History, Tradition, the Supreme Court, and the First Amendment

by
ERWIN CHEMERINSKY*

Introduction

My advice to an attorney litigating a case before the current Supreme Court is to buy a copy of Blackstone's history of the common law or at least a good book on legal history. In virtually every area of constitutional law, the Supreme Court increasingly is relying on tradition as its guide in decisionmaking. Repeatedly, the Supreme Court has denied constitutional protection by holding that the claimed right was not historically protected. The Court is often explicit in stating that rights should be protected only if there has been a tradition of judicial safeguards, and its analysis frequently is accompanied by a lengthy exegesis on common-law practices.

I believe that this is a perverse and undesirable method of interpreting the Constitution. What has been done in the past cannot answer normatively what the law should be in the future. Above all, the Constitution exists to check democratic majorities and ensure protection of the core values concerning the structure of government, basic liberties, and equality. Interpreting the Constitution primarily based on history allows the meaning of an antimajoritarian document to depend on the historical practices followed by majoritarian institutions. As Chief Justice John Marshall declared long ago, the Constitution is meant to "endure for ages to come" and therefore "to be adapted to the various crises of human affairs."[1] Tying the Constitution to past practices inhibits the Constitution's growth and prevents essential constitutional evolution.

The theme of this Symposium is the "changing face of constitutional interpretation," with the First Amendment as the central example. In

* Legion Lex Professor of Law, University of Southern California Law Center. I want to thank Sandy Lepson and Dana Milmeister for their excellent research assistance. I am also grateful to the participants at this Symposium and to the participants at a faculty workshop at Cleveland-Marshall Law School for their helpful comments.

1. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 345 (1819).

this Essay, I want to make three major points about the way in which the complexion of constitutional decisionmaking—in the area of the First Amendment and elsewhere—is being altered. First, Part I discusses the increasing reliance on tradition in Supreme Court constitutional interpretation. Second, Part II considers why history has become so important in contemporary constitutional law. I suggest two related reasons. The desire for an external constraint on judicial decisionmaking has led to the use of history as a seemingly objective reference. Also, the conservative Court's desire to defer to the government and reject individual rights is served by historical analysis because litigants virtually always assert rights that were not protected at common law.

Finally, in Part III, I contend that the focus on history and tradition as the primary basis for decisionmaking is deeply flawed. Historical practice is certainly one factor to consider in deciding, for example, whether a right is fundamental. But tradition should not be the primary or even the most important factor. History cannot serve its desired goal of constraining judges. Further, it is normatively inappropriate to base the Constitution's contemporary meaning solely on the practices that others at different times found acceptable.

I. The Growth in the Use of History

The Supreme Court's reliance on history as a basis for decisions is certainly not new. Countless nineteenth century decisions relied on history as a justification, perhaps most notably—and most infamously—*Dred Scott v. Sanford*,[2] in which Chief Justice Taney wrote a historical "essay on the Negro's role in early America, designed to establish that the Constitution was a 'white man's document.' "[3]

Throughout the twentieth century, the Supreme Court has continued to cite history and tradition as a basis for its holdings.[4] For example, during the 1940s and 1950s, the Supreme Court stated that it would look to tradition in determining what rights were fundamental and, therefore, incorporated into the Fourteenth Amendment and applied to the states. Justice Frankfurter, for example, declared that due process protects "the notions of justice of English-speaking peoples."[5] In *Rochin v. Califor-*

2. 60 U.S. (19 How.) 393 (1857).

3. Alfred H. Kelly, *Clio and the Court: An Illicit Love Affair*, 1965 SUP. CT. REV. 119, 125 (citing *Dred Scott*, 60 U.S. (19 How.) at 403-04).

4. For a discussion of many examples of the use of history and tradition, see CHARLES A. MILLER, THE SUPREME COURT AND THE USES OF HISTORY (1969) (using examples such as reapportionment and the First Amendment decisions).

5. Adamson v. California, 332 U.S. 46, 67 (1947) (Frankfurter, J., concurring).

nia,[6] the Court explained that due process safeguards liberties that are "so rooted in the traditions and conscience of our people as to be ranked fundamental."[7]

In the area of the First Amendment, which is the focus of this Symposium, the Court frequently has invoked history as a basis for its decisions. For instance, in *Roth v. United States*,[8] the Court used history to support its conclusion that the First Amendment does not protect obscenity.[9] Although there were no laws criminalizing pornography at the time the Bill of Rights was ratified, the Court noted that thirteen of the fourteen states that by 1792 had ratified the Constitution had laws prohibiting libel, and that each of those states had laws criminalizing either blasphemy or profanity or both.[10] In *New York Times v. Sullivan*,[11] the Court described the history of seditious libel and noted that although the Sedition Act of 1798 "was never tested in this Court, the attack upon its validity has carried the day in the court of history."[12]

Although history long has been a part of Supreme Court opinions, in the past decade there appears to have been a much greater reliance on history and tradition as a method of constitutional interpretation. Quantitatively, I have had the impression that more decisions are based on conclusions about historical practices. My impression was confirmed by Professor Rebecca Brown, who found that in 1990 and 1991, 83 majority opinions invoked tradition, compared to only 216 uses of tradition in majority opinions in the decade between 1980 and 1990.[13] Perhaps more importantly, qualitatively, tradition is playing a different role in constitutional analysis: increasingly, the Court uses tradition as a limit on the Constitution's meaning. In other words, a substantial change in the law has been effected by the Court's repeated statements and rulings that the Constitution does not protect more than has been traditionally safeguarded. This has been evident in virtually every area of individual rights, including First Amendment jurisprudence.

