion of Holmes, J.)).

<sup>119</sup> See, e.g., Laurence Tribe, *Equal Dignity: Speaking Its Name*, 129 HARV. L. REV. F. 16 (2015) ("Justice Kennedy unified the two *other* operative clauses of the [Fourteenth Amendment], Equal Protection and Due Process, in the name of 'dignity' . . ."). Under this theory, the rationale of *Obergefell* is limited to situations where the denial of a right also strips people of their dignity, and hence implicates both the Due Process and Equal Protection Clauses. Considering a fundamental right in this way could not possibly lead to a *Lochner*-type result because "dignity" was not at issue.

<sup>120</sup> Yoshino, *supra* note 2, at 174.

<sup>121</sup> *Id.*

<sup>122</sup> *Id.* at 175.

to presumed minority interests. Therefore, even if an antisubordination principle were read into the *Obergefell* methodology, it would do little more than address the *Locher* concern.

Notwithstanding whether *Obergefell* will usher in an era of undemocratic oppression, one would be hard-pressed to argue that the majority opinion is a flawless piece of legal reasoning and that many of Justice Roberts's criticisms are not valid. For instance, Justice Kennedy distinguishes *Obergefell* from *Glucksberg* by saying a "careful description" of the fundamental right asserted "may have been appropriate for those facts," but he in no way explains what makes them different.<sup>123</sup> How are future courts to decide when it is appropriate to narrowly frame a "carefully described" right, as *Glucksberg* would require, or when it is permissible to look to broader principles? Further, what methodology should a court use to decide whether a "principle or tradition" exists? Is it actually based in the Court's Fourteenth Amendment common law, as it appeared to be drawn from in *Obergefell*, and if so, is it exclusively based in that jurisprudence, or can it be drawn from other sources, such as history or cultural traditions? The majority opinion provides no answers for those questions.

The uncertainty surrounding the *Obergefell* methodology is further complicated when comparing it to the facts of *Glucksberg*. The respondents in *Glucksberg* made the same kind of argument that Justice Kennedy used to find the right in *Obergefell*, that the right to physician-assisted suicide existed because of its basis in the Court's fundamental rights common law, most notably *Cruzan*, but also *Roe*, *Casey*, and *Griswold*.<sup>124</sup> Does that mean that if the facts of *Glucksberg* were argued today, the result would be different? Or would the Court apply the same *Glucksberg* analysis again and pretend that *Obergefell* never happened? Kennedy is the only Justice to join the majority in both *Glucksberg* and *Obergefell*, and it is totally unclear from *Obergefell* whether his views have changed or if the two methodologies are somehow reconcilable. Setting aside any consideration of whether granting the right to same-sex marriage is a permissible act of constitutional law, Justice Kennedy's unwillingness to distinguish or overrule *Glucksberg* in *Obergefell*

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<sup>123</sup> *Obergefell*, 135 S. Ct. at 2602.

<sup>124</sup> *Washington v. Glucksberg*, 521 U.S. 702, 708 (1997) ("The plaintiffs asserted 'the existence of a liberty interest protected by the Fourteenth Amendment which extends to a personal choice by a mentally competent, terminally ill adult to commit physician-assisted suicide.' Relying primarily on *Planned Parenthood of Southeastern Pa. v. Casey*, the District Court agreed and concluded that Washington's assisted-suicide ban is unconstitutional because it 'places an undue burden on the exercise of [that] constitutionally protected liberty interest.'" (internal citations omitted)).



seems to facially support Chief Justice Roberts's contention that the holding is an act of subjective judicial policymaking.<sup>125</sup>

However, the *Glucksberg* methodology is also not without its flaws. Consider the problems that stem from the requirement that a right be "carefully descri[bed]."<sup>126</sup> In *Glucksberg*, the Court framed the liberty interest as the "right to commit suicide which includes a right to assistance in doing so,"<sup>127</sup> but such a construction does not even respond to the parties before the Court—doctors who felt they had a medical duty and terminally-ill patients living in constant pain with no possibility of a cure.<sup>128</sup> From that framing, the Court generally analyzes both suicide and the act of assisting another in committing suicide, ignoring any notion of patient necessity or medical expertise.<sup>129</sup> This framing allowed the Court to categorize those asserting the right to die as "self-murderer[ing] . . . coward[s] . . . who destroyed themselves to avoid those ills which they had not the fortitude to endure."<sup>130</sup> Considering the terminally-ill patients had all suffered and died before *Glucksberg* reached the Supreme Court and that their only constitutionally protected liberty was the right to starve to death,<sup>131</sup> invoking the "coward" language is not just unresponsive to the parties, it is unnecessarily callous and borderline inappropriate coming from the Supreme Court of the United States.

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<sup>125</sup> *Obergefell*, 135 S. Ct. at 2618 (Roberts, C.J., dissenting) ("The majority's approach has no basis in principle or tradition, except for the unprincipled tradition of judicial policymaking that characterized and discredited decisions such as *Lochner*. . .") (citing *Lochner v. New York*, 198 U.S. 45 (1905)).

<sup>126</sup> *Glucksberg*, 521 U.S. at 720 (citing *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977) (plurality opinion)).

<sup>127</sup> *Id.* at 723.

<sup>128</sup> *Id.* The majority professes to characterize the issue in that fashion because "[t]he Washington statute at issue in this case prohibits 'aid[ing] another person to attempt suicide,' WASH. REV. CODE § 9A.36.060(1) (1994), and, thus, the question before us is whether the 'liberty' specially protected by the Due Process Clause includes a right to commit suicide which itself includes a right to assistance in doing so." *Id.* However, that categorization forecloses the possibility that the statute might be unconstitutional as applied to the plaintiffs, effectively ignoring the plaintiff's case. See also Laurence H. Tribe & Michael C. Dorf, *Levels of Generality in the Definition of Rights*, 57 U. CHI. L. REV. 1057, 1106 (1990) (Laurence Tribe and Michael Dorf describe this problem as one of "generality." In their view, a right is framed too broadly when it requires judges to "virtually ignore the rationales of the cases which allegedly established it.").

<sup>129</sup> *Glucksberg*, 521 U.S. at 702.

<sup>130</sup> *Id.* at 712 (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES 189).

<sup>131</sup> *Cruzan v. Director, Mo. Dept. of Health*, 497 U.S. 261 (1990).

Justice Kennedy acknowledges the problem with the narrow *Glucksberg* framing in the *Obergefell* majority: “*Loving* did not ask about a ‘right to interracial marriage;’ *Turner* did not ask about a ‘right of inmates to marry;’ and *Zablocki* did not ask about a ‘right of father with unpaid child support duties to marry.’”<sup>132</sup> The implication is that the “careful description” as posed by the *Glucksberg* majority might very well have been the undoing of many previously held fundamental rights, many of which now garner wide public support.<sup>133</sup> This does not mean that an asserted liberty interest may be defined so broadly as to say, warrant a challenge to the constitutionality of seat belt laws by relying upon Patrick Henry’s famous utterance, “give me liberty or give me death,”<sup>134</sup> but if the level of generality is so specific that the issue actually before the Court cannot even be precisely discussed, then judicial subjectivity may well lie hidden in how the Justices choose to categorize the right.<sup>135</sup>

The supposed strength of the *Glucksberg* approach is that when a custom is pervasive in this nation’s history and tradition, it evidences a consensus, and hence, even if the judicial decision-maker exercises some subjectivity, the ultimate basis of the decision derives from a democratic source.<sup>136</sup> However, assessing whether or not a right is actually “objectively, deeply rooted in this Nation’s history and tradition”<sup>137</sup>

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<sup>132</sup> *Obergefell v. Hodges*, 135 S. Ct. 2584, 2602 (2015).

<sup>133</sup> Justice Souter also notes this issue implicitly in his *Glucksberg* concurrence when he points out that the right to contraception started with limiting principles to help restrict the breadth of the right that would be granted, rather than a limiting principles that would prevent the right from being recognized in the first place. *Glucksberg*, 521 U.S. at 770 (Souter, J., concurring) (“[I]n *Poe*, Justice Harlan viewed it as essential to the plaintiffs’ claimed right to use contraceptives that they sought to do so within the privacy of the marital bedroom.”).

<sup>134</sup> See, e.g., *State v. Hartog*, 440 N.W.2d 852, 855 (Iowa 1989) (constitutionality of seat belt laws challenged).

<sup>135</sup> See Tribe & Dorf, *supra* note 128, at 1106.

<sup>136</sup> See Michael W. McConnell, *The Right to Die and the Jurisprudence of Tradition*, 1997 UTAH L. REV. 665 (1997) (“These are two alternative ways of discerning the will of the people. Constitutional text was formally adopted by a supermajority of the people, and deserves respect for that reason. Longstanding consensus similarly reflects a supermajority of the people, expressed through decentralized institutions. No single vote, no single electoral victory, no single jurisdiction suffices to establish a tradition: it requires the acquiescence of many different decision makers over a considerable period of time, subject to popular approval or disapproval. When judges base their decisions either on constitutional text or on longstanding consensus, they do not usurp the right of the people to self-government, but hold the representatives of the people accountable to the deepest and most fundamental commitments of the people.”).

<sup>137</sup> *Washington v. Glucksberg*, 521 U.S. at 702, 720 (1997) (citing *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977) (plurality opinion)).

is not necessarily devoid of subjectivity. Consider the historical analysis put forth in the gun cases, *District of Columbia v. Heller*<sup>138</sup> and *McDonald v. City of Chicago*.<sup>139</sup> *Heller*, which only applies to the federal government, held that the right to possess a handgun in the home for the purpose of self-defense is found in the Second Amendment.<sup>140</sup> To reach that conclusion, Justice Scalia walked through a detailed history of post-ratification commentary,<sup>141</sup> pre-Civil War case law,<sup>142</sup> and post-Civil War legislation<sup>143</sup> and commentary,<sup>144</sup> ultimately holding that each historical source supports the proposition that the kind of firearms protected by the Second Amendment include handguns, “the most preferred firearm in the nation to ‘keep’ and use for protection of one’s home and family.”<sup>145</sup>

In *McDonald*, the Court used the Due Process Clause of the Fourteenth Amendment to hold that the same fundamental right of owning a handgun for self-defense applies equally to the states.<sup>146</sup> The opinions highlight two important points regarding the subjective nature of finding a fundamental liberty interest. First, as a principal matter, interpreting enumerated and unenumerated rights in modern society is a nearly identical task.<sup>147</sup> Despite *Heller* and *McDonald* dealing with “arms,” a right specifically enumerated in the Bill of Rights,<sup>148</sup> the journey from the text starting with “[a] well regulated Militia”<sup>149</sup> to the conclusion that a major American city cannot ban handguns because it infringes upon an individual’s right to protect

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<sup>138</sup> *District of Columbia v. Heller*, 554 U.S. 570, 598 (2008). This is not a substantive due process case, but a historical analysis was crucial to the legal determination. “Does the preface fit with an operative clause that creates an individual right to keep and bear arms? It fits perfectly, once one knows the history that the founding generation knew and that we have described above.” *Id.*

<sup>139</sup> *McDonald v. City of Chicago*, 561 U.S. 742 (2010).

<sup>140</sup> *Heller*, 554 U.S. at 628–29.

<sup>141</sup> *Id.* at 605–10.

<sup>142</sup> *Id.* at 610–14.

<sup>143</sup> *Id.* at 614–16.

<sup>144</sup> *Id.* at 616–19.

<sup>145</sup> *Id.* at 628–29 (quoting *Parker v. District of Columbia*, 478 F.3d 370 (D.C. Cir. 2007)).

<sup>146</sup> *McDonald v. City of Chicago*, 561 U.S. 742, 791 (2010).

<sup>147</sup> See Tribe & Dorf, *supra* note 128, at 1061 (“[T]he issues of interpretation that arise in construing the words of the Bill of Rights are identical to those that arise in the fundamental rights context.”).

<sup>148</sup> U.S. CONST. amend. II.

<sup>149</sup> *Id.*

his home and family with a preferred firearm, is a path inherently fraught with subjectivity, despite the enumeration of “arms.”<sup>150</sup> Therefore, subjectivity fears are not unique to unenumerated rights, and the argument that the judiciary is ill equipped or unable to assess a claim regarding the infringement of an individual’s liberty that might result in a sweeping policy change is less persuasive when one considers that assessing an enumerated right has the same pitfalls.<sup>151</sup>

Second, historical interpretations are rarely clear, and thus often constitute inherently subjective exercises.<sup>152</sup> In *Heller*, Justice Scalia spends almost as many pages trying to disprove the dissenting opinions’ views of history as he does putting forth his own.<sup>153</sup> Justice Breyer flatly refutes the entire premise underlying the finding of the fundamental right put forth by Justice Scalia stating, “I can find nothing in the Second Amendment’s text, history, or underlying rationale that could warrant characterizing it as ‘fundamental’ insofar as it seeks to protect the keeping and bearing of arms for private self-defense purposes,”<sup>154</sup> and therefore, there is no “justification for interpreting the Constitution as transferring ultimate regulatory authority over the private uses of firearms from democratically elected legislatures to courts.”<sup>155</sup> The conflicting views of history given within that opinion facially illustrate the subjective nature of historic analysis, especially as an objective basis of

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<sup>150</sup> See also Tribe & Dorf, *supra* note 128, at 1061 (“But even if we were to accept the premise that enumerated rights are more important than unenumerated rights, that does not mean that the process of defining the boundaries of the enumerated rights is any less *subjective* an enterprise than that of determining what liberties are fundamental.” (emphasis in original)).

