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Interpreting Substantive Due Process: What Does “History and Tradition” Really Mean?

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INTERPRETING SUBSTANTIVE DUE PROCESS: WHAT DOES “HISTORY AND TRADITION” REALLY MEAN?

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INTRODUCTION

Imagine meeting someone special, falling in love, and deciding to start a life together as “one.” The two of you plan to get married and live happily ever after. However, the state where you both live does not legally recognize same-sex marriages. To bypass your home state’s rigid laws, you travel with your partner to a neighboring state where your marriage can be legally recognized. You obtain a marriage license, exchange your vows, and move forward with your life as a married couple. As expected, your marriage is blissful, but unfortunately, your spouse falls ill with a debilitating disease and ultimately dies.

Since your home state still does not recognize same-sex marriages, you are precluded from being named as the surviving spouse. Even at death, a state-imposed separation forces you to remain strangers with your former spouse, so you decide enough is enough and fight back by filing suit. Your case goes all the way up to the United States Supreme Court, where the Court will decide the constitutionality of the same-sex marriage ban. In its analysis, the Court must consider whether a relationship like yours, a same-sex marriage, is deeply rooted in our nation's history and tradition, making it a fundamental right requiring substantive due process protection.¹

However, relevant case law does not provide any definitions of history and tradition, much less any separate analysis of the two terms. You begin to worry and wonder whether history and tradition are used interchangeably by the Court. Without a clear definition of these two terms, this deeply personal and very important right could have a vulnerable outcome. So, what does "history and tradition"² really mean in a substantive due process analysis?

In a substantive due process analysis, the notion of "history and tradition" is used to test whether a right is deemed fundamental, and thus protected.³ The Court uses this test to resolve substantive due process issues; however, the Court has yet to define the two terms explicitly. Often, the words are conflated without explanation.⁴ This

1. See generally *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) (the fact pattern described above is based on this case where fundamental rights were at stake).

2. Traditions are often valued memories or customs passed down that one can look forward to in the future. See *infra* Part II. In this respect, tradition provides status and identity. However, the notion of tradition is a choice, based on what is valued highly enough to be deemed traditional or a tradition. Ruth Finnegan, *Tradition, But What Tradition and For Whom?*, in 06 ORAL TRADITION 104, 104 (1991). Thus, tradition is heavily impacted by choice and value. Unlike traditions, history cannot be impacted by values or choices. In contrast, history is an objective analysis of what has occurred in the past. See *infra* Part I. History can also look beyond the individual law being challenged and consider the underlying components, which establish the right at issue. See *infra* Part III. Together, tradition considers values and choices, while history is objectively informed by the past.

3. *Bowers v. Hardwick*, 478 U.S. 186, 192 (1986) (quoting *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977) (plurality opinion)).

4. See, e.g., *Zablock v. Redhail*, 434 U.S. 374 (1978); *Moore v. East Cleveland*, 431 U.S. 494 (1977); *Lawrence v. Texas*, 539 U.S. 558 (2003); *McDonald v. City of Chicago*, 561 U.S. 742 (2010); *United States v. Windsor*, 570 U.S. 744 (2013).

leaves the Court with broad discretion in discerning what is deeply rooted in our nation’s history and tradition.⁵ However, without a clear definition of these two terms, a deeply personal and very important right, such as the right to marry, could become obsolete.

This Comment analyzes the terms “history” and “tradition” and proposes a clear, two-part test, that defines and separates these terms when conducting a fundamental rights analysis. While the Court has been vague in its analysis when addressing history and tradition,⁶ the terms are not interchangeable, and a two-part test is necessary to provide clarity in such a significant analysis of fundamental rights.⁷ Part I dissects the definition of “history” in judicial interpretations and literary definitions, and addresses whether defining “history” is an objective or subjective standard. Part II has a mirrored analysis of Part I, in analyzing the term “tradition.” Part III addresses “the overlapping characteristic of both “history” and “tradition,” the judicial interpretation of “history and tradition” together, and ultimately recommends a two-part test to address the terms separately. Finally, this Comment briefly concludes with an explanation of why a test analyzing the two terms separately is necessary in a substantive due process analysis.

I. DEFINING “HISTORY”

Broadly, history is a systematic account of humankind’s origin and development throughout time, producing a record of the unique movements and moments in life.⁸ As such, history remains diversely valuable and useful.⁹ Every generation looks to the past to serve as

5. *Id.*

6. *Id.*

7. *See infra* Part III.

8. E. Sreedharan, *A Textbook of Historiography, 500 B.C. to A.D. 2000*, ORIENT LONGMAN PRIVATE LIMITED 1, 1 (2004), https://shodhganga.inflibnet.ac.in/bitstream/10603/247238/8/08_chapter%20i.pdf.

9. Maurice Matloff, *The Nature of History, A GUIDE TO THE STUDY AND USE OF MILITARY HISTORY* 3, 17 (1979), <https://pdfs.semanticscholar.org/5b8f/ceb5a8636f4c1d4959bb2deb82a4d416f981.pdf>. The notion of history plays a fundamental role in the process of human thought. In this respect, history provides the possibility of better understanding or discovering ourselves in the present, by understanding the circumstances and choices that brought us to our current lives and situations.

guidance, knowledge, wisdom, or a source of ideas to meet its own problems.¹⁰ Although history provides society with a sense of identity, human beings create it themselves.¹¹ Without human action, history would not exist.¹²

The word “history” generally connotes the past.¹³ The Greek word *historia* originally meant knowing by inquiry or the act of seeking knowledge.¹⁴ The Merriam-Webster Dictionary defines “history” as “a chronological record of significant events (such as those affecting a nation or institution) often including an explanation of their causes.”¹⁵ In Ancient Greece, historiography was considered more as moral guidance, than factual accuracy,¹⁶ and any bad examples were conveniently ignored.¹⁷

However, over time, Western Civilization’s thought of history has contemporaneously tended to follow a linear progression.¹⁸ By the Nineteenth Century, the notion of presenting objective historical facts became prevalent when interpreting history.¹⁹ As such, history is a method of understanding the development and evolution of ideas and past actions.²⁰ When considering the idea of history, it is easy to think about past events. For example, when students study history in school,

10. *Id.*

11. See Daniel Little, *Philosophy of History*, STANFORD ENCYCLOPEDIA OF PHIL., <https://plato.stanford.edu/archives/sum2017/entries/history/> (last updated Oct. 13, 2016).

