Dumbo's Feather: An Examination and Critique of the Supreme Court's Use, Misuse, and Abuse of Tradition in Protecting Fundamental Rights

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DUMBO'S FEATHER: AN EXAMINATION AND CRITIQUE OF THE SUPREME COURT'S USE, MISUSE, AND ABUSE OF TRADITION IN PROTECTING FUNDAMENTAL RIGHTS

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ABSTRACT

The Justices of the Supreme Court have a great deal in common with the gifted pachyderm from the Walt Disney animated classic feature Dumbo. Like Dumbo's "magic" feather that purportedly enabled him to exercise his natural ability to fly, the tradition limitation on the Court's jurisprudence on unenumerated fundamental constitutional rights provides a more-apparent-than-real constraint on the Court's almost unlimited ability to nullify legislative and executive action. In all too many substantive due process cases, reason seems to follow a predetermined result, rather than the result in the case following from the applicable governing principles. In this Article, Professor Krotoszynski argues that substantive due process would benefit immeasurably if the Dumbo's feather of tradition could be reworked into something resembling an operational test that not only serves as a justification for results that a majority of the Justices might like to reach, but also as a brake against results that a majority of the Justices might like to reach—but that tradition, or consensus, does not yet sanction.
particular, Professor Krotoszynski argues that state counting could provide an important means of cabining judicial discretion in substantive due process cases, by making the application of the tradition test turn less on subjective considerations. A carefully theorized and operationalized effort at state counting might provide a useful way of identifying and protecting the traditions from which we have broken, which are no less deserving of constitutional protection than those traditions from which we have come. A commitment to maintain tradition as a living concept deserves no less.
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INTRODUCTION

In its Lawrence decision, the U.S. Supreme Court invalidated a Texas statute that prohibited same-sex intimacy by consenting adults in the privacy of the home.\(^1\) In doing so, it reversed its earlier decision in Bowers v. Hardwick\(^2\) because "[i]ts continuance as precedent demeans the lives of homosexual persons."\(^3\) The Lawrence majority opinion made an extended argument for the relevance of more recent social attitudes—and legal treatment—of sexual minorities as opposed to more long-standing, or even ancient, traditions.\(^4\)

The majority's concern with establishing a tradition-based argument for invalidating antisodomy laws should not be surprising. Indeed, the Supreme Court consistently has identified "tradition" as the touchstone for its substantive due process jurisprudence. In order for the Court to recognize an unenumerated, yet nevertheless fundamental, right, the Justices must consider whether the right is deeply rooted in Anglo-American tradition such that "neither liberty nor justice would exist" without it.\(^5\) The test sounds decidedly more concrete in theory than it actually seems to be in practice.\(^6\)

Indeed, the Supreme Court has been remarkably inconsistent, even sloppy, in its application of the tradition test. The Court has used various and sundry methodologies to ascertain tradition, including reviewing Anglo-American legal practices and the

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2. 478 U.S. 186 (1986), overruled by Lawrence, 539 U.S. at 578.
3. Lawrence, 539 U.S. at 575.
4. Id. at 571-77.
common law in the states, counting the number of states that maintain contemporary regulations regarding a particular behavior, relying solely on prior precedents, and considering how foreign nations approach the topic. Moreover, in some cases, the Supreme Court has found a fundamental right in the absence of a tradition of recognizing the right at issue. No single means of operationalizing the tradition test has enjoyed consistent application and observance.

If tradition is to provide a persuasive rationale for the recognition and protection of unenumerated rights, the Supreme Court must take greater care in enunciating and applying the test. In the absence of clearer rules and guidelines for applying the tradition test, it does little to counter the charge that substantive due process has more to do with the subjective moral preferences of the Justices than with any effort at principled constitutional adjudication.

In the Walt Disney classic animated feature *Dumbo*, the young elephant Dumbo had a remarkable gift: his supersized ears enabled him to fly. Being different from one's peers is difficult at any age, but it is particularly hard for the very young. Accordingly, Dumbo attempted to hide this talent and to disclaim his ability to use his ears to achieve flight.

In order to convince Dumbo to use his talents, some local birds gave Dumbo a “magic feather” that would “permit” him to fly. Armed with his magic feather, Dumbo achieved flight without fear or undue retrospection. By shifting responsibility for his ability to fly from his own innate gifts to the magic feather, Dumbo adroitly

7. See infra Part II.A-D.
9. See LEARNED HAND, THE BILL OF RIGHTS 70-73 (1958) (arguing that judges must approach the task of constitutional interpretation with great caution so as to avoid unduly subjective decision making, and particularly objecting to federal judges wielding a judicial “veto” that is wrapped “in a protective veil of adjectives such as ‘arbitrary,’ ‘artificial,’ ‘normal,’ ‘reasonable,’ ‘inherent,’ ‘fundamental,’ or ‘essential,’ whose office usually, though quite innocently, is to disguise what they are doing and impute to it a derivation far more impressive than their personal preferences, which are all that in fact lie behind the decision”).
avoided the cognitive dissonance associated with the realization that his otherness permitted him to achieve what no other pachyderm had done before him: natural flight unaided by any mechanical device.

Of course, Dumbo could fly because he had big ears—ears big enough to generate some serious lift forces. The magic feather had nothing to do with his ability to defy gravity. Dumbo needed the magic feather because he had difficulty accepting his gift and its full implications for his place in both the elephant and larger circus community.

At least arguably, the Justices of the Supreme Court have a great deal in common with Dumbo. Although possessed with an almost unlimited ability to nullify legislative and executive action, whether undertaken at the state or federal level, the Justices prefer to think of their power of judicial review as relatively mundane. Individually and collectively, the Justices attempt to find ways of denying the full scope of their powers—both to themselves and to the community at large. The Supreme Court's use of tradition in setting the metes and bounds of fundamental rights provides an excellent illustration of this phenomenon.

Like Dumbo's feather, the tradition limitation provides a more-apparent-than-real constraint; the ability to exercise judicial review to disallow statutes or executive actions really is not a function of whether a law or action transgresses "tradition." Tradition is a label given to support a result, but is not really the cause in fact of the result. To put the matter slightly differently, in all too many substantive due process cases, reason seems to follow a predetermined result, rather than the result in the case following from the applicable governing principles. It might be possible to develop and

10. See, e.g., City of Boerne v. Flores, 521 U.S. 507, 518-29 (1997) (holding that Congress cannot use its enforcement powers under section 5 of the Fourteenth Amendment to redefine the scope of substantive constitutional rights arising under section 1 and that the Supreme Court alone decides whether a statute constitutes appropriate enforcement action of a preexisting Fourteenth Amendment right); Marbury v. Madison, 5 U.S. (1 Cranch) 137, 176-78 (1803) (holding that federal courts have primacy in articulating the meaning of constitutional text and the concomitant power to invalidate acts that the Court finds inconsistent with the Constitution).

11. Justice Hugo L. Black's literalism provides an example of one of the less persuasive efforts at subterfuge in this regard. See infra notes 119-25 and accompanying text.
enforce a principled approach to limiting the scope of judicial review to protect fundamental rights. Even so, the Justices have shown little interest in either defining or following such limits. Instead, the application of the tradition test remains almost entirely an ad hoc affair.  

Moreover, the operational difficulties associated with the Supreme Court’s use of tradition in fundamental rights adjudication are legion. The Justices have never specified the level of generality at which one should attempt to ascertain “tradition.” For example, if a judge asks whether homosexual sodomy has enjoyed legal protection, the clear answer is, at least prior to the 1960s, “no.” Before 1961, most states maintained formal legal proscriptions against sodomy, whether of a same-sex or opposite-sex variety.  

If a judge reframes the question, however, and accesses “tradition” at a higher level of generality, the answer becomes less obvious. The number of prosecutions and convictions for sodomy involving consenting adults, in private, was minuscule. Most sodomy convictions involved a prosecutor invoking the sodomy statute because she could not establish the elements of common law

12. See Veronica C. Abreu, Note, The Malleable Use of History in Substantive Due Process Jurisprudence: How the “Deeply Rooted” Test Should Not Be a Barrier to Finding the Defense of Marriage Act Unconstitutional Under the Fifth Amendment’s Due Process Clause, 44 B.C. L. REV. 177, 204-05 (2002) (“The U.S. Supreme Court, although emphasizing tradition and history as the roots from which fundamental rights stem, has been quite willing to overlook, or to selectively read, such history and traditions.... The Court might also expose itself to criticism for selectively employing such methodologies [as variations on the tradition test] at its own judicial whim.”).  

13. Members of the Supreme Court fought a protracted, but inconclusive, battle over the subject in Michael H. v. Gerald D., 491 U.S. 110, 127 n.6 (1989) (plurality opinion) (“We refer to the most specific level at which a relevant tradition protecting, or denying protection to, the asserted right can be identified.”); cf. id. at 132 (O’Connor, J., concurring) (noting that Justice Scalia’s plurality opinion “sketches a mode of historical analysis to be used when identifying liberty interests ... that may be somewhat inconsistent with our past decisions” and refusing to “foreclose the unanticipated by the prior imposition of a single mode of historical analysis”); id. at 142 (Brennan, J., dissenting) (arguing that “the question is not what ‘level of generality’ should be used ... but whether the relationship under consideration is sufficiently substantial to qualify as a liberty interest under our prior cases”).  


15. See Lawrence, 539 U.S. at 581 (O’Connor, J., concurring in the judgment) (noting specifically that prosecutions under Texas’s sodomy law are rare).
rape.\textsuperscript{16} When states adopted sexual assault statutes, even these prosecutions largely disappeared from the scene.\textsuperscript{17} Thus, if "tradition" means not merely "law in books," but rather "law as applied in practice," different answers to the question of legal tradition regarding sodomy appear not merely possible, but likely.

A more relevant test might involve inquiry into the ubiquity of the practice itself, independent of the existence of formal proscriptions against the practice or the enforcement of such proscriptions. To what extent, over time, have Americans actually engaged in sodomy? Under this approach, the \textit{Kinsey Reports}\textsuperscript{18} would be more immediately relevant to substantive due process analysis than Blackstone or the Virginia Code of 1924. The Supreme Court has almost never tried to ascertain the actual behaviors of the public in applying the tradition test.

But the problem does not stop with an inquiry into the fact of meaningful enforcement of the sodomy statutes. One could generalize the inquiry more broadly still, and inquire into relevant social traditions regarding privacy in the home, or in the marital bedroom. As one makes the level at which the decision maker accesses tradition more general, the odds of finding a relevant tradition respecting the autonomy claim increase. This explains Justice Scalia's effort in \textit{Michael H.} to limit the tradition inquiry to "the most specific level at which a relevant tradition ... can be identified."\textsuperscript{19} Had he succeeded in securing a majority for this approach, most substantive due process claims would fail, because the existence of state laws regulating or prohibiting a practice would preclude a reviewing court from declaring a tradition of deference to individual autonomy.

The level of generality problem, however, represents only the tip of the iceberg. For a concept of such crucial importance in constitutional law, the Supreme Court has provided scant guidance to lower

\begin{itemize}
\item \textsuperscript{17} \textit{Id.} at 661-63.
\item \textsuperscript{18} ALFRED C. KINSEY ET AL., \textit{SEXUAL BEHAVIOR IN THE HUMAN FEMALE} (1953); ALFRED C. KINSEY ET AL., \textit{SEXUAL BEHAVIOR IN THE HUMAN MALE} (1948).
\end{itemize}
courts as to how to define relevant "tradition" in fundamental rights cases.

This Article proceeds as follows. Part I considers the origins of the tradition test. Part II then examines in some detail the Supreme Court's various methodologies for applying the tradition test. Part III argues that the use of a consensus among the states, or "state counting," as a means of defining "tradition" merits close attention as a possible principled means of limiting the potential scope of substantive due process. Part IV argues that using consensus among the states, to nationalize a particular human rights claim, could constitute a principled means of developing a renewed federalism in which human rights norms develop from the bottom up, rather than only from the top down. This Article concludes that, even if one rejects an approach that focuses on the existence of a strong contemporary consensus among the states as the best means of defining "tradition," the Supreme Court still must do more to operationalize the tradition test if the test is to serve as more than a mere Dumbo's Feather.

I. THE EMERGENCE OF TRADITION AS THE LYNCHPIN OF SUBSTANTIVE DUE PROCESS DOCTRINE

Since the late nineteenth century, the Supreme Court has endorsed the view that the concept of due process of law requires more than merely fair procedures.  20 No matter how much procedure government provides, some substantive ends are illegitimate and, accordingly, unconstitutional. In deciding how to set the scope of substantive due process rights, the Justices have used "tradition" to identify fundamental, yet unenumerated, human rights.  21


21. See Abreu, supra note 12, at 181 ("In defining what constitutes a fundamental liberty interest, the Court looks at whether the right in question is deeply rooted in our history, traditions, and evolving collective conscience, such that it is implicit in the Anglo-American concept of ordered liberty.").
This task was at the heart of the incorporation debates surrounding the application of specific provisions of the Bill of Rights against the state governments.\textsuperscript{22} The concept also played a major role in the articulation of the right of privacy and in the enforcement of equal protection doctrine.\textsuperscript{23} This Part considers the role of tradition in the incorporation process and the methodologies developed by the Supreme Court to define and ascertain “tradition.” One finds that, as with the contemporary Supreme Court, the Justices have never been wedded to any one test or methodology, favoring instead a vigorously eclectic approach.

A. Early Use of Tradition: The Incorporation Debates

Beginning with \textit{Twining v. New Jersey}\textsuperscript{24} and \textit{Palko v. Connecticut},\textsuperscript{25} and continuing through \textit{Duncan v. Louisiana},\textsuperscript{26} the Supreme Court has used tradition to determine whether particular guarantees in the Bill of Rights apply to the states. In \textit{Twining v. New Jersey}, a defendant in a state criminal case argued that the concept of “due process of law” encompassed a freedom from self-incrimination.\textsuperscript{27} The Supreme Court, after rejecting the notion that the Fifth

\textsuperscript{22} Cf. Barron v. Mayor of Baltimore, 32 U.S. (7 Pet.) 243, 247-51 (1833) (outlining “tradition” and original intent arguments against extending Bill of Rights restrictions to state governments, and holding that the Fifth Amendment Takings Clause should not limit state action, as opposed to the action of the federal government).

\textsuperscript{23} See Washington v. Glucksberg, 521 U.S. 702, 710-11, 721 (1997) (explaining the importance of tradition to substantive due process recognition and enforcement of unenumerated fundamental rights and applying the tradition test); Zablocki v. Redhail, 434 U.S. 374, 383-85, 388 (1978) (using history, tradition, and court precedents to analyze, on equal protection grounds, restriction on right to marry); Harper v. Va. State Bd. of Elections, 383 U.S. 663, 666-68 (1966) (applying the history and tradition test in the context of an equal protection challenge raising the unenumerated fundamental right to vote); \textit{id.} at 684-85 (Harlan, J., dissenting) (using history and tradition to reject equal protection challenge to imposition of poll taxes as prerequisite to voting in state and local elections); Griswold v. Connecticut, 381 U.S. 479, 500-02 (1965) (Harlan, J., concurring) (arguing that history and tradition should not only determine the incorporation of particular provisions of the Bill of Rights, but also should require judicial recognition of unenumerated, yet fundamental, rights not set forth in the Bill of Rights); \textit{see also infra} Part IV.B.3 (discussing the Supreme Court’s use of the tradition methodology in modern substantive due process cases).

