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I. INTRODUCTION

On May 2, 2022, an anonymous leaker released Justice Samuel Alito's draft majority opinion in *Dobbs v. Jackson Women's Health Organization*.[1] The opinion, dated February 10, overruled the Supreme Court of the United States's landmark abortion rulings in *Roe v. Wade*[2] and *Planned Parenthood v. Casey*[3] to hold that the U.S. Constitution did not protect a right to obtain an abortion.[4] Following vociferous criticism, the Court decided the case on June 24, 2022, issuing an opinion functionally identical to the leaked draft.[5] Now, after decades of contrary precedent, the Fourteenth Amendment's Due Process Clause (Due Process Clause)[6] is interpreted not to protect the right to obtain an abortion.[7] The holding is clear, but an unanswered—and perhaps more

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1. 142 S. Ct. 2228 (2022); Josh Gerstein & Alexander Ward, *Supreme Court has voted to overturn abortion rights, draft opinion shows*, POLITICO (May 2, 2022), https://www.politico.com/news/2022/05/02/supreme-court-abortion-draft-opinion-00029473 [https://perma.cc/94KZ-P3LX].

2. 410 U.S. 113 (1973).

3. 505 U.S. 833 (1992).

4. Gerstein & Ward, *supra* note 1.

5. *Dobbs*, 142 S. Ct. 2228.

6. U.S. CONST. amend. XIV, § 1, cl. 2. (stating: "nor shall any State deprive any person of life, liberty, or property, without due process of law[.]").

7. *Dobbs*, 142 S. Ct. at 2242.

consequential—question is what influence *Dobbs* will have on the Court's future unenumerated rights cases.

Before *Dobbs*, the Court primarily applied two alternative tests to assess whether the Due Process Clause implicitly protected a claimed right. One method, the "history and tradition" test, asks whether a claimed right is "'deeply rooted in this Nation's history and tradition'" and "'implicit in the concept of ordered liberty.'"[8] It focuses on historical laws and practices to determine whether a claimed right was generally considered implicitly protected by the Constitution, such that "neither liberty nor justice would exist if [that right] were sacrificed."[9] The other method, derived from *Griswold v. Connecticut*,[10] relies on claimed "penumbras and emanations" that surround explicit constitutional guarantees and create general "zones of protection" covering rights of the same kind as those expressly protected.[11] Where the "history and tradition" test looks for historically protected rights, the "penumbras and emanations" method often extends alleged protected zones to cover practices some Justices consider essential to liberty in a new era.[12] The *Dobbs* majority applied the "history and tradition" test and implied that it would do so in all future unenumerated rights claims,[13] casting doubt on the cases applying the "penumbras and emanations" method.

This Comment proposes a path for the Court's unenumerated rights jurisprudence, and for related legal developments, after *Dobbs*. It does not take a position on the substantive issues in *Dobbs* or any other unenumerated rights case. Instead, this Comment attempts to discern the best legal and political method to protect new rights—regardless of substance—after *Dobbs*. This Comment considers judicial and political procedures that could secure new liberties better than simple reliance on Supreme Court decisions. This Comment necessarily explores the substance of some unenumerated rights cases, but it does so only to analyze competing methods of recognizing rights that might best enable *either* side of any substantive issue to secure their preferred liberties. Love *Dobbs* or hate it, it lays bare the Court's inability to eternally cement any right in the constitutional order.

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8. *Id.* (quoting Washington v. Glucksberg, 521 U.S. 702, 721 (1997)).

9. *Glucksberg*, 521 U.S. at 721.

10. 381 U.S. 479 (1965).

11. *See id.* at 484.

12. *See, e.g.*, Lawrence v. Texas, 539 U.S. 558 (2003); Obergefell v. Hodges, 576 U.S. 644 (2015).

13. *See Dobbs*, 142 S. Ct. at 2242.

Structurally, this Comment first describes the "history and tradition" test's methodology and assesses its compatibility with *Griswold*'s "penumbras and emanations" method. It concludes that the two methodologies, and the cases relying on them, are inconsistent and require the Court to adopt one or the other. This Comment then argues that the Court should embrace the "history and tradition" test as the exclusive measure for unenumerated rights claims under the Due Process Clause. This Comment subsequently critiques the alternative "penumbras and emanations" methodology, as applied by the dissenting Justices in *Dobbs*. Finally, this Comment concludes by suggesting that if the Court adopts the "history and tradition" test for unenumerated rights, the People should pass a constitutional amendment to lower the threshold to pass future amendments. If the Court only recognizes rights exercised historically, the People must be able to amend the Constitution to adapt its protections to new eras.

II. INCONSISTENT TESTS FOR UNENUMERATED RIGHTS

The "history and tradition" test examines laws existing around the time of the American Founding and around 1868, when the Fourteenth Amendment was ratified.[14] It considers state and federal law, state and federal court holdings, authoritative scholarly treatises, and even pre-Founding common law principles to objectively determine which rights were historically protected in the American legal tradition.[15] The test presumes that the People's implicit understanding of unstated yet protected rights was codified into law when the Constitution was established in 1791 and amended in 1868, when the Fourteenth Amendment codified due process protection for certain unspecified "libert[ies]" later incorporated against the states.[16]

The "history and tradition" test is neither completely objective nor free from the shortcomings of incomplete, incorrect, or inconclusive historical records. Still, it attempts to determine which rights were actually considered protected when the People adopted or amended their Constitution. The Supreme Court of the United States applied this methodology, for example, in *Washington v. Glucksberg*.[17] The Court

14. *Id.* at 2246–47.

15. *Id.* at 2248–55.

16. U.S. CONST. amend. XIV, § 1, cl. 2. The phrase "substantive due process" refers to the doctrine that the Fourteenth Amendment's reference to "liberty" that cannot be infringed without due process of law protects substantive rights in addition to procedural rights. *See Dobbs*, 142 S. Ct. at 2301; *see also Roe*, 410. U.S. at 153.

17. 521 U.S. 702.

considered Anglo-American common-law, early colonial laws, and state laws around the time of the Fourteenth Amendment's adoption to conclude that historically widespread and consistent criminalization of assisted suicide demonstrated that the Constitution did not implicitly protect a right to physician-assisted suicide.[18]

After *Dobbs*, the Court seems poised to apply the "history and tradition" test for all unenumerated rights claims. For the majority, Justice Alito unequivocally stated: "[the Due Process Clause] has been held to guarantee some rights that are not mentioned in the Constitution, but any such right *must* be 'deeply rooted in this Nation's history and tradition' and 'implicit in the concept of ordered liberty.'"[19] A five-Justice majority concluded that this methodology determines which unenumerated rights are "implicitly protected" by the Constitution.[20] In his concurrence, Justice Kavanaugh maintained that the Constitution "protects those unenumerated rights that are deeply rooted in the Nation's history and tradition and implicit in the concept of ordered liberty."[21] In his view, "the dispositive point in analyzing American history and tradition for purposes of the Fourteenth Amendment [abortion] inquiry is that abortion was largely prohibited" in both 1868 and in 1973.[22] Though opposed to the "substantive due process" method of locating substantive, unenumerated rights in the Fourteenth Amendment's Due Process Clause, Justice Thomas noted that the majority properly applied the Court's substantive due process precedents using the "history and tradition" test.[23]

The Court's conservative majority even favors the test in areas where it is not typically applied, recently conducting a historical analysis to

18. *Id.* at 711–15. Notably, the Court also considered the Model Penal Code and several state laws during the Twentieth century. *Id.* at 715–19. The Court often views a law's relative consistency through the present as strong, but not definitive, evidence that a particular practice was or was not deeply rooted in the nation's history and tradition. *See id.*

19. *Dobbs*, 142 S. Ct. at 2242 (quoting *Glucksberg*, 521 U.S. at 721) (emphasis added).

20. *Id.*

21. *Id.* at 2304 (Kavanaugh, J., concurring).

22. *Id.* at 2304 n.1. Reference to early, middle, and late Nineteenth century laws may be appropriate to demonstrate consistency over time, though laws enacted long after the Fourteenth Amendment's adoption would rarely justify rejecting a historical practice in favor of a contrary modern practice when considering unenumerated rights. *See supra* text accompanying note 18.

23. *Id.* at 2300, 2304. (Thomas, J., concurring).

resolve gun rights[24] and Establishment Clause[25] cases. The "history and tradition" test appears here to stay, and that should be a net positive. As discussed below, *infra* Section III, the "history and tradition" test is most faithful to the Constitution's text and structure and best matches the Court's institutional capacity relative to other methodologies. But whatever questions adopting the "history and tradition" test might put to rest, the Court would have to determine how to treat past unenumerated rights precedents whose methodology flatly contradicts the new interpretative standard.

The Court is unlikely to revisit cases like *Obergefell v. Hodges*,[26] *Lawrence v. Texas*,[27] and *Griswold*, and those cases would probably present compelling *stare decisis* arguments if it did.[28] But a Court that values ideological consistency[29] cannot easily avoid what Justice Thomas correctly points out and the dissenters justifiably fear—*Dobbs*'s "history and tradition" test cannot logically be reconciled with prior unenumerated rights precedents relying on "penumbras [and] . . . emanations"[30] and the supposed "right to define one's own concept of existence."[31] Though the Court likely will not reverse, or even revisit, other landmark substantive due process cases,[32] it must prospectively reconcile or choose between the two unenumerated rights methodologies.