12. *Id.*

13. *Id.*

14. Katy Steinmetz, *This Is Where the Word ‘History’ Comes From*, TIME (June 23, 2017, 1:45 PM), <https://time.com/4824551/history-word-origins/>.

15. *History*, MERRIAM-WEBSTER DICTIONARY, <https://www.merriam-webster.com/dictionary/history> (last updated Mar. 25, 2020).

16. See *Philosophy of History*, BASICS OF PHIL., https://www.philosophybasics.com/branch_philosophy_of_history.html (last visited Apr. 7, 2020) (historiography refers to the processes by which historical knowledge is obtained and transmitted. “Good examples” to be followed were considered to morally improve the reader).

17. *Id.*

18. *Id.*

19. *Id.*

20. See Matloff, *supra* note 9.

they are learning about past events.²¹ We rely on historians to interpret, describe, conceptualize, contextualize, and explain circumstances and events of the past.²² The significance of history relies on understanding the evolution and development of ideas and understanding why these ideas changed or occurred in the past.²³ Therefore, history is connected to past events because it represents the recollection or objective study of events that have occurred in the past.

A. *Judicial Interpretation of “History”*

The Court has held history teaches and develops traditions.²⁴ History became an indicator of past events because it was viewed as a way of teaching and assisting in the development of tradition.²⁵ In the seminal gun rights case—*McDonald v. City of Chicago*—the Court relied on a survey of contemporaneous history within the nation, which demonstrated the Fourteenth Amendment’s Framers included the right to keep and bear arms as a fundamental right.²⁶ Because the Court framed the right to keep and bear arms (“gun rights”) as the right to self-defense,²⁷ the Court considered the history and tradition of the right to protect your own home, rather than whether general gun rights held a position deeply rooted in our nation’s history and tradition.²⁸ Since the Court previously held “the Second Amendment protects a personal right to keep and bear arms for lawful purposes, most notably for self-defense within the home,”²⁹ the Court found the right to self-defense was deeply rooted in our nation’s history and tradition. The Court based its decision on the Second Amendment representing past acts,

21. See Peter N. Stearns, *Why Study History?* (1998), AM. HIST. ASS’N, [https://www.historians.org/about-aha-and-membership/aha-history-and-archives/historical-archives/why-study-history-\(1998\)](https://www.historians.org/about-aha-and-membership/aha-history-and-archives/historical-archives/why-study-history-(1998)) (last visited Apr. 4, 2019).

22. Little, *supra* note 11.

23. Ronald B. Standler, *What Is History and Why Is History Important?*, <http://www.rbs0.com/wh.pdf> (last updated Feb. 18, 2013).

24. *Poe v. Ullman*, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting); see also *Moore v. East Cleveland*, 431 U.S. 494, 501 (1977).

25. *Id.*

26. 561 U.S. 742, 745 (2010).

27. *Id.* at 780.

28. *Id.*

29. *Id.*

specifically, “history” in our nation.³⁰ Consequently, the Court determined gun rights were deeply rooted in our nation’s history and tradition based on the existence of the right included in the Second Amendment of the United States Constitution.³¹ Thus, the past actions of the United States informed the Court’s decision to establish the right to keep and bear arms was deeply rooted in our nation’s history.

In *United States v. Windsor*, the Court decided whether the Defense of Marriage Act’s (“DOMA”) definition of a spouse, which denied federal recognition of same-sex marriages, was unconstitutional.³² In his dissent, Justice Roberts notes it was “beyond dispute that the right to same-sex marriage [was] not deeply rooted in [our] Nation’s history and tradition.”³³ This statement follows the prior treatment of same-sex marriage in the United States.³⁴ Because same-sex marriages were not yet fully recognized in every state, Justice Roberts argued the right to same-sex marriage was not part of the nation’s history.³⁵ In this respect, the notion of history is traditionally interpreted and informed by looking at prior conduct and events in the United States. However, the Court ultimately found DOMA’s definition of a spouse to be a violation of equal protection under the Due Process Clause of the Fifth Amendment because it was exclusively defined as a relationship between a man and a woman.³⁶ The Court held this distinction singled out people in same-sex marriages without a legitimate government purpose.³⁷ Thus, DOMA’s definition of a spouse was unconstitutional. This decision established a new history for same-sex marriages in the United States.

30. The Court successfully avoided engaging in a meaningful analysis of history and tradition by focusing on history and ignoring tradition. *See id.*

31. *Id.* at 791.

32. 570 U.S. 744, 752 (2013).

33. *Id.* at 808 (Roberts, C.J., dissenting).

34. *Id.* (noting that “no State permitted same-sex marriage until the Massachusetts Supreme Judicial Court held in 2003 that limiting marriage to opposite-sex couples violated the State Constitution.”).

35. *Id.*

36. *Id.* at 769.

37. *Id.* at 775.