Substantive due process is the most obvious area where the Court has relied on tradition as a limit on the Constitution's meaning. Recent

6. 342 U.S. 165 (1952).

7. *Id.* at 169 (citing Snyder v. Massachusetts, 291 U.S. 97, 105 (1934)).

8. 354 U.S. 476 (1957).

9. *Id.* at 484 ("[I]mplicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance.").

10. *Id.* at 482.

11. 376 U.S. 254 (1964).

12. *Id.* at 276.

13. Rebecca Brown, Tradition and Insight: A Theory of Cognitive Interpretation (unpublished manuscript, on file with author).

due process cases, involving everything from gay and lesbian rights to personal jurisdiction, have turned on the Court's historical analysis.[14] For example, in *Bowers v. Hardwick*,[15] the Supreme Court held that the Constitution does not protect a right to engage in private homosexual activity, justifying its conclusion largely on the traditional prohibition of such conduct. Justice White, writing for the majority, stated that the prohibition against sodomy has "ancient roots," having been forbidden in all thirteen of the original states and 32 of the 37 existing states at the time the Fourteenth Amendment was adopted.[16] He also noted that as recently as 1961, homosexual activity was outlawed in all fifty states.[17]

Justice White then concluded: "Against this background, to claim that a right to engage in such conduct is 'deeply rooted in this Nation's history and tradition' or 'implicit in the concept of ordered liberty' is, at best, facetious."[18] In a concurring opinion, Chief Justice Burger went even further, quoting Blackstone's description of sodomy as an "infamous crime against nature . . . the very mention of which is a disgrace to human nature."[19]

A few years later, in *Michael H. v. Gerald D.*,[20] the Court relied on tradition to deny constitutional protection to a biological father who wanted visitation rights with his child. *Michael H.* involved a challenge to a California law that created an irrebuttable presumption that a married woman's husband is the father of her child.[21] The biological father, whose paternity had been unequivocally established and who had lived with the child while functioning in a parental role, challenged the law.[22] The Court, in a plurality opinion by Justice Scalia, upheld the California law and ruled against the biological father.[23] Justice Scalia stated that the existence of a "liberty interest [must] be rooted in history and tradition."[24] He then defended the constitutionality of an irrebuttable presumption of legitimacy by citing as authority H. Nicholas's 1836 work,

14. For earlier examples of history as the basis for substantive due process analysis, see Poe v. Ullman, 367 U.S. 497 (1961) (Harlan, J., dissenting), and Moore v. City of East Cleveland, 431 U.S. 494 (1977).

15. 478 U.S. 186 (1986).

16. *Id.* at 192-93.

17. *Id.* at 193; *see also infra* text accompanying notes 93-95.

18. *Id.* at 194.

19. *Id.* at 197 (Burger, C.J., concurring) (emphasis omitted).

20. 491 U.S. 110 (1989).

21. *Id.* at 117.

22. *Id.* at 114.

23. *Id.* at 132.

24. *Id.* at 123.

Adulterine Bastardy,[25] which cited Bracton's 1659 book, and quoting from Blackstone's 1826 treatise,[26] and a family law treatise from 1882.[27]

In response to the dissent's argument that the majority was eschewing a long tradition of protecting parental rights, Justice Scalia stated that "[w]e refer to the most specific level at which a relevant tradition protecting, or denying protection to, the asserted right can be identified."[28] In other words, by Justice Scalia's view, a right can be protected under the Due Process Clause only if there is a very specific tradition of recognizing the right.

Justice Scalia repeated this position in another case under the Due Process Clause, *Burnham v. Superior Court*,[29] which concerned a state's ability to exercise personal jurisdiction based on service of process while a person was briefly in the state. Justice Scalia, again writing for the plurality, began his opinion by quoting the English Year Books from 1482 and Lord Coke in 1612.[30] The Court then proceeded to uphold transitory personal jurisdiction based on a lengthy examination of nineteenth century precedents. Justice Scalia expressly rejected the idea of basing due process analysis on "contemporary notions of due process," claiming instead that the focus should be on "traditional notions of fair play and substantial justice."[31]

The Court's reliance on history as a limit on the scope of individual rights is also found in cases arising under the constitutional provisions concerning criminal procedure. For instance, in *California v. Hodari D.*,[32] the Court held that the seizure of a person occurs under the Fourth Amendment only when there is either the application of physical force or a show of authority that effectively restrains the person.[33] In justifying this conclusion, the Court analyzed the common-law meaning of "seizure," including a discussion of nineteenth century common law.[34]

25. *Id.* at 124 (citing H. NICHOLAS, ADULTERINE BASTARDY 9-10 (1836) (citing BRACTON, DE LEGIBUSET CONSUETUDINIBUS ANGLIE (1659) (noting the presumption of legitimacy was a fundamental principle at common law)).

26. *Id.* (citing 1 BLACKSTONE'S COMMENTARIES 456 (Chitty ed. 1826)).

27. *Id.* at 124-25 (citing J. SCHOULER, LAW OF THE DOMESTIC RELATIONS 306 (3d ed. 1882)).

28. *Id.* at 127-28 n.6.