\textsuperscript{24} 211 U.S. 78 (1908), \textit{overruled in part} by Malloy v. Hogan, 378 U.S. 1, 9 (1964).


\textsuperscript{26} 391 U.S. 145, 149-53 & n.14 (1968).

\textsuperscript{27} 211 U.S. at 90-91.
Amendment’s self-incrimination clause was binding on the states as a “privilege or immunity” of federal citizenship, considered whether the concept of due process of law secured that right.\textsuperscript{28} The Court acknowledged that “[t]his contention requires separate consideration, for it is possible that some of the personal rights safeguarded by the first eight Amendments against National action may also be safeguarded against state action, because a denial of them would be a denial of due process of law.”\textsuperscript{29}

To be clear, the Court stated that, if certain rights may be safeguarded against state action, “it is not because those rights are enumerated in the first eight Amendments, but because they are of such a nature that they are included in the conception of due process of law.”\textsuperscript{30} Justice Moody described the test as whether the right is “a fundamental principle of liberty and justice which inheres in the very idea of free government and is the inalienable right of a citizen.”\textsuperscript{31} The right must be “an immutable principle of justice which is the inalienable possession of every citizen of a free government.”\textsuperscript{32}

The majority concluded that the right against self-incrimination was not implicit in the concept of ordered liberty. First, the right was not well established in English law prior to the American Revolution.\textsuperscript{33} Second, looking to the debates surrounding the ratification of the Constitution, the majority observed that “it appears that four only of the thirteen original States insisted upon incorporating the privilege in the Constitution.”\textsuperscript{34} Moreover, almost all state constitutions that guaranteed the right did so expressly, rather than as an incident of a generic due process or law of the land clause, and only one state supreme court, the Iowa Supreme Court, had found the right against self-incrimination to be an aspect of a state constitution due process clause.\textsuperscript{35} Finally, looking to the precedents of the Supreme Court, the right against self-

\textsuperscript{28} Id. at 99.  
\textsuperscript{29} Id.  
\textsuperscript{30} Id.  
\textsuperscript{31} Id. at 106.  
\textsuperscript{32} Id. at 113.  
\textsuperscript{33} See id. at 102-08.  
\textsuperscript{34} Id. at 109.  
\textsuperscript{35} Id. at 110.
incrimination had not been identified as having particular importance.36

Thus, Justice Moody offered three possible means of establishing the fundamental nature of the right against self-incrimination: British law, late-eighteenth-century law in the states, or prior precedent of the Supreme Court.37 In applying the second category, moreover, he engaged in an analysis relying on counting states that insisted the federal government observe the privilege and states with constitutions that guarantee the privilege.38

Finally, Justice Moody abstracted the inquiry and considered the privilege's importance more broadly: "It has no place in the jurisprudence of civilized and free countries outside the domain of the common law, and it is nowhere observed among our own people in the search for truth outside the administration of the law."39 This represents an early recourse to comparative law—Justice Moody plainly was referencing the practice in civil law countries, which often used an investigative, or "inquisitorial," paradigm for the adjudication of criminal charges rather than an adversarial model.40

In Palko v. Connecticut, Justice Cardozo described the relevant test as whether the guarantee against double jeopardy contained in the Fifth Amendment constitutes a "principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental."41 Alternatively, substantive due process incorporates "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions."42 Due process protects those liberty interests "implicit in the concept of ordered liberty" that are "the very essence of a scheme of ordered liberty," such that "a fair and enlightened system of justice would be impossible without them."43

36. See id. at 110-13.
37. See id. at 102-13.
38. See id. at 109-10.
39. Id. at 113.
42. Id. at 328 (quoting Hebert v. Louisiana, 272 U.S. 312, 316 (1926)).
43. Id. at 325.
Most, but not all, provisions of the Bill of Rights have been incorporated against the states through a process of "selective incorporation."\(^{44}\) Although Justice Hugo Black argued for a comprehensive incorporation of the first eight provisions of the Bill of Rights,\(^{45}\) either through the privileges and immunities clause or through the Fourteenth Amendment as a whole, a majority of the Supreme Court never accepted this approach.\(^{46}\) Instead, the Justices examined each provision of the Bill of Rights, breaking compound amendments into discrete subparts.\(^{47}\)

Thus, some provisions of the Fifth Amendment have been incorporated against the states while others have not. For example, the Supreme Court has found that the guarantees against self-incrimination, double jeopardy, and uncompensated takings are sufficiently "implicit in the concept of ordered liberty"\(^{48}\) to be incorporated against the states through the Due Process Clause of the Fourteenth Amendment.\(^{49}\) The Grand Jury Clause,\(^{50}\) on the


\(^{45}\) See id. at 71-75 (Black, J., dissenting) (arguing for "total incorporation" of the Bill of Rights against the states, at least with respect to the First to Eighth Amendments, on the theory that the framers of the Fourteenth Amendment intended this result).

\(^{46}\) Cf. Duncan v. Louisiana, 391 U.S. 145, 148-50 (1968); id. at 171 (Black, J., concurring) (explaining that the Supreme Court has settled on a process of "selective incorporation" of the Bill of Rights under which the Justices consider whether to incorporate individual provisions, or clauses, of each amendment and, if the Supreme Court incorporates the provision against the states, it applies line for line, and jot for jot, in the same fashion against the states as it does against the federal government). But see id. at 172-77 (Harlan, J., dissenting) (arguing that the incorporation of specific provisions of the Bill of Rights against the states should not imply that the provisions will apply in exactly the same fashion against the states as they do against the federal government). For a discussion of the partial versus total incorporation approach to applying the Bill of Rights against the states, see Toni M. Massaro, Reviving Hugo Black? The Court's "Jot for Jot" Account of Substantive Due Process, 73 N.Y.U. L. REV. 1086 (1998).

\(^{47}\) See supra note 46.

\(^{48}\) Palko, 302 U.S. at 325.

\(^{49}\) Id. Never mind the textual embarrassment of incorporating provisions of the Fifth Amendment via a clause that itself appears in the Fifth Amendment. The Fifth Amendment contains an identical due process clause to that in the Fourteenth Amendment; if the Fourteenth Amendment's Due Process Clause carries the weight the Supreme Court says that it does, the Fifth Amendment (and indeed the Bill of Rights as a whole) was grossly overwritten. The Framers could simply have written a single amendment providing that no person "shall ... be deprived of life, liberty, or property without due process of law."

\(^{50}\) U.S Const. amend. V ("No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury ....").
other hand, does not safeguard a right “implicit in the concept of
ordered liberty.” Accordingly, states are free to initiate a criminal
proceeding through an information to a state court judge, rather
than an indictment secured from a grand jury.

Although tradition played an important part of the incorporation
process—indeed, it effectively defined the process—tradition has
played an important role in the articulation and enforcement of
other, unenumerated rights. Just as due process protects “fundamen-
tal” rights so deeply rooted in the nation’s history and tradition
that they appear in the Bill of Rights, it also grounds judicial
recognition of rights that have no written analogue in the Bill of
Rights. Enumeration in the Bill of Rights can be a sufficient
condition for judicial recognition and enforcement of a right against
the federal and state governments, but it is not a necessary condi-
tion for such protection.

In defining the scope of constitutionally protected “liberty,” the
Supreme Court has engaged in an analysis of whether tradition
supports the judicial recognition and enforcement of an un-
enumerated right. Judicial imposition of the “guilt beyond a
reasonable doubt” standard arguably provides the least controver-
sial example of this behavior. Nothing in the Constitution speaks
to the standard of proof a state must meet to secure a criminal
conviction in a jury trial. Nevertheless, because of its common,
indeed universal, use in the state criminal justice systems over a
long period of time, the Supreme Court has held that the guilt
beyond reasonable doubt standard is “implicit in the concept of
ordered liberty.”

51. *Palko*, 302 U.S. at 325; *see* Alexander v. Louisiana, 405 U.S. 625, 633 (1972) (“[T]he
Court has never held that federal concepts of a ‘grand jury,’ binding on the federal courts
under the Fifth Amendment, are obligatory for the states.”).
53. *See infra* Part I.B.
55. *See id.* at 360-63; *Palko*, 302 U.S. at 325.
B. Defining Tradition: A Brief Overview of Five General Approaches

The incorporation doctrine cases provide a good introduction to the question of how to define tradition because they utilize several of the methodologies that the Supreme Court uses today. Over time, the Supreme Court has deployed five basic methodologies to define "tradition." The Justices have consulted the state of the law at the time of the framing to ascertain the level of acceptance that a right had achieved at the time of the Constitution's or amendment's adoption.56 We could call this the "tradition ascertained through original intent" approach. This approach privileges natural rights theory of the late eighteenth and early nineteenth centuries. If a particular right seemed self-evident and inalienable, it stood a good chance of adoption in a state constitution as well as in the Bill of Rights.

A second methodology looks at whether the states have voluntarily recognized and protected a particular right over time.57 Thus, if a jury trial for a felony has been and remains the means through which states adjudicate criminal charges, a free-spirited state would face difficulty abandoning the practice, say, in favor of a civil law panel of judges. We might call this the "consistent observance" test: if a strong majority of states historically has respected a right, a strong presumption arises in favor of imposing the right against efforts at experimentation.58

A third methodology pays scant attention to original intent or consistent observance and instead favors contemporary observance. For example, in Loving v. Virginia, the Justices observed that "Virginia is now one of 16 States which prohibit and punish marriages on the basis of racial classifications."59 Moreover, they

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56. See supra notes 34-35 and accompanying text.
57. See infra notes 80-82, 107-13 and accompanying text.
58. See Ann Althouse, Vanguard States, Laggard States: Federalism and Constitutional Rights, 152 U. PA. L. REV. 1745, 1823-24 (2004) (suggesting that Congress, as opposed to the federal courts, might force law reform on "laggard" states and positing that "[i]f one believes there are vanguard states and laggard states, the key question becomes whether to trust Congress to choose the vanguard policy and impose it on the entire country—to take the risk Justice Brandeis wanted to avoid").
59. 388 U.S. 1, 6 (1967).
further observed that “[o]ver the past 15 years [1952-1967], 14 States have repealed laws outlawing interracial marriages.”

Even though most states had such laws on the books in 1868 and maintained those laws after ratification of the Fourteenth Amendment, Chief Justice Warren dismissed this historical evidence, explaining that “although these historical sources ‘cast some light’ they are not sufficient to resolve the problem.” Thus, the Fourteenth Amendment’s framers’ original intent and a consistent historical practice running against interracial marriage did not foreclose recognition of a constitutional right to interracial marriage as a fundamental right protected by the Due Process Clauses.

Chief Justice Warren’s substantive due process analysis consisted of less than a single page. He summarily announced that “[t]hese statutes also deprive the Lovings of liberty without due process of law” because “[t]he freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men.” This contention is probably true—but the Supreme Court offered no authority to support this proposition.

Although a good argument exists that “[t]o deny this fundamental freedom on so unsupportable a basis as the racial classifications embodied in these statutes ... is surely to deprive all the State’s citizens of liberty without due process of law,” it is not an argument based on tradition defined by the practice of state governments in 1868, or even earlier. To the extent that a tradition favoring interracial marriage existed, it related entirely to legal changes developed in the post-World War II period.

Subsequent cases have treated this analysis as creating a substantive due process right to marry, which a state cannot abridge absent a compelling state interest and narrow tailoring.

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60. Id. at 6 n.5.
61. See id. at 9 (“The State argues that statements in the Thirty-ninth Congress about the time of the passage of the Fourteenth Amendment indicate that the Framers did not intend the Amendment to make unconstitutional state miscegenation laws.”).
63. Id. at 12.
64. Id.
65. Eisenstadt v. Baird, 405 U.S. 438, 447 n.7 (1972) (citing Loving and noting that “[o]f course, if we were to conclude that the Massachusetts statute impinges upon fundamental freedoms under Griswold, the statutory classification would have to be not merely rationally related to a valid public purpose but necessary to the achievement of a compelling state
For example, in *Zablocki*, the majority simply invoked *Loving* and concluded that “[w]hen a [state] statutory classification significantly interferes with the exercise of a fundamental right, it cannot be upheld unless it is supported by sufficiently important state interests and is closely tailored to effectuate only those interests.”

Thus, a fourth approach to defining tradition uses the Supreme Court's own precedents as dispositive evidence of a particular socio-legal practice. Over time, the Supreme Court's own precedents, rather than some preexisting historical fact regarding meaningful autonomy to marry freely, came to serve as the principal theoretical justification for recognizing a substantive due process right to marry. By the time the Supreme Court decided *Moore v. City of East Cleveland* in 1977, only ten years after *Loving*, the justification for subjecting certain state laws and regulations that affect family life to heightened scrutiny rested almost exclusively on the Court's own precedents, rather than on an independent examination of tradition in the states.

Writing in *Moore*, Justice Powell noted that “[o]ur decisions establish that the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition.” Moreover, Justice Powell stated that “[a]ppropriate limits on substantive due process come not from drawing arbitrary lines but rather from careful 'respect for the teachings of history [and] solid recognition of the basic values that underlie our society.'” Earlier precedents, however, rather
than an abstract review of historical evidence, constituted the legal source of the right of privacy: "Decisions concerning child rearing, which *Yoder*, *Meyer*, *Pierce*, and other cases have recognized as entitled to constitutional protection, long have been shared with grandparents or other relatives who occupy the same household—indeed who may take on major responsibility for the rearing of the children."71

Over the past several terms, the Supreme Court also has started looking to the law of foreign jurisdictions to ascertain relevant legal traditions. Foreign law could constitute a fifth means of defining "tradition" for purposes of substantive due process. In *Atkins* v. *Virginia*, for example, the Justices looked to the substantive law of the European Union and to the "Christian, Jewish, Muslim, and Buddhist traditions" when considering whether execution of mentally retarded persons transgresses "evolving standards of decency" under the Eighth Amendment.72

Chief Justice Rehnquist objected that the majority had "place[d] weight on foreign laws, the views of professional and religious organizations, and opinion polls in reaching its conclusion."73 In a substantially less reserved dissent, Justice Scalia inveighed that "the Prize for the Court’s Most Feeble Effort to fabricate ‘national consensus’ must go to its appeal (deservedly relegated to a footnote) to the views of assorted professional and religious organizations, members of the so-called ‘world community,’ and respondents to opinion polls."74 In Justice Scalia’s view, "the practices of the ‘world community’" are "irrelevant" to interpreting the Eighth Amendment because these nations maintain "notions of justice [that] are (thankfully) not always those of our people."75 Quoting an earlier dissent, Scalia insisted that "[w]here there is not first a settled consensus among our own people, the views of other nations, however enlightened the Justices of this Court may think them to be, cannot be imposed upon Americans through the Constitution."76

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71. *Id.* at 505.
73. *Id.* at 322 (Rehnquist, C.J., dissenting).
74. *Id.* at 347 (Scalia, J., dissenting).
75. *Id.* at 347-48.
76. *Id.* at 348 (quoting Thompson v. Oklahoma, 487 U.S. 815, 868 n.4 (1988)).
Neither Chief Justice Rehnquist nor Justice Scalia defined precisely how they would approach the "consensus" or "tradition" inquiry. Justice Scalia, in another context, has made clear that a tradition exists in his view only when, searching for the most narrow relevant legal tradition, the practices of the states support the autonomy claim.77 Chief Justice Rehnquist, on the other hand, has endorsed a consistent history approach to defining tradition.78

II. EXPLORING THE SUPREME COURT’S METHODOLOGIES FOR APPLYING THE TRADITION TEST

Having briefly sketched the principal methodologies that the Supreme Court has deployed to define "tradition," this Part will explore each methodology in greater detail and offer a critique of the methodology as a means of limiting the scope of substantive due process. Ideally, the test, or tests, used to define the tradition inquiry would be capable of predictable application not only by the Supreme Court, but also by the lower federal and state courts. If the tradition inquiry is to serve as more than a mere Dumbo's feather, it must constrain discretion in a meaningful and predictable way. Some of the approaches advance these values more effectively than others.