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24. N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2128–29 (2022).

25. Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2428 (2022).

26. 576 U.S. 644.

27. 539 U.S. 558.

28. That may be cold comfort for those who believe *Roe* and *Casey*'s reliance interests were strong enough to preclude reversal. That concern bolsters the argument below, *see infra* Section IV, that the Constitution must be made easier to amend so that the People need not rely on the Court and its variable ideological balance to determine which additional rights merit constitutional protection.

29. *Dobbs*, 142 S. Ct. at 2350 (Breyer, Sotomayor, Kagan, JJ., dissenting) (praising the *Casey* plurality's alleged preference for proper decisionmaking over "ideological purity").

30. *Griswold*, 381 U.S. at 484.

31. *Lawrence*, 539 U.S. at 574; *Dobbs*, 142 S. Ct. at 2301 (Thomas, J., concurring). This Comment compares the "history and tradition" test to earlier substantive due process methodologies in something of a vacuum, because considerations of political will, judicial will, and *stare decisis* concerns make an actual conflict between these two lines of precedent unlikely.

32. The *Dobbs* majority adamantly states that other substantive due process precedents are not imperiled by the ruling, 142 S. Ct. at 2243, as does Justice Kavanaugh, *id.* at 2309 (Kavanaugh, J., concurring). Chief Justice Roberts implies the same because he would not overrule *Roe* or *Casey*. *See id.* at 2314 (Roberts, C.J., concurring in judgment only). Again, this article compares the substantive due process tests in a vacuum. *Stare decisis* would provide a viable and logical distinction between future "history and tradition" cases and the earlier landmark substantive due process rulings.

A. Methodological Inconsistency as a Barrier to Reconciliation

Reconciliation is unlikely without suspect distinctions or legal fictions. There is little overlap between the "history and tradition" test and the "penumbras and emanations" precedents. Various pre-*Dobbs* substantive due process precedents do not apply the "history and tradition" test or turn on any historical evidence. A representative sample includes those Justice Thomas wants the Court to reconsider: *Obergefell*, *Lawrence*, and *Griswold*.[33] The rights protected—gay marriage, private consensual sexual conduct, and married persons' access to contraceptives, respectively—would not pass the "history and tradition" test.[34]

For example, the Court actually resolved *Griswold* with Justice Douglas's famous assertion that the Bill of Rights's specific guarantees have "penumbras, formed by emanations from those guarantees that help give them life and substance."[35] These unenumerated protections, said the Court, are necessary to give the enumerated guarantees full meaning.[36] Justice Douglas's opinion identified the First, Third, Fourth, Fifth, and Ninth Amendments as specific guarantees creating "zones of privacy" that ultimately include married persons' right to access contraceptives.[37] Justice Goldberg's concurrence, joined by Justices Warren and Brennan, likewise emphasizes the Ninth Amendment's[38] importance in recognizing that right.[39] *Griswold*'s methodology can generally be reduced to the proposition that an amalgam of specific guarantees, analogized to a claimed new right, permits a majority of the Court to recognize that claimed right as constitutionally protected.

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33. *Dobbs*, 142 S. Ct. at 2301 (Thomas, J., concurring).

34. That assessment assumes those rights are defined at that level of specificity, as in evaluating the right to "same-sex marriage" rather than a more general "freedom to marry." This Comment presumes that the "history and tradition" test must evaluate claimed rights as specifically as possible to prevent broadly formulated rights from swallowing the reference to historical practices. That approach adopts Justice Scalia's recommendation, *Michael H. v. Gerald D.*, 491 U.S. 110 (1989), that the Court define a relevant tradition as specifically as possible to serve as the "point of reference" for the "history and tradition" test. *Id.* at 127 n.6. Scalia argues that the relevant tradition, against which a claimed unenumerated right is to be evaluated, must be framed as narrowly as possible to avoid arbitrary judicial decisionmaking. *Id.* He supports this argument by noting that Justice Brennan, dissenting, and Justice O'Connor, concurring, both reference tradition but reach opposite rulings in the case. *Id.*

35. *Griswold*, 381 U.S. at 484.

36. *Id.*

37. *Id.*

38. U.S. CONST. amend. IX.

39. *Griswold*, 381 U.S. at 486–87 (Goldberg, J., concurring).

The "history and tradition" test would probably yield a different result in *Griswold*. Despite widespread contraceptive use in the early Nineteenth Century, many states enacted mid-century prohibitions on contraceptive sale and use.[40] Anti-contraceptive activists successfully advocated for 1873's Comstock Act, a federal law which "criminalized publication, distribution, and possession of information about or devices or medications for 'unlawful' abortion or contraception."[41] The "history and tradition" test would clearly impose a far higher barrier to recognizing a right to contraceptive use. While the "history and tradition" test might theoretically permit that right's recognition, that methodology is incompatible with the actual ruling's "penumbras and emanations" approach. None of *Griswold*'s opinions emphasized or even referred to historical practices or laws concerning contraceptive use in any historical period,[42] except for Justice Stewart's observation that the challenged law was an "uncommonly silly" outlier at the time the Court decided the case.[43]

Likewise, applying the "history and tradition" test to *Lawrence* and *Obergefell* would almost certainly not yield the actual results. Both cases appealed to lofty values supposedly implicit in the Constitution to recognize liberties to engage in private consensual sexual conduct and to marry someone of the same sex.[44] The *Lawrence* majority did refer to early American law, but concluded that widespread criminal sodomy laws between both same-sex and opposite-sex partners were not directed at homosexual sodomy and provided no support for the challenged criminal statute.[45] In response, the *Lawrence* dissenters noted that the majority's reliance on an alleged "emerging awareness [during the second

40. Lauren Thompson, *Mother's Friend: Birth Control in Nineteenth-Century America*, NAT'L. MUSEUM OF CIV. WAR MED. (Feb. 5, 2017), https://www.civilwarmed.org/birth-control/#_ftn4 [https://perma.cc/W2S3-Y7J7]. Laws criminalizing publication of materials advising women on contraceptive use existed earlier, for example resulting in domestic and foreign prosecution of Charles Knowlton, a physician whose influential treatise advised on contraceptive use. The Eds. of Encyc. Britannica, *Comstock Act*, ENCYC. BRITANNICA (May 30, 2022), https://www.britannica.com/event/Comstock-Act [https://perma.cc/TKH6-QGNA].

41. ENCYC. BRITANNICA, *supra* note 40.

42. *See Griswold*, 381 U.S. at 481–531.

43. *Id.* at 527 (Stewart, J., dissenting).

44. *Lawrence*, 539 U.S. at 574 ("At the heart of human liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life"); *Obergefell*, 576 U.S. at 663 (stating that liberties protected by the Due Process Clause "extend to certain personal choices central to individual dignity and autonomy, including choices that define personal identity and beliefs").

45. *Lawrence*, 539 U.S. at 568–69.

half of the Twentieth century] that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex"[46] is "by definition not 'deeply rooted in this Nation's history and traditions[.]'"[47] An "emerging awareness," by its very nature, cannot be "deeply rooted in history and tradition."[48] *Lawrence*'s methodology cannot logically be reconciled with *Dobbs*'s "history and tradition" test.

Obergefell's methodology and holding are equally incompatible with the "history and tradition" test. Justice Kennedy's majority opinion extolled marriage's great, "transcendent importance"[49] and relied on claimed liberties including "personal choices central to individual dignity and autonomy, including intimate choices that define personal identity and beliefs."[50] Justice Kennedy acknowledged, but ultimately dismissed, the states' historical prohibitions on same-sex marriage and the Court's various precedents characterizing the institution as a union between a man and a woman.[51] Injustice, said Kennedy, may not be recognized in one era, but when "new insight reveals discord between the Constitution's central protections and a received legal stricture, a claim to liberty must be addressed."[52] As with an "emerging awareness,"[53] a "new insight"[54] is per se not deeply rooted in the nation's history and tradition. As with *Griswold* and *Lawrence*, there is little—if any—methodological overlap between *Obergefell* and the "history and tradition" test.[55]

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46. *Id.* at 572 (Scalia, J., dissenting).

47. *Id.* at 598.

48. *Id.*

49. *Obergefell*, 576 U.S. at 656.

50. *Id.* at 663.

51. *Id.* at 660–61, 665. Defining the liberty interest more broadly, perhaps as a general right to marry the person of one's choosing, would not significantly alter the "history and tradition" test application, because many States had a long tradition of anti-miscegenation statutes until the Court declared them unconstitutional in *Loving v. Virginia*, 388 U.S. 1 (1967).

52. *Id.* at 664.

53. *Lawrence*, 539 U.S. at 572.

54. *Obergefell*, 576 U.S. at 664.

55. Justice Kennedy does attempt to distinguish his methodology from *Glucksberg*'s "history and tradition" assessment of a narrowly-defined claimed right. *Id.* at 671. He states that *Glucksberg*'s approach might have been proper for that claimed liberty interest, a patient's right to assisted suicide, 521 U.S. at 708, but not for an inquiry about marriage, which the Court considers in a "comprehensive sense[.]" *Obergefell*, 576 U.S. at 671. The different approach to marriage, says Kennedy, is to ensure that rights are not defined by

The "history and tradition" test and the methodology in *Griswold*, *Lawrence*, and *Obergefell* coalesce only to the extent that clear evidence indicates a supposed penumbral or implied right was historically considered implicit in the constitutional order erected by the Founders and modified by the Fourteenth Amendment. They share little in common and cannot both be sustained by an intellectually consistent Court, regardless of either method's merits.