Throughout American history, states have valued marriage as a societal benefit.³⁸ As such, the historical record of marriage “contradicts attempts to cast marriage as serving any single, overriding purpose.”³⁹ When Congress refused to federally recognize potential marriages of same-sex couples, it interfered with a long history of state autonomy by denying states the ability to bestow these couples the same fundamental status that other couples received when their state permitted them to marry.⁴⁰ As our federal system allows, marriage rules significantly differ among states.⁴¹ As such, states established many marital innovations—including changing aspects of marriage “once seen as essential and indispensable.”⁴² Alterations to the marital union, such as the erosion of coverture and the broadening of grounds for divorce, may be taken for granted now.⁴³ However, these alterations were aggressively resisted and opposed as revolutionary when they began.⁴⁴ What is now viewed as deeply rooted in our nation’s history was once a new and debated topic. Moreover, history changes and evolves as the country develops.⁴⁵ Due to the long history of states having authority to establish marital unions, DOMA was deemed as a “radical departure from settled federal practice,”⁴⁶ and therefore not deeply rooted in our nation’s history.

As noted, marriage is not “a static institution so rooted in ‘tradition’”—that it can be insulated from constitutional challenge.⁴⁷ On the contrary, marriage remains a crucial institution due to its non-

38. Brief on the Merits for Amici Curiae Historians - American Historical Association - in Support of Respondents and of Affirmance of the Judgement Below at 2, *United States v. Windsor*, 570 U.S. 744 (2013) (No. 12-307) WL840030 [hereinafter Am. Historical Ass’n. Brief for Respondents].

39. Brief of Historians of Marriage and the American Historical Association as Amici Curiae in Support of Petitioners at 4, *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) (Nos. 14-556, 14-562, 14-571, 14-574) WL1022698 [hereinafter Brief of Historians of Marriage].

40. Am. Historical Ass’n. Brief for Respondents, *supra* note 38, at 14.

41. *Id.* at 2.

42. *Id.* at 40.

43. *Id.* at 2.

44. *Id.*

45. Again, presently made choices have impactful weight in the future.

46. Am. Historical Ass’n. Brief for Respondents, *supra* note 38, at 34.

47. Brief of Historians of Marriage, *supra* note 39, at 4.

static characteristics.⁴⁸ Because previous “traditions and laws enforcing gender hierarchy (through coverture) and white supremacy (through anti-miscegenation laws) have been overturned,” these “traditional” actions are now unconstitutional.⁴⁹ Similar to other successful civil institutions, the tradition of marriage has evolved to contemplate and reflect societal developments and the judicial recognition of constitutional rights.⁵⁰

Additionally, the Court has held “history teaches [that there] are the traditions from which [history] developed as well as the traditions from which it broke.”⁵¹ Following this, the Court found history can add to or eliminate a tradition based on the values associated with the tradition.⁵² History has also taught us “tradition is a living thing” and thus open to development.⁵³ When considering history—in the context of larger family households—the Court has held that even in “a decline in extended family households,” modern society has not eroded “the accumulated wisdom of civilization, gained over the centuries and honored throughout our history, that supports a larger conception of family.”⁵⁴ The Court considered the past to be a roadmap for our nation’s history.⁵⁵ As such, the past has been interpreted as analogous to the term history, and the Court has looked at past conduct to inform its classification as history.⁵⁶ Moreover, past events in the United States contribute to what the Court interprets as the nation’s history because history requires prior conduct.⁵⁷

48. *Id.* at 5.

49. *Id.* at 5-6. Both legislatures and courts have used their authority to lessen marriage inequality between spouses and to lift restrictive rules on the eligibility to marry. *See also* Obergefell v. Hodges, 135 S. Ct. 2584 (2015).

50. Brief of Historians of Marriage, *supra* note 39, at 16.

51. Moore v. East Cleveland, 431 U.S. 494, 501 (1977).

52. *See id.*

53. *Id.*

54. *Id.* at 505.

55. *See id.*

56. *See id.*

57. *See* United States v. Windsor, 570 U.S. 744 (2013); *see also* McDonald v. City of Chicago, 561 U.S. 742 (2010).

B. Considerations of the Literary Definition of “History”

History is interpreted as a “recital of facts given as true,” and “an essential part of natural philosophy.”⁵⁸ History is also defined as the “study of the human past as it is described in written documents left behind by humans.”⁵⁹ Thus, history has long served as a guide illustrating the past. Analogous to its judicial interpretation, the term history is driven by the theme of past events.⁶⁰ History cannot be defined or developed without conduct or memory from the past.⁶¹ In its earliest known form in society, history was “simply a narrative account of past events.”⁶² Being developed and maintained by humankind, “human nature is itself a historical product and human beings act differently in different periods of historical development.”⁶³ Moreover, history cannot exist without prior acts or conduct. History will always be impacted by current times and choices made; what society considers as history in 2050 will be impacted by the choices and actions people take in 2020. As such, what occurs in the history of the United States impacts the Court and the interpretation of the American Constitution.⁶⁴ History itself has been seen as a process of qualitative change evolving over time.⁶⁵ What will happen in the future, and what

58. Voltaire, *The Philosophical Dictionary*, HANOVER COLLEGE DEP’T OF HIST., <https://history.hanover.edu/texts/voltaire/volhisto.html> (last updated Mar. 2001).

59. K. Kris Hirst, *What Is History?*, THOUGHTCO., <https://www.thoughtco.com/what-is-history-collection-of-definitions-171282> (last updated Oct. 1, 2019).

60. *See supra* Part I.

61. *Id.*

62. Bill Nasson, *History: The Meaning and Role of History in Human Development*, EOLSS, <https://www.eolss.net/Sample-Chapters/C04/E6-22-00-00.pdf> (last visited Aug. 1, 2020).

63. Little, *supra* note 11 (describing how Johann Gottfried Herder offered a different view about human nature and human ideas with respect to a historical analysis).

64. *See* Martin S. Flaherty, *History “Lite” in Modern American Constitutionalism*, 95 COLUM. L. REV. 523, 523-24 (1995) (discussing the impact of history).

65. G. Edward White, *The Arrival of History in Constitutional Scholarship*, 88 VA. L. REV. 485, 489 (2002) (addressing the contrast between the scholarly functions of legal scholars and historians).

materializes in the present, is governed closely by what has occurred in the past.⁶⁶ Thus, history progresses as time changes, and our nation evolves.