A. Reviewing English and Early American Legal Sources: The "Tradition Ascertained Through Original Intent" Approach

Since the turn of the nineteenth century, the Supreme Court has looked to the original understanding of the Framers when faced with substantive due process challenges. In Twining v. New Jersey, for example, the Justices had to decide whether the Fifth Amendment's privilege against self-incrimination applied to the states.79

78. See Washington v. Glucksberg, 521 U.S. 702, 710 (1997) ("We begin, as we do in all due process cases, by examining our Nation's history, legal traditions, and practices.").
79. 211 U.S. 78, 91 (1908) ("The general question, therefore, is, whether such a law [allowing adverse inferences based on a defendant's refusal to testify at trial] violates the Fourteenth Amendment, either by abridging the privileges or immunities of citizens of the United States, or by depriving persons of their life, liberty or property without due process of law."), overruled in part by Malloy v. Hogan, 378 U.S. 1, 9 (1964).
The *Twining* Court noted that the privilege is “universal in American law” and that “[a]t the time of the formation of the Union the principle that no person could be compelled to be a witness against himself had become embodied in the common law and distinguished it from all other systems of jurisprudence.”\(^\text{80}\) Thus, the most immediately relevant consideration in deciding whether due process incorporates the privilege against self-incrimination in a criminal proceeding was the actual practice of the states at the time of the Constitution’s framing:

> What is due process of law may be ascertained by an examination of those settled usages and modes of proceedings existing in the common and statute law of England before the emigration of our ancestors, and shown not to have been unsuited to their civil and political condition by having been acted on by them after the settlement of this country.\(^\text{81}\)

This is a necessary, but not sufficient, condition. If English common law established the requirements of due process, “the procedure of the first half of the seventeenth century would be fastened upon the American jurisprudence like a straightjacket, only to be unloosed by constitutional amendment.”\(^\text{82}\)

The *Twining* Court articulated a more open-ended general test for substantive due process claims: “Is [the right in question] a fundamental principle of liberty and justice which inheres in the very idea of free government and is the inalienable right of a citizen of such a government?”\(^\text{83}\) Put differently, the right at issue must be “an immutable principle of justice.”\(^\text{84}\) After examining the history of the privilege against self-incrimination in the common law of the United Kingdom and in the states, the majority found the historical record mixed.\(^\text{85}\) Its “survey [did] not tend to show that it was then in this country the universal or even general belief that the privilege ranked among the fundamental and inalienable rights of

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\(^{80}\) *Id.*

\(^{81}\) *Id.* at 100.

\(^{82}\) *Id.* at 101.

\(^{83}\) *Id.* at 106.

\(^{84}\) *Id.* at 113.

\(^{85}\) See *id.* at 107-10.
mankind,” but rather “it affirmatively shows that the privilege was not conceived to be inherent in due process of law, but ... a right separate, independent and outside of due process.”\(^86\) Moreover, the Court stated that “[e]ven if the historical meaning of due process of law and the decisions of this court did not exclude the privilege from it, it would be going far to rate it as an immutable principle of justice which is the inalienable possession of every citizen of a free government.”\(^87\) Thus, the Twining test conducts an abstract inquiry into the relation of the asserted right to any system of justice observing the rule of law. If it is possible to imagine any system of justice that fails to recognize the right, the right’s historical pedigree will not result in its incorporation against the states via the Due Process Clause.\(^88\)

Almost thirty years later, in Palko v. Connecticut, the Supreme Court reaffirmed this approach. Writing for the majority, Justice Cardozo rejected the claim that the privilege against double jeopardy applied to the states as an incident of due process of law.\(^89\) He framed the test as whether the privilege against double jeopardy is “implicit in the concept of ordered liberty” and explained that only rights constituting “the very essence of a scheme of ordered liberty” inhere in the concept of due process of law.\(^90\) Such rights have such a legal, social, and cultural importance that “neither liberty nor justice would exist if they were sacrificed.”\(^91\) The Court

\(^{86}\) Id. at 110.
\(^{87}\) Id. at 113.
\(^{88}\) See, e.g., id. ("It has no place in the jurisprudence of civilized and free countries outside the domain of the common law, and it is nowhere observed among our own people in the search for truth outside the administration of the law.").
\(^{89}\) 302 U.S. 319, 328 (1937) ("Is that kind of double jeopardy to which the statute has subjected him a hardship so acute and shocking that our polity will not endure it? ... The answer surely must be 'no.'"), overruled by Benton v. Maryland, 395 U.S. 784, 794 (1969).
\(^{90}\) Id. at 325.
\(^{91}\) Id. at 326. Another 1930s case, Snyder v. Massachusetts, offered a slightly different test: a state "is free to regulate the procedure of its courts in accordance with its own conception of policy and fairness unless in so doing it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." 291 U.S. 97, 105 (1934), overruled in part by Malloy v. Hogan, 378 U.S. 1, 9 (1964). In Snyder, the defendant was not allowed to accompany the jury on a viewing of the crime scene; Snyder claimed that this violated his Fourteenth Amendment due process rights. See id. at 103-06. In rejecting this claim, Justice Cardozo considered trial practice involving jury trips to crime scenes from the colonial period to the present and concluded that no firmly established rule existed that the defendant has a right to accompany the jury on such visits: "Whether a
provided that "[t]his is true, for illustration, of freedom of thought, and speech."\(^{92}\)

In \textit{Palko}, the Supreme Court did not even bother to examine in detail the history of government appeals of jury verdicts resulting in either acquittal or conviction of a lesser included offense, as was the case in \textit{Palko}. Because the Connecticut statute permitting a prosecutor to appeal a conviction required a showing of error in the initial trial, it did not present the specter of the state appealing a verdict in a trial "free from error" with the state attempting "to try the accused over again."\(^{93}\) The statute at issue "asks no more than this, that the case against him shall go on until there shall be a trial free from the corrosion of substantial legal error."\(^{94}\) Justice Cardozo argued that "[t]his is not cruelty at all, nor even vexation in any immoderate degree."\(^{95}\) Palko probably saw the matter somewhat less charitably: having been acquitted of capital murder but convicted of murder in the second degree in his initial trial, his retrial resulted in conviction of first degree murder and a death sentence.\(^{96}\)

Ultimately, the Supreme Court overturned both \textit{Palko}\(^{97}\) and \textit{Twining}\(^{98}\) and incorporated the constitutional guarantees against self-incrimination and double jeopardy against the states as incidents of due process of law. This was not, however, a function of a change in the Justices' views regarding the mere theoretical possibility of a system of criminal justice that lacked a privilege against self-incrimination or a rule against double jeopardy. Instead, the Supreme Court intentionally shifted the standard away from an abstract inquiry into principles of justice and toward a
more focused inquiry looking at the legal experience of the United States.

Although Warren Court opinions prior to 1968 reflect this shift in focus, *Duncan v. Louisiana*\(^9\) made express what had been largely implicit: Anglo-American legal traditions, rather than concepts “implicit in the concept of ordered liberty,” would set the metes and bounds of substantive due process protection.\(^{100}\) *Duncan* presented the question of whether the Sixth Amendment right to a trial by jury applied against the states as an incident of substantive due process.\(^{101}\) In deciding the question, Justice White substantially refocused the relevant inquiry into tradition: “The question thus is whether given this [common law] system a particular procedure is fundamental—whether, that is, a procedure is necessary to an Anglo-American regime of ordered liberty.”\(^{102}\) Even though “[a] criminal process which was fair and equitable but used no juries is easy to imagine,” the fact remained that “no American State has undertaken to construct such a system.”\(^{103}\)

Accordingly, in analyzing whether a right to a jury trial is “implicit in the concept of ordered liberty,” Justice White, writing for the *Duncan* majority, looked to English practice at the time of the framing and before, to the practice of the colonies, and to the practice of the states in the early years of the republic.\(^{104}\) He found that “[t]he constitutions adopted by the original States guaranteed jury trial,” as did “the constitution of every State entering the Union thereafter in one form or another.”\(^{105}\) Justice White concluded that “[e]ven such skeletal history is impressive support for considering the right to jury trial in criminal cases to

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100. Id. at 149 n.14.
101. Id. at 145.
102. Id. at 149 n.14; see also Johnson v. Louisiana, 406 U.S. 356, 372 n.9 (1972) (Powell, J., concurring) (noting agreement with *Duncan*’s “departure from earlier decisions” based on “a change in focus in the Court’s approach to due process,” and describing a shift away from “focusing alone on the element in question and ascertaining whether a system of criminal justice might be imagined in which a fair trial could be afforded in the absence of that particular element” in favor of focusing “on the fundamentality of that element viewed in the context of the basic Anglo-American jurisprudential system common to the States”).
104. See id. at 151-56.
105. Id. at 153.
be fundamental to our system of justice, an importance frequently recognized in the opinions of this Court."

In re Winship\textsuperscript{107} arguably represents the "poster child" decision for using Anglo-American legal tradition to establish the scope of substantive due process. Winship presented the question of whether New York State could abandon the "guilt beyond a reasonable doubt" burden of proof in certain juvenile criminal proceedings.\textsuperscript{108} New York law permitted a bench trial at which the judge was required to find that the state proved the facts relevant to the crime by "a preponderance of the evidence."\textsuperscript{109} Justice Brennan began his analysis of the issue for the six-to-three majority by noting that "[t]he requirement that guilt of a criminal charge be established by proof beyond a reasonable doubt dates at least from our early years as a Nation."\textsuperscript{110} He explained that the standard had been in place no later than 1798 and that states and the federal government had observed it scrupulously ever since: "Although virtually unanimous adherence to the reasonable-doubt standard in common-law jurisdictions may not conclusively establish it as a requirement of due process, such adherence does 'reflect a profound judgment about the way in which law should be enforced and justice administered.'"\textsuperscript{111} Justice Brennan also noted that numerous Supreme Court opinions, released over an extended period of time, assumed that the reasonable doubt standard was a mandatory element of the American criminal justice system.\textsuperscript{112} Finally, the standard advanced the crucial objective of "reducing the risk of convictions resting on factual error."\textsuperscript{113}

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\textsuperscript{106} Id. at 153-54. For evidence of the continuing importance of the jury trial to the contemporary Supreme Court, see Blakely \textit{v.} Washington, 542 U.S. 296 (2004), which invalidated Washington State's sentencing guidelines because the guidelines permitted upward departures in sentencing based on facts not submitted to jury determination, and Apprendi \textit{v.} New Jersey, 530 U.S. 466 (2000), which held that any fact used to justify imposition of an enhanced sentence must be presented and proved to a jury.

\textsuperscript{107} 397 U.S. 358 (1970).

\textsuperscript{108} Id. at 358, 360.

\textsuperscript{109} See id. at 360-61 (quoting the N.Y. Family Court Act § 744(b), which required that "[a]ny determination" regarding a juvenile defendant's guilt "must be based on a preponderance of the evidence").

\textsuperscript{110} Id. at 361.

\textsuperscript{111} Id. at 361-62 (quoting Duncan, 391 U.S. at 155).

\textsuperscript{112} See id. at 362-63.

\textsuperscript{113} Id. at 363.
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Although the Constitution never mentions the reasonable doubt standard, because of its deep roots in American law, the majority found it to be required as an incident of the Due Process Clauses. As Justice Brennan wrote, "[l]est there remain any doubt about the constitutional stature of the reasonable-doubt standard, we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." Moreover, New York could not establish any offsetting benefits associated with abandoning the standard only in the context of juvenile offender cases.

*Winship* is particularly significant because no express constitutional provision requires observance of the reasonable doubt standard; the standard is a matter of longstanding tradition and state governments have almost uniformly observed it. The question faced by the Supreme Court was whether a longstanding practice had morphed into a freestanding, nontextual, constitutional right. The majority's methodology builds a very strong case for recognition of an unenumerated fundamental right: the rule has roots dating back to the colonial period; all the states have observed the rule since that time; the Supreme Court's own precedents, over a substantial period of time, assume the constitutional status of the rule; and New York has failed to proffer a compelling, or even substantial, reason for abandoning the rule in the context of juvenile criminal proceedings. Indeed, the proof beyond reasonable doubt standard arguably presents the strongest case possible for the recognition and protection of an unenumerated constitutional right.

Justice John Marshall Harlan, one of the principal proponents of the use of due process to protect rights enjoying the imprimatur of history, filed a concurring opinion. He engaged in a more thorough historical overview, but reached the same conclusion as Justice Brennan. Harlan explained the absence of a prior precedent establishing the constitutional status of the standard as a function of its longstanding nature and almost uniform observance:

114. *Id.* at 364.
115. *See id.* at 367-68.
It is only because of the nearly complete and long-standing acceptance of the reasonable-doubt standard by the States in criminal trials that the Court has not before today had to hold explicitly that due process, as an expression of fundamental procedural fairness, requires a more stringent standard for criminal trials than for ordinary civil litigation.\(^\text{117}\)

Chief Justice Burger, joined by Justice Stewart, agreed that the reasonable doubt standard applies to criminal cases, but rejected the proposition that a juvenile court was the same thing as a criminal court: "I cannot regard it as a manifestation of progress to transform juvenile courts into criminal courts, which is what we are well on the way to accomplishing."\(^\text{118}\)

Only Justice Hugo Black dissented generally from the proposition that in a criminal proceeding, the Due Process Clause of the Fourteenth Amendment requires the state to observe the reasonable doubt burden of proof: "The Constitution thus goes into some detail to spell out what kind of trial a defendant charged with crime should have, and I believe the Court has no power to add to or subtract from the procedures set forth by the Founders."\(^\text{119}\) Justice Black feared the dangers of an open-ended judicial power to invalidate state and federal laws under the rubric of due process.\(^\text{120}\) His answer was to incorporate, lock, stock, and barrel, the first eight amendments to the Constitution:

I realize that it is far easier to substitute individual judges’ ideas of “fairness” for the fairness prescribed by the Constitution, but I shall not at any time surrender my belief that that document itself should be our guide, not our own concept of what is fair, decent, and right.\(^\text{121}\)

\(^{117}\) *Winship*, 397 U.S. at 372 (Harlan, J., concurring).

\(^{118}\) *Id*. at 376 (Burger, C.J., dissenting).

\(^{119}\) *Id*. at 377 (Black, J., dissenting).

\(^{120}\) See, e.g., *Harper*, 383 U.S. at 675-76 (Black, J., dissenting) ("I have heretofore had many occasions to express my strong belief that there is no constitutional support whatever for this Court to use the Due Process Clause as though it provided a blank check to alter the meaning of the Constitution as written so as to add to it substantive constitutional changes which a majority of the Court at any given time believes are needed to meet present-day problems.").