B. Abortion as a Substantive Barrier to Reconciliation

Further, Justice Alito's distinction between abortion and other claimed unenumerated rights is unpersuasive and legally irrelevant. He asserted that abortion presents a different legal question than other unenumerated rights protected because it, unlike "intimate sexual relations, contraception, and marriage," destroys something courts have called "fetal life" or an "unborn human being."[56] In response, the *Dobbs* dissenters correctly pointed out that there is no legal basis for concluding that reversal of *Roe* and *Casey* would not imperil precedents like *Griswold*, *Lawrence*, and *Obergefell*.[57] They observed that the majority's conclusion rested entirely on the determination that "abortion is not 'deeply rooted in history[.]'"[58] They noted that "the same could be said . . . of most of the rights the majority claims it is not tampering with."[59] And if "history and tradition" is the proper test, other unenumerated rights recognized under the "penumbras and emanations" methodology are at least inconsistent with *Dobbs* and at most ripe for blanket reversal.[60]

Justice Alito's rejoinder, the alleged difference in interests that abortion implicates,[61] may be morally significant, but it is not legally or logically significant. A claimed liberty interest is or is not a fundamental right regardless of the number of competing interests involved. Fundamental rights are protected precisely because of, not in spite of, compelling countervailing interests.[62] Abortion does implicate a conflict

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who previously exercised them. *Id.* Still, there is no apparent reason why some but not all enumerated rights would escape definition based on who previously exercised them.

56. *Dobbs*, 142 S. Ct. at 2243.

57. *Id.* at 2319 (Breyer, Sotomayor, Kagan, JJ., dissenting).

58. *Id.*

59. *Id.*

60. *See id.*

61. *Id.* at 2243 (majority opinion).

62. Even though it concerns an enumerated right, the freedom of religion, *Emp. Div. v. Smith*, 494 U.S. 872 (1990), illustrates this principle. The respondents in that case, denied unemployment benefits after being fired for religious peyote consumption, certainly had a fundamental interest in exercising their religion. *Id.* at 874. This interest was balanced

between two life interests, but the seriousness of those interests does not inherently preclude a determination about which of those two interests should prevail at law. In fact, one could plausibly argue the seriousness of those competing interests makes one or the other most deserving of legal protection among all rights—precisely because the other interest is so compelling. One struggles to conceptualize other substantive due process rights, like gay marriage, contraception, and intimate sexual conduct, as implicating less than two parties' interests. Justice Alito's distinction fails as a matter of legal principle and a matter of logic.

C. The Inevitable Choice

Unless saved by *stare decisis*, earlier substantive due process rulings are irreconcilable with the *Dobbs* majority's declaration that "*any* [unenumerated] right" must satisfy the "history and tradition" test.[63] They are inconsistent in methodology and result, and proffered legal or logical distinctions "[do] not pass . . . the laugh test."[64] Consequently, the Court must fulfill the *Dobbs* dissenters' hypocrisy allegation[65] or choose between the "history and tradition" test and *Griswold*, *Lawrence*, and *Obergefell*. To liberals' dismay and conservatives' chagrin, Justice Thomas is right to conclude that *Dobbs* is fundamentally inconsistent with earlier cases that failed to apply the "history and tradition" test.[66]

III. "HISTORY AND TRADITION" AS THE PROPER TEST

Presuming the Supreme Court of the United States values intellectual integrity, and presuming that *stare decisis* does not reconcile *Dobbs* with earlier "penumbras and emanations" cases, the Court should resolve its methodological dilemma by applying the "history and tradition" test to all unenumerated rights claims. Critics are correct to note that this method is imperfect, but they give insufficient weight to the "history and tradition" test's faithfulness to the Constitution's balance of power and its compatibility with the Court's institutional capacity. It is, at the very least, superior to the primary alternative—the "penumbras and emanations" approach—which enables a mere five Justices to identify

against, and ultimately made subservient to, the state's legitimate interest in enforcing criminal laws uniformly. *Id.* at 879. The state's penal interests required protection precisely because of the significant countervailing interest in religious freedom. Thus, competing interests that implicate fundamental rights are hardly unique to abortion cases.

63. 142 S. Ct. at 2243 (emphasis added).

64. Reed v. Town of Gilbert, 576 U.S. 155, 184 (2015).

65. *Dobbs*, 142 S. Ct. at 2319 (Breyer, Sotomayor, Kagan, JJ., dissenting).

66. *Id.* at 2301 (Thomas, J., concurring).

new rights or reshape old rights according to their perception of changing values and norms. This Section begins by making a case for the "history and tradition" test and ends by critiquing the *Dobbs* dissent to show that the alternative "penumbras and emanations" method is logically flawed and insufficient to guard against rule by nine unelected and unaccountable jurists.[67]

A. The "History and Tradition" Test's Virtues

Much ink has been spilled about the merits and demerits of interpretive methods, like the "history and tradition" test, that incorporate originalism—the attempt to interpret the Constitution according to the original understanding of those who drafted, enacted, and amended it. But this endeavor would be incomplete without enunciating the propriety and efficacy of the "history and tradition" test's originalist approach.

1. The "History and Tradition" Test's Legal Benefits

The "history and tradition" test offers various legal benefits as an interpretative methodology. Among the most important are its ability to limit the Court's power with a constitutionally legitimate and approximately objective standard, to respect the constitutional powers entrusted to the People, and to respect the Constitution's division of power among the branches of the Federal Government.

a. Limiting judicial power.

Because amendment alone changes the Constitution,[68] the Court's power of judicial review extends only to questions of what rights the Constitution *does* protect, not rights what it *ought* to protect. As Justice Alito noted, the Court "must guard against the natural human tendency to confuse what [the Due Process Clause] protects with [the Court's] own views about the liberty that Americans *should* enjoy."[69] The Court needs an objective standard to evaluate unenumerated rights claims because an "unprincipled approach," divorced from any objective measure, provides no check against "freewheeling judicial policymaking."[70]

67. *See* Plyler v. Doe, 457 U.S. 202, 242 (1982) (Burger, C.J., dissenting).
68. U.S. CONST. art. V.
69. *Dobbs*, 142 S. Ct. at 2247.
70. *Id.*

The "history and tradition" test more closely approximates an objective standard than any practical alternative.[71] Obviously incapable of perfectly objective reasoning and analysis, the Justices need more guidance than their own perceptions of what liberties are or should be protected. Historical practice should be that guide. Rather than the "penumbras and emanations" method's attempt to discern how general principles divined from the Constitution could apply to modern issues, the "history and tradition" test adds a factual dimension to the Court's inquiry—evidence of historical laws and practices.

Certainly, that assessment is neither perfect nor immune from motivated reasoning. Historical records are often incomplete or inconclusive, and they must still be interpreted.[72] The "history and tradition" test, then, does not eliminate the need for some reasoned judgment. But if reasoned judgment were unnecessary, or could somehow be removed from the legal system, America could trade its judges for computers. Unless enough laws are codified to govern every possible circumstance known to human existence, judges must necessarily exercise reasoned judgment. But in exercising that reasoned judgment, judges should strive to apply objective standards when interpreting and applying the law. Otherwise, the People can only expect rule by Man, not rule by Law. The need for objective guideposts is most acute when, as with unenumerated rights, the "law" being interpreted provides no textual starting point.

The "history and tradition" test supplies that objective guide, tasking the Court with evaluating historical evidence clarifying whether a claimed unenumerated right was so clearly established in Eighteenth- and Nineteenth-century American law that its restriction

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71. The only truly objective standard would disclaim recognition of any unenumerated rights. Some Justices have expressed this view, as did Justices Black and Stewart. *Griswold*, 381 U.S. at 507–31. But since the Constitution clearly protects some unenumerated rights, U.S. CONST. amend. IX, and since *Dobbs* suggests the Court will continue to recognize some of them, the Court is unlikely to abandon the unenumerated rights inquiry altogether. *See Dobbs*, 142 S. Ct. at 2242.

72. The Founders themselves often disputed the Constitution's meaning, as with Hamilton's debate against Jefferson and Madison regarding the constitutionality of a national bank. Scott Bomboy, *Hamilton's Treasury Department and a great Constitutional debate*, NAT'L CONST. CTR.: CONST. DAILY BLOG (Sept. 2, 2020), https://constitutioncenter.org/blog/hamiltons-treasury-department-and-a-great-constitutional-debate#:~:text=Madison%20insisted%20that%20Hamilton%20wanted,he%20agreed%20with%20Madison's%20reasoning [https://perma.cc/G496-LYH9]. Referencing to historical records for evidence of a shared understanding might exacerbate rather than resolve interpretive uncertainty.

would be fundamentally incompatible with liberty and justice.[73] The test often considers federal court rulings, state court rulings, federal and state laws, English common-law, and scholarly treatises and articles for clear evidence that a particular practice or liberty was deeply and implicitly enshrined in the constitutional order.[74] Absent overwhelming evidence that such protection existed, the "history and tradition" test precludes the Court from judicially amending the Constitution.