<sup>151</sup> Justice Thomas basically acknowledges this in his *McDonald* concurrence, and he cautions against using the Due Process clause to incorporate the right for fear that it might open the door for unenumerated rights. See *McDonald*, 561 U.S. at 806, 811 (Thomas, J., concurring). See also *McDonald*, 561 U.S. at 861 (Stevens, J., dissenting) (“This is a substantive due process case.”).

<sup>152</sup> See *Michael H. v. Gerald D.*, 491 U.S. 110, 137 (1989) (Brennan, J., dissenting) (“Because reasonable people can disagree about the content of particular traditions, and because they can disagree even about which traditions are relevant to the definition of ‘liberty,’ the plurality has not found the objective boundary that it seeks.”); *Roe v. Wade*, 410 U.S. 113, 129–47 (1973) (opening with a lengthy discussion of abortion rights from ancient Greece to the present); Tribe & Dorf, *supra* note 128, at 1106 (“Thus, history provides ambiguous guidance both because historical traditions can be indeterminate, and because even when we discover a clear historical tradition it is hardly obvious what the existence of that tradition tells us about the Constitution’s meaning.”).

<sup>153</sup> *District of Columbia v. Heller*, 554 U.S. 570 (2008).

<sup>154</sup> *McDonald v. City of Chicago*, 561 U.S. 742, 913 (2010) (Breyer, J., dissenting).

<sup>155</sup> *Id.*

constitutional interpretation.<sup>156</sup> Accordingly, *McDonald*, which used the “deeply rooted in this nation’s history and tradition” analysis, led to basically the same split as *Obergefell*, and resulted in the same subjectivity and judicial overreach arguments, just with different Justices on each side.<sup>157</sup>

Those are not the only problems with using history as a benchmark for finding whether a right exists. For instance, determining a right only by its place in this nation’s history and tradition inherently only protects rights that currently exist or have long existed in most jurisdictions. This likely does not seem like a problem to many judicial conservatives who tend to be very resistant to recognizing new rights.<sup>158</sup> Similarly, finding a new right is tricky and controversial business that should be done sparingly,<sup>159</sup> and all sides agree that courts should not be legislatures.<sup>160</sup> However, practically speaking, it is difficult to imagine many situations where a legislature would suddenly restrict an activity that had been historically widely, freely, and legally practiced, especially an activity that is “implicit in the concept of ordered liberty.”<sup>161</sup> Recognizing only those rights that have been so predominately and openly practiced so as to constitute a tradition that is deeply rooted in this nation’s history is therefore barely functionally different than an outright refusal to acknowledge new unenumerated rights.<sup>162</sup> The problems with

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<sup>156</sup> For a lengthy response to the contention that the phrase “bear arms” had an alternate meaning at the time of the ratification of the Second Amendment that runs contradictory to the majority position, see *Heller*, 554 U.S. at 588–92. For a response to a differing view of the historical context surrounding the drafting and ratification of the Second Amendment, see *id.* at 603–06.

<sup>157</sup> Justice Kennedy is the only member of the Court to be in both the *McDonald* and *Obergefell* majority. *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015); *McDonald v. City of Chicago*, 561 U.S. 742 (2010). Justice Stevens retired and was replaced by Justice Kagan in the interim between the two decisions.

<sup>158</sup> See, e.g., *Moore v. City of East Cleveland*, 431 U.S. 494, 544 (1977) (White, J., dissenting) (“[T]he Court should be extremely reluctant to breathe still further substantive content into the Due Process Clause so as to strike down legislation adopted by a State or city to promote its welfare.”).

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

<sup>160</sup> See *Obergefell v. Hodges*, 135 S. Ct. 2584, 2617 (2015) (Roberts, C.J., dissenting); see also *McDonald*, 561 U.S. 742, 913 (2010) (Breyer, J., dissenting) (criticizing the majority for taking a right away from the “democratically elected legislatures”).

<sup>161</sup> See *McDonald*, 561 U.S. at 761. The notable example is the Chicago handgun ban at issue in *McDonald*, which had been in effect for just under 20 years. *Id.* at 750 (“Chicago enacted its handgun ban to protect its residents ‘from the loss of property and injury or death from firearms’” citing Chicago, Ill., Journal of Proceedings of the City Council, at 10049 (Mar. 19, 1982).).

<sup>162</sup> Tribe & Dorf, *supra* note 128, at 1093 (noting that the careful description of a right that is deeply rooted in this nation’s history and tradition is essentially a test that was designed to prevent the finding of a future right. “Justice Scalia is aware that the method of footnote 6 [(essentially the *Glucksberg* test)] would

this analysis are further amplified when one considers that whether a practice is historic does not necessarily inform whether a compelling liberty interest exists.<sup>163</sup> After all, traditions themselves are not good or bad—they have merely been practiced for a long time.<sup>164</sup>

Beginning with historic tradition as the threshold matter leads to two other practical problems.<sup>165</sup> First, it leads to facially stronger legal challenges for practices that pose relatively minor infringements on liberty but are clearly historical. Consider smoking bans. Tobacco is one of the major crops that supported the founding of this nation, and smoking is a practice that is almost certainly deeply rooted in this nation's history and tradition.<sup>166</sup> Yet, despite the relative insignificance of a government prohibition on smoking in preferred locations, challenges to the constitutionality of cigarette bans in public places<sup>167</sup> warranted lengthier discussions than pre-*Obergefell*

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severely curtail the Supreme Court's role in protecting individual liberties. Indeed, that seems to be his purpose.”).

<sup>163</sup> See, e.g., *Washington v. Glucksberg*, 521 U.S. 702, 745 (1997) (Stevens, J., concurring) (“The now-deceased plaintiffs in this action may in fact have had a liberty interest stronger than [*Cruzan*] because not only were they terminally ill, they were suffering constant and severe pain.”). The stronger liberty interest that Justice Stevens is getting at is surely not based on the suffering having a stronger historic claim, but rather a conception of liberty that considers the gravity of the government's action in light of the individual's need. Therefore, the suffering, not tradition, makes the interest in liberty greater.

<sup>164</sup> *Tradition*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/tradition> (last updated Mar. 14, 2018) (“‘Tradition’ defined as 1. *a*: an inherited, established, or customary pattern of thought, action, or behavior (such as a religious practice or a social custom) *b*: a belief or story or a body of beliefs or stories relating to the past that are commonly accepted as historical though not verifiable.”); see also Tribe & Dorf, *supra* note 128, at 1087 (“It is worth noting that the law has never given its blessing to behavior simply because it is ‘traditional.’”).

<sup>165</sup> Scholars have also noted that this approach tends to favor majoritarian views and result in its own brand of subjectivity. Tribe & Dorf, *supra* note 128, at 1087 (“Judges must *choose* among competing traditions those which will receive legal protection—and the choice of, say, heterosexuality over homosexuality (or homophobia over tolerance) requires value judgments. If judges generally choose to enforce majoritarian values, then one cannot comfortably look to tradition to bolster the judicial role as protector of individual rights against the state.”).

<sup>166</sup> Livia Gershon, *A Brief History of Tobacco in America*, JSTOR DAILY (June 10, 2016), <https://daily.jstor.org/a-brief-history-of-tobacco-in-america/>; *Tobacco: The Early History of a New World Crop*, NAT'L PARK SERV., <https://www.nps.gov/jame/learn/historyculture/tobacco-the-early-history-of-a-new-world-crop.htm> (last updated Feb. 26, 2015).

<sup>167</sup> See *Castaways Backwater Cafe, Inc. v. Marsteller*, No. 2:05-cv-273-FtM-29SPC, 2006 WL 2474034, at \*4 (M.D. Fla. Aug. 25, 2006), *aff'd sub nom.* *Castaways Backwater Cafe, Inc. v. Fla. Dep't of Bus. & Prof'l Regs. Div. of Alcoholic Beverages & Tobacco*, 214 F. App'x 955 (11th Cir. 2007) (A challenge to the constitutionality of a smoking ban fails not necessarily on the history prong, but on the more subjective “implicit in the concept of ordered liberty” part of the *Glucksberg* test. “While tobacco smoking may have a long history, both liberty and justice will continue to exist if smoking in a public restaurant is curtailed

same-sex marriage cases, which tended to fall within the first sentence of the due process analysis.<sup>168</sup> This would be a minor issue if the entire *Glucksberg* liberty analysis did not start with history and treat it as a wholly dispositive factor.<sup>169</sup> Using the same methodology, challenges to anti-miscegenation laws in the 1960s would likely have fallen at the same juncture.<sup>170</sup>

Second, looking at a historic tradition does not properly respond to societal innovations, which cannot be traced in history at a “carefully described” level of generality because they, by definition, only recently came into existence. Consider the constitutionally recognized right to privacy, which includes the right to obtain birth control, as found in *Griswold* and *Eisenstadt*.<sup>171</sup> The first oral contraceptive received FDA approval less than five years before *Griswold*.<sup>172</sup> Yet under the *Glucksberg* carefully described in history and tradition test, the right would likely be categorized as something like “the right to receive any drug, medicinal article or instrument for the purpose of preventing conception.”<sup>173</sup> With that categorization, and only five years of history to draw upon, there is little doubt that if the facts of *Griswold* were decided under the *Glucksberg* test, the right would fail as swiftly as

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or precluded.”); *see also* *Fagan v. Axelrod*, 550 N.Y.S.2d 552, 559 (1990) (That case presented a challenge to the constitutionality of a portion of the Clean Indoor Air Act prohibiting smoking in certain public areas. Although not specifically a substantive due process case, the law is upheld largely because of overwhelming scientific evidence that smoking is harmful.).

<sup>168</sup> *See, e.g.*, *Inniss v. Aderhold*, 80 F. Supp. 3d 1335, 1353 (N.D. Ga. 2015) (“Plaintiffs do not, and cannot, claim that the right to marry a person of the same sex is ‘deeply rooted in this Nation’s history and tradition . . . .’”).

<sup>169</sup> *Washington v. Glucksberg*, 521 U.S. 702, 710–16 (1997).

<sup>170</sup> *See Loving v. Virginia*, 388 U.S. 1 (1967).

<sup>171</sup> Although both are substantive due process cases, they were decided under a different methodology, and neither have extensive discussions of history and tradition. Justice Scalia acknowledges in his much-discussed footnote in *Michael H. v. Gerald D.*, 491 U.S. 110, 127 n.6 (1989) (“[W]e may note that this analysis is not inconsistent with the result in cases such as [*Griswold*] or [*Eisenstadt*].”).

<sup>172</sup> Kirsten M.J. Thompson, *A Brief History of Birth Control in the U.S.*, OUR BODIES OURSELVES (Dec. 14, 2013), <http://www.ourbodiesourselves.org/health-info/a-brief-history-of-birth-control/>.

<sup>173</sup> *Griswold v. Connecticut*, 381 U.S. 479, 480 (1965). The statute at issue in *Griswold* made it illegal to receive “any drug, medicinal article or instrument for the purpose of preventing conception.” CONN. GEN. STAT. § 53-32 (repealed 1969). Compare this to the statute in *Glucksberg* which made it illegal to “aid another person to attempt suicide,” WASH. REV. CODE § 9A.36.060(1). If a careful description in *Glucksberg* meant that the issue was categorized as “a right to commit suicide which includes a right to assistance in doing so,” then surely the right at issue in this hypothetical *Griswold* would be categorized in largely the same way.

the pre-*Obergefell* same-sex marriage cases.<sup>174</sup> This is problematic because as far as substantive due process cases go, *Griswold* is considered to be a major victory for the Court and society.<sup>175</sup> And even if it were not, in a rapidly advancing society where it is impossible to anticipate what innovation might trigger a significant liberty interest, it is entirely within the realm of possibility that a future development might have an even more compelling claim to constitutional protection. Is it really in the best interest of the Court and society to cling to a *Glucksberg*-type test, knowing that if a technological innovation created an unanticipated liberty interest, that asserted liberty interest would not only fail but could do so in a single sentence, receiving no consideration on the merits?<sup>176</sup>

Finally, and perhaps most detrimental to Chief Justice Roberts's endorsement of *Glucksberg* in his *Obergefell* dissent is that *Lochner* easily could have been decided the same way using the *Glucksberg* methodology.<sup>177</sup> The New York statute that capped bakers' weekly hours at issue in *Lochner* had at least two separate historical grounds on which it could have been abrogated. First, the tradition of the freedom to contract is so deeply rooted in this nation's history that the Constitution itself expressly forbids states from impairing existing contracts.<sup>178</sup> Second, "[t]he idea of laissez faire could be said to be deeply rooted in the Nation's history and traditions."<sup>179</sup> Chief Justice Roberts even invokes without condemning the *laissez faire* tradition of *Lochner* when he quotes Justice Holmes's *Lochner* dissent, "[t]he Fourteenth Amendment does not enact *Mr. Herbert Spencer's Social Statics*," which the Chief Justice acknowledges is "a leading work on the philosophy of Social

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<sup>174</sup> See *Inniss v. Aderhold*, 80 F. Supp. 3d 1335, 1353 (N.D. Ga. 2015).

<sup>175</sup> See, e.g., Martha J. Bailey, *How Contraception Transformed the American Family*, THE ATLANTIC (June 16, 2015), <https://www.theatlantic.com/politics/archive/2015/06/griswold-50th-anniversary/395867/> (calling *Griswold* a "landmark decision" that "unleashed an era of new opportunities, changing American society and the economy for the better").