\(^{121}\) *Winship*, 397 U.S. at 377 (Black, J., dissenting); see *Adamson v. California*, 332 U.S.
In Black’s view, the majority’s approach was nothing more than the “old ‘shock-the-conscience’ test” rather “than the words of the Constitution.” Black admitted that a strong, persuasive argument can be made for a standard of proof beyond a reasonable doubt in criminal cases—and the majority has made that argument well—but it is not for me as a judge to say for that reason that Congress or the States are without constitutional power to establish another standard that the Constitution does not otherwise forbid.

He also conceded that “proof beyond a reasonable doubt has long been required in federal criminal trials,” and that “this requirement is almost universally found in the governing laws of the States.” But neither of these facts should preclude “a State through its duly constituted legislative branch” from deciding “to apply a different standard.”

Winship is where the rubber hits the road for opponents of substantive due process: if the federal courts truly have no legitimate power to recognize and protect unenumerated, nontextual constitutional rights, then Winship was wrongly decided. Winship, however, has never been subjected to the kind of intense scrutiny and critical commentary that decisions like Roe and Griswold have suffered. This is probably so because the legal and cultural assumption of a reasonable doubt standard in criminal proceedings is so firmly grounded in our society that abolition of the standard, absent the most extraordinary justifications, seems unthinkable—not only to liberals or libertarians, but also to conservatives.

One might predict that such a deeply rooted right would face few, if any, real legislative threats. But this underestimates the power

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122. Winship, 397 U.S. at 377.
123. Id. at 385.
124. Id. at 385-86.
125. Id. at 386.
of the perceived emergency. In the aftermath of September 11, 2001, would it have been unthinkable that Congress might create terrorism crimes and lower the standard of proof necessary to obtain a conviction? In Winship, New York's legislature abandoned the standard for criminal proceedings involving juveniles—a circumstance that seems much less compelling than the threat of terrorist attacks in the United States. Justice Brennan, in Winship, defined the state's interest as obtaining a factually accurate verdict. One would hope that a future Justice would view efforts to suspend or repeal the reasonable doubt standard from the same vantage point. The fact remains, however, that Justice Black's approach is the only principled approach open to a person who opposes any and all recognition of unenumerated, nontextual constitutional rights. If you believe Winship was rightly decided, then you have conceded the legitimacy of substantive due process—one can argue about the scope of the doctrine, but not its very existence.

In sum, Winship presents a very strong case for using history and tradition to recognize unenumerated constitutional rights. The methodology has three points of focus: legal practice at the time of the framing, consistent observance over time, and recognition in prior precedents. This is probably the least open-ended test for the recognition of unenumerated fundamental rights; it is perhaps not surprising, then, that the Supreme Court has articulated and applied broader tests. Under the Winship test, if strictly applied, a number of substantive due process cases were wrongly decided—notably including Griswold, Eisenstadt, Moore, Roe, and, most recently, Lawrence. Moreover, the Bowers majority probably reached the right result, if substantive due process protects rights only when the claimed right existed at the time of the framing, has been consistently observed, and enjoys recognition of some sort in existing case law.

128. See Bruce Ackerman, Essay, The Emergency Constitution, 113 Yale L.J. 1029, 1029 (2004). See generally Vincent Blasi, The Pathological Perspective and the First Amendment, 85 Colum. L. Rev. 449 (1985) (suggesting courts should "equip the [F]irst [A]mendment to do maximum service in those historical periods when intolerance of unorthodox ideas is most prevalent and when governments are most able and most likely to stifle dissent systematically").
B. Counting States

A second discrete methodology places less emphasis on history and more emphasis on contemporary practices. In several landmark substantive due process cases, the Supreme Court has resorted to counting states to determine whether a consensus exists regarding the existence of an asserted fundamental right. State counting looks to the contemporary and past content of state statutory law and common law doctrine to ascertain if a tradition, defined by consensus among the states, exists. If no state permits conviction of a crime on less than a proof-beyond-reasonable-doubt standard, the count would be fifty-to-zero. In the Lawrence case, four states prohibited same-sex sodomy and nine additional states prohibited sodomy generally. On those facts, the state count was either forty-six to four, or thirty-seven to thirteen. Justice Kennedy engaged in state counting in Lawrence, just as Justice White did in Bowers. At no point, however, has the Supreme Court ever explained how state counting works or when recourse to state counting should be had.

Justice John Marshall Harlan, in his famous Poe v. Ullman dissent, emphasized the importance of "having regard to what history teaches are the traditions from which [this nation] developed as well as the traditions from which it broke." In his view, "[t]hat tradition is a living thing." Although this language possesses great rhetorical power, it does not go very far in

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131. See id.
132. Id.
133. Bowers v. Hardwick, 478 U.S. 186, 192-94 (1986) (noting that all states prohibited sodomy until 1961 and that twenty-four states continued to prohibit sodomy at the time of that decision), overruled by Lawrence, 539 U.S. at 578.
134. Professor Jacobi makes much of this fact, particularly in the context of the Eighth Amendment. See Jacobi, supra note 129, at 1092-93, 1099-105. She suggests that “[r]eliance on state legislation is the least principled and least logical alternative available to the Court.” Id. at 1104. For reasons that Part III develops, this conclusion is profoundly mistaken.
135. 367 U.S. 497, 542 (Harlan, J., dissenting).
136. Id.
operationalizing tradition as a test for the scope of substantive due process: precisely how should federal courts identify the "traditions from which [we] have developed" and those "from which [we] have broke[n]?\textsuperscript{137}

Recourse to original intent—to the practices of the colonies, of the states in the early Republic, and of the federal government itself—provides strong evidence of the traditions \textit{from which we have come}; at the same time, however, such evidence says absolutely \textit{nothing about the traditions from which we have broken}. For example, consistent observance of the reasonable doubt standard in criminal trials creates a powerful argument that a state cannot modify or repeal this standard absent a remarkably compelling justification. Similarly, the common law's consistent treatment of unwanted medical attention as a \textit{battery}\textsuperscript{138} also creates a strong basis for disallowing efforts to force unwanted medical treatment on individual citizens absent the most exigent circumstances.\textsuperscript{139}

In sum, careful historical analysis, coupled with careful case analysis, should yield concrete answers when a court inquires into the traditions from which we have come. That said, this methodology will tell us nothing about the traditions from which we have broken (for example, the doctrine of coverture)—or traditions that we are in the process of abandoning (for example, the proscription against marijuana use in compassionate use cases). It also would be odd to define tradition solely by reference to the social norms of 1789 or 1868. Indeed, were the Supreme Court to take this approach in a consistent fashion, the only way to keep the Constitution socially relevant would be to resort to much more frequent amending.\textsuperscript{140}

\textsuperscript{137} See id.

\textsuperscript{138} See Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261, 268-69 (1990) (recognizing a liberty interest in refusing unwanted medical treatment and noting that "[a]t common law, even the touching of one person by another without consent and without legal justification was a battery"). The Cruzan Court recognized that "[t]he principle that a competent person has a constitutionally protected liberty interest in refusing unwanted medical treatment may be inferred from our prior decisions." Id. at 278.

\textsuperscript{139} See Jacobson v. Massachusetts, 197 U.S. 11, 26-27 (1905) (holding that substantive due process does not prohibit a state from requiring all persons to be vaccinated against a communicable disease, notwithstanding a strong liberty interest in the control over one's own person).

\textsuperscript{140} See 1 BRUCE ACKERMAN, WE THE PEOPLE 303-04 (1991); see also Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 442-43 (1934) ("It is no answer to say that this public need
Counting states provides perhaps the most persuasive rationale for finding that "We the People" have broken from a preexisting tradition. When states move rapidly to repeal proscriptions against a particular behavior, do so over a relatively short period of time, and move in a single direction, in lock step, a strong argument exists that a new tradition has been established. For example, the collection of poll taxes has deep roots in Anglo-American law and most states, at one time, maintained poll taxes as a restriction on suffrage. Justice Harlan explained:

It is also arguable, indeed it was probably accepted as sound political theory by a large percentage of Americans through most of our history, that people with some property have a deeper stake in community affairs, and are consequently more responsible, more educated, more knowledgeable, more worthy of confidence, than those without means, and that the community and Nation would be better managed if the franchise were restricted to such citizens.

141. See generally Kirk H. Porter, A History of Suffrage in the United States 77-111 (Greenwood Press 1969) (1918) (chronicling gradual abandonment of property restrictions in favor of universal suffrage for white males twenty-one and older); Chilton Williamson, American Suffrage: From Property to Democracy, 1760-1860 (1960) (detailing ubiquity of property qualifications for voting at the time of the framing and chronicling gradual abandonment of such restrictions in favor of universal suffrage for white males twenty-one and older). Indeed, at the time of the framing of the U.S. Constitution, many states limited suffrage not only to free white men, but also maintained property qualifications on suffrage; thus, being free, white, and twenty-one years of age did not ensure voting rights, in states such as Virginia or South Carolina, in 1789. See Frederic D. Ogden, The Poll Tax in the South 2 (1958); Francis Newton Thorpe, A Constitutional History of the American People, 1776-1850, at 92-97 (F.B. Rothman 1994) (1898).

142. Harper v. Va. State Bd. of Elections, 383 U.S. 663, 685 (1966) (Harlan, J., dissenting); see also Breedlove v. Suttles, 302 U.S. 277, 281, 283-84 (1937) ("Levy by the poll has long been a familiar form of taxation, much used in some countries and to a considerable extent here, at first in the Colonies and later in the States.... The payment of poll taxes as a prerequisite to voting is a familiar and reasonable regulation long enforced in many States and for more than a century in Georgia.") , overruled by Harper, 383 U.S. at 669.
Thus, even if all white male citizens had the theoretical ability to vote, only those willing and able to pay the poll tax could actually cast a ballot.

Over time, restrictions on suffrage fell—first property qualifications,\textsuperscript{143} then racial restrictions,\textsuperscript{144} then gender limitations,\textsuperscript{145} and finally the abolition of the poll tax for federal elections.\textsuperscript{146} It is true, of course, that the Twenty-fourth Amendment did not purport to address poll taxes for state and local elections; its drafters could have written the amendment more broadly but chose not to do so. Accordingly, when \textit{Harper v. Virginia State Board of Elections}\textsuperscript{147} came before the Supreme Court, the trend line of change was reasonably clear: over time, restrictions on voting were abolished, both legislatively and via formal constitutional amendments. The question before the Supreme Court was whether the continued application of a poll tax, when measured against the consistent pattern of law reform in this area, could stand.\textsuperscript{148} In answering this question, the Court "conclude[d] that a State violates the Equal Protection Clause of the Fourteenth Amendment whenever it makes the affluence of the voter or payment of any fee an electoral standard."\textsuperscript{149}

Justice Douglas, writing for the majority, noted that "[o]nly a handful of States today condition the franchise on the payment of a poll tax."\textsuperscript{150} Specifically, only five states maintained a poll tax in 1966,\textsuperscript{151} and one of those states repealed the tax after the case had been argued before the Court.\textsuperscript{152} This forty-five to five verdict—a

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  \item \textsuperscript{143} See supra note 141.
  \item \textsuperscript{144} See U.S. \textsc{const. amend. xv, § 1} ("The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.").
  \item \textsuperscript{145} See id. amend. \textsc{xix} ("The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex.").
  \item \textsuperscript{146} See id. amend. xxiv, § 1 ("The right of citizens of the United States to vote in any primary or other election ... shall not be denied or abridged by the United States or any State by reason of failure to pay any poll tax or other tax.").
  \item \textsuperscript{147} 383 \textsc{u.s.} 663 (1966).
  \item \textsuperscript{148} Id. at 664.
  \item \textsuperscript{149} Id. at 666.
  \item \textsuperscript{150} Id. at 666 n.4.
  \item \textsuperscript{151} The states included Alabama, Mississippi, Texas, Vermont, and Virginia. See id.
  \item \textsuperscript{152} Id. ("Vermont has recently eliminated the requirement that poll taxes be paid in order to vote.").
\end{itemize}
forty-six to four verdict by the time of the Court's decision—against the maintenance of poll taxes for state and local elections created a strong presumption against their continued existence. The states maintaining poll taxes could not offer very weighty rationales for their continued existence. Moreover, in the Court's view "[v]oter qualifications have no relation to wealth nor to paying or not paying this or any other tax." This is because "[w]ealth, like race, creed, or color, is not germane to one's ability to participate intelligently in the electoral process."

Harper presents a very strong case for invalidation based on state counting: when forty-six states abandon a practice that burdens the exercise of a fundamental right like voting, and the general fabric of the law reflects a consistent pattern of ever-expanding enfranchisement, the Supreme Court's claim that it should force nonconsenting states to abandon their long-held position seems reasonably strong. Counting states, the four remaining outlier states—Alabama, Mississippi, Texas, and Virginia—were required to give up their preferred legal rule because an overwhelming national consensus had developed against it; the right to vote could not be committed to the "laboratories of experimentation" at least insofar as payment of a poll tax was concerned. To be sure, a broader version of the Twenty-fourth Amendment would have been a better means of establishing a conclusive presumption against poll taxes in all circumstances. Nevertheless, when forty-six states abandon a practice once universally observed, no state adopts or re-enacts the practice, contemporary two-thirds majorities of both houses of Congress and three-fourths of the state legislatures permanently abolish the practice in an important subset of cases.

153. See supra notes 150-52.
155. Id. at 668.
156. See Althouse, supra note 58, at 1746-47 (arguing that after a clear national consensus emerges, states failing to embrace that consensus "have begun to appear as laggards, no longer serving any beneficial purpose by maintaining their differences, but only depriving their citizens of the greater good").
157. See United States v. Lopez, 514 U.S. 549, 581 (1995) (Kennedy, J., concurring) ("[T]he States may perform their role as laboratories for experimentation to devise various solutions where the best solution is far from clear."); New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.").
(all elections for federal office), a compelling argument exists that poll taxes are a tradition with which we have broken as a people. Indeed, a thirty-eight to twelve division of the states should arguably be sufficient to establish that a consensus has developed against any particular practice or regulation. In *Harper*, the Supreme Court effectively declared the period of experimentation to be over. This is not to say that, going forward, a state might never reenact a poll tax, but to do so constitutionally the state would be required to satisfy a heightened level of judicial scrutiny.

Justices Black and Harlan dissented in *Harper*. Each opinion offered a different objection to state counting as a means of limiting state-imposed burdens on fundamental rights. Justice Black objected to the Supreme Court forcing nonconsenting states to abandon a practice not proscribed by any specific constitutional text. He stated, "[one] reason for my dissent from the Court's judgment and opinion is that it seems to be using the old 'natural-law-due-process formula' to justify striking down state laws as violations of the Equal Protection Clause." The state election reform movement was irrelevant to Justice Black:

Moreover, when a "political theory" embodied in our Constitution becomes outdated, it seems to me that a majority of the nine members of this Court are not only without constitutional power but are far less qualified to choose a new constitutional political theory than the people of this country proceeding in the manner provided by Article V.