"Deeply rooted" is a high standard apart from the strength of proof, so the "history and tradition" test disfavors recognizing new unenumerated rights. It is an inherently conservative approach, but it is also the most constitutionally legitimate approach. The U.S. Constitution is a series of laws, not a series of suggestions.[75] Those laws change only by constitutional amendment. The "history and tradition" test recognizes that the rights exercised around the time of the Founding and the Fourteenth Amendment's ratification were impliedly adopted by the People, through their elected representatives. The People have not ratified any amendments bearing on unenumerated rights since then, so the "history and tradition" test concludes that those rights have not subsequently been expanded or limited. The methodology that evaluates modern laws, cases, treatises, and other commentary to determine what the People now consider implicitly protected in their constitutional order lacks the "history and tradition" test's constitutional legitimacy—no amendment has enshrined a new implicit understanding in the Constitution. Unlike alternative tests that look to legal changes long after the Fourteenth Amendment's ratification, the "history and tradition" test does not presume that the Constitution can be changed simply by subsequent implied consent.

A proper interpretive standard must also balance the Constitution's clear delegation of amendment authority to the People with the instrument's clear protection of unenumerated rights.[76] The "history and tradition" test, which excludes any claimed right not clearly inherent in the constitutional order, best balances those interests. Unlike alternative

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73. *See Glucksberg*, 521 U.S. at 720–21.

74. *Dobbs*, 142 S. Ct. at 2248–56.

75. Some jurists disagree. For example, Justice Kennedy's opinion in *Obergefell* evinces a belief that the Constitution's dictates are mere guides to which the Court may add substance as time progresses: "The [Framers and Ratifiers] did not presume to know the extent of freedom in all its relative dimensions, and so they entrusted to future generations a charter protecting the right of all persons to enjoy liberty as we learn its meaning." 576 U.S. at 664. Apparently, the Constitution is binding only in its directive to "learn" what it means as later generations uncover the "truth."

76. U.S. CONST. art. V; U.S. CONST. amend. IX.

tests ultimately dependent on Justices' personal views, *see infra* Subsection B, the "history and tradition" test provides an objective benchmark against which the Court can test unenumerated rights claims. A clear historical practice operates like a textual right—it can be analogized to new circumstances in new eras. Without any law or practice to provide a starting point for constitutional interpretation, the "penumbras and emanations" method offers little guidance for applying ill-defined principles to the modern era. But at minimum, the "history and tradition" test identifies historically protected practices to guide the Court when applying impliedly protected rights to modern circumstances. The "history and tradition" test is far from perfect, but the absence of a perfect solution should not compel the Court to reject the best solution.[77]

b. Respecting the People's power.

The "history and tradition" test also allows the political process for creating and amending rights—constitutional amendment—to function without judicial interference. It limits recognized rights to those explicitly protected by the Constitution or those clearly protected implicitly. The power to create new rights, or even to modify or eliminate old rights, rests with the People, operating through their elected representatives.[78]

A federalist system like America's entrusts the States with the ability to govern different peoples according to different interests. By locating political power at a level of government closer to the People, the federalist system accommodates a variety of local concerns, values, and preferences.[79] The states are, as Justice Brandeis famously stated, laboratories of democracy.[80] He was referring to state laws and constitutions, but each state's democratic experience influences the federal Constitution: any amendment must be approved by three quarters of the states' legislatures or ratifying conventions, both of which

77. Gretchen Rubin, *Don't Let The Perfect Be The Enemy Of The Good*, HUFFPOST: THE BLOG (Dec. 6, 2017), https://www.huffpost.com/entry/dont-let-the-perfect-be-t_b_158673 [https://perma.cc/ZY3V-MFFT].

78. U.S. CONST. art. V.

79. *See, e.g.*, Pietro Nivola, *Rebalancing American Federalism*, THE BROOKINGS INST. (Apr. 1, 2010), https://www.brookings.edu/articles/rebalancing-american-federalism/ [https://perma.cc/24YQ-NX6V] (expounding on the civic benefits Alexis de Tocqueville observed and attributed to administrative decentralization in the American federalist system).

80. New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932).

reflect each state's political and legal landscape.[81] The Court interferes with that process when it claims authority to add, alter, or remove rights from the federal Constitution.

If the Court refrains, the People can decide how to shape their inherited Constitution for present and future generations. Decisions about important social, political, and economic issues could be shaped by the democratic process rather than unelected federal jurists with scant accountability. Instead, individuals would be forced to engage with, and persuade, their constituents, their representatives, their neighbors, and their family members—even those across the aisle. Abortion illustrates. After *Dobbs* returned the issue to the States, voters in red-leaning Kansas rejected a ballot initiative that would have enabled stricter abortion regulations.[82] Favor the outcome or not, the process's democratic legitimacy is unassailable.[83]

And the "history and tradition" test does not leave important liberty interests unprotected. It empowers the People to democratically secure at the state or federal level, liberties they consider worthy of protection, by legislation or constitutional amendment.[84] Concurrently, the Federal Constitution sets a floor for those political processes, prohibiting infringement of enumerated rights and clearly-protected unenumerated rights.[85] Even those claimed liberty interests that fail the "history and tradition" test are still protected from laws that fail rational basis review.[86] This says nothing of other civil liberties protected by statutes

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81. U.S. CONST. art. V.

82. Nancy Rommelmann, *Does Kansas Prove the Roe Voter Is Here?*, THE FREE PRESS (Aug. 15, 2022), https://www.thefp.com/p/does-kansas-prove-the-roe-voter-is [https://perma.cc/8GXN-P72T].

83. The process is not literally unassailable, because there is some evidence that the Kansas ballot initiative's wording was confusing to many voters. Rommelmann, *supra* note 82. The point is not that Kansas administered the process perfectly, but that the process's democratic legitimacy is clear.

84. *Obergefell*, 576 U.S. at 732 (Scalia, J., dissenting).

85. *Id.* That floor could be drastically lowered or eliminated in theory, but a wholesale repudiation of the Constitution's core protections via the amendment process seems highly unlikely in practice. Thus, except in cases of widespread political consensus to the contrary, it seems safe to assume that the basic constitutional structure will continue to serve as the backstop for democratic action affecting statutory and constitutional rights.

86. *Lawrence*, 539 U.S. at 593 n.3 (Scalia, J., dissenting). Rational basis review is a very low bar, offering little protection to liberty interests not enumerated in or impliedly protected by the Constitution. However, the rational basis test prevents some illiberal state conduct, as when evidence of bare animus encourages the Court to vet the challenged action more thoroughly. *See, e.g.*, City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432 (1985); Romer v. Evans, 517 U.S. 620 (1996).

like the Civil Rights Act of 1964[87] or the Americans with Disabilities Act of 1990.[88] The "history and tradition" test thereby offers ample protection for liberty interests through the political process, which the People can use to determine which rights should be protected.

c. Congress and the Vesting Clause.

The "history and tradition" test respects the Constitution's balance of power between the federal government and the People, and it also respects the balance of power between the federal government's branches. The Constitution's first substantive provision vests all granted legislative powers in Congress.[89] Still, the Court clearly holds that Congress can delegate some of those granted authorities to executive agencies under certain circumstances.[90] The legislative powers may not, however, be delegated to the Court. Any time the Court exercises legislative authority, it violates the careful balance and separation of federal powers. Whether *Roe* or *Dobbs* constitutes the true violation, with the Court rewriting the law as it sees fit, the Court is clearly an unwieldy legislator.

The "history and tradition" test reduces, albeit imperfectly, the risk of judicial legislation. Its reasonably objective standard, and the legitimacy it derives from the Constitution's structure, limit opportunities to add or remove rights from the Constitution while providing some flexibility to protect unenumerated—but nonetheless fundamental—rights. Certainly, retrospective application of the "history and tradition" test could reverse judicial protection of earlier substantive due process cases. However, prospective application of the "history and tradition" test limits judicial recognition of new rights to a limited class of historically-entrenched rights. It thereby reduces the Justices' ability to legislate from the bench, at least as to addition or subtraction of fundamental rights. Just as that limitation guards against infringement of the Peoples' constitutional authority, it respects the Constitution's prescribed balance of power by limiting the number of rulings that say what the law should be rather than what it is.

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87. Pub. L. No. 88-352, 78 Stat. 241 (1964) (codified as amended in scattered sections of 42 U.S.C.).

88. Pub. L. No. 101-336, 104 Stat. 327 (1990) (codified as amended at 42 U.S.C. §§ 12101–12213).

89. U.S. CONST. art. I, § 1.

90. *See, e.g.*, Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984); Gundy v. U.S., 139 S. Ct. 2116 (2019).

d. Enumerated powers or enumerated rights?

Finally, the "history and tradition" test might contribute to a beneficial shift in the People's political consciousness. Many of the Founders, especially James Madison, opposed including a Bill of Rights in the Constitution for fear that enumerating rights would imply that unenumerated rights lacked protection or that the federal government could exercise powers not expressly granted by the Constitution.[91] In years since, a new assumption emerged—that the federal government can do anything not specifically prohibited by the Constitution.[92] The presumption now seems to be that the federal government can act unless it faces a specific restriction, rather than the Madisonian presumption that the government can act only by clear authorization.[93] The difference may seem semantic, but a restored presumption of strictly limited federal powers might secure the People's liberty better than attempting to identify everything government may not do. Instead of delineating the expansive sphere of things the government cannot do, the Court could delineate the comparatively limited sphere of things the government *can* do.