<sup>176</sup> The Court has notoriously struggled with how to interpret the Constitution in light of technological advances. See, e.g., *Olmstead v. United States*, 277 U.S. 438, 466 (1928), *overruled by Katz v. United States*, 389 U.S. 347, 359 (1967). Although not a substantive due process case, *Olmstead* held that wiretapping was not an "unreasonable search" under the Fourth Amendment because there was no "tangible" invasion of the defendant's persons, houses, papers, or effects. *Id.* Clearly the framers could not have anticipated wiretapping when drafting the Fourth Amendment.

<sup>177</sup> *Obergefell v. Hodges*, 135 S. Ct. 2584, 2618 (2015) (Roberts, C.J., dissenting).

<sup>178</sup> U.S. CONST. art. I, § 10, cl. 1.

<sup>179</sup> Yoshino, *supra* note 2, at 171.



Darwinism.”<sup>180</sup> Therefore, although Chief Justice Roberts’s call for “restraint in administering the strong medicine of substantive due process”<sup>181</sup> is absolutely valid, a test that can also lead to the nightmare-scenario-of-a-result that he cites no less than sixteen times can hardly be said to be the best methodology moving forward.<sup>182</sup>

#### IV. A NEW PROCESS FOR NEW RIGHTS

The time is rife to reinterpret how the Court approaches fundamental rights issues. In *Obergefell*, Justice Kennedy eschewed the *Glucksberg* methodology, which had been the agreed upon standard, clearly displacing the old doctrine but giving very little guidance as to how to interpret unenumerated rights moving forward.<sup>183</sup> Although *Obergefell* opens the door for a new methodology, it is important to note at the outset that other methodologies have been previously used to find fundamental rights in the Fourteenth Amendment, including whether the right is “explicitly or implicitly guaranteed by the constitution,”<sup>184</sup> whether the need for protection from governmental action “shocks the conscience,”<sup>185</sup> and whether the right can be implied from the structure and substance of the constitution.<sup>186</sup> Despite more than one hundred years of debate and refinement from the finest legal minds in the country, these methods, like the ones discussed in the previous Part, are not without their flaws.<sup>187</sup> For that reason, I must acknowledge that the analysis I propose

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<sup>180</sup> *Obergefell*, 135 S. Ct. at 2617 (citing *Lochner v. New York*, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting)).

<sup>181</sup> *Id.* at 2616.

<sup>182</sup> *Id.* at 2611–26.

<sup>183</sup> *Obergefell v. Hodges*, 135 S. Ct. 2584, 2602 (2015) (“[W]hile [the *Glucksberg*] approach may have been appropriate for the asserted right there involved (physician-assisted suicide), it is inconsistent with the approach this Court has used in discussing other fundamental rights, including marriage and intimacy.”). See also *Obergefell*, 135 S. Ct. at 2621 (Roberts, C.J., dissenting) (“It is revealing that the majority’s position requires it to effectively overrule *Glucksberg*.”).

<sup>184</sup> *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 17 (1973). This test sustained obvious criticism for being facially circular. See, e.g., Robert C. Farrell, *An Excess of Methods: Identifying Implied Fundamental Rights in the Supreme Court*, 26 ST. LOUIS U. PUB. L. REV. 203, 224 (2007).

<sup>185</sup> *Rochin v. California*, 342 U.S. 165, 172 (1952).

<sup>186</sup> *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965) (The right to privacy is found through the “penumbra” that “eman[ate]” from specific guarantees of the Bill Rights through the Ninth Amendment.). For an extensive discussion of the history of different methods for finding implied rights in the Fourteenth Amendment see Farrell, *supra* note 184, at 217–47.

<sup>187</sup> See *supra* Part III. See also Farrell, *supra* note 184, at 248 (“As for the merits of the tests, none of them is entirely satisfactory.”).

is surely also flawed. There is no perfect structure to anticipate the emergence of liberty. The task is not about finding the “*perfect means* of restraining aristocratic judicial Constitution-writing,” but rather about finding “the *best means available* in an imperfect world.”<sup>188</sup> However, what I hope to offer is a practical approach to assessing unenumerated rights, based in precedent, that does not inherently preclude judicial scrutiny of asserted rights that do not fit neatly within a rigid framework while also providing a check against subjective judicial policymaking.<sup>189</sup>

With that in mind, finding any unenumerated right moving forward should begin, as *Obergefell* did,<sup>190</sup> with Justice Harlan’s notion that the liberty protected by the Due Process Clause cannot be reduced to a set formula.<sup>191</sup> That does not mean that finding an unenumerated right should be based on the judge’s own personal feelings.<sup>192</sup> Rather, Justice Harlan’s assertion should be cited at the beginning of the opinion to reinforce the notion that in this area of the law a rigid test does not serve justice or any other public purpose that sufficiently justifies its preclusive cost, that the forthcoming analysis will require a complex grappling with the merits of the parties’ asserted liberty, and that future cases should not galvanize earlier opinions into a paint-by-numbers approach for assessing liberty. However, to counterbalance the notion that the lack of a set formula enables legislating from the bench, the Court should cite Justice White’s cautionary words, “[we] should be extremely reluctant to breathe still further substantive content into the Due Process Clause so as to strike down legislation adopted by a State or city to promote its welfare.”<sup>193</sup>

Next, the Court should look to, without holding either factor dispositive, whether and to what extent the right being asserted as defined by the party asserting

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<sup>188</sup> *McDonald v. City of Chicago*, 561 U.S. 742, 804 (2010).

<sup>189</sup> *Obergefell v. Hodges*, 135 S. Ct. 2584, 2611 (2015) (Roberts, C.J., dissenting); *McDonald*, 561 U.S. at 912 (Breyer, J., dissenting); *Lochner v. New York*, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting).

<sup>190</sup> *Obergefell*, 135 S. Ct. at 2598.

<sup>191</sup> *Poe v. Ullman*, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting) (“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.”); *see also* *Hannah v. Larche*, 363 U.S. 420, 442 (1960) (Warren, C.J.) (“‘Due process’ is an elusive concept. Its exact boundaries are undefinable, and its content varies according to specific factual contexts.”).

<sup>192</sup> *Obergefell*, 135 S. Ct. at 2611 (Roberts, C.J., dissenting).

<sup>193</sup> *Moore v. City of East Cleveland*, 431 U.S. 494, 544 (1977) (White, J., dissenting).

a liberty interest has a nexus to either the nation's deeply rooted history<sup>194</sup> or principles and traditions of the Supreme Court's Fourteenth Amendment common law.<sup>195</sup> The finding of a close nexus would not necessarily trigger a strict scrutiny standard of review, as holding a right to be fundamental did under previous tests.<sup>196</sup> Instead, the Court would weigh the closeness of the nexus of the asserted liberty to principles and traditions of the Supreme Court's Fourteenth Amendment common law or this nation's deeply rooted history against whether the governmental action at issue sets up "one of those 'arbitrary impositions' or 'purposeless restraints' at odds with the Due Process Clause of the Fourteenth Amendment."<sup>197</sup> Considered in its simplest form, the Court engages in a balancing test between the individual's liberty interest and the governmental interest.<sup>198</sup> If the nexus between the asserted liberty interest and this nation's history or the Court's Fourteenth Amendment common law tradition is strong, and the governmental restriction is or leans strongly toward being purposeless or arbitrary, then a new liberty interest would likely be granted. If the right has a weak nexus, and the governmental restriction is even somewhat legitimate, then the right would likely be denied. Similarly, a weaker nexus could overcome an arbitrary restraint, while a stronger nexus could trump a compelling restraint.<sup>199</sup> In this way, the Court can effectively consider and, if necessary, grant an

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<sup>194</sup> *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997).

<sup>195</sup> This is basically a distilled version of *Obergefell*, which looked generally to "four principles and traditions" in order to grant the fundamental right, but the Court found all of those principles and traditions in previous fundamental rights cases. *Obergefell*, 135 S. Ct. at 2599–601.

<sup>196</sup> See, e.g., *Glucksberg*, 521 U.S. at 721 (quoting *Reno v. Flores*, 507 U.S. 292, 301 (1993)) ("As we stated recently in *Flores*, the Fourteenth Amendment 'forbids the government to infringe . . . 'fundamental' liberty interests at all, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest.") (emphasis in original).

<sup>197</sup> *Id.* at 721 (citing *Poe v. Ullman*, 367 U.S. 497, 543 (1961) (Harlan, J., dissenting)). This is also the approach to substantive due process endorsed by Justice Souter in his *Glucksberg* concurrence. See *Glucksberg*, 521 U.S. at 752 (Souter, J., concurring).

<sup>198</sup> This is a slight variation on an approach endorsed by Justice Marshall in his approach to equal protection. See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 102–03 (1973) (Marshall, J., dissenting) ("As the nexus between the specific constitutional guarantee and the nonconstitutional interest draws closer, the nonconstitutional interest becomes more fundamental and the degree of judicial scrutiny applied when the interest is infringed on a discriminatory basis must be adjusted accordingly."). See also Richard H.W. Maloy, *Thurgood Marshall and the Holy Grail—The Due Process Jurisprudence of a Consummate Jurist*, 26 PEPP. L. REV. 289, 292 n.18 (1999) ("Justice Marshall blended a large measure of due process jurisprudence when making his equal protection analysis.").

<sup>199</sup> See *Rodriguez*, 411 U.S. at 98 (Marshall, J., dissenting) (criticizing the majority for failing to see any nuance when analyzing rights by stating that it tries to put cases into "one of two neat categories which dictate the appropriate standard of review—strict scrutiny or mere rationality").

emerging right without the need to create a new test or deviate from prior precedent.<sup>200</sup>

This analysis uses portions of both of the *Obergefell* and *Glucksberg* methodologies, while curing the most notable flaws with each. For instance, this analysis dispels the ambiguity of *Obergefell* by plainly stating that the principles and traditions will be derived from the Court's Fourteenth Amendment common law.<sup>201</sup> Similarly, treating history as a non-dispositive factor allows the Court to protect essential liberties without necessarily swiftly denying liberty interests that do not neatly fit within the rigid *Glucksberg* framework.<sup>202</sup>

Additionally, clearly categorizing the right at issue based on how the asserting party framed her request cures the problem of how the Court should “careful[ly] descri[be]” the level of generality of the asserted right.<sup>203</sup> Framed this way, the Court would simply consider the right that would be granted if the governmental restraint on the asserting party's liberty ceased, and the responsibility to properly frame that interest would be entirely on the asserting party. For instance, in *Roe*, the asserting party would seek the right to get an abortion<sup>204</sup> or, if like *Loving*, the right to marry a person of any race.<sup>205</sup> Allowing the party asserting the right to frame the issue removes the subjectivity in categorization from the Justices, and because of that, the Court can no longer ignore the parties before it by framing the issue too narrowly or

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<sup>200</sup> See, e.g., *Obergefell v. Hodges*, 135 S. Ct. 2584, 2599–601 (2015). Although the principles and traditions all derive from the Court's Fourteenth Amendment jurisprudence, no court has ever specifically applied the “principle and traditions” analysis when considering a fundamental right. Even if this were a principled approach, the ad hoc nature of the analysis certainly lends credence to Chief Justice Roberts's criticism that the Court merely found a right because they think it is a “good idea.” *Id.* at 2611 (Roberts, C.J., dissenting).

<sup>201</sup> See *supra* Part III.

<sup>202</sup> *Id.*

<sup>203</sup> *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997). See also *id.* But see Tribe & Dorf, *supra* note 128, at 1087 (“What is novel about Justice Scalia's argument is the implicit suggestion that historical traditions come equipped with something like instruction manuals explaining how abstractly the Court should describe them.”).

<sup>204</sup> *Roe* is somewhat unique in that the Court held a liberty interest existed up to a certain point, the viability line. *Roe v. Wade*, 410 U.S. 113, 160 (1973). A party asserting a similar right would not necessarily have to frame the right in such a way that she would anticipate that the liberty interest only exists “pre-viability.” Similarly, a party seeking a *Glucksberg*-type interest would not have to explain to the court at what point a dying person is sufficiently terminal. The Court would still have some discretion in limiting the right.

<sup>205</sup> *Loving v. Virginia*, 388 U.S. 1 (1967).

too broadly.<sup>206</sup> Accordingly, if the Court finds a new right for the asserting party, it may make slight alterations to the characterization of the liberty that it is granting, so that if a party categorized the right in an overly broad, narrow, or absurd way, the holding would clearly apply to all similarly situated people.<sup>207</sup>

Once the right is categorized, the Court engages in its historical analysis, considering whether and to what extent the right, as framed by the asserting party, is a deeply-rooted historic practice.<sup>208</sup> The Court conducts this analysis using the same kind of sources that it has in previous cases decided under the history and tradition analysis. Do other local governments engage in that right?<sup>209</sup> Is there a basis for granting the right in the common law, natural law, or state constitutions?<sup>210</sup> That the party asserting the right categorizes the liberty interest helps to curb the practice of Justices engaging in a subjective reimagining of the history.<sup>211</sup> Thus, the question that the Justices grapple with would simply be: have people historically done what it is that the party asserting the right is specifically seeking to do?<sup>212</sup>

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<sup>206</sup> The benefit here is most obvious in *Glucksberg*. The party asserting the right, doctors and terminally ill patients, really just wanted the right to assisted suicide for the consenting, terminally-ill adults, administered by consenting physicians. The Court's framing as a general right to commit suicide with another's assistance in doing so effectively eliminated any chance of granting the right. *Glucksberg*, 521 U.S. at 723. See also *supra* Part III.

<sup>207</sup> This is for both reliance and administrability reasons. Similarly situated people, as well as legislators, need to know the scope of a liberty. Similarly, courts cannot keep adjudicating whether a right exists when there is no meaningful distinction between the initial person who achieved the right and similarly situated people. This prevents the courts from having to make arbitrary rulings on categorizations like, the right to get an abortion for all women named Jane or the right to marriage for all left-handed persons.