Justice Harlan, on the other hand, believed that the long history of poll taxes made them presumptively valid, notwithstanding the

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159. In *Roper v. Simmons*, 543 U.S. 551 (2005), the Court did not insist on a thirty-eight to twelve division, but instead found a thirty-twenty split among the states probative evidence against the imposition of the death penalty on minors. *Id.* at 564-67.
160. See *Harper*, 383 U.S. at 670 (Black, J., dissenting) ("We have long been mindful that where fundamental rights and liberties are asserted under the Equal Protection Clause, classifications which might invade or restrain them must be closely scrutinized and carefully confined.").
161. *Id.* at 675 (quoting Adamson v. California, 332 U.S. 46, 90 (1946) (Black, J., dissenting), overruled in part by Malloy v. Hogan, 378 U.S. 1, 9 (1964)).
162. *Id.* at 678.
Twenty-fourth Amendment and the strong consensus against such taxes reflected by the decision of forty-six states voluntarily to abandon the practice for state and local elections. According to Harlan, it is only by fiat that it can be said, especially in the context of American history, that there can be no rational debate as to their desirability. Even though "[p]roperty and poll-tax qualifications, very simply, are not in accord with current egalitarian notions of how a modern democracy should be organized," Justice Harlan argued that:

> it is all wrong, in my view, for the Court to adopt the political doctrines popularly accepted at a particular moment of our history and to declare all others to be irrational and invidious, barring them from the range of choice by reasonably minded people acting through the political process.

Because of the long tradition of imposing property qualifications and poll taxes on would-be voters, Justice Harlan thought the obvious law reform trend irrelevant. This view, however, grossly diserved his own observation in *Poe v. Ullman* that the Supreme Court has an obligation to identify and respect not only the traditions from which we have come, but also those traditions with which we have broken. If, as Harlan wrote, "tradition is a living thing," there must be room for substantive due process doctrine to take account of the new as well as the old.

Justice Harlan's strict insistence on a preexisting tradition going back to the time of the framing would unduly limit the Supreme Court's updating function and, in all probability, force greater reliance on the amending process to maintain the vitality of the Constitution. His approach has the benefit of restricting the scope of substantive due process in a very concrete way, but this benefit constitutes a shortcoming too. Effectively, although

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163. *Id.* at 684-86 (Harlan, J., dissenting) ("Property qualifications and poll taxes have been a traditional part of our political structure.").
164. *Id.* at 684.
165. *Id.* at 686.
167. *Id.* at 542.
168. See *Rochin v. California*, 342 U.S. 165, 171-72 (1952) ("To believe that this judicial exercise of judgment could be avoided by freezing 'due process of law' at some fixed stage of
acknowledging that we break from traditions, he would require recognition of such breaks to come solely through the legislative process. Perhaps his intention in *Poe* was to establish a bifurcated system in which federal courts enforce the traditions from which we have come, but not those from which we have broken. This is not the most natural reading of his language, nor does it address why courts should have primacy in identifying and enforcing old traditions but not newer ones.

To be sure, the problem of false positives is more acute with respect to identifying traditions from which we have broken; but this would seem to relate to the appropriate level of scrutiny the court should bring to bear on state regulations burdening the interest, rather than to the question of whether judicial enforcement of the interest should exist at all. Thus, courts might apply a less demanding test on regulations affecting relatively new rights, while applying a more demanding standard for regulations burdening more deeply established rights.

C. Using Past Precedents as Proof of an Existing Tradition

In several major substantive due process cases, the Supreme Court has invoked its own past precedents as conclusive evidence of a tradition justifying heightened protection of an unenumerated right. For example, in *Troxel v. Granville*, a case involving a Washington State statute that permitted state trial courts to order third-party visitation rights over a custodial biological parent’s objection, the Court cited earlier precedents, going back to *Meyer v. Nebraska* and *Pierce v. Society of Sisters* to establish a tradition of parental control over raising children.

Writing for a plurality, Justice O’Connor explained that “[t]he liberty interest at issue in this case—the interest of parents in the care, custody, and control of their children—is perhaps the oldest of the fundamental liberty interests recognized by this Court.”

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169. 262 U.S. 390, 399, 401 (1923).
172. *Id.* at 65.
After invoking *Meyer* and *Pierce*, she observed that “[i]n subsequent cases also, we have recognized the fundamental right of parents to make decisions concerning the care, custody, and control of their children.” She concluded that “[i]n light of this extensive precedent, it cannot now be doubted that the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children.”

Justice Scalia was the only member of the Supreme Court who rejected the existence of an unenumerated fundamental right to oversee the upbringing of one's children:

> [W]hile I would think it entirely compatible with the commitment to representative democracy set forth in the founding documents to argue, in legislative chambers or in electoral campaigns, that the State has *no power* to interfere with parents' authority over the rearing of their children, I do not believe that the power which the Constitution confers upon me as a judge entitles me to deny legal effect to laws that (in my view) infringe upon what is (in my view) that unenumerated right.

For Justice Scalia, the Court's prior cases in this area represented a hodgepodge stemming from "an era rich in substantive due process holdings that have since been repudiated," undeserving of stare decisis effect.

For eight members of the Supreme Court, both in the majority and in dissent, however, the prior cases were a sufficient predicate for recognition and enforcement of an unenumerated right to auto-

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173. *Id.* at 65-66.
174. *Id.* The plurality went on to invalidate the Washington statute, finding that, “as applied to Granville and her family in this case, [the law] unconstitutionally infringes on that fundamental parental right.” *Id.* at 67.
175. *Id.* at 91-92 (Scalia, J., dissenting).
176. *Id.* at 92.
177. See *id.* (“The sheer diversity of today's opinions persuades me that the theory of unenumerated parental rights underlying these ... cases has small claim to *stare decisis* protection. A legal principle that can be thought to produce such diverse outcomes in the relatively simple case before us here is not a legal principle that has induced substantial reliance.”).
nomy in child rearing. Not one member of the Court thought it necessary to demonstrate the continuing existence of a community tradition of deference to parental decision making over matters associated with raising a child. Nor was *Troxel* unique in its use of prior precedent to establish the existence of a tradition, and thereby triggering enhanced constitutional protection for an unenumerated right. In fact, the Justices have used this technique in a number of landmark cases, including *Moore v. City of East Cleveland*, *Zablocki v. Redhail*, and *Griswold v. Connecticut*. Although

178. See *id.* at 77 (Souter, J., concurring in the judgment) (noting that “[w]e have long recognized that a parent’s interests in the nurture, upbringing, companionship, care, and custody of children are generally protected by the Due Process Clause of the Fourteenth Amendment” and citing cases); *id.* at 80 (Thomas, J., concurring in the judgment) (noting that the Supreme Court has recognized “a fundamental right of parents to direct the upbringing of their children” and resting this right on prior cases); *id.* at 87 (Stevens, J., dissenting) (“Our cases leave no doubt that parents have a fundamental liberty interest in caring for and guiding their children, and a corresponding privacy interest—absent exceptional circumstances—in doing so without the undue interference of strangers to them and to their child.”); *id.* at 95 (Kennedy, J., dissenting) (“As our case law has developed, the custodial parent has a constitutional right to determine, without undue interference by the State, how best to raise, nurture, and educate the child.”).

179. 431 U.S. 494, 503 (1977) (plurality opinion) (“Appropriate limits on substantive due process come not from drawing arbitrary lines but rather from careful ‘respect for the teachings of history [and] solid recognition of the basic values that underlie our society.’ Our decisions establish that the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation’s history and tradition.” (alteration in original) (citations omitted)); *see also id.* at 511 (Brennan, J., concurring) (citing and applying *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944), in support of constitutional protection for the “private realm of family life”).

180. 434 U.S. 374, 383 (1978) (“Since our past decisions make clear that the right to marry is of fundamental importance, and since the classification at issue here significantly interferes with the exercise of that right, we believe that ‘critical examination’ of the state interests advanced in support of the classification is required.” (citing Mass. Bd. of Ret. v. Murgia, 427 U.S. 307, 312, 314 (1976))); *id.* at 392-93 (Stewart, J., concurring in the judgment) (“The Constitution does not specifically mention freedom to marry, but it is settled that the ‘liberty’ protected by the Due Process Clause of the Fourteenth Amendment embraces more than those freedoms expressly enumerated in the Bill of Rights. And the decisions of this Court have made clear that freedom of personal choice in matters of marriage and family life is one of the liberties so protected.” (citations omitted)); cf. *id.* at 407 (Rehnquist, J., dissenting) (ignoring prior cases and declaring “that under the Equal Protection Clause the statute need pass only the ‘rational basis test,’ and that under the Due Process Clause it need only be shown that it bears a rational relation to a constitutionally permissible objective” (citation omitted)).

181. 381 U.S. 479, 482-85 (1965) (reviewing cases involving various constitutional provisions, including *Meyer* and *Pierce*, and holding that “[t]he foregoing cases suggest that specific guarantees in the Bill of Rights have penumbras, formed by emanations from those
Justice Blackmun made a tepid effort to establish the existence of an emerging tradition of permitting women to decide whether or not to terminate a pregnancy, his majority opinion in *Roe v. Wade* rested the right to terminate a pregnancy almost entirely on prior substantive due process cases, rather than on a contemporary tradition of deference with respect to abortion. In turn, the authors of the *Casey* joint opinion were content to follow Justice Blackmun's lead:

Our law affords constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education. Our cases recognize "the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." Our precedents "have respected the private realm of family life which the state cannot enter." These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and guarantees that help give them life and substance"; id. at 495 (Goldberg, J., concurring) (citing and applying *Meyer* and *Pierce* as establishing a zone of privacy associated with "the marital relation and the marital home"); id. at 502 (White, J., concurring in the judgment) ("It would be unduly repetitious, and belaboring the obvious, to expound on the impact of this statute on the liberty guaranteed by the Fourteenth Amendment against arbitrary or capricious denials or on the nature of this liberty. Suffice it to say that this is not the first time this Court has had occasion to articulate that the liberty entitled to protection under the Fourteenth Amendment includes the right 'to marry, establish a home, and bring up children,' and 'the liberty ... to direct the upbringing and education of children,' and that these are among 'the basic civil rights of man.'" (citations omitted)).

182. See *Roe v. Wade*, 410 U.S. 113, 139-40 (1973) ("By the end of the 1950's, a large majority of the jurisdictions banned abortion, however and whenever performed, unless done to save or preserve the life of the mother.... In the past several years, however, a trend toward liberalization of abortion statutes has resulted in adoption, by about one-third of the States, of less stringent laws, most of them patterned after the ALI Model Penal Code ....").

183. See *id.* at 152 ("The Constitution does not explicitly mention any right of privacy. In a line of decisions, however, going back perhaps as far as [1891], the Court has recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution." (citation omitted)); cf. *id.* at 174 (Rehnquist, J., dissenting) ("The fact that a majority of the States reflecting, after all, the majority sentiment in those States, have had restrictions on abortions for at least a century is a strong indication, it seems to me, that the asserted right to an abortion is not 'so rooted in the traditions and conscience of our people as to be ranked as fundamental.' Even today, when society's views on abortion are changing, the very existence of the debate is evidence that the 'right' to an abortion is not so universally accepted as the appellant would have us believe." (citation omitted)).
Thus, the joint opinion made little, if any, effort to ground a right to terminate a pregnancy in the nation’s history and traditions.

In dissent, Chief Justice Rehnquist engaged in a more systematic analysis of “tradition” and reported that “in 1868, at least 28 of the then-37 States and 8 Territories had statutes banning or limiting abortion” and “[b]y the turn of the century virtually every State had a law prohibiting or restricting abortion on its books.”Chief Justice Rehnquist acknowledged that “[b]y the middle of the [twentieth] century, a liberalization trend had set in,” but still argued that “[o]n this record, it can scarcely be said that any deeply rooted tradition of relatively unrestricted abortion in our history supported the classification of the right to abortion as ‘fundamental’ under the Due Process Clause of the Fourteenth Amendment.”

State supreme courts invalidating state laws prohibiting sodomy also have used the past precedent methodology: the state supreme courts cited turn-of-the-century cases from the 1890s and early 1900s recognizing privacy interests, generally in the context of criminal search and seizure, and then generalized the right of privacy to encompass consensual acts of sodomy, between adults, in private. The state supreme and appellate courts probably used
precedents, rather than tradition, to establish the contours of the right of privacy because this approach—generalizing a preexisting right of privacy to encompass sexual intimacy in the home—provided a stronger basis for invalidation than an appeal to tradition. Had Georgia, Kentucky, or Tennessee had an express right of privacy in its state constitution, this right might have provided an alternative basis for invalidating the antisodomy laws. The Montana Supreme Court, interpreting its state constitution, which contained a textual privacy clause, relied on this clause to invalidate Montana's antisodomy statute.189 The court stated that, "[s]ince the right to privacy is explicit in the Declaration of Rights in Montana's Constitution, it is a fundamental right and any legislation regulating the exercise of a fundamental right must be reviewed under a strict-scrutiny analysis."190

Using prior cases to establish a generalized legal right, then applying that right to a new set of facts, seems entirely consistent with the common law methodology of law reform.191 The weak point in the logic, of course, is the decision to extend the right to a

that unforced sexual behavior conducted in private between adults is covered by the principles espoused in Pavesich since such behavior between adults in private is recognized as a private matter" and concluding that Georgia's anti-sodomy statute, "insofar as it criminalizes the performance of private, unforced, non-commercial acts of sexual intimacy between persons legally able to consent" violates "the right of privacy"); Commonwealth v. Wasson, 842 S.W.2d 487, 494-98 (Ky. 1993) (citing and applying Commonwealth v. Campbell, 117 S.W. 383 (Ky. 1909), a case involving the possession and use of alcohol in one's home, which held that "[i]t is not within the competency of government to invade the privacy of a citizen's life and to regulate his conduct in matters in which he alone is concerned," to invalidate Kentucky's antisodomy law (emphasis omitted)); Campbell v. Sundquist, 926 S.W.2d 250, 259-61 & n.9 (Tenn. Ct. App. 1996) (applying Cravens v. State, 256 S.W. 431 (Tenn. 1923), and Davis v. Davis, 842 S.W.2d 588 (Tenn. 1992), to invalidate Tennessee's antisodomy law).

189. See Gryczan v. State, 942 P.2d 112, 121-22, 125-26 (Mont. 1997) ("Regardless of whether Bowers was correctly decided, we have long held that Montana's Constitution affords citizens broader protection of their right to privacy than does the federal constitution.... The right of consenting adults, regardless of gender, to engage in private, non-commercial sexual conduct strikes at the very core of Montana's constitutional right of individual privacy; and, absent an interest more compelling than a legislative distaste of what is perceived to be offensive and immoral sexual practices on the part of homosexuals, state regulation, much less criminalization, of this most intimate social relationship will not withstand constitutional scrutiny.").

190. Id. at 122.

behavior that, as a matter of longstanding practice and tradition, has been subject to government regulation, perhaps up to and including criminalization. The approach runs the risk of putting appellate courts ahead of the cultural curve;\textsuperscript{192} that is to say, generalizing rights and applying a Millsian harm principle to weigh the state's interest in regulating will produce decisions that are deeply counterintuitive to average citizens.\textsuperscript{193} Moreover, appellate courts invoking Mill cannot really mean what they appear to say: no government would really rest its ability to regulate on a demonstrated showing of affirmative harm to the community. Government regulates many behaviors that do not necessarily cause harm to others: for example, marrying a sibling, using

\textsuperscript{192} For an argument that reliance on past precedents actually facilitates the evolution of law in a fashion that helps to keep it consistent with cultural norms and expectations, see Theodore P. Seto, \textit{Originalism vs. Precedent: An Evolutionary Perspective}, 38 LOY. L.A. L. REV. 2001, 2025-26 (2005) (“The requirement that courts adhere to precedent serves to preserve the cultural learning embodied in that precedent. As we learn more about rule of law, equality, liberty, and other fundamental values, our case law comes to reflect that learning.”).