The "history and tradition" test might aid that restoration. If the Court only recognizes the finite category of unenumerated rights deeply rooted in the nation's history and tradition, and if the Constitution remains all but impossible to amend, *see infra* Section IV, need for other limits on federal power arises. Identifying rights might become less important if the Court limited itself to recognizing deeply rooted unenumerated rights and refusing to create new rights according to "new understandings" of liberty. With lots of luck, and a little help from strategic lawsuits, the legal system might come to insist that the federal government only exercise powers clearly entrusted to it by the Constitution. The focus would then be on enumerating the government's limited powers, rather

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91. *James Madison and the Bill of Rights*, BILL OF RIGHTS INST., https://billofrightsinstitute.org/essays/james-madison-and-the-bill-of-rights [https://perma.cc/9UHE-SL78] (last visited Jan. 10, 2023) (exploring Madison's staunch initial opposition to including a Bill of Rights in the Constitution).

92. Jacob Sullum, *Defending OSHA's Vaccine Mandate, Sonia Sotomayor Says 'I'm Not Sure I Understand the Distinction' Between State and Federal Powers*, REASON.COM (Jan. 10, 2022), https://reason.com/2022/01/10/defending-oshas-vaccine-mandate-sonia-sotomayor-says-im-not-sure-i-understand-the-distinction-between-state-and-federal-powers/ [https://perma.cc/JD3N-TMAE] (last visited Jan. 10, 2023) (recounting the oral argument where Justice Sotomayor seemed to suggest that the federal government, in her view, wields a general police power like that traditionally and exclusively attributed to the States).

93. *Id.*

than on the monumental task of identifying every one of the People's rights.

The "history and tradition" test might not start, or even materially advance, that shift in the legal system's focus. Still, it would not inhibit a transferred focus on enumerated powers. By reducing the importance of identifying new rights, the "history and tradition" test would likely support the shift towards limiting federal authority to clearly-enumerated powers.

2. The "History and Tradition" Test's Institutional Benefits

The *Dobbs* controversy typifies the profound impact that the Court can have on American public life. Both the unprecedented draft leak[94] and its controversial content symbolize growing cracks in the Court's legitimacy.[95] Though that controversy seemed to reach a fever pitch after the leak, public perception of the Court was already in decline.[96] The nearest comparison to the post-*Dobbs* tumult is that which followed *Roe* itself. Many argue the Pro-Life movement wielded little political and cultural power before 1973.[97] *Roe* at least supercharged the conservative legal movement,[98] which subsequently dedicated itself to repudiating the decision and its reasoning that even *Roe*'s most fervent defenders maligned.[99] Though impossible to prove, consistent application of the "history and tradition" test would have likely averted these (and various other) controversies—and could do so again if applied prospectively. By establishing a finite class of recognized rights, the "history and tradition" test should reinforce the Court's institutional legitimacy. The test

94. Gerstein & Ward, *supra* note 1.

95. Angie Gou, *Cherry-picked history: Reva Siegel on "living originalism" in* Dobbs, SCOTUSBLOG (Aug. 11, 2022), https://www.scotusblog.com/2022/08/cherry-picked-history-reva-siegel-on-living-originalism-in-dobbs/ [https://perma.cc/K83D-SLQ5].

96. *Public's Views of Supreme Court Turned More Negative Before News of Breyer's Retirement*, PEW RSCH. CTR. (Feb. 2, 2022), https://www.pewresearch.org/politics/2022/02/02/publics-views-of-supreme-court-turned-more-negative-before-news-of-breyers-retirement/ [https://perma.cc/7GQK-YVCN].

97. Jennifer Holland, *Abolishing Abortion: The History of the Pro-Life Movement in America*, ORG. OF AM. HISTORIANS, https://www.oah.org/tah/issues/2016/november/abolishing-abortion-the-history-of-the-pro-life-movement-in-america/ [https://perma.cc/39US-JXH3] (last visited Jan. 10, 2023).

98. Charlie Savage, *For Conservative Legal Movement, a Long-Sought Triumph Appears at Hand*, N.Y. TIMES (May 3, 2022), https://www.nytimes.com/2022/05/03/us/conservative-legal-movement-roe-v-wade.html [https://perma.cc/8LCN-JAP7].

99. Frederic Frommer, *Justice Ginsburg thought* Roe *was the wrong case to settle abortion issue*, WASH. POST (May 6, 2022), https://www.washingtonpost.com/history/2022/05/06/ruth-bader-ginsburg-roe-wade/ [https://perma.cc/7LCR-Z4TL].

provides a self-contained inquiry that promotes judicial efficacy, helps the Court avoid transformative rulings' unintended consequences, and should reduce the Court's political importance, each bolstering the Court's legitimacy.

a. Self-contained inquiries promote judicial efficacy.

First, consistent application of the "history and tradition" test permits the Court to not address questions its nine Justices cannot effectively answer. *Roe* illustrates. The opinion concludes with what is, in effect, a statute, prescribing supposedly constitutional mandates for abortion law down to the trimester.[100] The resulting "legislation" inherently lacks the legislative process's benefits: thorough fact-finding and analysis, extensive deliberation within and between institutions, and democratic legitimacy. 1992's *Planned Parenthood v. Casey* proved the Court's earlier inability to legislatively resolve the abortion issue when it was forced to abandon *Roe*'s framework in favor of another standard requiring just as many policy judgments.[101] The Court decided abortion regulations had to satisfy a vague and uncertain standard prohibiting regulations imposing an "undue burden" on access to abortion services.[102] Its indeterminacy forced the Justices to comprehensively delineate an "undue burden," and given the universally-acknowledged weighty interests abortion issues implicate, that standard posed policy questions of the highest order. By undertaking the responsibility to prescribe national abortion policy, the federal branch least equipped for policy deliberation repeatedly made complex policy judgments up to (and, for some, including) the point it decided *Dobbs*.[103]

Certainly, the Court is not liberated from all future policy judgments regarding abortion law, but it is no longer required to establish and maintain a nationwide legislative framework governing the practice. In fact, because *Dobbs*' rational basis review is a deferential standard, the Court is now responsible for fewer abortion policy decisions than ever before. Had the Court in *Roe* applied the "history and tradition" test and only considered the finite class of rights deeply rooted in the nation's history and tradition, it would have faced a primarily descriptive rather than normative inquiry. The former approach offers a discernable,

100. *Roe*, 410 U.S. at 164–65.

101. *See* 505 U.S. at 873–74.

102. *Id.*

103. *See, e.g.*, Stenberg v. Carhart, 530 U.S. 914 (2000); Gonzales v. Carhart, 550 U.S. 124 (2007); Whole Woman's Health v. Hellerstedt, 579 U.S. 582 (2016); June Med. Servs., LLC v. Russo, 591 U.S. 1101 (2020).

relatively objective end point. History either does or does not support an unenumerated rights claim. Applying the "history and tradition" test, the Court would only examine historical evidence to identify those rights and liberties clearly and implicitly protected from government infringement. Only when compelling evidence shows that a practice was deeply rooted in the nation's history and tradition would the Court face the possibility of having to continue the inquiry by applying that right to modern circumstances. Conversely, the normative inquiry is not complete until the Court fills every gap in the legislative scheme it creates. It continues until the Court fully defines a particular practice that the present day's "better informed understanding"[104] considers essential to a free society. However capable the Court's few dozen employees, they are certainly less well-equipped for complex policy decisions than the thousands of legislators, staffers, and employees in Congress and the States' legislatures.

The Court compromises its own legitimacy by reaching beyond its grasp, attempting to answer policy questions implicating deeply divisive and consequential issues. The Court preserves its legitimacy by addressing disputes it is actually able to resolve. The "history and tradition" test assists by limiting the Court's substantive due process inquiries to fundamental liberties clearly yet implicitly enshrined in the Constitution.

b. Avoiding unintended consequences.

Second, the "history and tradition" test permits the Court to avoid the logical but controversial consequences of prior contentious rulings. Justice Scalia's *Lawrence* dissent showed that the "penumbras and emanations" method tends to drag the Court further into uncharted cultural waters. In *Lawrence*, Justice Scalia correctly predicted that the majority's ruling, rooted in an "emerging awareness" of new dimensions of liberty, would force the Court to recognize a constitutional right to same-sex marriage.[105] If, as the *Lawrence* Court concluded, anti-sodomy laws (which indeed seem "uncommonly silly"[106]) infringe a protected liberty interest in conduct that is essential to human autonomy and dignity, it necessarily follows that excluding same-sex Americans from the institution of marriage also violates liberty interests essential to

104. *Obergefell*, 576 U.S. at 671.
105. 539 U.S. at 604–05.
106. *Griswold*, 381 U.S. at 527.

human autonomy and dignity.[107] When the Court classifies a new liberty interest essential to human autonomy and dignity, there is no logical reason not to extend constitutional protection to other liberty interests necessarily implicated by the first.