<sup>208</sup> *McDonald v. City of Chicago*, 561 U.S. 742, 806 (2010).

<sup>209</sup> See *Bowers v. Hardwick*, 478 U.S. 186 (1986), *overruled by* *Lawrence v. Texas*, 539 U.S. 558 (2003).

<sup>210</sup> For an example of the right being found in the common law, see *Cruzan v. Director, Mo. Dept. of Health*, 497 U.S. 261 (1990).

<sup>211</sup> Even proponents of the history and tradition method note its subjectivity. See, e.g., *McDonald*, 561 U.S. at 804 ("But the question to be decided is not whether the historically focused method is a *perfect means* of restraining aristocratic judicial Constitution-writing; but whether it is the *best means available* in an imperfect world.").

<sup>212</sup> This also helps to incentivize the party asserting the right to frame the right in a proper manner. The more specifically the right is framed, the less likely that narrow practice will be found in history. For an example where respondents urged the categorization of the right to die with dignity, see *Washington v. Glucksberg*, 521 U.S. 702, 727 (1997). There is much more likely to be an historical basis for the generalized notion of dying with dignity than the more specific right for a terminally-ill patient to consent to having a physician end his life in the most painless way possible.

The Court would then consider the nexus between the right, as framed by the asserting party, and the principles and traditions of the Court's Fourteenth Amendment common law. This analysis, although deriving from the party's asserted liberty, inherently involves a broader approach because it necessitates the thoughtful consideration of the rationale underpinning previously-granted liberties.<sup>213</sup> For instance, a court evaluating a potential new right would consider whether and to what extent the right is one to bodily integrity,<sup>214</sup> marriage,<sup>215</sup> privacy,<sup>216</sup> or any other principle or combination of principles previously recognized by the Court.<sup>217</sup> This allows the Court to consider new issues that may not have previously emerged or could not adequately have been evaluated under previous tests,<sup>218</sup> while also limiting the sphere of evaluation to the kind of rights previously found in the Court's fundamental rights jurisprudence.<sup>219</sup> This method all-but inhibits a rapid expansion of rights based solely on the Court's tradition because a never-before-found category of liberty, such as a right to social welfare,<sup>220</sup> would inherently have a weak nexus.<sup>221</sup>

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<sup>213</sup> See *Obergefell v. Hodges*, 135 S. Ct. 2584, 2599 (2015).

<sup>214</sup> See, e.g., *Cruzan*, 497 U.S. at 269.

<sup>215</sup> See, e.g., *Obergefell*, 135 S. Ct. at 2584.

<sup>216</sup> See, e.g., *Lawrence v. Texas*, 539 U.S. 558, 562 (2003).

<sup>217</sup> See, e.g., *Obergefell*, 135 S. Ct. at 2584, which had four.

<sup>218</sup> See, e.g., *Griswold v. Connecticut*, 381 U.S. 479 (1965) (finding that a new liberty interest corresponded with a new medical advancement).

<sup>219</sup> See *Obergefell*, 135 S. Ct. at 2599 (where the four principles and traditions all derived from rights that had previously been established under the Due Process Clause).

<sup>220</sup> See, e.g., International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, S. Treaty Doc. No. 95-19, 6 I.L.M. 360 (1967), 993 U.N.T.S. 3, [https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-3&chapter=4&clang=en](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-3&chapter=4&clang=en). The International Covenant on Economic, Social and Culture Rights has been signed but not ratified by the US. It includes things such as a "right to work," a "right of everyone to social security," and a "right of everyone to an adequate standard of living." *Id.* Although these are socially-desirable goals, such rights very likely do not have a compelling claim in the Court's Fourteenth Amendment common law, and hence this test does not give future courts a license to grant these rights under the pretense that they may be a "good idea." *Obergefell*, 135 S. Ct. at 2611 (Roberts, C.J., dissenting).

<sup>221</sup> See *Moore v. City of East Cleveland*, 431 U.S. 494, 544 (1977) (White, J., dissenting) ("[T]he Court should be extremely reluctant to breathe still further substantive content into the Due Process Clause so as to strike down legislation adopted by a State or city to promote its welfare."). However, if someone had her welfare benefits unjustly terminated, it could very well warrant a procedural due process or equal protection claim under existing law. I only note this example to show that the method I propose is highly unlikely at the present time to be used to usher in positive benefits that otherwise have no nexus to the Court's fundamental rights jurisprudence.

When considering the strength of the nexus, the Court would not merely consider a base categorical association with a principle in the Court's common law or a clear correspondence with a minor historical practice, but rather how much that association corresponds with the gravity of the asserted liberty interest. Put simply, to what extent is the right asserted the kind of important liberty that the Court has previously held to be fundamental? For instance, a right to get a tattoo might fit squarely with a right to bodily integrity<sup>222</sup> and perhaps there is even a deeply-rooted tradition of tattooing and being tattooed, but if a town were to pass legislation that prohibits its residents from getting tattoos, the liberty associated with the act likely would not rise to the level of having such a strongly compelling liberty as to allow judicial intervention. Similarly, a right need not have a strong nexus with both history and the Fourteenth Amendment common law tradition in order to receive constitutional protection. However, a liberty assertion that has a strong nexus with both would have an exceptionally strong argument. Conversely, for an asserted liberty interest that does not have a categorical connection with a historical practice or the Court's Fourteenth Amendment common law, a deprivation of the liberty could theoretically be so grave that it forms a nexus with the types of previously granted rights.<sup>223</sup> However, the lack of any nexus with history or the Fourteenth Amendment common law means that the deprivation would have to be extreme and completely in line with the rationale granting previously found rights in order to have a compelling nexus argument.<sup>224</sup>

The nexus analysis allows the Court to do away with the "implicit in the concept of ordered liberty such that neither liberty nor justice could exist without it" portion of the *Glucksberg* test.<sup>225</sup> This is preferable because the limiting principle against frivolous assertions of liberty is now inherent in how the Court analyzes the nexus of the liberty interest.<sup>226</sup> Further, as a gatekeeper, the "implicit in the concept

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<sup>222</sup> See *Roe v. Wade*, 410 U.S. 113 (1973).

<sup>223</sup> This loophole considers both Justice Harlan's contention that finding a fundamental right cannot be reduced to a set formula, and Justice White's contention that the court should be reluctant to grant new rights. *Poe v. Ullman*, 367 U.S. 497, 543 (1961) (Harlan, J., dissenting); *Moore*, 431 U.S. at 544.

<sup>224</sup> A deprivation of liberty that "shocks the conscience" might still give rise to the finding of a right under this test. *Rochin v. California*, 342 U.S. 165, 172 (1952).

<sup>225</sup> *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997).

<sup>226</sup> See *Castaways Backwater Cafe, Inc. v. Marstilller*, No. 2:05-cv-273-FtM-29SPC, 2006 WL 2474034, at \*4 (M.D. Fla. Aug. 25, 2006), *aff'd sub nom.* *Castaways Backwater Cafe, Inc. v. Fla. Dep't of Bus. & Prof'l Regs. Div. of Alcoholic Beverages & Tobacco*, 214 F. App'x 955 (11th Cir. 2007); see also *Fagan v. Axelrod*, 550 N.Y.S.2d 552, 559 (1990).

of ordered liberty” framing offered no guidance on how a judge is supposed to evaluate what makes a liberty “implicit,” thus inviting judicial subjectivity with its lack of clarity.<sup>227</sup> Under the nexus framing, a right that has a strong nexus to history and tradition or the Court’s Fourteenth Amendment jurisprudence can inherently be seen as implicit in the concept of ordered liberty.

Next, the Court should shift its analysis to “whether the statute sets up ‘arbitrary impositions’ or ‘purposeless restraints’ at odds with the Due Process Clause of the Fourteenth Amendment.”<sup>228</sup> This analysis would be fact intensive and require a back and forth between the parties. First, the government would give its reasons for upholding the law in question, and then the party asserting the liberty interest could refute or rebut the stated reasons. The Court would then assess the validity of the governmental action and ultimately weigh that against the strength of the nexus found in the previous step in order to gauge whether a constitutionally-protected liberty interest exists. As a result, finding a new liberty interest would not simply be a rigid binary that gauges whether the governmental action should receive strict scrutiny. Rather, this method would function more like an equal protection analysis with the level of scrutiny not based on protected class status but the proportionate strength of the liberty as assessed by the nexus analysis.<sup>229</sup> The overarching goal of this approach is to provide the Court with one consistent approach that allows it to engage in principled, objective judicial decision-making while openly scrutinize odious, harmful, or “purposeless” laws even when an asserted liberty interest does not necessarily fit neatly into a formal fundamental rights test.<sup>230</sup>

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<sup>227</sup> See Farrell, *supra* note 184, at 222–23 (Noting the circularity of the of the “implicit” test. “In purporting to answer the question of how we identify implied fundamental rights under the term ‘liberty’ in the Due Process Clause, the Court’s answer is to identify those rights ‘implicit in the concept of ordered liberty.’ It does not appear that the Court has advanced the discussion at all by going from the word ‘implied’ to ‘implicit.’”).

<sup>228</sup> Poe v. Ullman, 367 U.S. 497, 543 (1961) (Harlan, J., dissenting).

<sup>229</sup> See *Equal Protection*, LEGAL INFO. INST., [https://www.law.cornell.edu/wex/equal\\_protection](https://www.law.cornell.edu/wex/equal_protection) (last visited Jan. 28, 2018) for a brief overview of the equal protection analysis. For a more fluid approach of interpreting rights that does not necessarily follow the rigid tiers or scrutiny, see *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 102–03 (1973) (Marshall, J., dissenting) (“As the nexus between the specific constitutional guarantee and the nonconstitutional interest draws closer, the nonconstitutional interest becomes more fundamental and the degree of judicial scrutiny applied when the interest is infringed on a discriminatory basis must be adjusted accordingly.”).

<sup>230</sup> See, e.g., *Robicheaux v. Caldwell*, 2 F. Supp. 3d 910 (E.D. La. 2014), *rev’d*, 791 F.3d 616 (5th Cir. 2015), *and recalled*, No. CIV.A. 13-5090, 2015 WL 4090353 (E.D. La. July 2, 2015), *abrogated by Obergefell v. Hodges*, 135 S. Ct. 2584 (2015); *Bowers v. Hardwick*, 478 U.S. 186, 191 (1986), *overruled by Lawrence v. Texas*, 539 U.S. 558 (2003).



The *Glucksberg* majority specifically rejected a weighing of the proffered governmental reason when assessing whether a liberty interest exists, stating that the analysis is subjective and difficult to administer.<sup>231</sup> But to dismiss this approach so quickly is problematic for several reasons. First, it allows virtually any law challenged under substantive due process to go unchecked so long as the liberty interest asserted does not rise to 100% of whatever threshold the Court is using to assess a fundamental right.<sup>232</sup> Second, considering the governmental purpose does not necessarily lead to greater subjectivity, both because, as argued above, the notion that the *Glucksberg* methodology curbs subjectivity is dubious at best,<sup>233</sup> but also because both sides have an adequate opportunity to make a persuasive case debunking the other's reasoning, and requiring a weighing of those arguments as part of the test means that the Court cannot simply ignore one side's argument without some discussion of its merits. Further, scrutinizing a governmental action from multiple perspectives using all data available not only leads to a more informed judicial decision, it has historically been used to great success in overruling and distinguishing subjective and erroneous decisions.<sup>234</sup> Finally, given the importance, controversy and relative infrequency of substantive due process cases, an approach that allows the Court to thoroughly consider the issue before it should be greatly

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<sup>231</sup> *Washington v. Glucksberg*, 521 U.S. 702, 721–22 (1997) (calling Justice Souter's endorsement of Harlan's approach too "subjective" and requiring "complex balancing").

<sup>232</sup> Cases decided under rational basis review practically always fail. See Robert C. Farrell, *Successful Rational Basis Claims in the Supreme Court from the 1971 Term Through Romer v. Evans*, 32 IND. L. REV. 357, 357, 416–17 (1999) ("In the past twenty-five years, the Court has decided ten such cases, while during the same time period, it has rejected rational basis arguments on one hundred occasions. This ratio of successful to unsuccessful claims is not surprising given that rational basis review is considered an extremely deferential standard."). Note that all ten cases at issue in which plaintiffs prevailed on a rational basis review were decided on equal protection rather than substantive due process grounds. *Romer v. Evans*, 517 U.S. 620 (1996); *Quinn v. Millsap*, 491 U.S. 95 (1989); *Allegheny Pittsburgh Coal Co. v. County Comm'n*, 488 U.S. 336 (1989); *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432 (1985); *Hooper v. Bernalillo County Assessor*, 472 U.S. 612 (1985); *Williams v. Vermont*, 472 U.S. 14 (1985); *Metropolitan Life Ins. Co. v. Ward*, 470 U.S. 869 (1985); *Plyler v. Doe*, 457 U.S. 202 (1982); *Zobel v. Williams*, 457 U.S. 55 (1982); and *United States Dep't of Agric. v. Moreno*, 413 U.S. 528 (1973).

<sup>233</sup> See *supra* Part III.

<sup>234</sup> See, e.g., *Brown v. Bd. of Edu.*, 347 U.S. 483, 494–95 (1954), *overruling Plessy v. Ferguson*, 163 U.S. 537 (1896) ("Segregation of white and colored children in public schools has a detrimental effect upon the colored children . . . [W]hatever may have been the extent of psychological knowledge at the time of *Plessy v. Ferguson*, this finding is amply supported by modern authority. Any language in *Plessy v. Ferguson* contrary to this finding is rejected.").

preferred to methods that are merely easier to administer.<sup>235</sup> Consider each of these points individually and at some depth.