29. 495 U.S. 604 (1990).

30. *Id.* at 608 (citing The Marshalsea, 77 Eng. Rep. 1027, 1041 (K.B. 1612), and Bowser v. Collins, 145 Eng. Rep. 97 (Ex. Ch. 1482)).

31. *Id.* at 623.

32. 111 S. Ct. 1547 (1991).

33. *Id.* at 1552.

34. *Id.* at 1549-50.

In *Harmelin v. Michigan*,[35] the Supreme Court upheld a mandatory sentence of life imprisonment without the possibility of parole for possession of more than 650 grams of cocaine.[36] In rejecting the claim that the mandatory sentence constituted cruel and unusual punishment in violation of the Eighth Amendment, the Court began with a discussion of punishments imposed by the infamous Lord Chief Jeffreys of the King's Bench during the Stuart reign of James II.[37] After considering permissible punishments in seventeenth century England, the Court focused on acceptable sanctions in nineteenth century America. Largely on the basis of this historical common-law analysis, the Court upheld the harsh sentence.[38]

The reliance on history and tradition as a limit on the scope of rights is also evident in First Amendment decisions. For example, in deciding whether government property should be regarded as a "public forum" available for speech, the Court focuses heavily on traditional practice. In its recent decision in *International Society for Krishna Consciousness, Inc. v. Lee*,[39] the Supreme Court held that airports are not public forums. Chief Justice Rehnquist, writing for the majority, emphasized that airports are a relatively modern development and that therefore, by definition, there could not be a sufficient tradition of availability for speech activities.[40] The Chief Justice wrote: "Reflecting the general growth of the air travel industry, airport terminals have only recently achieved their contemporary size and character. But given the lateness with which the modern air terminal has made its appearance," it does not qualify as a public forum.[41]

The emphasis on history and tradition also is evident in cases under the religion clauses of the First Amendment. *Marsh v. Chambers*[42] is a particularly striking example of a decision based entirely on historical analysis. *Marsh* involved an Establishment Clause challenge to Nebraska's state-paid employment of a Presbyterian minister as the state legislature's chaplain for sixteen years.[43] The Supreme Court did not apply or analyze the issue under the traditional three-prong test of *Lemon*

35. 111 S. Ct. 2680 (1991).
36. *Id.* at 2702.
37. *Id.* at 2687-88.
38. *Id.* at 2681.
39. 112 S. Ct. 2701 (1992).
40. *Id.* at 2706.
41. *Id.* (citations omitted).
42. 463 U.S. 783 (1983).
43. *Id.* at 784-85.

v. Kurtzman.[44] Instead, the *Marsh* Court focused on history.[45] The Court reviewed the employment of legislative chaplains dating back to the first Congress and concluded: "From colonial times through the founding of the Republic and ever since, the practice of legislative prayer has coexisted with the principles of disestablishment and religious freedom."[46]

These examples—drawn from substantive due process, criminal procedure provisions such as the Fourth and Eighth Amendments, and the First Amendment—are simply representative illustrations of a much larger body of cases. Common to these cases is the Supreme Court's use of history and tradition to reject claims of individual rights. The Court openly declares that the scope of constitutional rights is limited to that which has been historically protected. The Court then reviews history and concludes that there is no tradition of judicial protection in the particular area. Over and over again, history is the determinative method of constitutional interpretation.

Some might respond to the description of these cases by saying that it assumes that the Court's analysis is historical simply because its opinions are written in historical terms. In other words, perhaps history is just the rhetoric the Court uses to express conclusions arrived at on other grounds.[47] This may well be true, but it does not undermine the importance of focusing on the use of history as part of the changing face of constitutional interpretation. First, at the very least, it is important to see the significance of history in contemporary Supreme Court rhetoric and analyze the cause of such a growth in reliance on this style of argument. Second, it is necessary to consider whether such arguments are persuasive. Is it a sufficient justification for the rejection of a constitutional right that it has not been traditionally safeguarded? Third, even if history and tradition are often used by the Court merely as convenient

44. 403 U.S. 602, 612-13 (1971). In *Lemon*, the Court ruled that statutes can withstand an Establishment Clause challenge only when three requirements are met: "First, the state must have a secular purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster 'an excessive entanglement with religion.'" *Id.* (citations omitted).

45. LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 14-15, at 1289 (2d ed. 1988). Tribe described the *Marsh* approach as "deeply problematic" because the Court not only "glossed over serious ambiguities in the historical record" but, "[m]ore importantly, the Court failed to explain how and when a history suggesting early acceptance of practice trumps the Framers' apparent adoption of a principle inconsistent with that practice." *Id.* at 1291.

46. 463 U.S. at 788.

47. For a discussion of the distinction between discovery and justification in judicial opinions, see RICHARD WASSERSTROM, THE JUDICIAL DECISION: TOWARD A THEORY OF LEGAL JUSTIFICATION (1961).

explanations for results reached on other grounds, the Court's endorsement of the methodology means that it will take on a life of its own and be used by Justices and lower courts in the future.[48]

Whether it is the actual method of decisionmaking or the method of explanation, there is a striking pattern found in countless cases dealing with individual rights. The Court carefully describes historical practices, virtually always with citations to Blackstone. The Court then rules in favor of the government, using the historical analysis as a basis for rejecting the constitutional claim.