Chief Justice Roberts also made this point in *Obergefell*. He observed that plural marriage, which enjoys more cultural support in some societies than does same-sex marriage, could not logically be denied constitutional protection based on the "better informed understanding" of liberty that "informed" the majority's recognition of same-sex marriage.[108] Unlike Congress or any state legislature, the Court cannot refuse protection to claimed liberty interests necessarily implicated by precedents protecting other liberty interests.[109] That is not to say that rights and liberty interests should not expand. They should expand, in the author's view, so that the People may exercise freedom to the fullest extent without harming their fellow citizens. That is also not to say that any liberty interest recognized in cases like *Lawrence* and *Obergefell* is "good" or "bad." But it is to say that the Court often embroils itself in controversy when the "penumbras and emanations" approach keeps the Court on the cutting edge of unresolved cultural disputes.

In contrast, the "history and tradition" test only requires the Court to recognize rights with a clear historical basis. There is no need to analogize principles informing unenumerated rights to other, new rights, because those other rights are also either deeply rooted in the nation's history and tradition or they are not. Certainly, the Court will still be asked to apply recognized, unenumerated rights to new circumstances, but the "history and tradition" test's objective guideposts again channel and limit that inquiry. The "history and tradition" test preserves the Court's institutional legitimacy by limiting recognized unenumerated rights to those with a firm historical basis, rather than those on the forefront of social, political, and legal evolution.

c. Reducing the Court's political importance.

Finally, applying the "history and tradition" test to unenumerated rights claims would preserve the Court's legitimacy by reducing the Court's importance. The Court's last several years have been increasingly fraught. Concern for its personnel and their rulings inspired rejection of

107. *Lawrence*, 539 U.S. at 604–05.
108. *Obergefell*, 576 U.S. at 671, 704.
109. *Lawrence*, 539 U.S. at 604.

congressional norms,[110] a bitter and divisive confirmation hearing at the height of the "Me Too" Movement,[111] dangerous and incendiary rhetoric,[112] an unprecedented assassination attempt against a sitting Supreme Court Justice,[113] and of course, the unparalleled *Dobbs* leak.[114] It is difficult to separate these novel controversies from the Court's substantial influence over contemporary social issues.

If the Court only recognized unenumerated rights that pass the "history and tradition" test, it would not be possible to constitutionalize new rights and liberty interests by attempting to control the nomination process or changing the Court's size or composition.[115] Other institutions and processes, *see infra* Section IV, would offer effective avenues to expand constitutional protections. Certainly, the Court would still resolve controversial disputes and issue controversial rulings, but it would not be the vanguard of America's social and political evolution. The Court would be less of a social change agent, and hopefully inspire less controversy as a result. By reducing the Court's role in many of the nation's most controversial disputes, the "history and tradition" test would bolster and preserve the Court's institutional legitimacy, hopefully ensuring that Supreme Court affairs inspire less political excess.[116]

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110. Joseph Williams, *Garland Looms Over Gorsuch Confirmation Hearing*, U.S. NEWS & WORLD REP. (Mar. 20, 2017), https://www.usnews.com/news/politics/articles/2017-03-20/merrick-garland-looms-over-neil-gorsuch-confirmation-hearing.

111. Amy Howe, *Decade in review: Justice Brett Kavanaugh's confirmation hearing*, SCOTUSBLOG (Dec. 31, 2019), https://www.scotusblog.com/2019/12/decade-in-review-justice-brett-kavanaughs-confirmation-hearing/ [https://perma.cc/U2JY-CXVC].

112. Noah Feldman, *Feinstein's Anti-Catholic Questions Are an Outrage*, BLOOMBERG (Sept. 11, 2017), https://www.bloomberg.com/opinion/articles/2017-09-11/feinstein-s-anti-catholic-questions-are-an-outrage [https://perma.cc/C4P2-84LL]; Ian Millhiser, *The controversy over Chuck Schumer's attack on Gorsuch and Kavanaugh, explained*, VOX (Mar. 5, 2020), https://www.vox.com/2020/3/5/21165479/chuck-schumer-neil-gorsuch-brett-kavanaugh-supreme-court-whirlwind-threat [https://perma.cc/Y8MC-79FU].

113. Maria Cramer & Jesus Jimenez, *Armed Man Traveled to Justice Kavanaugh's Home to Kill Him, Officials Say*, N.Y. TIMES (June 8, 2022), https://www.nytimes.com/2022/06/08/us/brett-kavanaugh-threat-arrest.html [https://perma.cc/MBD2-ZTYJ].

114. Amy Howe, *Roberts orders leak investigation as court confirms authenticity of draft opinion*, SCOTUSBLOG (May 3, 2022), https://www.scotusblog.com/2022/05/roberts-orders-leak-investigation-as-court-confirms-authenticity-of-draft-opinion/ [https://perma.cc/E6FN-AXGZ].

115. Scott Boddery & Benjamin Pontz, *Don't Pack the Court. Allow the Number of Justices to Float*, POLITICO (Jan. 15, 2022), https://www.politico.com/news/magazine/2022/01/15/supreme-court-reform-justices-527111 [https://perma.cc/8MPQ-QZDB].

116. Sophia Ankel, *Ted Cruz photographed checking his Twitter mentions immediately after aggressive questioning of SCOTUS nominee*, BUSINESS INSIDER (Mar. 24, 2022),

B. The Alternative's Critical Flaws

Perhaps the best case for the "history and tradition" test is the jointly-authored dissent in *Dobbs*. The dissenters, Justices Breyer, Kagan, and Sotomayor, began their opinion with several telling statements. First, they conceded that *Roe* and *Casey* were attempts to balance the competing interests of the mother against the interests of the fetus or unborn child.[117] Second, they noted that most of the other substantive due process rights the majority claims not to imperil could, like abortion, be said to fail the "history and tradition" test.[118] Finally, the dissenters accused the majority of rejecting *Roe* and *Casey* simply because the Court's composition changed, criticizing what the dissenters considered unprincipled judicial policymaking.[119] The dissenters then traced their own unenumerated rights methodology, which incidentally reveals the "history and tradition" test's wisdom.

The dissenters began by characterizing *Roe* and *Casey* as rooted in and having led to "other rights giving individuals control over their bodies and their most personal intimate associations."[120] They are, said the dissenters, "embedded in core constitutional concepts of individual freedom, and of the equal rights of citizens to decide on the shape of their lives."[121] Without naming *Griswold*'s "penumbras and emanations" approach, the dissenters effectively adopted its methodology—certain rights derive not from any one constitutional provision, but from their being of the same nature and kind as other rights explicitly protected by the Constitution.[122] The right to obtain an abortion is what Justice Douglas would call a "peripheral right,"[123] one whose protection is necessary to substantiate principles impliedly enshrined in the Constitution.[124]

The dissenters then reviewed *Roe*'s and *Casey*'s holdings before turning to the latter's methodology.[125] They noted that the Fourteenth Amendment's reference to "liberty" is interpreted to protect conduct not

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https://www.businessinsider.com/ted-cruz-pictured-checking-twitter-after-questioning-of-scotus-nominee-2022-3 [https://perma.cc/5J9S-9382].

117. *Dobbs*, 142 S. Ct. at 2317 (Breyer, Sotomayor, Kagan, JJ., dissenting).

118. *Id.* at 2319.

119. *Id.* at 2320.

120. *Id.*

121. *Id.*

122. *See Griswold*, 381 U.S. at 482–84.

123. *Id.* at 482.

124. *Dobbs*, 142 S. Ct. at 2321–22 (Breyer, Sotomayor, Kagan, JJ., dissenting).

125. *Id.* at 2322–23 (Breyer, Sotomayor, Kagan, JJ., dissenting).

elsewhere mentioned in the Constitution.[126] They followed that correct statement of law by asserting that the "liberty" guarantee "encompasses conduct today that was not protected at the time of the Fourteenth Amendment."[127] Not until several pages later do the dissenters reveal the basis for that assertion, along with their misunderstanding of the majority's methodology. After disputing the majority's historical record concerning abortion laws in pre-*Roe* America, the dissenters characterized the majority as saying: "[i]f the ratifiers did not understand something as central to freedom, then neither can we."[128] Facially, this correctly states the "history and tradition" test's basic premise. But it still mischaracterizes the majority's position. The majority was not saying that only those rights recognized at the time the Fourteenth Amendment was ratified can be recognized into the infinite future. The majority was saying that the Court—the "we" in the dissenters' critique—may not amend the Constitution by reading in new rights.[129] The dissenters did not address that point, instead equating concern for proper constitutional process with a desire to permanently freeze constitutional law in 1868.[130]

They then argued that it is improper to interpret the Constitution according to its understanding in 1868 because women were not then considered full members of society.[131] Since then, times have changed, a woman's place in society has changed, and constitutional law has "changed along with it."[132] The dissenters questioned how the Constitution could be read to protect any woman's rights if those rights were not considered protected in 1868.[133] Their query improperly discounts the difference between enumerated and unenumerated rights. It is one thing to apply enumerated constitutional guarantees, like the Equal Protections Clause[134] or the Nineteenth Amendment,[135] to new, unforeseen circumstances and another thing entirely to recognize a right

126. *Id.* at 2321 (Breyer, Sotomayor, Kagan, JJ., dissenting).

127. *Id.* at 2321–22 (Breyer, Sotomayor, Kagan, JJ., dissenting).

128. *Id.* at 2324 (Breyer, Sotomayor, Kagan, JJ., dissenting).

129. *Id.* at 2247.

130. The dissenters also imply that the Court should be able to update the Constitution to keep pace with the times because the Fourteenth Amendment's ratifiers were all men. *Id.* at 2324. That might be morally significant, but it is not procedurally significant as to the legitimacy of processes for constitutional formation, adoption, and alteration.