\textsuperscript{193} The Pennsylvania Supreme Court's decision invalidating that commonwealth's anti-sodomy law provides a good example. In \textit{Commonwealth v. Bonadio}, the Supreme Court of Pennsylvania held that “[t]he Voluntary Deviate Sexual Intercourse Statute has only one possible purpose: to regulate the private conduct of consenting adults.” 415 A.2d 47, 50 (Pa. 1980). This objective “exceeds the valid bounds of the police power while infringing the right to equal protection of the laws guaranteed by the Constitution of the United States and of this Commonwealth.” \textit{Id.} This was so because, “[w]ith respect to regulation of morals, the police power should properly be exercised to protect each individual’s right to be free from interference in defining and pursuing his own morality but not to enforce a majority morality on persons whose conduct does not harm others.” \textit{Id.} The court went on to cite John Stuart Mill's \textit{On Liberty} in support of this proposition and to hold that “[t]his philosophy, as applied to the issue of regulation of sexual morality presently before the Court, or employed to delimit the police power generally, properly circumscribes state power over the individual.” \textit{Id.} at 50-51. Of course, the justices could not really mean this; many laws, such as those involving drug use, rest on cultural and moral distinctions rather than on real differences in social harm (alcohol and tobacco are acceptable, but marijuana and peyote are not). The real reason for the court's holding was not a general right of citizens to be free from state regulation based on morality, but rather the court's assumption of a social consensus that same-sex intimacy is not socially harmful. See Robert C. Post, \textit{Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law}, 117 HARV. L. REV. 4, 8-10, 82-85, 105-07 (2003) (arguing that cultural norms and expectations play a major role in constitutional adjudication in general, and particularly in the area of substantive due process). John Stuart Mill had little, if anything, to do with contemporary attitudes toward sodomy in 1980 Pennsylvania. The opinion would be more persuasive if it provided the real reason for the outcome: social attitudes had shifted such that same-sex sodomy stood on a different constitutional footing than the use of heroin.
marijuana for recreational purposes, committing suicide or assisting someone else in doing so, and masturbating in a public park. Such decisions really reflect an assertion about a shift in cultural and public attitudes regarding the behavior at issue.\textsuperscript{194}

If this is correct, the decisions should be able to point to affirmative evidence that people no longer care about regulating the behavior at issue. For example, do police actively enforce the laws in question? Do prosecutors make serious efforts at enforcement when police arrest someone for the behavior in question? To what extent does social science data show that average citizens actually engage in the behavior in question? Arguments premised on social realities will have more persuasive force than arguments premised on the idea that government cannot act to advance moral notions.

D. Using Foreign Law To Inform Contemporary Tradition

In recent cases, including \textit{Roper}, \textit{Lawrence}, and \textit{Atkins}, the Supreme Court has cited foreign legal norms to support an interpretation of the domestic Constitution. This practice has not gone unnoticed.\textsuperscript{195} For example, during the recent confirmation hearings of Chief Justice John Roberts and Associate Justice Samuel Alito, both judges disavowed the practice in response to pointed questions from senators.\textsuperscript{196} Professor Roger P. Alford has mounted a sustained attack on the practice.\textsuperscript{197} Even so, several members of the Supreme Court appear committed to using foreign

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\item See supra note 193.
\item See Steven G. Calabresi & Stephanie Dotson Zimdahl, \textit{The Supreme Court and Foreign Sources of Law: Two Hundred Years of Practice and the Juvenile Death Penalty Decision}, 47 WM. & MARY L. REV. 743, 748-56 (2005) (observing that the Court's decisions in \textit{Lawrence} and \textit{Roper} represented an increased reliance on foreign sources of law); Donald E. Childress III, \textit{Note}, \textit{Using Comparative Constitutional Law To Resolve Domestic Federal Questions}, 53 DUKE L.J. 193, 193 (2003) ("In \textit{Lawrence v. Texas} ... the Supreme Court did what it had never done before in the main body of text in such a momentous case.").
\item See Adam Liptak & Adam Nagourney, \textit{Judge Alito the Witness Proves a Powerful Match for Senate Questioners}, N.Y. TIMES, Jan. 11, 2006, at A27 (reporting Chief Justice Roberts's opposition to citing foreign legal precedents, his view that "[l]ooking at foreign law for support ... is like looking out over a crowd and picking out your friends," and Justice Alito's opposition and view that "I don't think that foreign law is helpful in interpreting the Constitution").
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law to inform the scope of domestic constitutional rights—including unenumerated fundamental rights protected under the doctrine of substantive due process.\textsuperscript{198} In fact, reference to foreign law has been a consistent feature of U.S. Supreme Court opinions.\textsuperscript{199} Most commonly, the Justices' recourse to foreign law has involved consideration of the domestic law of the United Kingdom. For example, in deciding the scope of Congress's subpoena and contempt powers, the Supreme Court placed extensive reliance on the English practices at the time of the framing and going forward.\textsuperscript{200} In other words, the best way to understand the Framers' intent with respect to congressional investigatory powers was to consider the template on which the Framers modeled Congress: the British Parliament.

Other examples occurred through time. In Twining\textit{ v. New Jersey}, the Supreme Court invoked the civil law tradition to reject the claim that the privilege against self-incrimination was "an immutable principle of justice" and therefore implicit in the concept of due process.\textsuperscript{201} Thirty years later, when considering whether the privilege against double jeopardy applies against the state governments, the Supreme Court cited and applied\textit{Twining} and once again invoked continental legal systems: "Compulsory self-incrimination is part of the established procedure in the law of Continental Europe."\textsuperscript{202} Writing for the\textit{Palko} majority, Justice Cardozo posited that "[f]ew would be so narrow or provincial as to maintain that a fair and enlightened system of justice would be impossible" without

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\textsuperscript{198} See Lawrence\textit{ v. Texas}, 539 U.S. 558, 572-73, 576-77 (2003); Childress, supra note 195, at 193-94.  
\textsuperscript{199} See Calabresi & Zimdahl, supra note 195, at 756-877 (chronicling the extensively restrained use of foreign law in Supreme Court opinions before\textit{Lawrence}); cf. Kathleen M. Sullivan & Gerald Gunther,\textit{ Constitutional Law} 613 (15th ed. 2004) ("Justice Kennedy's opinion in\textit{Lawrence}, for the first time in a Supreme Court majority opinion, cited with approval an authority from European law."); Childress, supra note 195, at 194 (arguing that by citing "foreign legal precedent—specifically, a decision of the European Court of Human Rights, as well as examples of the legal culture of other nations—in support of the Court's ultimate holding," the Supreme Court did something monstrously novel).
\textsuperscript{201} 211 U.S. 78, 113 (1908) ("It has no place in the jurisprudence of civilized and free countries outside the domain of the common law, and it is nowhere observed among our own people in the search for truth outside the administration of the law.");\textit{overruled in part by Malloy v. Hogan}, 378 U.S. 1, 9 (1964).  
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jury trial and initiation of prosecution by grand jury indictment, and “[w]hat is true of jury trials and indictments is true also, as the cases show, of the immunity from compulsory self-incrimination.” Thus, early substantive due process cases made recourse, in majority opinions, to foreign law.

All that said, Lawrence does represent a break with past practice, but the practice at issue—defining fundamental rights with reference to Anglo-American legal practice and tradition—is of a considerably more recent vintage than Twining and Palko. In Duncan v. Louisiana, the Supreme Court undertook a comprehensive review of its efforts to “incorporate,” through the Fourteenth Amendment’s Due Process Clause, various and sundry provisions of the Bill of Rights. In describing the process of “selective incorporation,” Justice White noted that, as a general rule, the Supreme Court

can be seen as having asked, when inquiring into whether some particular procedural safeguard was required of a State, if a civilized system could be imagined that would not accord the particular protection.... The recent cases, on the other hand, have proceeded upon the valid assumption that state criminal processes are not imaginary and theoretical schemes but actual systems bearing virtually every characteristic of the common-law system that has been developing contemporaneously in England and in this country.

Justice White rejected the “implicit in the concept of ordered liberty” test in favor of a test that places greater relative weight on the actual practices of the United States: “The question thus is whether given this kind of system a particular procedure is fundamental—whether, that is, a procedure is necessary to an Anglo-American regime of ordered liberty.”

In the case at bar, Justice White readily conceded that “[a] criminal process which was fair and equitable but used no juries is easy to imagine.... Yet no American State has undertaken to construct such a system” and “[i]nstead, every American State,

203. Id. at 325 (citing Twining generally).
205. Id.
including [civil law] Louisiana, uses the jury extensively." It made little sense to ask if one could dispense with juries in a civil law system when no other aspect of a state's criminal justice program reflected or incorporated an inquisitorial approach to fact finding. Justice White emphasized that "the structure and style of the criminal process—the supporting framework and the subsidiary procedures—are of the sort that naturally complement jury trial, and have developed in connection with and in reliance upon jury trial."

This reformulation of the test represents a major conceptual shift away from the Twining/Palko approach. If the judicial inquiry encompasses any theoretical system of justice, recourse to comparative law materials seems useful, if not absolutely essential. On the other hand, if the "Anglo-American regime of ordered liberty" is all that counts, recourse to foreign law seems much less immediately helpful. After all, the best indicator of the domestic legal tradition would be the laws and practices of the states and the federal government.

To the extent comparative law might be helpful, the common law of Great Britain would be the most obvious source of inspiration and, even then, principally as a means of ascertaining the original understanding of the Framers. Contemporary law in Great Britain or in other commonwealth jurisdictions would perhaps have greater relevance than materials from civil law jurisdictions, but would stand in a decidedly inferior position vis-à-vis the law in the states. Lawrence could have potential significance by broadening the tradition inquiry to encompass contemporary legal practices in both common law and civil law jurisdictions. The obvious danger, of

206. Id. at 150 n.14.
207. See MERRYMAN, supra note 40, at 126-30.
209. See, e.g., Johnson v. Louisiana, 406 U.S. 356, 372 n.9 (1972) (Powell, J., concurring) (noting that the "departure from earlier decisions [refusing to incorporate provisions of the Bill of Rights] was, in large measure, a product of a change in focus in the Court's approach to due process," and observing that "[n]o longer are questions regarding the constitutionality of particular criminal procedures resolved by focusing alone on the element in question and ascertaining whether a system of criminal justice might be imagined in which a fair trial could be afforded in the absence of that particular element").
210. See id. ("Rather, the focus is, as it should be, on the fundamentality of that element viewed in the context of the basic Anglo-American jurisprudential system common to the States.").
course, is that the history of foreign law in substantive due process has been an almost exclusively negative one: after finding a plausible historical case for the recognition of a fundamental right, judicial recourse to foreign law led the Supreme Court to declare the history test to have arrived at a false positive.

Justice Scalia recently endorsed just this sort of use of foreign law, not to recognize new fundamental rights, but rather to reject them as mere accidents, or false positives:

While "[t]he practices of other nations, particularly other democracies, can be relevant to determining whether a practice uniform among our people is not merely a historical accident, but rather so 'implicit in the concept of ordered liberty' that it occupies a place not merely in our mores, but, text permitting, in our Constitution as well," they cannot serve to establish the first Eighth Amendment prerequisite, that the practice is accepted among our people. 2


In rejecting the claim that the right to be sentenced to death by a jury, rather than a judge, constituted a "watershed" rule of criminal procedure with full retroactive effect, Justice Scalia noted that "the mixed reception that the right to jury trial has been given in other countries, though irrelevant to the meaning and continued existence of that right under our Constitution, surely makes it implausible that judicial factfinding so 'seriously diminishes[ ]' accuracy as to produce an 'impermissibly large risk' of injustice." Schriro, 542 U.S. at 356 (alteration in original) (citation omitted). This use of comparative law to establish the nonfundamental nature of an asserted right harkens back to Palko and Twining, which engaged in the exact same gambit. The problem, of course, is that the use of comparative law must be a two-way street: if it is relevant to rejecting a constitutional claim, then it must also be relevant to recognizing a constitutional claim. Justice Scalia, however, seems intent on using foreign law only to reject, but not validate, recognition of human rights.
Justice Scalia warned that "where there is not first a settled consensus among our own people, the views of other nations, however enlightened the Justices of this Court may think them to be, cannot be imposed upon Americans through the Constitution."212 Thus, under Justice Scalia's approach, the views of other nations can be relevant in rejecting substantive due process claims, notwithstanding the apparent imprimatur of domestic tradition, but cannot be used to determine whether a practice is "cruel or unusual" for Eighth Amendment purposes. One has to wonder, however, why recourse to foreign law should be limited to rejecting claims that enjoy the backing of tradition, as mere "accidents," but not used to vindicate or establish such claims in the first place. In other words, foreign law should be relevant to defining tradition or it should not; if it is not relevant, then it should play no part in the Supreme Court's decisional process. On the other hand, if it is relevant, then the Supreme Court needs to provide guidance on precisely when it becomes relevant and how it should be established by the parties.213

E. Dispensing with the Tradition Requirement Entirely

Despite the Glucksberg Court's insistence that "[w]e begin, as we do in all due process cases, by examining our Nation's history, legal traditions, and practices,"214 the Supreme Court has not always

212. Thompson, 487 U.S. at 868 n.4 (Scalia, J., dissenting).


limited the recognition of unenumerated rights via the doctrine of substantive due process to interests deeply rooted in the U.S. legal or social tradition. Chief Justice Rehnquist specifically rejected the more open-ended approach embraced by Justice Souter, which was largely based on Justice John Marshall Harlan's dissenting opinion in *Poe v. Ullman*, explaining that “[t]his approach tends to rein in the subjective elements that are necessarily present in due process judicial review.” Similarly, in *County of Sacramento v. Lewis*, the Supreme Court explained that “*Glucksberg* presented a disagreement about the significance of historical examples of protected liberty in determining whether a given statute could be judged to contravene the Fourteenth Amendment.”

*Lewis* involved a fatal injury to a passenger on a motorcycle being pursued by a Sacramento County, California, sheriff's deputy. The district court dismissed a § 1983 suit brought against the deputy and the sheriff's department based on qualified immunity; the Ninth Circuit, however, reversed, holding that the officer and department could have acted with “deliberate indifference” and that this standard of care was known, or should have been known, to law enforcement personnel at the time of the events in question.