C. Is “History” an Objective or Subjective Standard?

Similar to the Constitution, history is read and interpreted in more than one way.⁶⁷ The Court found it both prideful and unwise to blind oneself to history.⁶⁸ History establishes a hybrid mix of objective memory and subjective interpretation.⁶⁹ An intimate relationship exists “between ‘objective’ history and the subjective development of the individual consciousness (‘spirit’).”⁷⁰ Despite this, objectively, history can be primarily viewed as something undisturbed by personal bias or emotion and more closely related to actual and external phenomena.⁷¹ Further, history is generally the objective recitation of past events. However, because these recitations can be personal and perceived differently, history can objectively be recited, but subjectively experienced or interpreted.⁷² For example, history has been interpreted as the process whereby the spirit uncovers itself and its own concept.⁷³ Just as scientists disagree, historians may also differ in their interpretations.⁷⁴ However, history focuses on human values, in a manner the sciences do not, allowing for a broader scope of

66. Arthur Marwick, *The Fundamentals of History*, OPEN U., <https://archives.history.ac.uk/history-in-focus/Whatishistory/marwick1.html> (last visited Aug. 1, 2020).

67. Nancy F. Cott, *In Same-Sex Marriage Case, a Contest over History*, BOSTON REV. (July 1, 2015), <http://bostonreview.net/us/nancy-cott-supreme-court-same-sex-marriage-history>.

68. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2623 (2015).

69. *See generally* Little, *supra* note 11 (discussing how to pursue historical objectivity in light of subjective values).

70. *Id.* (citing WILHELM FRIEDRICH HEGEL, *PHENOMENOLOGY OF SPIRIT* (J.N. Findlay ed., A. V. Miller trans., Oxford: Clarendon Press 1977)).

71. Sakul Kundra, *Objectivity in History*, RESEARCH GATE (Feb. 20, 2017), <https://www.researchgate.net/publication/31411340>.

72. *See supra* Part I.

73. Little, *supra* note 11.

74. Marwick, *supra* note 66.

evaluation.⁷⁵ Therefore, despite history being a primarily objective analysis, it can also be subjectively interpreted.

II. DEFINING "TRADITION"

The concept of a tradition originally comes from the Latin meaning of "something handed over."⁷⁶ The word tradition has multiple meanings.⁷⁷ In its barest form, tradition simply means "a *traditum*; it is anything which is transmitted or handed down from the past to the present."⁷⁸ The *Merriam-Webster Dictionary* defines tradition as "[a]n inherited, established, or customary pattern of thought, action, or behavior (such as a religious practice or a social custom)."⁷⁹ Tradition, and the notion of that which is handed down, includes beliefs, customs, material objects, or images of persons and events.⁸⁰ At the center of a tradition is the value one holds to carry on this custom or belief as being established. Slow changing societies have viewed tradition as the equivalence to inheritance.⁸¹ The means of making a living, as well as the stories and memories of their progenitors, provides one with both status and identity.⁸²

Because tradition tends to look forward, the term refers to the process of handing a custom down to later generations over time,⁸³ as well as the belief that the custom will continue to be passed down in the future. Traditions are based on values, and they will continue to evolve because of the desire to establish something better, more authentic, or

75. *Id.*

76. Nelson H. H. Graburn, *What is Tradition?*, AM. ANTHROPOLOGY ASS'N. 6, 6 (2008), <https://web.law.columbia.edu/sites/default/files/microsites/gender-sexuality/What%20is%20tradition.pdf>.

77. EDWARD A. SHILS, *TRADITION* 12 (U. Chi. Press, 1981).

78. *Id.*

79. *Tradition*, MERRIAM-WEBSTER DICTIONARY, <https://www.merriam-webster.com/dictionary/tradition> (last updated Mar. 26, 2020) [hereinafter *Tradition*, MERRIAM-WEBSTER].

80. SHILS, *supra* note 77, at 13.

81. Graburn, *supra* note 76, at 6–7 (discussing how tradition has been viewed as a central and important concept of identity).

82. *Id.*

83. *Id.* at 6.

more convenient—resting in those who acquire and create them.⁸⁴ A tradition can be impacted by history. However, tradition is centered on value and looks forward at a future event and considers whether it is valued high enough to be passed down; thus, establishing a tradition or custom.⁸⁵

A. *Judicial Interpretation of “Tradition”*

The Court has held that “history [teaches] us that tradition is a living thing.”⁸⁶ When faced with the decision of the constitutionality of a law requiring child support to be paid before getting married, the Court held such a law was unconstitutional because it “infringed upon a fundamental right, the right to marry.”⁸⁷ Justice Powell concurred in the opinion, pointing to the “constitutional limits” as to state power over domestic relations.⁸⁸ Further, because marriage has been a central component, creating the most important relationship in one’s life,⁸⁹ the government needed to show a justification in its actions.⁹⁰ The Court reasoned these intrusions were contrary to deeply rooted traditions⁹¹ because marriage was seen as a—highly valued—component.⁹² Thus, the Court has interpreted tradition loosely, emphasizing value, to be a passed down custom, continuing to be passed down and occurring in the future.

Similarly, the Court recognized a relationship closely tied to the right to marital privacy and found Connecticut’s anti-contraceptive statute to be unconstitutional.⁹³ The Court addressed the constitutionality of the state’s statute when an Executive Director of Planned Parenthood and a doctor were fined for violating Connecticut’s anti-contraceptive statute; the Court addressed the constitutionality of

84. SHILS, *supra* note 77, at 13.

85. *See infra* Part II Section B.

86. *See Moore v. East Cleveland*, 431 U.S. 494, 501 (1977).

87. *Zablocki v. Redhail*, 434 U.S. 374, 381 (1978).