II. Why the Emphasis on History?

Two interrelated factors account for the Court's obsession with history in defining the scope of constitutional rights. First, the Court relies on history to provide a constraint on judicial decisionmaking. Justices want very much to make it appear that their decisions are not based on their personal opinions, but instead are derived from an external source. The Court has expressly defended history on this ground—that it provides an objective basis for decisions as an alternative to impermissible value imposition by the Court.

For instance, in *Stanford v. Kentucky*,[49] the Court upheld the imposition of capital punishment on an individual for a crime committed at sixteen or seventeen years of age as permissible under the Eighth Amendment. While rejecting the proportionality analysis established by the precedent, the Court applied its own historical analysis, stating that to adopt the proportionality analysis would be improperly to follow "our personal preferences" and "to replace judges of the law with a committee of philosopher-kings."[50] Justice Scalia, writing for the plurality in *Michael H. v. Gerald D.*, similarly rejected an unmarried father's substantive due process claim and warned that recognizing such rights would make constitutional law " 'the predilections of those who happen at the time to be Members of this Court.' "[51] In *Bowers v. Hardwick*,[52] Justice White, writing for the majority, explained that invalidating a Georgia statute prohibiting homosexual activity would amount to "the imposition of the Justices' own choice of values on the States."[53]

48. For an example of a lower court case based on history and tradition, see Kreimer v. Bureau of Police, 958 F.2d 1242 (3d Cir. 1992).

49. 492 U.S. 361 (1989).

50. *Id.* at 379 (plurality opinion).

51. 491 U.S. 110, 121 (1989) (plurality opinion) (quoting Moore v. East Cleveland, 431 U.S. 494, 502 (1977)).

52. 478 U.S. 186 (1986).

53. *Id.* at 191.

History thus fulfills a powerful desire for constraint in judicial decisionmaking. The search for an objective basis for constitutional interpretation is in part a response to criticism of perceived judicial activism. The decisions of the *Lochner* era,[54] when the Court invalidated progressive legislation designated to protect workers and consumers, were criticized as impermissible judicial value imposition; critics said that the Court was wrongly functioning as a "super-legislature."[55] Thus, as Professor Tribe notes, "the search for ways to make judicial review legitimate, given the rejection of *Lochner* for reasons of institutional competence and authority, has preoccupied (one could say obsessed) constitutional scholarship for the last forty years."[56]

Moreover, critics of the Warren Court maintained that the decisions of that era were the product of the Justices' liberal preferences and not a result of an objective constitutional methodology.[57] Thus, the current Court—comprised almost exclusively of Justices nominated by Presidents who opposed the Warren Court's liberal rulings—is deeply animated by a desire for judicial constraints.

Besides, at least since Alexander Bickel called judicial review a "deviant institution in the American democracy,"[58] there has been a flood of scholarly literature seeking to reconcile judicial review with democratic principles.[59] Appeals to democracy have enormous currency, both with the public and among scholars. An "objective" method of constitutional interpretation would appear far more consistent with the country's commitment to democratic principles.

In the 1970s and especially the 1980s, the desire for an objective constitutional methodology led many conservative commentators and jurists to embrace originalism—the view that the Constitution's meaning is limited to that expressly stated in the text or clearly intended by the

54. The era takes its name, of course, from the landmark case of Lochner v. New York, 198 U.S. 45 (1905), in which the Court invalidated a maximum hour law for bakers.

55. *See, e.g.*, CHARLES G. HAINES, THE AMERICAN DOCTRINE OF JUDICIAL SUPREMACY 425 (1959) ("The character of these decisions and the numerous restrictions thereby placed on legislative assemblies have made it possible for the courts to invade the field of public policy.").

56. TRIBE, *supra* note 45, § 8-7, at 584.

57. *See, e.g.*, Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 13-19 (1971).

58. ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 16, 18 (2d ed. 1986).

59. *See, e.g.*, JOHN ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980); MICHAEL PERRY, THE CONSTITUTION, THE COURTS, AND HUMAN RIGHTS: AN INQUIRY INTO THE LEGITIMACY OF CONSTITUTIONAL POLICYMAKING BY THE JUDICIARY (1982).

framers.[60] Professor Michael McConnell explained that "[t]he appeal of originalism is that the moral principles so applied will be the foundational principles of the American republic . . . and not the political-moral principles of whomever happens to occupy the judicial office."[61]

A flood of scholarly criticism attacked originalism. In part, the critics of originalism focused on methodological problems of identifying the framers and determining their collective intent.[62] Also, critics argued that originalism self-destructs because the framers did not intend that their intent would be controlling; thus a commitment to follow the framers' intent requires that it be abandoned as a method of constitutional interpretation.[63]

Additionally, opponents of originalism described the inherent problem of determining the level of abstraction at which to state the framers' views.[64] If the framers' specific intent is controlling, then the Constitution cannot govern the modern world. The framers' specific views obviously did not contemplate modern issues such as the broadcast media, electronic eavesdropping, or the desire to protect women and other nonracial minorities from discrimination. Conversely, if fidelity is owed only to the framers' abstract views, then there is little constraint in judicial decisionmaking. At the highest level of abstraction, the framers sought to protect values such as liberty and equality; and virtually any decision can be reconciled with this abstract intent.