Justice Souter, writing for the majority, rejected the Ninth Circuit's deliberate indifference standard in favor of a rule requiring a plaintiff to show intentional harm: “Just as a purpose to cause harm is needed for Eighth Amendment liability in a [prison] riot case, so it ought to be needed for due process liability in a pursuit case.” Along the way, Justice Souter identified the “shocks the conscience” test as the standard for assessing the deputy's conduct. His application of the test, however, placed no real weight on history or tradition. Justice Souter explained that, in a case “challenging executive action on substantive due process

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215. *Id.* at 721 (citation omitted).
219. *Id.* at 836-37.
220. *Id.* at 837-38.
221. *See id.* at 852-54.
222. *Id.* at 854.
223. *Id.* at 846.
grounds, like this one, ... an issue antecedent to any question about the need for historical examples of enforcing a liberty interest of the sort claimed" must be addressed.\(^{224}\) In such cases, "the threshold question is whether the behavior of the governmental officer is so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience."\(^{225}\) Glucksberg, however, seemed to hold that only tradition-based claims were protected under substantive due process. Souter explained that "the difference of opinion in Glucksberg was about the need for historical examples of recognition of the claimed liberty protection at some appropriate level of specificity" and, by way of contrast, "[i]n an executive action case, no such issue can arise if the conduct does not reach the degree of the egregious."\(^{226}\) The Lewis Court appeared to say that the "shocks the-conscience" test serves as a prerequisite to reaching the tradition inquiry; if a plaintiff fails to show that the executive action at issue "shocks-the-conscience," a court need not reach questions related to tradition at all.\(^{227}\)

In a concurring opinion, Justice Kennedy, joined by Justice O'Connor, expressly disavowed any absolute obligation to limit the scope of substantive due process to rights that could pass a tradition test: "[I]t must be added that history and tradition are the starting point but not in all cases the ending point of the substantive due process inquiry."\(^{228}\) Moreover, "[i]t can no longer be controverted that due process has a substantive component as well" and, "[a]s a consequence, certain actions are prohibited no matter what procedures attend them."\(^{229}\) On the facts presented, however, "[i]t suffices to conclude that neither our legal traditions nor the present needs of law enforcement justify finding a due process violation when unintended injuries occur after the police pursue a suspect who disobeys their lawful order to stop."\(^{230}\)

Justice Scalia expressed strong reservations about the majority's use of the "shocks-the-conscience" test in lieu of a tradition based

\(^{224}\) Id. at 847 n.8.

\(^{225}\) Id. at 848 n.8.

\(^{226}\) Id.

\(^{227}\) See id.

\(^{228}\) Id. at 857 (Kennedy, J., concurring).

\(^{229}\) Id. at 856.

\(^{230}\) Id. at 858.
test: "The atavistic methodology that JUSTICE SOUTER announces for the Court is the very same methodology that the Court called atavistic when it was proffered by JUSTICE SOUTER in Glucksberg." Indeed, Justice Scalia believed that the Lewis formulation of the test was even broader than Justice Souter's concurring opinion in Glucksberg: "Whereas the latter said merely that substantive due process prevents 'arbitrary impositions' and 'purposeless restraints' (without any objective criterion as to what is arbitrary or purposeless), today's opinion resuscitates the ne plus ultra, the Napoleon Brandy, the Mahatma Gandhi, the Cellophane of subjectivity, th' ol' 'shocks-the-conscience' test." Justice Scalia continued, "[a]dhering to our decision in Glucksberg, rather than ask whether the police conduct here at issue shocks my unelected conscience, I would ask whether our Nation has traditionally protected the right respondents assert." Justice Scalia quickly concluded that no such tradition of protection against injury from an otherwise lawful attempt by a police officer to arrest a fleeing suspect existed: "I would reverse the judgment of the Ninth Circuit, not on the ground that petitioners have failed to shock my still, soft voice within, but on the ground that respondents offer no textual or historical support for their alleged due process right."

Justice Scalia's objection that Lewis failed to observe the Glucksberg methodology was spot on. Lewis was a reversion to a line of cases holding that any government action, if sufficiently arbitrary or irrational, violates the Due Process Clause. The line encompasses Lochner v. New York and extends to the modern

231. Id. at 861 (Scalia, J., concurring in the judgment).
232. Id. (with apologies to Cole Porter). Justice Scalia also rejected the majority's effort to distinguish Glucksberg as having involved legislative, rather than executive, action. "The proposition that 'shocks-the-conscience' is a test applicable only to executive action is original with today's opinion." Id. at 861 n.2. Justice Scalia correctly noted that this approach "has never been suggested in any of our cases" and that the "shocks-the-conscience" test "was recited in at least one opinion involving legislative action." Id. He concluded that he was "happy to accept whatever limitations the Court today is willing to impose upon the 'shocks-the-conscience' test, though it is a puzzlement why substantive due process protects some liberties against executive officers but not against legislatures." Id.
233. Id. at 862.
234. See id. at 862-64.
235. Id. at 865.
236. See 198 U.S. 45, 57, 62 (1905) ('There is no reasonable ground for interfering with the liberty of person or the right of free contract, by determining the hours of labor, in the
punitve damages cases.237 “As a general matter, the Court has always been reluctant to expand the concept of substantive due process because guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended,”238 and, in general, a plaintiff seeking recognition of a substantive due process claim must demonstrate that the claim enjoys some sort of historical imprimatur.239 But the Rehnquist Court consistently failed to observe the tradition limitation as establishing the outer limits of due process. The decisions considering the constitutional status of punitive damages perhaps provide the most glaring departure from the tradition rule.

Starting in Pacific Mutual Life Insurance Co. v. Haslip,240 decided in 1991, and continuing through 2003 with the decision in State Farm Mutual Automobile Insurance Co. v. Campbell,241 the Supreme Court has imposed limits on punitive damages in the absence of any “tradition” establishing such limits. As the Court noted in Pacific Mutual, punitive damages have long been a feature of the common law in the United States,242 and “[i]n view of this consistent history, we cannot say that the common-law method for assessing punitive damages [by jury with appellate court review] is so inherently unfair as to deny due process and be per se unconstitutional.”243 In theory, this should have been the end of the matter. Indeed, Justice Scalia, in a concurring opinion, said as much:244 “Since jury-assessed punitive damages are a part of our living

occupation of a baker.... Adding to all these requirements, a prohibition to enter into any contract of labor in a bakery for more than a certain number of hours a week, is, in our judgment, so wholly beside the matter of a proper, reasonable, and fair provision, as to run counter to that liberty of person and of free contract provided for in the Federal Constitution.”.

237. See infra notes 240-80, 292-304 and accompanying text.
239. See, e.g., id. at 126 (“Neither the text nor the history of the Due Process Clause supports petitioner’s claim that the governmental employer’s duty to provide its employees with a safe working environment is a substantive component of the Due Process Clause.”).
242. See Haslip, 499 U.S. at 15.
243. Id. at 17.
244. See id. at 24-28, 39-40 (Scalia, J., concurring in the judgment).
tradition that dates back prior to 1868, I would end the suspense and categorically affirm their validity.\textsuperscript{245}

Notwithstanding history's strong imprimatur, this was "not the end of the matter."\textsuperscript{246} Justice Blackmun explained that "[i]t would be just as inappropriate to say that, because punitive damages have been recognized for so long, their imposition is never unconstitutional."\textsuperscript{247} The majority declared that "our task today is to determine whether the Due Process Clause renders the punitive damages award in this case constitutionally unacceptable," for reasons having nothing to do with the history of punitive damages in the United States.\textsuperscript{248} Fearing the ability of a jury to award punitive damages that produce "extreme results that jar one's constitutional sensibilities," the majority went on to hold that punitive damages awards must be held to a standard of "reasonableness and adequate [jury] guidance."\textsuperscript{249} In the case at bar, the Alabama punitive damages award did not "jar" the majority's "constitutional sensibilities," whatever those were, and, therefore, did not transgress the outer limits of due process of law.\textsuperscript{250}

Justice Scalia preferred a more absolute approach that would take the Supreme Court out of the business of reviewing punitive damages awards at all;\textsuperscript{251} Justice Kennedy also wrote a concurring opinion in which he expressed concern that the majority's approach was insufficiently deferential to state legislatures and state supreme courts:\textsuperscript{252} "Historical acceptance of legal institutions serves to validate them not because history provides the most convenient rule of decision but because we have confidence that a long-accepted legal institution would not have survived if it rested upon procedures found to be either irrational or unfair."\textsuperscript{253} Thus, he concluded that the "judgment of history should govern the outcome in the case before [the Court]" because "[j]ury determination of punitive damages has such long and principled recognition as a central part
of our system that no further evidence of its essential fairness or rationality ought to be deemed necessary." Justice Kennedy suggested that, absent a "verdict returned by a biased or prejudiced jury," there was no justification for a federal court to undertake "a detailed examination" of the merits of the punitive damages award. He emphasized that "[w]e do not have the authority, as do judges in some of the States, to alter the rules of the common law respecting the proper standard for awarding punitive damages and the respective roles of the jury and the court in making that determination."

Justice O'Connor dissented from the decision to affirm the Alabama punitive damages award because the jury instructions associated with punitive damage awards were "so fraught with uncertainty that they defy rational implementation." "While I do not question the general legitimacy of punitive damages," she wrote, "I see a strong need to provide juries with standards to constrain their discretion so that they may exercise their power wisely, not capriciously or maliciously." More specifically, Justice O'Connor believed that "due process requires that a State provide meaningful standards to guide the application of its laws" and that "Alabama's common-law scheme for imposing punitive damages is void for vagueness." Justice O'Connor flatly rejected the idea that the long history of unbridled jury discretion to impose punitive damages established a strong presumption in favor of the practice, because "due process is not a fixed notion." In her view, recent changes in jury behavior justified a more hands-on judicial approach to regulating such awards at the constitutional level.

Alabama's approach, in particular, gave "free reign to the biases

254. Id.
255. Id. at 41-42.
256. Id. at 42. This was a rather ironic statement, viewed against Justice Kennedy's subsequent majority opinion in State Farm Mutual Automobile Insurance Co. v. Campbell, which appeared to do exactly what Justice Kennedy decried: "alter the rules of the common law respecting the proper standard for awarding punitive damages." See 538 U.S. 408, 416 (2003).
258. Id.
259. Id. at 44.
260. Id. at 60-61.
261. See id. at 61-63.
and prejudices of individual jurors, allowing them to target unpopular defendants and punish selectively.”\(^{262}\) In her view, due process precluded “arbitrary” government action and the Alabama system was “the antithesis of due process.”\(^{263}\)

Two years later, in *TXO Production Corporation v. Alliance Resources Corp.*, the Supreme Court once again considered imposing limits on punitive damages as a function of substantive due process.\(^{264}\) Justice Stevens, announcing the judgment of the Court, identified the applicable standard as whether a particular award is “grossly excessive.”\(^{265}\) Although acknowledging that the earliest cases establishing this rule arose during the *Lochner* era, the plurality reaffirmed the *Haslip* ruling that due process imposes limits on the award of punitive damages.\(^{266}\) The Court ultimately reiterated and applied the *Haslip* “reasonableness” standard to determine whether the award at issue was “grossly excessive” and concluded that it was not.\(^{267}\)

Once again, Justice Scalia concurred in the judgment, this time joined by Justice Thomas, but expressly rejected the idea that federal courts should review state court jury punitive damages awards for “reasonableness”:

> I am willing to accept the proposition that the Due Process Clause of the Fourteenth Amendment, despite its textual limitation to procedure, incorporates certain substantive guarantees specified in the Bill of Rights; but I do not accept the proposition that it is the secret repository of all sorts of other, unenumerated, substantive rights—however fashionable that proposition may have been (even as to economic rights of the sort involved here) at the time of the *Lochner*-era cases the plurality relies upon.\(^{268}\)

\(^{262}\) *Id.* at 63.

\(^{263}\) *Id.*


\(^{265}\) *Id.* at 454.

\(^{266}\) *Id.* at 455, 458.

\(^{267}\) See *id.* at 458 (noting that “[i]n the end, then, in determining whether a particular award is so ‘grossly excessive’ as to violate the Due Process Clause of the Fourteenth Amendment, we return to what we said two Terms ago in *Haslip*” and applying a standard of “reasonableness” to the West Virginia jury award at issue in the case).

\(^{268}\) *Id.* at 470-71 (Scalia, J., concurring in the judgment).
Justice Kennedy repeated his view that “when a punitive damages award reflects bias, passion, or prejudice on the part of the jury, rather than a rational concern for deterrence and retribution, the Constitution has been violated, no matter what the absolute or relative size of the award.” In the case at bar, Justice Kennedy did not find sufficient evidence of irrationality or prejudice to justify invalidating the jury's award of punitive damages.

Justice O'Connor, who believed the award reflected strong bias against an out-of-state corporation, argued that it violated due process: “Influences such as caprice, passion, bias, and prejudice are antithetical to the rule of law.” If a punitive damages award transgresses these notions of “fundamental fairness,” then it should be invalidated on due process grounds. “Given the absence of another plausible explanation for this monumentally large punitive damages award,” Justice O'Connor “believe[d] it likely, if not inescapable, that the jury was influenced unduly by TXO's out-of-state status and its large resources.”

Ultimately, TXO expanded the scope of review first articulated in Haslip, but once again concluded that the award did not violate the requirements of substantive due process. Three years later, in BMW of North America, Inc. v. Gore, the Supreme Court finally invalidated a punitive damages award on due process grounds. The Gore opinion opened with a matter of fact statement of the due process rights of defendants in civil lawsuits: “The Due Process Clause of the Fourteenth Amendment prohibits a State from imposing a ‘grossly excessive’ punishment on a tortfeasor.” Justice Stevens, writing for the majority, cited TXO for this proposition and completed his due process analysis in a single opening paragraph; the bulk of the opinion applied the “grossly

269. Id. at 467 (Kennedy, J., concurring in part and concurring in the judgment).
270. Id. at 468.
271. Id. at 475-76 (O'Connor, J., dissenting) (“If there is a fixture of due process, it is that a verdict based on such influences cannot stand.”).
272. See id. at 476-81.
273. Id. at 495.
275. Id. at 562 (quoting TXO, 509 U.S. at 454); see also id. at 568 (“Only when an award can fairly be categorized as ‘grossly excessive’ in relation to these interests [punishing and deterring unlawful conduct] does it enter the zone of arbitrariness that violates the Due Process Clause of the Fourteenth Amendment.”).
excessive" standard and found that an award of $4 million for a refinished paint job on a BMW vehicle sold as new, with a maximum compensatory value of $4000, met this standard.\textsuperscript{276}

Justice Breyer, joined by Justices O'Connor and Souter, authored a concurring opinion that emphasized the protection against arbitrary government action that underlay the Supreme Court's punitive damages jurisprudence: "Requiring the application of law, rather than a decisionmaker's caprice, does more than simply provide citizens notice of what actions may subject them to punishment; it also helps to assure the uniform general treatment of similarly situated persons that is the essence of law itself."\textsuperscript{277} He continued, stating that "[l]egal standards need not be precise to satisfy this constitutional concern. But they must offer some kind of constraint upon a jury or court's discretion, and thus protection against purely arbitrary behavior."\textsuperscript{278}

All of this is well and good. After all, who advocates arbitrary, lawless government action or opposes values associated with the rule of law? The problem, of course, is the lack of a tradition of limiting jury discretion when assessing punitive damages; if the rule of law requires such limits, evidently the nation suffered—for more than 200 years!—under the delusion that it operated under the rule of law. Justice Breyer asked, rhetorically:

To the extent that neither clear legal principles nor fairly obvious historical or community based standards (defining, say, especially egregious behavior) significantly constrain punitive damages awards, is there not a substantial risk of outcomes so arbitrary that they become difficult to square with the Constitution's assurance, to every citizen, of the law's protection?\textsuperscript{279}

\begin{footnotes}
\item[276] See id. at 562-63, 568-86.
\item[277] Id. at 587 (Breyer, J., concurring).
\item[278] Id. at 588 (citation omitted).
\item[279] Id. at 596.
\end{footnotes}
Coming from a bench that permits wide disparities in charging and conviction rates for capital crimes, this plea for understanding seems unpersuasive.