88. *Id.* at 399 (Powell, J., concurring).

89. *Id.* (quoting *Maynard v. Hill*, 125 U.S. 190, 209 (1888)).

90. *See id.* at 381.

91. *See id.* at 399.

92. *Id.* at 397.

93. *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965).

the state's statute.⁹⁴ Justice Goldberg concurred in the opinion, reiterating when fundamental rights are determined, judges are not left to decide cases to reflect their personal and private notions.⁹⁵ Instead, they must look to the history and tradition of our nation to determine whether a right is fundamental.⁹⁶ Because marital privacy had a long history within the nation and was viewed as a traditional value, Connecticut's statute prohibiting contraceptives was deemed unconstitutional.⁹⁷

Moreover, in *Lawrence v. Texas*, the Court found a statute criminalizing homosexual activity to be unconstitutional.⁹⁸ The Court centered its focus on the notion of personal autonomy and the freedom one holds to conduct his or her private life.⁹⁹ Further, the Court held, "[h]istory and tradition are the starting point [...] of the substantive due process inquiry."¹⁰⁰ In its analysis, the Court looked at the tradition of one's personal autonomy and freedom in the privacy of his or her own home.¹⁰¹ The Court held policing the private conduct in one's home was unconstitutional because the nation held a tradition (value) of personal autonomy.¹⁰²

Accordingly, tradition can be both forward- and backward-looking, but it is always centered on value.¹⁰³ With respect to a backward look at customs from the past, the tradition of the right to marry carried sufficient weight on its own to overrule a statute banning anyone with outstanding child support obligations from marriage.¹⁰⁴ In a forward-looking approach, the Court was able to overrule a ban on same-sex private conduct.¹⁰⁵ Despite the lack of this social custom or lack of

94. *See generally id.*

95. *Id.* at 493 (Goldberg, J., concurring).

96. *See id.*

97. *Id.*

98. 539 U.S. 558, 578–79 (2003).

99. *Id.* at 572.

100. *Id.* (quoting *County of Sacramento v. Lewis*, 523 U.S. 833, 857 (1998) (Kennedy, J., concurring)).

101. *Id.* at 573.

102. *Id.* at 578 (holding the petitioners were entitled to respect in their private lives).

103. *See supra* Part II.

104. *See Zablocki v. Redhail*, 434 U.S. 374 (1978).

105. *See Lawrence*, 539 U.S. at 558.

tradition in the nation, this conduct was not barred. Because the notion of personal liberty in one's private life helped guide the Court in its decision, a new custom of same-sex relationships was established in the nation's tradition.¹⁰⁶ The reoccurring events not only create a history of events, but it also establishes a tradition and emphasizes the values of our nation.

B. Considerations of the Literary Definition of "Tradition"

The study of developing traditions is recently becoming more and more popular and acceptable.¹⁰⁷ Although the notion of tradition is still associated with the concept of something established, and perhaps old, it is no longer assumed that this necessarily implies old in the sense of years, far less multiple centuries.¹⁰⁸ Tradition has been summarized into one word: "change."¹⁰⁹ These changes and developments associated with tradition can now be recognized as fit objects of study.¹¹⁰ Therefore, the general category of tradition is no longer a clear-cut definition. Instead, it requires a further clarification of which particular aspects or which specified historical or past situation is referenced.¹¹¹ The changes in tradition are driven by the value or disvalue placed on the concept at issue.¹¹² People must value a tradition for it to continue to exist,¹¹³ and the actual use of it—whether in personal, artistic, or political contexts—may inevitably be exposed to modification, manipulation, or even elimination.¹¹⁴ Thus, traditions are constantly open to change, development, interpretation, and occasional manipulation by those who follow or create them.¹¹⁵ Despite tradition being open for development and change, the critical aspect of tradition remains centered on value.

106. *Id.* at 578.

107. Finnegan, *supra* note 2.

108. *Id.* at 112.

109. *Id.* (quoting Honko and Laaksonen 1983:236 "Tradition is change" as a recent summary of the term).

110. *Id.*

111. *Id.*

112. *See supra* Part II.

113. *Id.*

114. *Id.*

115. *Id.*

Tradition has sometimes been viewed as the opposite of innovation.¹¹⁶ However, it is a commonly used word, and it can be elusive.¹¹⁷ The concept of tradition holds a connotation to *value*,¹¹⁸ and the common use of the term has established meaning of something handed down, particularly by word of mouth.¹¹⁹ However, tradition sometimes holds contrasting definitions.¹²⁰ The view of what is traditional may depend on what has been handed down or viewed as valuable enough to be a tradition or traditional.¹²¹ Traditions can evolve as customs are passed down and selected to be labeled as such. Initially, every tradition is based on the choices people make and continue to make in the future, centered on their values. As time passes and the nation’s values evolve, so too do laws and traditions. What was once a tradition can cease to be held as traditional, based on choice and value.

C. Is “Tradition” an Objective or Subjective Standard?

When discussing tradition, we refer to that which has exemplary characteristics.¹²² Tradition depends on what has been handed down and valued high enough to be labeled tradition or traditional.¹²³ The Court has held that what is a “deeply rooted tradition” of the country is “arguable.”¹²⁴ As such, what is the tradition of one can contrast the tradition of another entirely because not everyone holds the same values. Moreover, tradition includes a choice because it involves value and development.¹²⁵ Ultimately, the key factor in determining what is considered a tradition rests on what custom or past event is valued

116. Graburn, *supra* note 76.

117. Finnegan, *supra* note 2.

118. *Id.* at 110 (commenting on the notion of *value* and whose values we are considering for tradition).

119. *Id.* at 104.

120. *Id.*

121. *Id.*

122. SHILS, *supra* note 77.

123. *See Tradition*, MERRIAM-WEBSTER, *supra* note 79; *see also* Finnegan, *supra* note 2.