In addition to all of these problems, the Supreme Court would have had a hard time completely embracing originalism because it is such a dramatic departure from two hundred years of decisionmaking. Although the Court has invoked the framers' intent since the Court's inception, it has also protected countless rights that are neither stated in

60. *See, e.g.*, RAOUL BERGER, GOVERNMENT BY JUDICIARY (1977); Bork, *supra* note 57, at 1; William H. Rehnquist, *The Notion of a Living Constitution*, 54 TEX. L. REV. 973 (1976).

61. Michael W. McConnell, *The Role of Democratic Politics in Transforming Moral Convictions into Law*, 98 YALE L.J. 1501, 1525 (1989) (book review).

62. *See, e.g.*, Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204 (1980) (concluding that nonoriginalist adjudication better protects fundamental values and the integrity of democratic processes than does guessing how other people meant to govern a different society in the past); Jeffrey M. Shaman, *The Constitution, the Supreme Court, and Creativity*, 9 HASTINGS CONST. L.Q. 257 (1982) (asserting that often the Court's purported reliance upon the words of the Constitution or upon the framers' intent is more pretense than reality).

63. H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885 (1985); *see also* Larry Simon, *The Authority of the Framers of the Constitution: Can Originalist Interpretation Be Justified?*, 73 CAL. L. REV. 1482 (1985) (arguing that originalism cannot be normatively justified).

64. *See, e.g.*, Ronald Dworkin, *The Forum of Principle*, 56 N.Y.U. L. REV. 469, 488, 500 (1981).

the Constitution nor intended by the framers. Indeed, on many occasions, the Supreme Court has expressly rejected originalism as the basis for constitutional decisionmaking. In *United States v. Classic*,[65] for example, the Court declared:

> [In deciding] whether a provision of the Constitution applies to a new subject matter, it is of little significance that it is one with which the framers were not familiar. For in setting up an enduring framework of government they undertook to carry out for the indefinite future and in all the vicissitudes of the changing affairs of men, those fundamental purposes which the instrument itself discloses.[66]

Similarly, in *Home Building & Loan Ass'n v. Blaisdell*,[67] the Court denounced the view that the Constitution is limited to what the framers intended:

> It is no answer to say that this public need was not apprehended a century ago, or to insist that what the provision meant to the vision of that day it must mean to the vision of our time. If by the statement that what the Constitution meant at the time of its adoption it means today, it is intended to say that the great clauses of the Constitution must be confined to the interpretation which the framers, with the conditions and outlook of their time, would have placed upon them, the statement carries its own refutation. It was to guard against such a narrow conception that Chief Justice Marshall uttered the memorable warning—"We must never forget, that it is a Constitution we are expounding . . . ."[68]

In *Brown v. Board of Education*,[69] the Court observed: "In approaching this problem, we cannot turn the clock back to 1868 when the Amendment was adopted, or even to 1896 when *Plessy v. Ferguson* was written."[70] The Court's repeated rejection of originalism made it difficult for this theory to become the Court's controlling approach to constitutional interpretation.

Originalism, therefore, was so problematic for the Rehnquist Court that it turned to historical analysis, an analysis that had not been explicitly rejected by the Court in earlier decisions. After all, as explained earlier, since its inception, the Court has invoked history in explaining particular decisions. Conservatives on the Court, such as Justice Scalia, argued that to constrain decisionmaking the Court must follow traditions stated at the most specific level of abstraction:

65. 313 U.S. 299 (1941).

66. *Id.* at 316.

67. 290 U.S. 398 (1934).

68. *Id.* at 442-43 (quoting McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 407 (1819)).

69. 347 U.S. 483 (1954).

70. *Id.* at 492.

> Because . . . general traditions provide such imprecise guidance, they permit judges to dictate rather than discern society's views. . . . Although assuredly having the virtue (if it be that) of leaving judges free to decide as they think best when the unanticipated occurs, a rule of law that binds neither by text nor by any particular, identifiable tradition, is no rule of law at all.[71]

At the same time, emphasizing history and tradition serves the Court's ideological agenda. Since 1986, Presidents Reagan and Bush have made five appointments to the Supreme Court: William Rehnquist to the post of Chief Justice, and Justices Scalia, Kennedy, Souter, and Thomas. The Reagan and Bush Administrations openly used ideology as a key criterion and by all accounts succeeded in moving the Court dramatically to the right. The Rehnquist Court's deep conservatism is reflected in its persistent rejection of claims of individual liberties and civil rights and its almost complete deference to governmental institutions.[72]

Using history and tradition as the dominant interpretive methodology serves this ideological agenda. The absence of protection for the constitutional right explains the need for the litigation, but it also reflects the historical lack of protection. In other words, the more successful a litigant is in showing widespread, long-term violations of a right, the less likely the Court will protect it because of society's traditional posture concerning it. Invariably, the Court uses the absence of historical protection of a right as the basis for refusing current judicial protection. The result is that the government continues to prevail before the Court while individuals asserting constitutional rights usually do not prevail.[73]

III. What Is Wrong with the Emphasis on History?

My point is certainly not that history should be irrelevant in constitutional interpretation. The Court should consider text, historical background, traditional practices, precedent, and contemporary policy considerations whenever it is construing a constitutional provision. My objection is to restricting the Constitution's protections solely to those that traditionally have been safeguarded.