131. *Id.* at 2324–25 (Breyer, Sotomayor, Kagan, JJ., dissenting).

132. *Id.* at 2325 (Breyer, Sotomayor, Kagan, JJ., dissenting).

133. *Id.* (Breyer, Sotomayor, Kagan, JJ., dissenting).

134. U.S. CONST. amend. XIV.

135. U.S. CONST. amend. XIX.

without historical or textual support and update it to fit the Court's perception of new circumstances.

The Equal Protections Clause illustrates that discrepancy. While the Clause's reference to "person"[136] may not have included women in 1868, it is unnecessary to cabin that term to its Nineteenth century interpretation because that clause's text is clear. A woman is a "person," so she is entitled to equal protection under law. Reference to the Nineteenth century legislators' subjective intent as to who was entitled to equal protection is unnecessary, just as it was unnecessary in *Bostock v. Clayton County*[137] to consider the subjective intent of the Civil Rights Act's adopters when the law's plain text mandates a clear result today.[138] An enumerated protection like the Equal Protections Clause can be applied to new situations, like admitting women into military colleges,[139] because the textual enumeration provides a legal and logical basis for the Court to address unforeseen circumstances.

Conversely, when the Court creates an unenumerated right not rooted in the nation's history and tradition, there is no text or historical practice to be interpreted or applied to new circumstances. The Due Process Clause's reference to "liberty"[140] provides no guidance, so the Court must effectively draft a text, like "undue burden," that then serves as the basis for its inquiry. As with contraception, same-sex marriage, and private sexual conduct between consenting adults, there is no constitutional text or historically analogous right to guide the Court's interpretation of the Fourteenth Amendment. The dissenters' methodology effectively seeks to invent both the starting point and the ending point for an unenumerated rights inquiry. How could that approach lead the Justices anywhere except their preferred outcome?

Interpreting a written constitutional provision differs, in legal propriety and in practical efficacy, from interpreting a claimed unenumerated protection created, delineated, and applied by the Court. The dissenters ignored this distinction and, quoting Chief Justice John Marshall, concluded that the Constitution "must adapt itself to a future 'seen dimly,' if at all[,] if it is to persevere for future generations."[141] They

136. U.S. CONST. amend. XIV.

137. 140 S. Ct. 1731, 1738 (2020) ("[O]nly the words on the page constitute the law adopted by Congress and approved by the President.").

138. *Id.* at 1737 ("[T]he limits of the drafters' imagination supply no reason to ignore the law's demands. When the express terms of a statute give us one answer and extratextual considerations suggest another, it's no contest. Only the written word is the law . . .").

139. U.S. v. Virginia, 518 U.S. 515 (1996).

140. U.S. CONST. amend. XIV.

141. *Dobbs*, 142 S. Ct. at 2325 (Breyer, Sotomayor, Kagan, JJ., dissenting).

suggested that the Constitution resembles a living organism that "adapt[s] itself" over time to ensure survival.[142] But unless one is willing to replace rule by law with rule by men, laws—and especially constitutions—should not be considered anything but "dead, dead, dead."[143] There is no limiting principle when the Court's perception of new values can supplant the legislative process as the mechanism for legal change.

Nonetheless, the dissenters implied that the Court is and should be empowered to "adapt" the Constitution so that it may evolve and survive into the future.[144] The dissenters invoked the Founders' intent to establish an enduring Constitution to justify judicial amendment,[145] disregarding the political amendment mechanism the Founders established to ensure "survival." The dissenters even claimed the Founders invited the Court to apply the Constitution's general principles in new ways.[146] They expressly stated their willingness to interpret the Constitution in a manner "responsive to new societal understandings and conditions."[147] The dissenters repeatedly suggested that because the Constitution was not devised to remain static, the Court is authorized to be a source of constitutional dynamism.[148]

Still, the methodology's greatest shortcoming appears soon after. Offering a common critique of the "history and tradition" test, the dissenters stated that rights cannot be defined by who previously exercised them.[149] Defining rights by their historical users, said the dissenters, would continually justify a narrow definition "even when they conflict with 'liberty' and 'equality' as *later* and *more broadly*

142. *Id.* (Breyer, Sotomayor, Kagan, JJ., dissenting).

143. Katie Glueck, *Scalia: The Constitution is 'dead'*, POLITICO (Jan. 29, 2013) https://www.politico.com/story/ 2013/01/scalia-the-constitution-is-dead-086853.

144. *Dobbs*, 142 S. Ct. at 2326 (Breyer, Sotomayor, Kagan, JJ., dissenting).

145. *Id.* at 2325 (Breyer, Sotomayor, Kagan, JJ., dissenting).

146. *Id.* (Breyer, Sotomayor, Kagan, JJ., dissenting).

147. *Id.* (Breyer, Sotomayor, Kagan, JJ., dissenting).

148. *See id.* at 2325–26 (Breyer, Sotomayor, Kagan, JJ., dissenting). The dissenters conclude that the Constitution's meaning "gains content from the long sweep of our history and from successive judicial precedents" such that the Court "seek[s] to apply the Constitution's most fundamental commitments to new conditions." *Id.* Again, a common sense reading of the Constitution's text provides scarce support for the conclusion that a legitimate end—updating the Constitution to reflect new conditions—justifies an interpretive method that gives meaning to supposed general principles based on the Court's interpretation of the "long sweep of . . . history." *Id.*

149. *Id.* at 2326 (Breyer, Sotomayor, Kagan, JJ., dissenting).

understood."[150] This formulation reveals an unrealized or unstated assumption: later generations will define "liberty" and "equality" more broadly.

It is harmless to trust the Court with authority to perceive and respond to the "arc of history" if one assumes that the arc always bends in their favor. If "liberty" and "equality" are always expanding, a methodological departure from the Constitution's text and the "history and tradition" test's objective measure is entirely innocuous. But how should a proponent of the "penumbras and emanations" method respond if the Nation's values shifted in a more restrictive direction, where liberty and equality were defined more *narrowly* than before? If the dissenters' methodology is correct, there is no principled basis to criticize a future Court from recognizing that constriction and interpreting the Constitution's "general principles" accordingly. Of course, there is no guarantee as to how tomorrow's America will define "liberty" and "equality." So either the dissenters' methodology is nothing more than a value preference, or a future Court must respect that era's citizens' implied consent for the Justices to define liberty and equality more *narrowly*. "It is one or the other."[151]

The dissenters' assumption also begs another question: whose liberty is expanding over time? Greater liberty for one often means lesser liberty for another. Here, consider America's history of slavery. All should agree that ratification of the Thirteenth Amendment and its categorical prohibition of slavery was an unmitigated, moral increase in liberty and equality.[152] But the slaveholders who were rightly precluded from claiming a repugnant property interest in other human beings would have claimed that the very same amendment contracted their own liberty. Without implying a substantive comparison to slavery, again consider abortion. Depending on one's view of the beginning of human life, *Dobbs* and *Roe* could both be reasonably construed as expanding or contracting the definition of "liberty" and "equality." For the Pro-Lifer, *Dobbs* expands the unborn child's liberty and equality just as surely as the Pro-Choicer concludes that it constricts the mother's liberty and equality. Reverse those positions and the same can be said for *Roe*.

There is no unquestionable march towards greater liberty and equality. Each change in either term's definition is an expansion or contraction depending on whose liberty interests are evaluated.

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150. *Id.* (Breyer, Sotomayor, Kagan, JJ., dissenting) (quoting *Obergefell*, 576 U.S. at 671) (emphasis added).

151. *Id.* at 2319 (Breyer, Sotomayor, Kagan, JJ., dissenting).

152. U.S. CONST. amend. XIII.

Supporters of abortion, gay marriage, contraception, or the private sexual conduct protected by *Lawrence* should take no comfort from an interpretive methodology that rests on such a shaky foundation as some idealistic expectation for the sweep of history. The *Dobbs* majority could reasonably argue that it applied the dissenters' methodology and interpreted the People's values as favoring an expansion of liberty for the unborn. Couldn't the Fourteenth Amendment's reference to "life"[153] be interpreted to guarantee a right to life? If that supplies a general principle describing the People's rights, all that remains for the Court is an assessment of *some* liberty interest as "later and more broadly understood."[154] If the Court concludes that opinion polls undercount Pro-Lifers,[155] such that a true majority of the People believe liberty now includes greater protection for an unborn child,[156] what charge could the dissenters level at that interpretive process? No speculation required. The dissenters assert that "ideological purity" takes a back seat when the Justices have an opportunity to "[leave] this country better" than they found it.[157] Better for whom exactly? They'll decide.

IV. SUPPLEMENTING THE "HISTORY AND TRADITION" TEST

That is not to say the Court should attempt to interpret the Constitution according to a conservative view of what liberty should or should not include. In fact, the opposite is true. The critique of the *Dobbs* dissenters' methodology only shows that their approach is substance without form. It imposes no limits on the Court's ability to "update" the Constitution beyond any extratextual value system to which a bare majority of the Justices subscribe. Their methodology is effective only to the extent that the People's values actually shift to reflect the Court's, and to the extent that five Justices can accurately perceive that shift. A standard bounded only by one's personal convictions is no standard at all.