124. *Moore v. East Cleveland*, 431 U.S. 494, 549 (1977) (White, J., dissenting) (critiquing the “traditions” in the Nation).

125. *See supra* Part II.

enough.¹²⁶ At a family gathering, choices are made, and traditions are established as a result of these choices and actions. While a tradition may be viewed objectively, based on previous conduct and customs, those customs are subjectively selected by choice.¹²⁷ Therefore, creating a tradition is decided subjectively by values and informed by the interpretation of past events.

III. THE CORRECT ANALYSIS: “HISTORY” AND “TRADITION” AS SEPARATE AND DISTINCT TERMS

Although history and tradition may overlap, with respect to the past, they are distinct terms in all other aspects. History is the development or objective recounting of past events.¹²⁸ In contrast, tradition is centered on values and choice and does not simply recount the past.¹²⁹ While a tradition can be modified and adjusted based on one’s subjective values,¹³⁰ history cannot be modified according to one’s personal preference.¹³¹ The critical distinction between the two terms rests on the ability of tradition to be established or discontinued based on the creators’ or adopters’ values and choices. In contrast, history cannot be changed or eliminated once an action has been taken.

Consequently, because history and tradition are not interchangeable, both terms, as a part of the two-part test, must be satisfied to be afforded substantive due process protection. A test that analyzes history and tradition separately creates a clear analysis for the Court to follow. This test requires a fact-by-fact analysis, based on the totality of the circumstances.¹³² For example, what society will consider history and tradition in 2050 will be impacted by choices and actions in 2020,¹³³ and the decisions the Court makes in 2020 will impact litigants in 2050. A two-part test of history and tradition will

126. *Id.*

127. *Id.*

128. Sreedharan, *supra* note 8.

129. *See supra* Part II.

130. Finnegan, *supra* note 2, at 112.

131. *See supra* Part I.

132. *See infra* Part III Section C.

133. *See supra* Part I Section B.

provide uniformity and eliminate the Court’s vague use of the terms in a substantive due process analysis.

The first part of the two-part test looks at history. The test does not look plainly at past events in history. Rather, it also requires looking beyond the individual law being challenged, and considers the underlying components and factors establishing its history.¹³⁴ Because history cannot exist without human action, history develops and evolves as society continues to grow and carve out history.¹³⁵ The second part of the test considers the concepts and customs. These concepts and customs are determined by what is highly valued by our nation to deem it a tradition. Thus, tradition is driven by value and change.¹³⁶ What we value can develop and progress as our concepts and customs evolve.¹³⁷

A. The Overlapping Characteristics of “History” and “Tradition”

In cases discussing fundamental rights in a substantive due process analysis, courts analyze whether a right is “deeply rooted in our nation’s history and tradition.”¹³⁸ However, the Court has never provided a separate and distinct definition for each term.¹³⁹ Vaguely, courts established both “history” and “tradition” hold different definitions in substantive due process cases.¹⁴⁰ Because history is developed by humankind literally and recounts past events in life,¹⁴¹ it is not only a roadmap of past moments; it also creates a sense of identity for

134. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2618 (2015)

135. *See supra* Part I.

136. *See supra* Part II.

137. *Id.* Together, history objectively looks at past events and the underlying circumstances of the right at issue, while tradition analyzes what past events, customs, or concepts are valued important enough by the nation to be deemed a tradition or traditional.

138. *See Moore v. East Cleveland*, 431 U.S. 494 (1977); *Zablocki v. Redhail*, 434 U.S. 374 (1978); *Washington v. Glucksberg*, 521 U.S. 702 (1997); *Lawrence v. Texas*, 539 U.S. 558 (2003); *McDonald v. City of Chicago*, 561 U.S. 742 (2010); *United States v. Windsor*, 570 U.S. 744 (2013).

139. *Id.*

140. *Id.*

141. Sreedharan, *supra* note 8.

society.¹⁴² Similarly, tradition can provide a level of identity and status by way of passing down objects, beliefs, and concepts of value.¹⁴³

Tradition can be influenced by history.¹⁴⁴ However, history is not established nor shaped by tradition.¹⁴⁵ Rather, sometimes, split-second actions or decisions create history. Although the two terms both involve decisions and actions of the past, they each hold separate and distinct definitions.¹⁴⁶ For example, the history of a family tree is created by past actions or choices made, while family traditions rest on the value we place on certain events or customs to continue occurring in the future. There is value in analyzing both terms separately because of the very different meanings each term holds. Grouping the terms together exposes the vulnerability of missing the two terms' separate and essential definitions.

B. Judicial Interpretation of "History and Tradition" as a Whole

The Court has not defined history and tradition separately.¹⁴⁷ However, when analyzed as a whole, the Court has loosely distinguished history to represent the past and applied both a forward and backward look at customs and social norms to represent traditions.¹⁴⁸

This analysis was applied in *Obergefell v. Hodges*, where the full recognition of same-sex marriage and marital benefits were at issue.¹⁴⁹ While the Court held that the history of marriage has always been a union between a male and a female, the Court noted the "[t]he history of marriage is one of both continuity and change."¹⁵⁰ Thus, history

142. Standler, *supra* note 23.

143. Graburn, *supra* note 76, at 6-7.

144. *See supra* Part II.

145. *See supra* Part I.

146. *See supra* Part III.

147. *See* Moore v. East Cleveland, 431 U.S. 494 (1977); Zablocki v. Redhail, 434 U.S. 374 (1978); Washington v. Glucksberg, 521 U.S. 702 (1997); Lawrence v. Texas, 539 U.S. 558 (2003); McDonald v. City of Chicago, 561 U.S. 742 (2010); United States v. Windsor, 570 U.S. 744 (2013).

148. *Id.*

149. 135 S. Ct. 2584 (2015).