For many reasons, the Court's current obsession with history is undesirable and should be abandoned. At the very least, the Supreme Court's use of history is often biased; the Court will read history selectively to support a particular result, when a fairer reading would not provide such support. Additionally, the Court wrongly presents history

71. Michael H. v. Gerald D., 491 U.S. 110, 128 n.6 (1989).

72. I develop this point in Erwin Chemerinsky, *The Supreme Court, 1988 Term—Foreword: The Vanishing Constitution*, 103 HARV. L. REV. 43, 47-61 (1989).

73. *Id.*

as determinative and objective, when, in fact, it is indeterminate and subjective. Ultimately, history can reveal only what has been; it cannot tell normatively what should be in the future.

A. The Supreme Court's Use of History Is Often Selective and Biased

More than a quarter of a century ago, Alfred Kelly complained of what he called "law office" history practiced by the Supreme Court.[74] Historical practices often vary. The Court picks and chooses from its reading of history and selects those practices that confirm the conclusion that it wants to reach. At the very least, the Court can be criticized for its historical analysis. Moreover, the selective reading of history shows how little history actually constrains judicial decisionmaking.

Stump v. Sparkman[75] is a revealing example. The issue before the Supreme Court was whether a judge has absolute immunity, when sued pursuant to 42 U.S.C. § 1983, for imposing involuntary sterilization on a teenager without any semblance of due process.[76] The Supreme Court based its holding of absolute immunity largely on its view that judges historically had absolute immunity at common law in 1871, when section 1983 was adopted. Yet, a closer look at history reveals that judges had absolute immunity in only 13 of 37 states that existed in 1871.[77] The Court focused on the historical practice that supported its conclusion and simply ignored the fact that this was a minority practice at the relevant time.

The same questionable reading of history is often present in First Amendment cases. In *Heffron v. International Society for Krishna Consciousness, Inc.*,[78] the Supreme Court upheld a Minnesota State Fair rule that prohibited individuals from soliciting funds or distributing literature while walking through the fairgrounds. The Court concluded that state fairs should not be regarded as traditional public fora.[79] Yet, historical research shows that government fairs have long been a primary place for the gathering of people and the dissemination of information.[80] The

74. Kelly, *supra* note 3, at 122, 125-32.

75. 435 U.S. 349 (1978).

76. *Id.* at 359.

77. Note, *Liability of Judicial Officers Under Section 1983*, 79 YALE L.J. 322, 326-27 (1969); *see also* J. Randolph Block, Stump v. Sparkman *and the History of Judicial Immunity*, 1980 DUKE L.J. 879, 899.

78. 452 U.S. 640 (1981).

79. *Id.* at 657.

80. Brief for the American Civil Liberties Union, the Minnesota Civil Liberties Union, and the National Council of Churches, Amici Curiae at 18-19, *Heffron* (No. 80-795).

Court simply ignored this history in allowing the restriction of speech at state fairs.

Another example from the First Amendment concerns a relatively little-discussed provision: the clause that protects the right to petition Congress for a redress of grievances. In *McDonald v. Smith*,[81] the Supreme Court relied almost exclusively on historical analysis as the basis for rejecting constitutional protection. Yet, as Eric Schnapper has persuasively demonstrated, had the Court accurately reported and followed history rather than dramatically misusing it, its decision would have been different.[82]

McDonald involved letters written by Robert McDonald to President-elect Ronald Reagan, Edwin Meese, the Federal Bureau of Investigation, and four members of Congress opposing the nomination of David Smith for the position of United States Attorney for North Carolina.[83] Smith brought a defamation suit against McDonald for the content of the letters, which McDonald defended by claiming a privilege based on the petition clause.[84] The Supreme Court ruled in favor of Smith, concluding that there was no historical basis for McDonald's contention that the framers understood the right to petition to include a privilege against suits for defamation.[85] The Court's analysis was based almost exclusively on historical analysis and old precedents, especially *White v. Nicholls*,[86] from 1845.

Yet, had the focus truly been on history, the conclusion would have been quite different. At English common law, statements in petitions were deemed absolutely privileged.[87] Professor Schnapper's historical research shows that the petition clause owes its origin to the *Seven Bishops Case*[88] in 1688, which was the immediate cause of the petition clause in the 1689 Bill of Rights. The *Seven Bishops Case* involved prosecution of the Archbishop of Canterbury and six other bishops for seditious libel based on the content of a petition presented to King James. The response to that case led to the conclusion that there should be an absolute privilege for the content of petitions to the government. Yet, the Court

81. 472 U.S. 479 (1985).

82. Eric Schnapper, *"Libelous" Petitions for Redress of Grievances: Bad Historiography Makes Worse Law*, 74 IOWA L. REV. 303 (1989).

83. *McDonald*, 472 U.S. at 481.

84. *Id.* at 481-82.

85. *Id.* at 482-83.

86. 44 U.S. (3 How.) 266 (1845), *overruled by* Briscoe v. Lattoe, 460 U.S. 385 (1983).

87. *See* Lake v. King, 1 Wms. Saund. 131, 85 Eng. Rep. 137 (K.B. 1668-1669), *discussed in* Schnapper, *supra* note 82, at 329-43.

88. 12 Howell, St. Tr. 183 (1688), *discussed in* Schnapper, *supra* note 82, at 313-329.

never discussed this history in deciding *McDonald v. Smith*, even though its decision rested on historical analysis.