Scrutinizing governmental actions, even when the standard of review is merely rational basis, has previously yielded just and uncontroversial results, most notably in equal protection cases.<sup>236</sup> For instance, in *Quinn v. Millsap*, a unanimous Court invalidated a Missouri statute that required anyone who holds certain government positions to own property because the law was not “rationally related to any legitimate state interest.”<sup>237</sup> The Court scrutinized the government’s two proffered reasons, that owning property gives one “first-hand knowledge” of the community and owning property gives one a “tangible stake in the long term future of his area,” holding neither to be persuasive enough to justify the law.<sup>238</sup> Similarly, in *Clebourne*, the Court invalidated a zoning ordinance that required a special permit when building a home for mentally-challenged individuals.<sup>239</sup> The government stated five different reasons for supporting the ordinance and denying the plaintiff’s building permit, including that the residents in the community had “fears” about the home, the proposed location was on a flood plain, and the proximity of the facility to the junior high school could mean that the students might harass the residents.<sup>240</sup> The Court invalidated the ordinance, holding that the government’s real reason “rest[s] on an irrational prejudice against the mentally retarded,” a result with which all Justices unanimously agreed.<sup>241</sup> Although Due Process challenges similarly receive rational basis review when a right is not found to be fundamental, the governmental action at

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<sup>235</sup> See, e.g., Chemerinsky, *supra* note 9, at 1501 (“There is no concept in American law that is more elusive or more controversial than substantive due process.”).

<sup>236</sup> See, e.g., *Allegheny Pittsburgh Coal Co. v. County Comm’n*, 488 U.S. 336 (1989) (real property assessments held to violate the Equal Protection Clause when the assessor valued the property at 8 to 35 times more than neighboring properties were valued).

<sup>237</sup> *Quinn v. Millsap*, 491 U.S. 95, 104 (1989).

<sup>238</sup> *Id.* at 107.

<sup>239</sup> *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432 (1985).

<sup>240</sup> *Id.* at 448–50.

<sup>241</sup> *Id.* at 450. There were concurrences and a partial dissent, but those Justices disagreed with the reasoning, not the result.

issue tends to swiftly prevail with little judicial scrutiny, allowing for markedly different results from than the examples stated above.<sup>242</sup>

Even in cases where the Court has applied strict scrutiny, imagining an alternate holding where the government's rationale would not inform the existence of the liberty interest could lead to disastrous results. *Loving* is illustrative of this concept.<sup>243</sup> When defending its miscegenation law, the state of Virginia actually cited as support a case that held that states have an interest in "preserv[ing] the racial integrity of its citizens,' and preventing 'the corruption of blood,' 'a mongrel breed of citizens,' and 'the obliteration of racial pride,'" which the Supreme Court had no trouble calling, "obviously an endorsement of the doctrine of White Supremacy."<sup>244</sup> Although laws along racial lines obviously trigger strict scrutiny in today's judiciary, a similarly odious or ridiculous rationale could infringe upon a liberty that falls anywhere shy of being fundamental or against a class that does not have protected status, and those ludicrous or reprehensible governmental interests could stand with little to no judicial scrutiny.<sup>245</sup> This is exactly what happened in one of the pre-*Obergefell* same-sex marriage cases, which held that the state of Louisiana had a rational basis in prohibiting same-sex marriage simply because public debate still existed around the issue.<sup>246</sup> Given the same level of deference, that flimsy argument could easily have allowed the miscegenation law in *Loving* to stand.<sup>247</sup>

Other problems with near wholesale deference to the government when a liberty interest does not fit neatly into a formalistic doctrine are illustrated in *Bowers v. Hardwick* and *Lawrence v. Texas*. *Bowers*, decided in 1986, held that a Georgia statute criminalizing homosexual sodomy did not violate the defendant's constitutional right because there is no fundamental right for homosexuals to engage

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<sup>242</sup> See, e.g., *Bowers v. Hardwick*, 478 U.S. 186, 196 (1986), *overruled by* *Lawrence v. Texas*, 539 U.S. 558, 578 (2003); see also Farrell, *supra* note 184, 416–17 (all rational basis cases that prevailed were under equal protection).

<sup>243</sup> *Loving v. Virginia*, 388 U.S. 1 (1967).

<sup>244</sup> *Id.* at 7 (citing *Naim v. Naim*, 87 S.E.2d 749, 756 (1955)).

<sup>245</sup> See, e.g., *Robicheaux v. Caldwell*, 2 F. Supp. 3d 910 (E.D. La. 2014), *rev'd*, 791 F.3d 616 (5th Cir. 2015), and *recalled*, No. CIV.A. 13-5090, 2015 WL 4090353 (E.D. La. July 2, 2015), *abrogated by* *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

<sup>246</sup> *Id.* at n.21 ("The public contradictions and heated disputes among the community of social scientists, clergy, politicians, and thinkers about what is marriage confirms and clearly sends the message that the state has a legitimate interest, a rational basis, in addressing the meaning of marriage.").

<sup>247</sup> *Loving*, 388 U.S. at 6 ("Virginia is now one of 16 States which prohibit and punish marriages on the basis of racial classifications.").

in sodomy.<sup>248</sup> Because the Court held that no fundamental right existed, the rational basis review portion of the opinion was only one paragraph and upheld the law based on the notion that states have the general right to govern moral issues and that half of the states still criminalized sodomy.<sup>249</sup> *Lawrence* overruled *Bowers* a mere seventeen years later, undoing a Texas statute that similarly criminalized sodomy and established that *Bowers* was wrong when it was decided.<sup>250</sup> However, Justice Kennedy did not overtly hold that homosexual sodomy or any other framing of the right at issue achieved the status of being a fundamental right.<sup>251</sup> Instead, applying what presumably was a rational basis review,<sup>252</sup> Justice Kennedy held that the Due Process Clause protected unenumerated rights such as the one at issue.<sup>253</sup> In that sense, *Lawrence* most closely approximates how the test I propose would function in practice in that it undoes the rigid dichotomy between necessarily finding a right before applying heightened scrutiny. However, Justice Kennedy's unwillingness to assert any method for applying this methodology moving forward undermines the Court's legitimacy and leaves no framework for how compelling liberty interests that

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<sup>248</sup> *Bowers v. Hardwick*, 478 U.S. 186, 191 (1986), *overruled by* *Lawrence v. Texas*, 539 U.S. 558 (2003) (“Precedent aside, however, respondent would have us announce, as the Court of Appeals did, a fundamental right to engage in homosexual sodomy. This we are quite unwilling to do.”).

<sup>249</sup> *Id.* (“Even if the conduct at issue here is not a fundamental right, respondent asserts that there must be a rational basis for the law and that there is none in this case other than the presumed belief of a majority of the electorate in Georgia that homosexual sodomy is immoral and unacceptable. This is said to be an inadequate rationale to support the law. The law, however, is constantly based on notions of morality, and if all laws representing essentially moral choices are to be invalidated under the Due Process Clause, the courts will be very busy indeed. Even respondent makes no such claim, but insists that majority sentiments about the morality of homosexuality should be declared inadequate. We do not agree, and are unpersuaded that the sodomy laws of some 25 States should be invalidated on this basis.”).

<sup>250</sup> *Lawrence*, 539 U.S. at 592 (“The Court still must establish that *Bowers* was wrongly decided.”).

<sup>251</sup> *Id.* at 586 (Scalia, J., dissenting) (“Nowhere does the Court’s opinion declare that homosexual sodomy is a ‘fundamental right’ under the Due Process Clause; nor does it subject the Texas law to the standard of review that would be appropriate (strict scrutiny) if homosexual sodomy were a ‘fundamental right.’”).

<sup>252</sup> *Id.* The majority opinion never states what standard of review it uses. *But see* Charles B. Straut, *Due Process Disestablishment: Why Lawrence v. Texas Is a First Amendment Case*, 91 N.Y.U. L. REV. 1794, 1808 (2016) (“Justice Kennedy did not claim sodomy bans infringed a fundamental right; therefore, rational basis governed the case.”).

<sup>253</sup> *Lawrence*, 539 U.S. at 578–79 (“Had those who drew and ratified the Due Process Clauses of the Fifth Amendment or the Fourteenth Amendment known the components of liberty in its manifold possibilities, they might have been more specific. They did not presume to have this insight. They knew times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress.”).

are similarly difficult to categorize should be assessed.<sup>254</sup> Given the cursory analysis in *Bowers* that was quickly overruled and the uncertainty surrounding how to apply *Lawrence* to future cases, the legal analysis in both cases would be improved by the application<sup>255</sup> or acknowledgement<sup>256</sup> of a heightened scrutiny of the governmental restriction of a liberty interest that might not be sufficiently “fundamental” but yet is essential enough that an outright prohibition of the act is impermissible.<sup>257</sup>

Now consider the broader point that judicial scrutiny of proffered governmental reasons for upholding laws can lead to better decisions while not necessarily leading to judicial subjectivity. To begin, conceptualize the many ways in which the government’s reasoning for upholding a law can be supported or scrutinized. For example, this analysis can be done using a wide range of extra-judicial information, including hard or social sciences,<sup>258</sup> economics,<sup>259</sup> moral or philosophical principles,<sup>260</sup> basic logical reasoning,<sup>261</sup> or any other conceivable metric that, at a bare minimum, would inform the Court whether a governmental action is rationally related to a legitimate state interest.<sup>262</sup> The fear of subjectivity would then stem from

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<sup>254</sup> *Id.* at 586 (Scalia, J., dissenting) (quoting *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 844 (1992) (“Liberty finds no refuge in a jurisprudence of doubt.”)).

<sup>255</sup> *Bowers v. Hardwick*, 478 U.S. 186, 196 (1986) (upholding the Georgia statute after a swift, cursory examination of the governmental interest).

<sup>256</sup> *Lawrence*, 539 U.S. at 586 (Scalia, J., dissenting) (acknowledging that the majority did not state its standard of review).

<sup>257</sup> See Jeremy B. Smith, *The Flaws of Rational Basis with Bite: Why the Supreme Court Should Acknowledge Its Application of Heightened Scrutiny to Classifications Based on Sexual Orientation*, 73 *FORDHAM L. REV.* 2769 (2005).

<sup>258</sup> See *Loving v. Virginia*, 388 U.S. 1, 8 (1967) (“[T]he State argues, the scientific evidence is substantially in doubt and, consequently, this Court should defer to the wisdom of the state legislature . . . .”); *Brown v. Bd. of Ed.*, 347 U.S. 483, 494 (1954) (“Whatever may have been the extent of psychological knowledge at the time of *Plessy v. Ferguson*, this finding is amply supported by modern authority.”).

<sup>259</sup> Richard A. Posner, *The Chief Justice’s Dissent is Heartless*, *SLATE* (June 27, 2015), [http://www.slate.com/articles/news\\_and\\_politics/the\\_breakfast\\_table/features/2015/scotus\\_roundup/supreme\\_court\\_gay\\_marriage\\_john\\_roberts\\_dissent\\_in\\_obergefell\\_is\\_heartless.html](http://www.slate.com/articles/news_and_politics/the_breakfast_table/features/2015/scotus_roundup/supreme_court_gay_marriage_john_roberts_dissent_in_obergefell_is_heartless.html) (noting that same-sex marriage comes with the “financial advantages of legitimacy”).

<sup>260</sup> *Bowers*, 478 U.S. at 196 (“The law, however, is constantly based on notions of morality . . . .”).

<sup>261</sup> *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 450 (1985) (“The short of it is that requiring the permit in this case appears to us to rest on an irrational prejudice against the mentally retarded.”).

<sup>262</sup> *Id.* at 440 (“The general rule is that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest.”).

the concern that finding a right partially by using a wide-array of metrics to assesses a governmental restriction, rather than applying a strict, formalistic legal doctrine, allows the judge to simply pick and choose which metric leads to the result that she finds most desirable, hence leading to decisions based exclusively on what the judge thinks is a good idea.<sup>263</sup>

The seemingly prime example of using an extra-judicial analysis to make flawed and subjective law is *Lochner*.<sup>264</sup> In his *Obergefell* dissent, Chief Justice Roberts cited *Lochner* sixteen times, equating the opinion's reliance on social statistics and economic philosophy to the majority's deviation from the *Glucksberg* methodology.<sup>265</sup> While it is true that *Lochner* looked to statistics and philosophy to find an unenumerated right in a "freedom to contract," it only looked at some statistics in order to support a particular philosophy.<sup>266</sup> Therefore, the lesson of *Lochner* could just as easily be that if the Court is to judge the constitutionality of a particular statute by using any kind of extra-judicial analysis, it should consider multiple lenses, perspectives, and conflicting data.<sup>267</sup> Hence, the use of extra-judicial evidence does not necessarily lead to subjectivity, but the selective application of only one particular line of evidence or philosophy certainly might.

This principle became clear three years after *Lochner*, in *Muller v. Oregon*, a case that challenged the constitutionality of a statute that limited the hours worked of women employed in mechanical establishments, factories, and laundry positions to no more than ten per day.<sup>268</sup> Following *Lochner*, which abrogated a New York statute limiting the hours of bakers in New York to 60 per week, *Muller* seemed like

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<sup>263</sup> See *Obergefell v. Hodges*, 135 S. Ct. 2584, 2616 (2015) (Roberts, C.J., dissenting) ("Stripped of its shiny rhetorical gloss, the majority's argument is that the Due Process Clause gives same-sex couples a fundamental right to marry because it will be good for them and for society.").