150. *Id.* at 2588.

continues to teach and develop traditions.¹⁵¹ The Court acknowledged different changes, such as the decline in arranged marriages and the abandonment of coverture, which helped create a transformation in the structure of marriage.¹⁵² Moreover, the tradition of male and female marriages was evolving.¹⁵³ As such, the notion of a tradition is a fluid concept, established by choice and value. The Court held the “[c]hanged understandings of marriage are characteristics of a nation where new dimensions of freedom become apparent to new generations.”¹⁵⁴ As our views and values continue to evolve and grow, so too do our traditions.

Although the history of our nation was evolving due to the developing traditions surrounding the union of marriage, the Court did not view this as a new established right.¹⁵⁵ Instead, through careful issue framing, the Court leaned on a line of precedents that emphasized individual autonomy, personal choice, and sexual equality.¹⁵⁶ The Court relied on these pressing rights to emphasize deeply rooted history marriage held in our nation.¹⁵⁷ The Court also relied on numerous cases that held “marriage is fundamental to individuals and a building block of society[.]”¹⁵⁸ Thus, the majority viewed a new class of persons being admitted to a long-established right.¹⁵⁹ The majority did not see a new history being established.¹⁶⁰

Additionally, in *Loving v. Virginia*, the Court held a state code punishing interracial marriage was unconstitutional based on the broad fundamental right to marriage.¹⁶¹ Because Virginia was one of sixteen states prohibiting interracial marriages,¹⁶² a deeply rooted history or

151. *See infra* Part III Section C.

152. *Id.*

153. *Id.*

154. *Id.*

155. Cott, *supra* note 67.

156. *Id.*; *see also* Lawrence v. Texas, 539 U.S. 558 (2003).

157. Lawrence, 539 U.S. at 558.

158. Cott, *supra* note 67.

159. *See* Lawrence, 539 U.S. at 558.

160. *Id.* at 559.

161. 388 U.S. 1, 2 (1967). This statute followed the Racial Integrity Act of 1924, prohibiting a “white person” from marrying any other race. *Id.* at 6.

162. *Id.*

tradition of interracial marriages did not exist. However, analogous to *McDonald v. City of Chicago*,¹⁶³ the Court broadly framed this issue as the right to marry, rather than the right to an interracial marriage.¹⁶⁴ Consequently, the question of interracial marriage being deeply rooted in our nation's history and tradition was avoided entirely by the Court's mindful issue framing.¹⁶⁵ The right to marry overpowered the question of interracial marriages.¹⁶⁶ With this tactic, the Court established a pertinent, new tradition of interracial marriages.¹⁶⁷ Thus, through careful issue framing, new rights deemed as historical or traditional within our nation can be created by the Court without an explicit requirement or two-part test provided. An official test will enable the Court to accurately decide substantive due process issues in a systematic process, instead of deciding based on personal preference without supporting analysis.

C. The Correct Application of History and Tradition

In *Obergefell v. Hodges*, it was uncontested that the history of marriage has always been a union between a male and a female.¹⁶⁸ This historical approach required a simple analysis considering past events regarding marriage in our nation.¹⁶⁹ However, applying the framework of the two-part history and tradition test, the Court will look beyond the challenged law, and consider the underlying circumstances driving the right at issue.¹⁷⁰ The nation's long history of promoting individual autonomy, personal choice, and sexual equality supports the underlying areas of the right at issue.¹⁷¹ Historically, marriage in our nation has

163. 561 U.S. 742 (2010); *see also supra* Part II Section A.

163. *Id.*

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

165. *Id.*

166. *Id.*

167. *Id.*

168. 135 S. Ct. 2584 (2015).

169. *Id.*

170. *See* *Lawrence v. Texas*, 539 U.S. 558 (2003) (considering the underlying factors of marriage, including the notions of autonomy, personal choice, and sexual equality that were driving the right at stake of same-sex marriage prohibitions).

171. *See* *Cott*, *supra* note 67.

also changed over time.¹⁷² This aspect of marriage was highlighted further when racial restrictions in marriage were deemed unconstitutional.¹⁷³ Beyond the challenged law of same-sex marriage, the underlying framework of marriage holds a well-established history of evolution and development.¹⁷⁴ Thus, same-sex marriage is not only supported by the history of marriage, it also ties to personal choice, and the notion of individual autonomy.¹⁷⁵ This right is also rooted in history because of the long past of marriage changing and evolving.¹⁷⁶ Thus, a deeply rooted history can be established in same-sex marriage based on past events supporting freedom of choice in marriage and the underlying concept of marriage continually changing and evolving in our nation.

With respect to tradition, the Court noted the history of marriage was one of "both continuity and change,"¹⁷⁷ highlighting an essential element of a tradition analysis: change. However, the Court did not engage in an analysis of tradition,¹⁷⁸ likely because a clear definition had not yet been established.¹⁷⁹ With marriage established as a concept of change and continuity, the Court could have done an analysis on tradition instead of avoiding it altogether. Change and value are vital to a tradition analysis, and the Court already highlighted how much personal autonomy and sexual equality were valued by our nation in the choice to marry.¹⁸⁰ These concepts were not new; they were passed down from a line of precedent.¹⁸¹ Our nation deeply values sexual equality and marriage, and these values are areas of continuity and change.¹⁸² Because these concepts of marriage and sexual equality were already deeply valued in our nation, the right to same-sex marriage

172. *Obergefell*, 135 S. Ct. at 2614 (discussing the elimination of arranged marriage and coverture).

173. *See Loving v. Virginia*, 388 U.S. 1, 12 (1967).

174. *See Obergefell*, 135 S. Ct. at 2614.

175. *Id.*

176. *Id.*

177. *Id.* at 2595.

178. *Id.* at 2602.

179. The Court avoided a history and tradition analysis by viewing this as an Equal Protection issue. *Id.*

180. *See id.* at 2584.

181. *Cott*, *supra* note 67; *see also Lawrence v. Texas*, 539 U.S. 558 (2003).