B. History Cannot Provide the Desired Constraint

As described in Part II, the focus on history is motivated, in part, by a desire for an objective basis for judicial decisionmaking to constrain the Justices and avoid results based on their personal preferences. Yet history cannot provide the sought-after constraint. Instead, history only can reveal choices that inevitably must be made based on the Justice's views and values. Historians long have taught that history is a matter of interpretation.[89] Thus, the Court's presentation of history as an objective basis for decisions really has subjective choices masquerading as objective constraints.

Many factors account for the need for subjective choices in drawing conclusions about historical practices. For example, there often were geographic variances in practices. In *Smith v. Wade*,[90] the Supreme Court considered whether individual government officers can be sued for punitive damages under section 1983. Both the majority and the dissent cited countless cases to support their views of historical practice. The reality was simply that in some jurisdictions punitive damages were allowed and in other jurisdictions they were not. As Justice O'Connor explained,

> [b]oth opinions engage in exhaustive, but ultimately unilluminating, exegesis of the common law of the availability of punitive damages in 1871. Although both the Court and Justice Rehnquist display admirable skills in legal research and analysis of great numbers of musty cases, the results do not significantly further the goal of the inquiry . . . .[91]

In Justice O'Connor's words, "[t]he battle of the string citations can have no winner."[92] In a country committed to decentralized decisionmaking as embodied in federalism, it is not surprising that countless practices varied across the country. The result is that drawing definitive conclusions about history requires choices, focusing on some practices and ignoring others.

Also, practices vary over time. Consider the prohibition of homosexual activity at issue in *Bowers v. Hardwick*.[93] If the focus is on the

89. *See* R. COLLINGWOOD, THE IDEA OF HISTORY 218-19 (1946); Georges Florovsky, *The Study of the Past*, *in* 2 IDEAS OF HISTORY 351, 352 (R. Nash ed., 1969) (stating that history is "always an interpretation") (emphasis omitted).

90. 461 U.S. 30 (1983).

91. *Id.* at 92 (O'Connor, J., dissenting).

92. *Id.* at 93 (O'Connor, J., dissenting).

93. 478 U.S. 186 (1986).

laws that existed before 1961, then tradition supports the lack of constitutional protection for private consensual homosexual activity.[94] But since 1961, almost half the states have repealed such laws.[95] If this is the focus of historical analysis, the Court came to exactly the wrong conclusion in denying constitutional protection.

The tradition of protecting speech and religion has changed profoundly over time. For example, there was relatively little judicial safeguarding of speech prior to World War I.[96] Indeed, one can count on the fingers of one hand the Supreme Court cases that protected free speech prior to the 1930's. If this is the focus of historical analysis, virtually every First Amendment claim is sure to lose.

Consider incitement prosecutions as a specific example. The tradition that, especially in times of war and crisis, the government is given broad latitude to prosecute subversive speech is exemplified in the Court's upholding convictions in cases like *Schenck v. United States*,[97] *Whitney v. California*,[98] and *Dennis v. United States*.[99] If the Court uses history and tradition in determining the scope of judicial protection for incitement, there will be little First Amendment protection, notwithstanding the current, more speech-protective test announced in 1969 in *Brandenburg v. Ohio*.[100]

Similarly, historical practice has varied enormously with regard to the types of government involvement in religion that are acceptable. State churches are as much a part of history as is a commitment to a separation of church and state. As Professor Tribe explains, some framers favored the Establishment Clause as a way of protecting state churches from federal encroachment, while others affirmatively desired a wall separating church and state.[101] Prayers in public schools were common in the first part of the twentieth century,[102] but have been banned

94. *See id.* at 193.

95. *See id.* at 193-94.

96. *See, e.g.*, David M. Rabban, *The Emergence of Modern First Amendment Doctrine*, 50 U. CHI. L. REV. 1205, 1213-15 (1983).

97. 249 U.S. 47 (1919) (upholding the conviction of a person for circulating leaflets that argued that conscription is unconstitutional involuntary servitude).

98. 274 U.S. 357 (1927), *overruled by* Brandenburg v. Ohio, 395 U.S. 444 (1969) (upholding the conviction of an individual under the California Criminal Syndicalism Act for attending a Communist Labor Party convention).

99. 341 U.S. 494 (1951) (upholding convictions of the leaders of the Communist Party for advocacy of Marxist-Leninist ideology).

100. 395 U.S. 444, 447 (1969).

101. TRIBE, supra note 45, § 14-3, at 1158-59.

102. Mark Fischer, *The Sacred and the Secular: An Examination of the "Wall of Separation" and Its Impact on Religious World View*, 54 U. PITT. L. REV. 325, 327 (1992).

for the last three decades.[103] Decisions based on history must choose which traditions to honor and which to discard.

Additionally, there often has been a great variance between the law as it is stated on the books and the law as it is enforced. Laws prohibiting homosexual activity may long have been on the books, but are rarely enforced.[104] Similarly, obscenity laws are virtually unused in many parts of the country.[105] Which tradition counts?

Finally, and perhaps most importantly, there is the need to choose the level of abstraction at which to state the tradition. As Judge Frank Easterbrook noted, "Traditions are constructs and may be described in many ways."[106] If the focus is on tradition at the most specific level of analysis, there will be relatively little judicial protection of rights. Alternatively, if one can abstractly define tradition, judicial value choices are inevitable. Given American history's diversity, a tradition can be found to support or condemn almost any practice. As Garry Wills remarked: "[R]unning men out of town on a rail is at least as much an American tradition as declaring unalienable rights."[107] As with original intent, the choice of how to describe the tradition requires a choice of the level of abstraction, and virtually any result can be justified as consistent with the American tradition of protecting liberty and advancing equality.