<sup>264</sup> *Id.* at 2612 (citing *Lochner v. New York*, 198 U.S. 45, 76 (Holmes, J., dissenting)) ("It can be tempting for judges to confuse our own preferences with the requirements of the law. But as this Court has been reminded throughout our history, the Constitution 'is made for people of fundamentally differing views.'").

<sup>265</sup> *Id.* at 2611–27.

<sup>266</sup> *Lochner*, 198 U.S. at 75 (Holmes, J., dissenting) ("This case is decided upon an economic theory which a large part of the country does not entertain.").

<sup>267</sup> *Id.* at 76 (Commenting on the various reasons one could uphold the New York statute, the Court stated: "[a] reasonable man might think it a proper measure on the score of health. Men whom I certainly could not pronounce unreasonable would uphold it as a first installment of a general regulation of the hours of work.").

<sup>268</sup> *Muller v. Oregon*, 208 U.S. 412, 417 (1908).

a sure loser.<sup>269</sup> But instead of arguing for a slight distinction in precedent between *Lochner*, then attorney, and later Justice, Louis Brandeis, with the help of his sister-in-law, pioneering legal reformer Josephine Clara Goldmark, submitted to the Court what became known as the “Brandeis Brief.”<sup>270</sup> The *Muller* “Brandeis Brief” was a 100-page brief, 99½ of which were “facts of common knowledge of which the Court may take judicial note.”<sup>271</sup> Those facts included practices of foreign and American legislation, evidence supporting the “dangers of long hours,” evidence that “shorter hours [are] the only possible protection,” the economic benefits of working shorter hours, and the reasonableness of a 10-hour work day, including opinions given by both physicians and employees.<sup>272</sup> The Court unanimously ruled for the State, thus effectively distinguishing *Lochner* based solely on an expansive consideration of information, rather than a singular examination of “Mr. Herbert Spencer’s *Social Statics*.”<sup>273</sup>

Of course, this not to say that *Muller* is impeccably reasoned and 100% scientifically accurate.<sup>274</sup> It is riddled with gender stereotypes that could easily be refuted by any reasoned body in today’s society.<sup>275</sup> However, the influx of information from numerous accounts and perspectives allowed for better judicial decision-making that, in hindsight, elicited a result that is flawed only in that it could

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<sup>269</sup> *Lochner*, 198 U.S. at 64.

<sup>270</sup> Ruth Bader Ginsburg, *Lessons Learned from Louis D. Brandeis*, BRANDEISNOW (Jan. 28, 2016), <http://www.brandeis.edu/now/2016/january/ginsburg-remarks.html>.

<sup>271</sup> Brief for the State of Oregon at 9, *Muller v. Oregon*, 208 U.S. 412 (1908) (No. 107).

<sup>272</sup> *Id.* at 24 (“Table of Contents”).

<sup>273</sup> *Obergefell v. Hodges*, 135 S. Ct. 2584, 2617 (2015) (Roberts, C.J., dissenting) (citing *Lochner v. New York*, 198 U.S. 45 (1905) (Holmes, J., dissenting)); *Muller*, 208 U.S. at 421.

<sup>274</sup> *Muller v. Oregon*, 208 U.S. 412, 416 (1908).

<sup>275</sup> *Id.* at 421 (“[A]s healthy mothers are essential to vigorous offspring, the physical well-being of woman becomes an object of public interest and care in order to preserve the strength and vigor of the race.”).

apply to all, rather than just one sex.<sup>276</sup> *Muller* is still good law.<sup>277</sup> *Lochner* has long since been overruled.<sup>278</sup>

In addition to a more complete consideration of extra-judicial evidence being a limiting factor for judicial subjectivity, today's judiciary, unlike in the *Lochner*-era, is restricted by whatever threshold is applied when considering whether a sufficient liberty interest exists, be it the nexus analysis, or something else.<sup>279</sup> This is not to say that judges will not still engage in a selective portrayal of information to support their decision. But this practice already regularly happens in almost all cases, especially those in which a colorable counterview can be proffered.<sup>280</sup> Additionally, when a majority opinion possesses especially dubious reasoning, it tends to draw strong dissents based in superior information and possessing a sounder rationale, and despite *stare decisis*, future courts tend to overrule the faulty decision.<sup>281</sup> Further still, the mere act of drafting an opinion can serve as a limiting principle because

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<sup>276</sup> Sarah Green Carmichael, *The Research is Clear: Long Hours Backfire for People and for Companies*, HARV. BUS. REV. (Aug. 19, 2015), <https://hbr.org/2015/08/the-research-is-clear-long-hours-backfire-for-people-and-for-companies>.

<sup>277</sup> *Muller*, 208 U.S. at 416.

<sup>278</sup> *Lochner v. New York*, 198 U.S. 45 (1905), *abrogated by* *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937).

<sup>279</sup> Under my test, it would be the nexus analysis. See also, for example, “history and tradition.” *Washington v. Glucksberg*, 521 U.S. 702, 719–20 (1997). *Lochner* had no such restriction. *Lochner*, 198 U.S. at 64 (“*It seems to us that the real object and purpose were simply to regulate the hours of labor between the master and his employees (all being men, Sui juris), in a private business, not dangerous in any degree to morals, or in any real and substantial degree to the health of the employees. Under such circumstances the freedom of master and employee to contract with each other in relation to their employment, and in defining the same, cannot be prohibited or interfered with, without violating the Federal Constitution.*” (emphasis added)).

<sup>280</sup> See, e.g., *McDonald v. City of Chicago*, 561 U.S. 742 (2010). The majority opinion and the dissents both give conflicting views of history. See also Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed*, 3 VAND. L. REV. 395 (1950) (“One does not progress far into legal life without learning that there is no single right and accurate way of reading one case . . .”). Llewellyn further notes the innumerable methodologies that judges use in deciding cases, any one of which could presumably be substituted for another. *Id.* at 396 (“In the work of a single opinion-day I have observed 26 different, describable ways in which one of our best state courts handled its own prior cases, repeatedly using three to six different ways within a single opinion.”).

<sup>281</sup> See, e.g., *Bowers v. Hardwick*, 478 U.S. 186 (1986), *overruled by* *Lawrence v. Texas*, 539 U.S. 558 (2003); *Lochner v. New York*, 198 U.S. 45 (1905), *abrogated by* *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937); *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting), *overruled by* *Brown v. Bd. of Ed. of Topeka*, 347 U.S. 483 (1954) (“Our constitution is color-blind, and neither knows nor tolerates classes among citizens . . . the judgment this day rendered will, in time, prove to be quite as pernicious as the decision made by this tribunal in the *Dred Scott Case*.”).



clearly flawed information, extra-judicial or otherwise, tends to stand out as so clearly wrong that it cannot serve as the basis of an opinion that is wide open for the public scrutiny by peers, colleagues, and the public at large.<sup>282</sup>

Therefore, prohibiting the Court from considering and applying valuable information to a legitimate analysis of a governmental restriction under the pretense that allowing judges such leeway will lead to impermissible subjectivity is not a compelling enough reason to maintain continued adherence to a rigid system that can lead to ignorant, short-sighted, or factually inaccurate decisions.<sup>283</sup> This is especially true when the proposed limiting principle places a near-wholesale restriction on any analysis of the government's action.<sup>284</sup> Instead, consideration of extra-judicial evidence allows the Court to conduct a broad inquiry, which explores the government's interest not just as it pertains to the parties but to society as a whole. This is not to say that the Court should suddenly become a legislative body when a fundamental right is at issue, but rather when a liberty interest is compelling enough that an individual who has suffered an injury for engaging in an activity that may be afforded protection, the Court, in its analysis of the government's reason, can

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<sup>282</sup> See Joseph William Singer, *Legal Realism Now*, 76 CAL. L. REV. 465, 471–72 (1988) (noting that even legal realists, who tended to view formalistic judicial decision-making that stemmed from clearly-established rules as flawed, considered writing a judicial opinion to be in of itself a limit on subjectivity: “The most convincing legal realists argued that the reasoning demanded by judicial opinions substantially constrained judges”). Singer further explained, “[t]o be persuasive, the argument must tie the proposed result to existing practice in a way that appears not to deviate from fundamental principles underlying prior law; this is determined partly by professional consensus, partly by community views, and partly by the substantive content and organization of existing law. Thus, the fact that the judge must justify the decision by conventional legal arguments constrains her, not because the law itself logically requires the result, but because the argument for a change in the law must appear to fit with existing practice, and more importantly, the argument must persuade a particular audience that is likely to be conservative about such matters. Existing doctrine may therefore be very manipulable, ambiguous, and contradictory, yet still substantially constrain judges’ decisions.” *Id.* at 472–73.

<sup>283</sup> See Justice John Paul Stevens (Ret.), *Two Thoughts About Obergefell v. Hodges*, 77 OHIO ST. L.J. 913, 915–16 (2016). In a response to the *Obergefell* dissenters, Justice Stevens notes the limitation of their approach, which would have ended judicial inquiry with little to no scrutiny upon finding that same-sex marriage had no historical precedent. *Id.* (“It seems bizarre to conclude that a right to own handguns is ‘among those fundamental rights necessary to our system of ordered liberty’ but that the right to choose one’s spouse is not.”); see also Posner, *supra* note 259 (“Unless it can be shown that same-sex marriage harms people who are not gay (or who are gay but don’t want to marry), there is no compelling reason for state intervention, and specifically for banning same-sex marriage. The dissenters in *Obergefell* missed this rather obvious point.”).

<sup>284</sup> *Bowers*, 478 U.S. at 220 (Stevens, J., dissenting) (“Both the Georgia statute and the Georgia prosecutor thus completely fail to provide the Court with any support for the conclusion that homosexual sodomy, *simpliciter*, is considered unacceptable conduct in that State . . . .” (emphasis added)).

consider all of the reasons why the liberty interest should be permitted or restricted.<sup>285</sup>

A brief article written by Seventh Circuit Judge Richard Posner about *Obergefell* illustrates numerous small considerations that could easily have received discussion in an opinion that more closely examined the states' reasoning.<sup>286</sup> First, Judge Posner established that the only ground for a prohibition on same-sex marriage, like the miscegenation in *Loving* is "bigotry."<sup>287</sup> He then looked to the philosophy of John Stuart Mill to cite a general principle that there is no compelling reason for state intervention in the prohibition of same-sex marriage unless it can be shown that the act harms anyone.<sup>288</sup> He debunks the religious argument<sup>289</sup> while noting that there is no social benefit to banning same-sex marriage "beyond gratifying feelings of hostility toward gays and lesbians."<sup>290</sup> He refutes Chief Justice Roberts's argument that throughout history marriage only referred to a relationship between a man and a woman.<sup>291</sup> He distinguishes same-sex marriage from polygamy<sup>292</sup> because polygamy imposes grave social concerns that could harm society in a way that same-sex marriage does not.<sup>293</sup> He notes that there is no reasonable basis for the argument that allowing same-sex marriage discourages

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<sup>285</sup> *Obergefell v. Hodges*, 135 S. Ct. 2584, 2605 (2015) ("The dynamic of our constitutional system is that individuals need not await legislative action before asserting a fundamental right . . . . An individual can invoke a right to constitutional protection when he or she is harmed, even if the broader public disagrees and even if the legislature refuses to act.").

<sup>286</sup> Posner, *supra* note 259.

<sup>287</sup> *Id.*

<sup>288</sup> *Id.*

<sup>289</sup> *Id.* ("The United States is not a theocracy, and religious disapproval of harmless practices is not a proper basis for prohibiting such practices, especially if the practices are highly valued by their practitioners."); *Obergefell*, 135 S. Ct. at 2625 (Roberts, C.J., dissenting) ("Today's decision, for example, creates serious questions about religious liberty.").

<sup>290</sup> Posner, *supra* note 259 ("That's nonsense; polygamy . . . has long been common in many civilizations.").

<sup>291</sup> *Id.*; *Obergefell*, 135 S. Ct. at 2612 (Roberts, C.J., dissenting).

<sup>292</sup> Chief Justice Roberts argues that the majority's rationale for granting a right to same-sex marriage cannot be distinguished from polygamy. *Obergefell*, 135 S. Ct. at 2622 (Roberts, C.J., dissenting) ("If not having the opportunity to marry 'serves to disrespect and subordinate' gay and lesbian couples, why wouldn't the same 'imposition of this disability,' *ante*, at 2604, serve to disrespect and subordinate people who find fulfillment in polyamorous relationships?").

<sup>293</sup> Posner, *supra* note 259 ("Suppose a society contains 100 men and 100 women, but the five wealthiest men have a total of 50 wives. That leaves 95 men to compete for only 50 marriageable women.").

procreation<sup>294</sup> because the “nation is not suffering from a shortage of children” and “[s]terile people are not forbidden to marry.”<sup>295</sup> He notes that same-sex marriage is positive for the children of parents in a same-sex relationship both emotionally and economically.<sup>296</sup> He debunks the argument that granting a right to same-sex marriage “contribute[s] to marriage’s further decay”<sup>297</sup> and notes that same-sex marriage promotes social utility because it promotes adoption for children who would otherwise “languish in foster homes.”<sup>298</sup> Finally, he cuts at the heart of the states’ rights argument<sup>299</sup> by asking, “why should the people who control a state have the right to deny the right of some of their fellow citizens to marry, without a reason?”<sup>300</sup>

This is not to say that *Obergefell* is per se a correct decision, or that the Supreme Court should adopt an approach that creates a fast track to finding new rights.<sup>301</sup> However, compare Judge Posner’s brief but thorough discussion with the throwaway analysis in the pre-*Obergefell* same-sex marriage decisions.<sup>302</sup> Compare it with the flimsy *Bowers* rationale that states seemingly have a general, limitless right to police

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<sup>294</sup> *Obergefell*, 135 S. Ct. at 2641 (Alito, J., dissenting) (noting that states have the right to “encourage potentially procreative conduct to take place within a lasting unit that has long been thought to provide the best atmosphere for raising children”).