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153. U.S. CONST. amend. XIV, § 1, cl. 2.

154. *Dobbs*, 142 S. Ct. at 2326 (Breyer, Sotomayor, Kagan, JJ., dissenting).

155. Though it is a crude shorthand for "Pro-Life" voters, Republicans are now notoriously less likely to respond to polls than their Democratic counterparts. Emily Ekins, *Why Did Republicans Outperform The Polls Again? Two Theories.*, FIVETHIRTYEIGHT, https://fivethirtyeight.com/features/why-did-republicans-outperform-the-polls-again-two-theories/ [https://perma.cc/5BPU-LXUY] (last visited Jan. 10, 2023).

156. Hannah Hartig, *About six-in-ten Americans say abortion should be legal in all or most cases*, PEW RSCH. CTR. (June 13, 2022), https://www.pewresearch.org/fact-tank/2022/06/13/about-six-in-ten-americans-say-abortion-should-be-legal-in-all-or-most-cases-2/ [https://perma.cc/Y5HL-KES4].

157. *Dobbs*, 142 S. Ct. at 2350 (Breyer, Sotomayor, Kagan, JJ., dissenting).

Still, the dissenters, and other critics of the "history and tradition" test are correct to point out that its faithful application limits protected rights to those recognized at a fixed point more than one hundred and fifty years in the past.[158] The test permits constitutional alteration by amendment alone. Coupling recent years' rancorous social and political division[159] with the high threshold for amendment—three quarters of the state legislatures or state ratifying conventions[160]—the prospect of recognizing new rights is dim. One strains to imagine anything that thirty-eight states would agree to add to the Constitution. Absent some miraculous political reunion of America's Left and Right, the "history and tradition" test appears to leave the Constitution without any realistic expectation of alteration.

Ironically, one beneficial way to realize the Founders' vision of enduring Constitution is to change that Constitution. Specifically, the People could amend Article V to lower the threshold required to pass a constitutional amendment. Justice Scalia once stated that if he were to make any one change to the Constitution, he would make it easier to amend.[161] As the Constitution currently exists, a proposed amendment can be blocked with almost no effort. Former Justice Department spokeswoman and Advisory Opinions podcast host Sarah Isgur observed that if the smallest twelve states, with a total population of 14 million people, opposed a particular amendment, 96% of the nation's 330 million people would have to agree to change the Constitution.[162] The Constitution has not been amended since 1992, when the Twenty-Seventh Amendment was ratified after being proposed over 200 years earlier.[163] Along with creeping congressional inaction on many of the day's most pressing issues,[164] the incredibly high bar for

158. *Id.* at 2333 (Breyer, Sotomayor, Kagan, JJ., dissenting).

159. Aidan Connaughton, *Americans see stronger societal conflicts than people in other advanced economies*, PEW RSCH. CTR. (Oct. 13, 2021), https://www.pewresearch.org/fact-tank/2021/10/13/americans-see-stronger-societal-conflicts-than-people-in-other-advanced-economies/ [https://perma.cc/KUZ8-KN83].

160. U.S. CONST. art. V.

161. Debra Cassens Weiss, *How Scalia and Ginsburg would amend the Constitution*, AM. BAR ASS'N: ABA JOURNAL (Apr. 21, 2014), https://www.abajournal.com/news/article/how_scalia_and_ginsburg_would_amend_the_constitution [https://perma.cc/7AD5-RJDT].

162. Sarah Isgur, *It's Time to Amend the Constitution*, POLITICO (Jan. 8, 2022), https://www.politico.com/news/magazine/2022/01/08/scalia-was-right-make-amending-the-constitution-easier-526780 [https://perma.cc/SBB2-9PYP].

163. *Id.*

164. Isgur cites immigration as an example, observing that each political party's desire to campaign on the issue led to legislative inaction, attempted resolution by executive order, and finally to contested resolution in the Supreme Court. *Id.* Another example might be the

constitutional amendment poses a monumental obstacle to the People's exercise of political power.

Consequently, Isgur proposes a sample amendment to lower the threshold and to avoid the Equal Rights Amendment's pitfall, where several states claimed to rescind their ratification before thirty-eight states could adopt the proposed amendment.[165] The "Isgur Amendment" reads:

> An amendment to this Constitution proposed by a majority of both houses of Congress or a majority of states shall be valid when ratified by the legislatures of two thirds of the several states; provided that no amendment shall abridge the privileges or immunities of citizens of the United States. No state shall be able to withdraw their ratification and all deadlines for ratification must themselves be contained within the text to be ratified.[166]

The ideal standard is uncertain, but recent experience militates in favor of attempting something other than the 75% line. Common sense counsels against a threshold as low as 51%, or 26 states, which would risk subjecting the Constitution to flippant alteration with each change in the nation's political majority. The Constitution establishes the entire structure of the American regime, enumerates the powers its various institutions hold, and establishes a floor for the People's rights. It should have more staying power than the average piece of federal legislation. But it also seems clear that the current 75% threshold is too high.[167] Isgur's proposed two-thirds standard roughly splits the difference and seems to be a reasonable starting point, which could be raised or lowered according to its workability.

Under that standard, the smallest 16 states and their total population of roughly 20,731,000 people could force the remaining states and their

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general lack of federal legislation concerning firearms, which has generally been a deadlocked issue except for the rare passage of 2022's bipartisan gun control legislation. George Wright & Matt Murphy, *Congress passes first gun control bill in decades*, BBC NEWS SERVS. (June 24, 2022) https://www.bbc.com/news/world-us-canada-61919752 [https://perma.cc/PMX6-523W]. Up until that unusual moment of cross-aisle agreement, the issue enjoyed little consensus and the law remained stagnant for decades. *Id.*

165. Isgur, *supra* note 162.

166. *Id.*

167. *See* Eric Posner, *The U.S. Constitution Is Impossible to Amend*, SLATE (May 5, 2014), https://slate.com/news-and-politics/2014/05/amending-the-constitution-is-much-too-hard-blame-the-founders.html [https://perma.cc/BBG3-ULY8] (arguing that the amendment threshold is too high, as evidenced by number of amendments passed versus amendments proposed, and noting that the United States is an outlier among liberal democracies whose constitutions are significantly easier to amend).

population of roughly 300,000,000 people to agree to pass a proposed amendment.[168] That would mean that roughly 6.3% of the public could block a proposed amendment. It is a slight improvement over the three quarters standard, but the collective disapproval of the sixteen smallest states is the mathematical worst-case scenario. Those states would likely not be in uniform opposition, and the difference between thirty-four states and thirty-eight states could make a material difference for a proposed amendment. Had two-thirds been the standard, the Constitution would now include the Equal Rights Amendment.[169] Whether the two-thirds benchmark ultimately needs to be raised or lowered, it is a calculated and cautious step towards restoring the People's ability to amend their founding charter. And what better place for an experiment than their shared, national laboratory of democracy?

V. CONCLUSION

Dobbs v. Jackson Women's Health was undoubtedly the Supreme Court of the United States' most controversial ruling of the 2021–22 term. Whether it will be the most consequential ruling remains to be seen. The Court suggests that it will apply the "history and tradition" test to all future unenumerated rights cases, even if it does not reverse longstanding precedents like *Griswold*, *Lawrence*, and *Obergefell*. Based on the Court's institutional capacity and the authority entrusted to it by the Constitution, this test is the proper method for evaluating unenumerated rights claims. The alternative "penumbras and emanations" approach is misguided, premised on false assumptions, and untethered to the Constitution. But the "history and tradition" test limits recognition of new rights and construes recognized rights based on their historical scope, tending to constrain constitutional protections according to their exercise in a prior age.

The Constitution is notoriously difficult to amend, so the People should respond to the Court's adoption of the "history and tradition" test by amending the Constitution to lower the threshold required to adopt future amendments. The People, rather than the Court, can then meaningfully exercise their authority to update or alter the Constitution as desired. The Court is neither permitted nor equipped to do that for them. The question is not whether one supports abortion, or gay marriage, or any other issue addressed in the Court's substantive due

168. *Race, DECENNIALPL2020*, U.S. CENSUS BUREAU, https://data.census.gov/cedsci/table?g=0100000US%240400000&tid=PEPPOP2021.NST _EST2021_POP [https://perma.cc/4K6G-AQWG] (last visited Jan. 10, 2023).

169. Isgur, *supra* note 162.

process precedents. The question is one of political legitimacy: who should rule? Who should have the final say on which rights ought to define the American regime and protect its People? What process best secures those rights? Support abortion or loathe abortion, the answer is clear.

Hopefully, that answer appeals to both supporters and detractors of the rights discussed in this Comment. Few legal issues are more significant than the tension between and balancing of powerful, compelling interests involved when a liberty interest is claimed as a right. Those substantive issues, monumental as they are, exceed the scope of this Comment. The process to resolve those disputes is of equal importance. Losing a national debate is infinitely easier to digest when you know you have lost without a judicial finger of the scale. Democracy falters without clear, agreed-upon procedures, like a limited role for the Supreme Court and an amendable Constitution, to fairly resolve national disputes. But with these procedures, the promise that losing today is alright because, through honest debate and persuasion, you might win tomorrow.[170] If *Dobbs* reveals anything, it is this—the People, not the Court, must resuscitate a democracy on life support. The Court's role? Get out of the way.

170. *See Obergefell*, 576 U.S. at 714.