182. *Obergefell*, 135 S. Ct. at 2588.

meets the requirements of a tradition, based on our nation's values and choices. Moreover, these long-held values of sexual equality and personal autonomy established same-sex marital rights, which evolved into a finally recognized (but not new) tradition.¹⁸³ Due to this, same-sex marriage equality could also be deemed a value deeply rooted in our nation's tradition. The notion of marriage being a building block for society and fundamental to individuals further supported the position that this newly recognized tradition helped provide a sense of identity, which is fundamental to society.¹⁸⁴

Thus, based on our nation's value of sexual equality and personal choice, same-sex marriage was implicitly rooted in our nation's history. Same-sex marriage was also deeply rooted in our nation's tradition based on our nation's values regarding the continuity and change of marriage, personal autonomy, and sexual equality. Although this case was correctly decided, the Court did not engage in any meaningful analysis of history and tradition or apply any type of test.¹⁸⁵ This lack of uniformity or clear definitions of the two terms creates a sense of uncertainty for decisions of future cases. It also opens the Court to a significant amount of scrutiny and critique in terms of deciding future cases based on potential judicial preference rather than engaging a meaningful substantive due process analysis.

An analysis of history and tradition was almost applied in *McDonald v. City of Chicago*.¹⁸⁶ The Court acknowledged the rights to bear arms and of self-defense are deeply rooted in our nation's history, which were included in the Second Amendment.¹⁸⁷ Instead of looking directly at the challenged law, the Court correctly considered the underlying components that made up the right at issue.¹⁸⁸ Here, the underlying aspects of the right to bear arms were the right to protect one's home and the right to self-defense.¹⁸⁹ The Court properly found that the right to self-defense was deeply rooted in our nation's history

183. *See id.*

184. Cott, *supra* note 67.

185. *Obergefell*, 135 S. Ct. at 2602.

186. 561 U.S. 742 (2010).

187. *Id.* at 780.

188. *Id.*

189. *Id.* at 742.

based on the Second Amendment and the history of the underlying components making up the right.¹⁹⁰

However, the other half of the test was never addressed. Instead, the Court conflated history and tradition together without establishing how the right was deeply rooted in our nation’s tradition.¹⁹¹ Here, the right to bear arms was so highly valued that the newly-formed government found it to be a fundamental right.¹⁹² “[A]nd those who were fearful that the new Federal Government would infringe traditional rights such as the right to keep and bear arms insisted on the adoption of the Bill of Rights as a condition for ratification of the Constitution.”¹⁹³ This recognized tradition was established and preserved by our nation’s values.

While the Court correctly decided these cases, it did so without applying a full analysis of history and tradition.¹⁹⁴ Rather, the Court was able to shift its focus entirely to history and ignore the tradition component of the analysis. Or perhaps the Court avoided the analysis entirely by centering the right on a different constitutional area of issue.¹⁹⁵ Without a test separately addressing history and tradition, the ramifications could go beyond a mere lack of strength in substantive due process analyses. If the Court does not have such a test to follow, this could impact solutions to the Coronavirus pandemic (“COVID-19”).¹⁹⁶ Because potential solutions or attempts to avoid additional COVID-19 outbreaks might not be part of our nation’s history and tradition at first glance, the Court could easily deny a right on its face. However, with this two-part test, the Court would have structure in

190. *Id.* at 780.

191. *Id.* at 742.

192. *Id.* at 769.

193. *Id.*

194. *See id.* at 742; *see also Obergefell*, 135 S. Ct. at 2602.

195. *See Obergefell*, 135 S. Ct. 2584 (2015) (describing the Courts focus on Equal Protection as the heart of its argument, rather than engaging in a history and tradition analysis).

196. The Coronavirus is a respiratory illness, referred to as “COVID-19,” and created a worldwide pandemic in 2019. Lauren M. Sauer, M.S., *What Is Coronavirus?*, JOHN HOPKINS MED. (June 27, 2020), <https://www.hopkinsmedicine.org/health/conditions-and-diseases/coronavirus>. (explaining that the Coronavirus is a respiratory illness, referred to as “COVID-19,” that created a worldwide pandemic in 2019).

deciding these current and pressing issues with clarity. While a fundamental right might not be part of our nation's history and tradition on the exterior, a closer look following the proposed test's guidelines could in fact uncover underlying roots of history or values establishing a tradition in our nation. The fundamental rights of Americans could be at risk without clear definitions and uses of the terms in a substantive due process analysis. This two-part test will not only strengthen the Court's analysis and provide clarity in substantive due process issues, but it will also ensure protection of Americans' fundamental rights.

CONCLUSION

Substantive due process protects fundamental rights, and history and tradition are separate, distinct terms that play imperative roles in that analysis. There is value in keeping the terms removed from one another because of the different definitions each term brings to the analysis. A test requiring the separate evaluation of history and tradition will positively impact substantive due process decisions by creating uniformity and eliminating the vague use of the two terms. Additionally, the test will force the Court to analyze the terms separately. The current lack of clear guidance has left the Court with broad discretion to decide which rights are deeply rooted in our history and traditions and which are not, without supporting analysis. The outcome of the same-sex marriage ban weighing down on a grieving spouse could have been severely impacted if the Court vaguely lumped the two terms together without finding another constitutional issue in the case. Future cases might not be as fortunate without a history and tradition test applied.

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By implementing a two-part test that analyzes history and tradition separately, substantive due process cases will not be able to be decided by conveniently avoiding one term over the other, based on judicial preference. The benefit of a two-part test goes beyond clear guidance for the Court when interpreting constitutional law. The test ensures protection for fundamental rights that could otherwise been overlooked or misconstrued to not be deeply rooted in our nation's history and tradition. For this reason, a test separately focusing on history and tradition will ensure a balanced analysis to determine whether a right will be afforded substantive due process protection.

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