<sup>295</sup> Posner, *supra* note 259.

<sup>296</sup> *Id.* (“[Gay marriage] is actually good for children by making the children adopted by gay couples (and there are a great many such children), better off emotionally and fiscally.”).

<sup>297</sup> *Obergefell*, 135 S. Ct. at 2642 (Alito, J., dissenting) (“They worry that by officially abandoning the older understanding, they may contribute to marriage’s further decay.”).

<sup>298</sup> Posner, *supra* note 259 (“This doesn’t make sense. Why would straight people marry less and procreate less just because gay people also marry and raise adopted children, who, but for adoption, would languish in foster homes?”).

<sup>299</sup> *Obergefell*, 135 S. Ct. at 2640 (Alito, J., dissenting) (“The question in these cases, however, is not what States *should* do about same-sex marriage but whether the Constitution answers that question for them. It does not. The Constitution leaves that question to be decided by the people of each State.”).

<sup>300</sup> Posner, *supra* note 259.

<sup>301</sup> *See, e.g.*, Moore v. City of East Cleveland, 431 U.S. 494, 544 (1977) (White, J., dissenting) (“[T]he Court should be extremely reluctant to breathe still further substantive content into the Due Process Clause so as to strike down legislation adopted by a State or city to promote its welfare.”).

<sup>302</sup> *Robicheaux v. Caldwell*, 2 F. Supp. 3d 910, 928 n.21 (E.D. La. 2014), *rev’d and remanded*, 791 F.3d 616 (5th Cir. 2015), *abrogated by Obergefell*, 135 S. Ct. 2584 (“The public contradictions and heated disputes among the community of social scientists, clergy, politicians, and thinkers about what is marriage confirms and clearly sends the message that the state has a legitimate interest, a rational basis, in addressing the meaning of marriage.”).

morality.<sup>303</sup> Surely, in light of the importance of fundamental rights decisions,<sup>304</sup> the judiciary is better off adopting a methodology that permits, rather than precludes, the analysis of such important considerations.

Another concern with engaging in a more rigorous analysis of a governmental action is that it causes administrability problems for the Court, both because it expands the scope and thoroughness of the analysis and because the judiciary is ill-equipped to undertake so much extra-judicial analysis.<sup>305</sup> However, before responding to either criticism, consider how important and infrequent fundamental rights cases are at the Supreme Court level. During the 18 years between *Glucksberg* and *Obergefell*, only two cases came before the Court that reasonably considered whether to grant a new fundamental right.<sup>306</sup> Although lower court rulings have necessarily been more frequent,<sup>307</sup> the granting of the right only becomes the “supreme law of the land” with a Supreme Court ruling, and therefore the Supreme Court docket provides the most accurate metric for emerging rights cases.<sup>308</sup>

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<sup>303</sup> *Bowers v. Hardwick*, 478 U.S. 186, 195 (1986), *overruled by* *Lawrence v. Texas*, 539 U.S. 558 (2003) (“[I]f all laws representing essentially moral choices are to be invalidated under the Due Process Clause, the courts will be very busy indeed.”).

<sup>304</sup> *See Obergefell*, 135 S. Ct. at 2606 (explaining that fundamental rights are certain crucially important rights of such significance that they “withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts” (quoting *W. Virginia Bd. of Ed. v. Barnette*, 319 U.S. 624, 638 (1943))).

<sup>305</sup> *See* *Washington v. Glucksberg*, 521 U.S. 702, 721–22 (1997) (warning that Justice Harlan’s approach requires a “complex balancing of competing interests in every case”); *see also* Felix Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 819 (1935) (citing *Adkins v. Children’s Hosp.*, 261 U.S. 525, 559 (1923)) (noting that when future Justice Felix Frankfurter presented a “Brandeis brief” of favorable opinions supporting minimum wage legislation for women, the reply of the Court was that “one might also make an impressive compilation of unfavorable opinions”).

<sup>306</sup> *See* *Lawrence v. Texas*, 539 U.S. 588 (2003); *McDonald v. City of Chicago*, 561 U.S. 742 (2010).

<sup>307</sup> *See, e.g.,* *Baskin v. Bogan*, 766 F.3d 648, 672 (7th Cir. 2014) (invalidating an Indiana statute and a Wisconsin constitutional amendment that prohibited same-sex marriage prior to the *Obergefell* decision).

<sup>308</sup> Lower courts can invalidate a legislative act using substantive due process. *See, e.g.,* *Compassion in Dying v. Washington*, 79 F.3d 790, 838 (9th Cir. 1996), *rev’d sub nom. Glucksberg*, 521 U.S. 702 (“We hold that a liberty interest exists in the choice of how and when one dies, and that the provision of the Washington statute banning assisted suicide, as applied to competent, terminally ill adults who wish to hasten their deaths by obtaining medication prescribed by their doctors, violates the Due Process Clause.”). However, only the Supreme Court can make the ruling the “supreme law of the land.” U.S. CONST. art. III, § 1 (“The judicial Power of the United States, shall be vested in one supreme Court[.]”); U.S. CONST. art. VI, cl. 2 (“This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land[.]”).

Additionally, the constitutional protection that comes with finding a fundamental right precludes any legislative action that might interfere with the exercise of that right, sometimes undoing numerous state or local statutes.<sup>309</sup> Hence, fundamental rights decisions are among the most critically important cases in all of American law.<sup>310</sup> Granting a new fundamental right allows a sweeping legalization.<sup>311</sup> Denying a fundamental right can mean that a subjugated group is subject to the tyranny of a discriminatory majority.<sup>312</sup> Therefore, as an overarching consideration, an increase in administrability cost should be gauged in light of the importance of the decision and minimized by the infrequency of substantive due process litigation.

Considering then the first issue, analyzing the governmental rationale and balancing it against the asserted liberty interest clearly increases the Court's workload in a given case. The analysis requires a close consideration of history and fundamental rights jurisprudence, as well as an extensive discussion of the governmental interest, which could include any number of broad, policy interests ranging from economic, philosophical, or practical reasons for curbing a certain behavior. However, although this inquiry is broad, it is limited to a great extent by what reasons the government gives to justify its action. In *Obergefell*, for instance, the state's reason for amending its constitution to prohibit same-sex marriage mostly stemmed from its fear that its own courts would find a fundamental right in the state constitution, and its belief that its own citizens should legalize same-sex marriage through the democratic process.<sup>313</sup> In its brief on the merits, the state gave no policy reason why prohibiting same-sex marriage was in and of itself a valid amendment to

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<sup>309</sup> See, e.g., Julia Zorthian, *These are the States Where SCOTUS Just Legalized Same-Sex Marriage*, TIME (June 26, 2015), <http://time.com/3937662/gay-marriage-supreme-court-states-legal/> (noting that 13 states banned same-sex marriage at the time of *Obergefell*).

<sup>310</sup> See Richard Wolf, *The 21 Most Famous Supreme Court Decisions*, USA TODAY (June 26, 2015) <https://www.usatoday.com/story/news/politics/2015/06/26/supreme-court-cases-history/29185891> (including *Loving*, *Obergefell*, *Roe*, and *Lawrence*, as well as several other cases that have the Due Process Clause of the Fourteenth Amendment at issue).

<sup>311</sup> *Obergefell v. Hodges*, 135 S. Ct. 2584, 2604–05 (2015) (“[T]he State laws challenged by Petitioners in these cases are now held invalid to the extent they exclude same-sex couples from civil marriage on the same terms and conditions as opposite-sex couples.”).

<sup>312</sup> See Posner, *supra* note 259 (“[F]orbidden same-sex marriage confer[s] no . . . benefits at all beyond gratifying feelings of hostility toward gays and lesbians.”).

<sup>313</sup> See Brief for Respondent at 51–59, *Obergefell v. Hodges*, 135 S. Ct. 2584 (No. 14-556), 2015 WL 1384100 at \*51–59.

its own constitution.<sup>314</sup> Although it is true that the state was not as incentivized to proffer policy considerations in *Obergefell*, like it would under the approach I propose, the amendment was still subject to rational basis review, and hence consideration of the adequacy of the policy rationale was still theoretically on the table. Further, the Seventh Circuit had just invalidated a ban on same-sex marriage on the grounds that the prohibition had no “reasonable basis.”<sup>315</sup> Therefore, the state’s policy reasoning for denying same sex couples the right to marry was legally relevant, and if policy reasons existed, it could have easily stated them over the course of its 59-page brief.<sup>316</sup> Under the approach I propose, when the government gives few reasons for its actions or where the government’s reasons are odious or ridiculous,<sup>317</sup> the Court’s inquiry is largely the same as it would be in any case in which a law is being challenged.

Even in a complex scenario where the government offers five or more reasons why their law is a valid restriction on the asserted liberty interest,<sup>318</sup> the Court should still prioritize coming to a correct, rather than a swift decision.<sup>319</sup> Many of the worst decisions in the Court’s history had clear evidence, extrajudicial or otherwise, showing that they were wrong at the time they were decided, and the results of which sometimes subjugated and oppressed millions of people for generations.<sup>320</sup> That

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<sup>314</sup> *See id.*

<sup>315</sup> *Baskin v. Bogan*, 766 F.3d 648, 654 (7th Cir. 2014) (“[T]he governments of Indiana and Wisconsin have given us no reason to think they have a ‘reasonable basis’ for forbidding same-sex marriage.”).

<sup>316</sup> *See* Brief for Respondent, *supra* note 313; *see also* Bd. of Regents of State Colleges v. Roth, 408 U.S. 564, 591 (1972) (Marshall, J., dissenting) (“[I]t is not burdensome to give reasons when reasons exist.”).

<sup>317</sup> *See, e.g.,* *Loving v. Virginia*, 388 U.S. 1 (1967).

<sup>318</sup> *See* *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 448–50 (1985) (discussing the city’s five reasons for maintaining its zoning ordinance against the mentally challenged and denying a particular builder the right to construct a group home).

<sup>319</sup> *See, e.g.,* *Bowers v. Hardwick*, 478 U.S. 186, 191 (1986), *overruled by* *Lawrence v. Texas*, 539 U.S. 558 (2003).

<sup>320</sup> *See, e.g.,* *Lochner v. New York*, 198 U.S. 45, 75 (1905), *abrogated by* *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937) (Holmes, J., dissenting) (“This case is decided upon an economic theory which a large part of the country does not entertain.”); *Plessy v. Ferguson*, 163 U.S. 537, 561 (1896), *overruled by* *Brown v. Bd. of Ed. of Topeka*, 347 U.S. 483 (1954) (Harlan, J., dissenting) (“If laws of like character should be enacted in the several states of the Union, the effect would be in the highest degree mischievous . . . there would remain a power in the states, by sinister legislation, to interfere with the full enjoyment of the blessings of freedom, to regulate civil rights, common to all citizens, upon the basis of race, and to place in a condition of legal inferiority a large body of American citizens.”); *see also* Casey C. Sullivan, *13 Worst Supreme Court Decisions of All Time*, FINDLAW (Oct. 14, 2015), [http://blogs.findlaw.com/supreme\\_court/2015/10/13-worst-supreme-court-decisions-of-all-time.html](http://blogs.findlaw.com/supreme_court/2015/10/13-worst-supreme-court-decisions-of-all-time.html) (“[T]he

compelling concern should outweigh almost any administrability concern stemming from infrequent fundamental rights cases. Further, the drastic increase in *amicus* briefs, especially in cases that draw national interest like fundamental rights cases, means that a magnitude of data is already available to the Court. *Obergefell* had 148 amicus briefs.<sup>321</sup> Even twenty years ago, *Glucksberg*, and its companion case, *Quill*, had forty-one amicus briefs.<sup>322</sup> Even if the Court took fewer cases in years when it had to consider a new fundamental right, society would be better served by a well-informed decision that has a greater potential to avoid decades of social flaws, injustice, or majoritarian tyranny.<sup>323</sup> This recognition that considering only existing legal doctrine can only take a court so far is in large part why Justice Holmes famously stated that the legal practitioner of the future should be a “man of statistics and the master of economics.”<sup>324</sup> Accordingly, for an issue important enough to warrant consideration by the Supreme Court,<sup>325</sup> a more measured, well-considered opinion that provided a legitimate discussion of the merits of an issue, yet ended in the same result, would almost certainly end the practice of hastily overturned decisions.<sup>326</sup> A thorough discussion of the merits of a right that ends in a denial of that right will necessarily highlight the merits of each side of an argument. That

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Court made sure that the gains of the post-Civil War reconstruction era were quickly replaced by decades of Jim Crow laws.”); M. Kelly Tillery, *The Top 10 Worst Supreme Court Decisions*, PHILA. LAWYER (Summer 2010), [http://www.philadelphiabar.org/WebObjects/PBAReadOnly.woa/Contents/WebServerResources/CMSResources/TPL\\_summer2010\\_worst.pdf](http://www.philadelphiabar.org/WebObjects/PBAReadOnly.woa/Contents/WebServerResources/CMSResources/TPL_summer2010_worst.pdf).