Consider a concrete example: whether sidewalks on postal properties should be considered a public forum, which was the issue in *United States v. Kokinda*.[108] Sidewalks long have been considered the paradigmatic public forum.[109] Therefore, if the issue of sidewalks is viewed generally, there is little doubt that the Court in *Kokinda* should have protected access to postal sidewalks for speech purposes. But the Court instead looked at the question much more narrowly as whether there is a right of access to the specific property involved and concluded that managers of postal properties could close to speech those sidewalks leading from parking lots to front entrances.[110]

103. *See, e.g.*, Engel v. Vitale, 370 U.S. 421 (1962).

104. Timothy W. Reinig, Comment, *Sin, Stigma & Society: A Critique of Morality and Values in Democratic Law and Policy*, 38 BUFF. L. REV. 859, 865-66 (1990).

105. Karl A. Groskaufmanis, Comment, *What Films We May Watch: Videotape Distribution and the First Amendment*, 136 U. PA. L. REV. 1263, 1268 (1988).

106. Frank H. Easterbrook, *Abstraction and Authority*, 59 U. CHI. L. REV. 349, 351 (1992); *see also* Bruce Ackerman, *Liberating Abstraction*, 59 U. CHI. L. REV. 317 (1992) (advocating a more abstract approach to constitutional decisionmaking).

107. GARRY WILLS, INVENTING AMERICA at xiii (1978).

108. 497 U.S. 720 (1990).

109. *See* Hague v. CIO, 307 U.S. 496, 515-16 (1939).

110. *Kokinda*, 497 U.S. at 727-28.

The ultimate point is that the Court had to make a choice. History cannot serve the Court's goal of constraining decisionmaking. At most, it provides an objective-sounding basis for the Justices' subjective choices.

C. The Court's Reliance on History Confuses Normative and Descriptive Issues

The Court commits a logical fallacy by using descriptive statements to answer normative questions. The core issue in almost all constitutional law cases before the Supreme Court is what the Constitution should be interpreted to mean. Examination of history only can tell what has been; it never can reveal what should be. Justice Blackmun expressed this in his dissent in *Bowers v. Hardwick*: "[T]he fact that the moral judgments expressed by statutes . . . may be ' "natural and familiar . . . ought not to conclude our judgment upon the question of whether statutes embodying them conflict with the Constitution of the United States." ' "[111] Simply put, what "is" never answers what "ought" to be.

Yet frequently the Supreme Court invokes tradition as if it is sufficient to answer the normative questions. For example, in the recent case *Lee v. Weisman*,[112] Justice Scalia's dissenting opinion was a scathing attack on the majority's decision to invalidate clergy-delivered prayers at public school graduations.[113] Scalia objected that the majority "lays waste a tradition that is as old as public-school graduation ceremonies themselves."[114] He simply assumed that the traditional existence of a practice is sufficient to make it normatively permissible under the Constitution.

While it might be possible to construct a normative theory to justify using history as the basis for decisionmaking, no such theory has yet been offered. The central justification for the Court's reliance on tradition has been the desire to constrain judicial decisionmaking. Yet, as explained above, history and tradition cannot serve this objective.

Moreover, if history normatively should be the basis for judicial decisionmaking, there is a need for a theory to explain when tradition should be followed and when it should be discarded. Obviously, not all traditions should be followed. Segregation was a part of the tradition of

111. 478 U.S. 186, 199 (1986) (Blackmun, J., dissenting) (quoting Roe v. Wade, 410 U.S. 113, 117 (1973) (quoting Lochner v. New York, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting))).

112. 112 S. Ct. 2649 (1992).

113. *Id.* at 2678-86 (Scalia, J., dissenting).

114. *Id.* at 2679 (Scalia, J., dissenting).

the South and its approval was part of the sad historical legacy of racism. Yet, the Court rightly abandoned this tradition. If there is a theoretical basis for believing that what has existed is normatively desirable, how can some traditions be deemed undesirable and abandoned?

Moreover, to give normative significance to historical practices is to assume that an unchallenged, unreviewed government action should be presumed constitutional, even though it might have been disapproved if challenged earlier. The fact that a practice was never reviewed or invalidated by a court does not mean that it is constitutional. Yet, that is the implicit assumption when the very existence of a practice is deemed to be conclusive evidence of its constitutionality.

Nor does the fact that an earlier Court approved a practice necessarily indicate that it should be regarded as constitutional today. *Bradwell v. Illinois*[115] approved the exclusion of women from the practice of law, yet surely the historical approval of such discrimination does not justify the practice today. Society is constantly changing and its moral standards are perpetually evolving. The Constitution must reflect these changes and this cannot be accomplished through a method of interpretation that is primarily based on Blackstone, English common law, and nineteenth century precedents.

Conclusion

Even though the Court always has discussed historical practices in justifying its conclusions, the emphasis on tradition as a limit on the scope of rights is new. The constant use of history to justify conservative results leads to the cynical conclusion that the country has a seventeenth century Court as it enters the twenty-first century. It is not enough to make one want to take all the history books out of the Supreme Court's library, but it makes one come close.

115. 83 U.S. 130 (1872).