<sup>321</sup> Nina Totenberg, *Record Number of Amicus Briefs Filed in Same-Sex-Marriage Cases*, NPR: IT’S ALL POLITICS (Apr. 28, 2015), <http://www.npr.org/sections/itsallpolitics/2015/04/28/402628280/record-number-of-amicus-briefs-filed-in-same-sex-marriage-cases>.

<sup>322</sup> Richard E. Coleson, *The Glucksberg & Quill Amicus Curiae Briefs: Verbatim Arguments Opposing Assisted Suicide*, 13 ISSUES L. & MED. 3, 3 (1997) (“Forty-one amicus curiae briefs were filed in one or both of the cases in support of New York and Washington.”).

<sup>323</sup> See *Lochner*, 198 U.S. at 45; *Plessy*, 163 U.S. at 537.

<sup>324</sup> Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897) (“For the rational study of the law the black-letter man may be the man of the present, but the man of the future is the man of statistics and the master of economics. It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.”).

<sup>325</sup> *Supreme Court Procedure*, SCOTUSBLOG, <http://www.scotusblog.com/reference/educational-resources/supreme-court-procedure/> (last visited Mar. 22, 2018) (“Of the 7,000 to 8,000 cert petitions filed each term, the court grants certiorari and hears oral argument in only about 80.”).

<sup>326</sup> See *Bowers v. Hardwick*, 478 U.S. 186, 191 (1986), *overruled by Lawrence v. Texas*, 539 U.S. 558 (2003).

debate will perhaps encourage a legislature to act, thus furthering rather than impeding the democratic process.<sup>327</sup>

An additional concern in using extra-judicial analysis might arise because judges are generalists who are ill suited to weigh conflicting, sometimes highly technical data. But, as *Muller* illustrates, the Court has been weighing substantial amounts of empirical data for more than one hundred years.<sup>328</sup> Further, the Court already regularly receives and weighs complex scientific information, notably in Eighth Amendment cases interpreting whether harsh punishments doled out to juveniles, whose brains have yet to fully develop, constitute “cruel and unusual punishment.”<sup>329</sup> Although it is true that the use of empirical evidence is controversial, Justices who oppose its use on constitutional relevance grounds still capably engage in its analysis.<sup>330</sup> This has led Justice Breyer to request outside information from experts in any case where it might reasonably inform him about how to consider an issue and encourages other judges to do the same.<sup>331</sup> Therefore, openly analyzing more information in the rare case considering a new fundamental right simply does not change what the Court has already been doing. It just brings the behind-the-scenes debate into the open.

Finally, it should be noted that my approach obviously does not respond to those who think that the Court either cannot or should not engage in the practice of finding unenumerated rights based on the Due Process Clause of the Fourteenth

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<sup>327</sup> See *Obergefell v. Hodges*, 135 S. Ct. 2584, 2611 (2015) (Roberts, C.J., dissenting) (“But this Court is not a legislature. Whether same-sex marriage is a good idea should be of no concern to us.”). Had *Obergefell* gone the other way, a political backlash surely would have ensued in attempt to achieve national legalization of same-sex marriage.

<sup>328</sup> See *Muller v. Oregon*, 208 U.S. 412 (1908).

<sup>329</sup> U.S. CONST. amend. VIII. See *Graham v. Florida*, 560 U.S. 48, 68 (2010) (“No recent data provided reason to reconsider the Court’s observations in *Roper* about the nature of juveniles. As petitioner’s *amici* point out, developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds. For example, parts of the brain involved in behavior control continue to mature through late adolescence.”).

<sup>330</sup> *Graham*, 560 U.S. at 117 (Thomas, J., dissenting) (“But even if such generalizations from social science were relevant to constitutional rulemaking, the Court misstates the data on which it relies.”).

<sup>331</sup> The Associated Press, *Justice Breyer Calls for Experts to Aid Courts in Complex Cases*, N.Y. TIMES (Feb. 17, 1998), <http://www.nytimes.com/1998/02/17/us/justice-breyer-calls-for-experts-to-aid-courts-in-complex-cases.html> (“‘You have offered your help,’ he said. ‘We in the legal community should accept that offer, and we are in the process of doing so.’”).



Amendment.<sup>332</sup> Such a stance is clear, principled, promotes judicial certainty, and is perhaps theoretically appealing, but there is no clear indication that such strict formalism is constitutionally required, just as there is no clear indication that the founders intended to prohibit the Court from finding unenumerated rights.<sup>333</sup> Therefore, my argument, in its simplest form, is directed toward those who recognize the importance of substantive due process in our system of constitutional law.<sup>334</sup> Thoroughly arguing whether and why substantive due process should exist is outside the scope of this note.

### CONCLUSION

There has never been a perfect method for finding a fundamental right, and future courts should refrain from attempting to “reduce” any approach to a “formula.”<sup>335</sup> However, analyzing each burgeoning right without at least some established framework runs the risk of becoming outright legislating from the bench.<sup>336</sup> Even when a decision does have a principled constitutional basis, the lack of an application of a recognizable framework can call into question the legitimacy

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<sup>332</sup> See *McDonald v. City of Chicago*, 561 U.S. 742, 806 (2010) (Thomas, J., concurring in part and concurring in the judgment) (stating his view that the Due Process Clause cannot be used to grant a substantive right: “I agree with that description of the right. But I cannot agree that it is enforceable against the States through a clause that speaks only to ‘process.’”); see also Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 862 (1989) (“[E]ven if one assumes (as many nonoriginalists do not even bother to do) that the Constitution was originally meant to expound evolving rather than permanent values . . . I see no basis for believing that supervision of the evolution would have been committed to the courts.”).

<sup>333</sup> See Irving R. Kaufman, *What did the Founding Fathers Intend?*, N.Y. TIMES MAG. (Feb. 23, 1986), <http://www.nytimes.com/1986/02/23/magazine/what-did-the-founding-fathers-intend.html?pagewanted=all&mcubz=0> (“As a Federal judge, I have found it often difficult to ascertain the ‘intent of the framers,’ and even more problematic to try to dispose of a constitutional question by giving great weight to the intent argument. Indeed, even if it were possible to decide hard cases on the basis of a strict interpretation of original intent, or originalism, that methodology would conflict with a judge’s duty to apply the Constitution’s underlying principles to changing circumstances.”).

<sup>334</sup> Nearly every justice, even those most geared toward originalism, have in some capacity recognized substantive due process. See, e.g., *McDonald*, 561 U.S. at 791 (Scalia, J., concurring) (“Despite my misgivings about substantive due process as an original matter, I have acquiesced in the Court’s incorporation of certain guarantees in the Bill of Rights . . .”). Even Justice Thomas joined the *Glucksberg* majority in full, without concurring to say it was improper to even engage in a substantive due process analysis. *Washington v. Glucksberg*, 521 U.S. 702 (1997).

<sup>335</sup> See *Poe v. Ullman*, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting).

<sup>336</sup> See, e.g., *Lochner v. New York*, 198 U.S. 45 (1905), *abrogated by* *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937).

of the decision, unnecessarily undermining a critically important holding.<sup>337</sup> Similarly, when the Court assesses a new liberty interest in a manner that is too narrow, what may have developed as a noble effort to reduce judicial discretion, can lead to a swift, formalistic rejection of a potentially viable right with no real consideration of the merits.<sup>338</sup> The approach that I suggest attempts to find a middle ground between those alternatives—one that allows for principled, objective decision-making while allowing asserted liberty interests the opportunity to be openly and substantively considered.<sup>339</sup>

One would be hard-pressed to argue that, despite notably controversial decisions, the rights that the Supreme Court has recognized as fundamental have not generally been regarded as social improvements that have protected individuals from unnecessary governmental overreach.<sup>340</sup> These decisions have formed an essential piece of American law and society, such that, even when a contentious right is found, that right cannot merely be taken away without a showing that the right can be “removed without serious inequity to those who have relied on it” or the continued granting of the right causes “significant damage to the stability of the society.”<sup>341</sup> Similarly, a wrongly decided rights case can reverberate across generations, sometimes long after the decision is overruled.<sup>342</sup> For those reasons, the Court must

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<sup>337</sup> See *Obergefell v. Hodges*, 135 S. Ct. 2584, 2630 n.22 (2015) (Scalia, J., dissenting) (“The Supreme Court of the United States has descended from the disciplined legal reasoning of John Marshall and Joseph Story to the mystical aphorisms of the fortune cookie.”).

<sup>338</sup> See *Bowers v. Hardwick*, 478 U.S. 186, 191 (1986), *overruled by* *Lawrence v. Texas*, 539 U.S. 558, (2003).

<sup>339</sup> *Supra* Part III.

<sup>340</sup> See *Loving v. Virginia*, 388 U.S. 1 (1967); *Griswold v. Connecticut*, 381 U.S. 479 (1965); *but see* *Roe v. Wade*, 410 U.S. 113 (1973), *overruled in part* by *Planned Parenthood of Se. Pennsylvania v. Casey*, 505 U.S. 833 (1992) (which is not without its detractors). Kaufman, *supra* note 333 (“I believe the concern of many modern ‘intentionalists’ is quite specific: outrage over the right-of-privacy cases, especially *Roe v. Wade*, the 1973 Supreme Court decision recognizing a woman’s right to an abortion. (The right of privacy, of course, is not mentioned in the Constitution.) Whether one agrees with this controversial decision or not, I would submit that concern over the outcome of one difficult case is not sufficient cause to embrace a theory that calls for so many changes in existing law.”).

<sup>341</sup> *Planned Parenthood of Se. Pennsylvania v. Casey*, 505 U.S. 833, 855 (1992) (“[W]hether *Roe*’s central rule has been found unworkable; whether the rule’s limitation on state power could be removed without serious inequity to those who have relied upon it or significant damage to the stability of the society governed by it . . .”).

<sup>342</sup> *Plessy v. Ferguson*, 163 U.S. 537, 548, (1896), *overruled by* *Brown v. Bd. of Ed. of Topeka*, 347 U.S. 483 (1954) (“While we think the enforced separation of the races, as applied to the internal commerce of the state, neither abridges the privileges or immunities of the colored man, deprives him of his property without due process of law, nor denies him the equal protection of the laws, within the meaning of the

adopt an agreed-upon approach that values both thorough judicial scrutiny and objectivity. To do the opposite not only impedes the furtherance of liberty and justice, it promotes heated judicial dissents that question not just the result but the methods used,<sup>343</sup> furthering the harmful perception that the Court is nothing more than a partisan tool.<sup>344</sup> The approach I propose certainly is not the only way to ensure this result, but the country and the Court will benefit from a universally agreed-upon method for finding unenumerated rights. In this regard, the method used will matter even when the judgment is the same.<sup>345</sup>

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fourteenth amendment[.]”); Chris Gosier, *An Ugly Legacy of Jim Crow is with Us Today, Scholar Argues*, FORDHAM NEWS (June 9, 2016), <https://news.fordham.edu/inside-fordham-category/an-ugly-legacy-of-jim-crow-is-with-us-today-scholar-argues/> (“The ideas about race that are prevalent today are, for the most part, not the ideas that sustained slavery; they are the ideas that came about with the extremist white supremacy of Jim Crow.”).

<sup>343</sup> *Obergefell v. Hodges*, 135 S. Ct. 2584, 2626–27 (2015) (Scalia, J., dissenting) (“I write separately to call attention to this Court’s threat to American democracy . . . [T]his practice of constitutional revision by an unelected committee of nine, always accompanied (as it is today) by extravagant praise of liberty, robs the People of the most important liberty they asserted in the Declaration of Independence and won in the Revolution of 1776: the freedom to govern themselves.”).

<sup>344</sup> Mark Berman, *Trump Promised Judges who Would Overturn Roe v. Wade*, WASH. POST (Mar. 21, 2017), [https://www.washingtonpost.com/politics/2017/live-updates/trump-white-house/neil-gorsuch-confirmation-hearings-updates-and-analysis-on-the-supreme-court-nominee/trump-promised-judges-who-would-overturn-roe-v-wade/?utm\\_term=.8ef62bfbc18e](https://www.washingtonpost.com/politics/2017/live-updates/trump-white-house/neil-gorsuch-confirmation-hearings-updates-and-analysis-on-the-supreme-court-nominee/trump-promised-judges-who-would-overturn-roe-v-wade/?utm_term=.8ef62bfbc18e); Adam Liptak, *The Polarized Court*, NY TIMES, May 11, 2014, at SR1 (“The perception that partisan politics has infected the court’s work may do lasting damage to its prestige and authority and to Americans’ faith in the rule of law.”); Dana Milbank, *Anthony Kennedy Restores a Liberal Supreme Court*, WASH. POST (June 27, 2016), [https://www.washingtonpost.com/opinions/a-liberal-majority-returns-to-the-supreme-court/2016/06/27/b6d53370-3ca1-11e6-80bc-d06711fd2125\\_story.html?utm\\_term=.2d5dc851e831](https://www.washingtonpost.com/opinions/a-liberal-majority-returns-to-the-supreme-court/2016/06/27/b6d53370-3ca1-11e6-80bc-d06711fd2125_story.html?utm_term=.2d5dc851e831) (“‘Roses are red [ ] Violets are blue [ ] Abortion is legal [ ] So f--- you.’ Justice Anthony Kennedy didn’t use those words, but that was, essentially, the valentine he delivered to the antiabortion movement.”).

<sup>345</sup> See *Washington v. Glucksberg*, 521 U.S. 702, 752 (1997) (Souter, J., concurring) (“I conclude that the statute’s application to the doctors has not been shown to be unconstitutional, but I write separately to give my reasons for analyzing the substantive due process claims as I do, and for rejecting this one.”).