Many legal standards, as a matter of historical practice, vest great discretion with decision makers. If "tradition" truly sets the metes and bounds of substantive due process protection, then the level of indeterminacy associated with punitive damage awards should be unremarkable, as far as due process values are concerned, precisely because "we've always done it this way." To the extent that states decide to modify the rules governing punitive damages, a new or modified tradition might arise—but none of the Gore majority argued that such a consensus had come into existence.

On these facts, the majority jumped the due process gun by recognizing a due process right to be free of "grossly excessive" punitive damage judgments. As states experiment with tort reform, a plausible argument that an emerging trend has solidified into a full blown tradition might arise. In 1996, however, this was not yet the case—just as, at least arguably, the pace of law reform as of 1986 did not make Bowers an easy case, if viewed from the perspective of an emerging national consensus against sodomy laws.

One could argue that the requirement that all government action bear a rational relationship to a legitimate state interest, known as the rationality requirement, rather than the fundamental rights aspect of substantive due process, should have governed this case. It is difficult to see, however, why the award in Gore was irrational: it certainly advanced Alabama's interests in deterrence and punishment in a direct, linear fashion. Justice Breyer concluded that "the award in this unusual case violates the basic guarantee of nonarbitrary governmental behavior that the Due Process Clause provides."


281. Gore, 517 U.S. at 597 (Breyer, J., concurring).
One can identify the problem with this reasoning with relative ease: it is far from obvious that the award in the case was, in fact, utterly irrational and arbitrary. Certainly, if the mean level of irrationality at work in *Gore* was sufficient to justify the federalization of state tort law, as an incident of substantive due process, then one could claim with equal passion, as Justice Blackmun did, that laws proscribing consensual sodomy between adults, in private, represent an unacceptable level of irrationality.282

The point here is fairly simple: either tradition counts, or it does not. The *Haslip* line of cases demonstrates quite conclusively that Chief Justice Rehnquist's efforts to cabin substantive due process to rights enjoying the broad and long support of tradition have failed. As things stand now, if a government decision is sufficiently "shocking" to a majority of the Justices, they will not shy away from deploying substantive due process to void the decision.283 Moreover, it would be an odd human rights jurisprudence that elevates a corporation's interest in avoiding money damages above an individual's interest in personal autonomy in her bedroom.

Before moving on, one should note that Justices Scalia and Thomas remain committed to validating the states' discretion to impose unlimited punitive damages. In *Gore*, Justice Scalia once again noted that "I do not regard the Fourteenth Amendment's Due Process Clause as a secret repository of substantive guarantees against 'unfairness'—neither the unfairness of an excessive civil compensatory award, nor the unfairness of an 'unreasonable' punitive award."284 Moreover, Justice Scalia recognized the gross incursion on federalism that the *Haslip* line of cases represents:

The Constitution provides no warrant for federalizing yet another aspect of our Nation's legal culture (no matter how much in need of correction it may be), and the application of the Court's new rule of constitutional law is constrained by no principle other than the Justices' subjective assessment of the "reasonableness" of the award in relation to the conduct for which it was assessed.285

283. See *supra* notes 218-81 and accompanying text.
285. *Id.* at 599.
Justice Ginsburg also dissented, warning that the majority had established a virtually meaningless test:286 "It has only a vague concept of substantive due process, a 'raised eyebrow' test as its ultimate guide."287 She asked, "[w]hat is the Court's measure of too big?" and concluded that "[t]oo big is, in the end, the amount at which five Members of the Court bridle."288 To prove her point that no judicially discernable standard could yet be fixed for limiting punitive damages, Justice Ginsburg attached an appendix listing state tort reform efforts.289 As one would expect, these efforts do not reflect any consistent pattern or practice. Finally, she warned that "[i]n contrast to habeas corpus review ... the Court will work at this business alone."290 Indeed, as Justice Ginsburg correctly noted, the federal Supreme Court "will be the only federal court policing the area."291

The Supreme Court's most recent effort at constitutionally-mandated tort reform, State Farm Mutual Auto Insurance Co. v. Campbell, added remarkably little to the picture of an emerging "I know it when I see it" punitive damages jurisprudence.292 Once a skeptic, Justice Kennedy wrote for the six-Justice majority that invalidated a Utah punitive damages award.293 Justice Kennedy noted that "[w]hile States possess discretion over the imposition of punitive damages, it is well established that there are procedural and substantive constitutional limitations on these awards."294 And, repeating the chorus of the Supreme Court's earlier decisions in the area, he explained that "[t]he Due Process Clause of the Fourteenth Amendment prohibits the imposition of grossly

286. Id. at 613 (Ginsburg, J., dissenting) ("Tellingly, the Court repeats that it brings to the task no 'mathematical formula,' no 'categorical approach,' [and] no 'bright line.'" (citations omitted)).
287. Id. (citation omitted).
288. Id. at 613 n.5.
289. Id. at 614-19 app.; see also id. at 607 ("The Court, I am convinced, unnecessarily and unwisely ventures into territory traditionally within the States' domain, and does so in the face of reform measures recently adopted or currently under consideration in legislative arenas.").
290. Id. at 613.
291. Id.
293. 538 U.S. 408 (2003).
294. Id. at 418.
295. Id. at 416.
excessive or arbitrary punishments on a tortfeasor." Campbell limited the evidence that serves as the basis for a punitive damages award to wrongdoing that occurred within the jurisdiction making the award and barred jury consideration of defendant wrongdoing that bears "no relation" to the plaintiff's harm.

Breaking with its earlier cases, the majority finally established a mathematical baseline for assessing the validity of punitive damages awards: "Our jurisprudence and the principles it has now established demonstrate, however, that, in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process." This is a truly remarkable act of judicial activism; in a single sentence, Justice Kennedy preempted the tort reform debates that have been ongoing in the various state legislatures and courts by imposing, as a matter of federal constitutional law, a factor of 9 to 1 as the presumptive limit on punitive damages. Justice Kennedy made no effort to ground his ruling in Anglo-American common law; instead, he simply observed that past cases permitted factors of around 4 to 1 and noted that these past ratios "demonstrate what should be obvious: Single-digit multipliers are more likely to comport with due process, while still achieving the State's goals of deterrence and retribution, than awards with ratios in range of 500 to 1, or, in this case, of 145 to 1."

Although the 9 to 1 ratio provides a general rule of thumb, "because there are no rigid benchmarks that a punitive damages award may not surpass, ratios greater than those we have previously upheld may comport with due process where 'a particularly egregious act has resulted in only a small amount of economic

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296. Id.
297. See id. at 420-21 ("Nor, as a general rule, does a State have a legitimate concern in imposing punitive damages to punish a defendant for unlawful acts committed outside of the State's jurisdiction.").
298. Id. at 422-23 ("Due process does not permit courts, in the calculation of punitive damages, to adjudicate the merits of other parties' hypothetical claims against a defendant under the guise of reprehensibility analysis, but we have no doubt the Utah Supreme Court did that here.").
299. Id. at 425.
300. See id.
301. Id. (citation omitted).
Damages." But, Justice Kennedy noted, "[t]he converse is also true," thus, "[w]hen compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee."

Lochner's decision to disallow daily and weekly maximum working hours for bakers was less intrusive of state regulatory authority than the Campbell metric for limiting punitive damages. And, one should be careful to note that the Court made no effort whatsoever to ground its math in the traditions and practices of the American people, whether at the present or as a matter of historical record. In other words, Campbell represents federally imposed tort reform, on a national scale, in the name of due process.

Justices Scalia, Thomas, and Ginsburg all dissented—as they had in Gore. Justice Scalia noted that he was "of the view that the punitive damages jurisprudence which has sprung forth from BMW v. Gore is insusceptible of principled application" and, accordingly, he declined to give it "stare decisis effect." Justice Thomas noted that he "continue[d] to believe that the Constitution does not constrain the size of punitive damages awards." Justice Ginsburg emphasized that tort reform was a matter committed to state governments and "remain[ed] of the view that this Court has no

302. *Id.*
303. See *id.*
304. *Id.*
306. *Campbell* is objectionable too with respect to the particular branch of the federal government that displaced state policy-making authority over punitive damages; if the federal government is to force "laggard" states to abandon unduly generous jury awards for punitive damages, arguably *Congress* and not the *Supreme Court* should preempt state law, via a legislative exercise of its Commerce Clause powers. See Althouse, *supra* note 58, at 1823-25 (suggesting that Congress should consider forcing "laggard" states to respect a national consensus position, but warning that "if one thinks there is a vanguard direction and that it is good to take it, but also thinks that no one in power will reliably find it, one ought to want decisions to be made at the lowest level—without 'risk to the rest of the country,' as Justice Brandeis put it" (quoting *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting))).
307. See *Campbell*, 538 U.S. at 429 (Scalia, J., dissenting); *id.* (Thomas, J., dissenting); *id.* at 430 (Ginsberg, J., dissenting).
308. *Id.* at 429 (Scalia, J., dissenting).
309. *Id.* (Thomas, J., dissenting) (quoting *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 443 (2001) (Thomas, J., concurring)).
warrant to reform state law governing awards of punitive damages.\textsuperscript{310} She noted:

In a legislative scheme or a state high court's design to cap punitive damages, the handiwork in setting single-digit and 1-to-1 benchmarks could hardly be questioned; in a judicial decree imposed on the States by this Court under the banner of substantive due process, the numerical controls today's decision installs seem to me boldly out of order.\textsuperscript{311}

The use of abstract, and perhaps highly personal, notions of justice to disallow state punitive damages awards rests very uncomfortably against the Supreme Court's general reluctance to recognize fundamental rights involving decisions such as the time at which one will die\textsuperscript{312} and the rights of nontraditional biological fathers.\textsuperscript{313} Frankly, a more consistent reliance on tradition might have led to a better outcome in the Haslip line of cases: if, as Justice O'Connor has argued, juries had become more likely to grant outrageous punitive damage awards,\textsuperscript{314} it would have been more tradition-friendly—and also federalism-friendly—for the Court simply to note the possible conflict with notions of equal protection or substantive due process, and then wait to see what, if any, action the states took. Certainly, such an approach would have better served values associated with judicial minimalism\textsuperscript{315} than adoption and enforcement of an overt "raised eyebrow" standard.\textsuperscript{316}

\textsuperscript{310} Id. at 430-31, 438 (Ginsburg, J., dissenting).

\textsuperscript{311} Id. at 438.


\textsuperscript{314} See TXO Prod. Corp. v. Alliance Res. Corp., 509 U.S. 443, 500 (1993) (O'Connor, J., dissenting) (noting that "[a]s little as 30 years ago, punitive damages awards were 'rarely assessed' and usually 'small in amount,'" but that "[r]ecently ... the frequency and size of such awards have been skyrocketing" (quoting Dorsey D. Ellis, Jr., Fairness and Efficiency in the Law of Punitive Damages, 56 S. CAL. L. REV. 1, 2 (1982))); Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 61-63 (1991) (O'Connor, J., dissenting) ("Recent years, however, have witnessed an explosion in the frequency and size of punitive damages awards.").


\textsuperscript{316} See TXO, 499 U.S. at 481 (O'Connor, J., dissenting) ("This $10 million punitive award,
III. STATE COUNTING, OR CONSENSUS, AS A MEANS OF DEFINING TRADITION

This Part systematically considers the phenomenon of state counting as a means of establishing and constitutionalizing a national consensus. In the context of Eighth Amendment cases, the contemporary Supreme Court has enshrined state counting as its preferred means of defining “cruel and unusual” punishments. Even though bitter disagreements exist among the Justices regarding the proper methodology for state counting in these cases, unanimity exists regarding the general approach, at least in this context. Eighth Amendment jurisprudence is, of course, effectively a subset of substantive due process because the Due Process Clause of the Fourteenth Amendment is technically the source of the limitation on criminal punishments. However, more generic substantive due process cases also feature state counting as a methodology. These cases merit careful consideration when evaluating the overall promise of this approach to defining tradition.

In both the Eighth Amendment and more generic substantive due process contexts, the cases reflect a grossly undertheorized approach to the state counting methodology; the Justices appear to be approaching state counting on an entirely ad hoc basis. If state counting is to serve as a credible means of ascertaining the "traditions from which [this nation] broke," a more systematic approach to state counting will be required.

317. See infra Part III.A.
318. See id.
319. See infra Part III.B.
320. See Jacobi, supra note 129, at 1147.
A. State Counting in the Specific Context of the Eighth Amendment

The Supreme Court has relied on state counting most prominently in its Eighth Amendment jurisprudence, when deciding whether a particular punishment is "cruel and unusual." For example, in *Atkins v. Virginia*, the Court counted states to determine whether it remained constitutional to execute mentally retarded persons. It adopted the same approach in *Roper v. Simmons* to decide whether the Constitution permitted execution of minors. In deciding whether a punishment is cruel and unusual, the Court will engage in a "proportionality review" and apply the "evolving standards of decency" to test the proportionality of a proposed criminal sanction. Justice Stevens, writing for the *Atkins* majority, explained that "[p]roportionality review under those evolving standards should be informed by 'objective factors to the maximum possible extent.'" The best source of such objective evidence is "legislation enacted by the country's legislatures." Accordingly, the majority viewed its task as reviewing "the judgment of legislatures that have addressed the suitability of imposing the death penalty on the mentally retarded and then consider reasons for agreeing or disagreeing with their judgment."

The *Atkins* Court found that, from 1989 to 2001, eighteen states enacted legislation prohibiting the execution of the mentally retarded, and in three other states some portion of the legislature adopted such legislation but the bill failed to become law. In the same twelve-year period, no state adopted a law expressly providing for the execution of the mentally retarded. As Justice Stevens wrote, "[i]t is not so much the number of these States that is

324. See Trop v. Dulles, 356 U.S. 86, 100-01 (1958) ("The basic concept underlying the Eighth Amendment is nothing less than the dignity of man.... The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.").
326. Id. (quoting Penry v. Lynaugh, 492 U.S. 302, 331 (1989)).
327. Id. at 313.
328. See id. at 314-15.
significant, but the consistency of the direction of change." He argued that "the large number of States prohibiting the execution of mentally retarded persons (and the complete absence of States passing legislation reinstating the power to conduct such executions) provides powerful evidence that today our society views mentally retarded offenders as categorically less culpable than the average criminal." Justice Stevens also addressed the relative infrequency with which states permitting the execution of mentally retarded persons actually do so: "even in those States that allow the execution of mentally retarded offenders, the practice is uncommon." In sum, "[t]he practice ... therefore, has become truly unusual, and it is fair to say that a national consensus has developed against it." Precisely how does the majority define "national consensus"? In Atkins, it appears to be a function of a thirty to twenty split among the states regarding the execution of the mentally retarded. If the eighteen states prohibiting the execution of the mentally retarded are added to the twelve states that do not impose capital punishment at all, state counting yields a split of thirty states opposed to executing mentally retarded persons to twenty states in favor of the practice.

Justice Scalia considered this to be fuzzy math. He objected that the majority "miraculously extracts a 'national consensus' forbidding execution of the mentally retarded from the fact that 18 States—less than half (47%) of the 38 States that permit capital punishment (for whom the issue exists)—have very recently enacted legislation barring execution of the mentally retarded." Indeed, in Scalia's view, the "bare number of States alone—18—should be enough to convince any reasonable person that no 'national consensus' exists." He asked: "How is it possible that agreement among 47% of the death penalty jurisdictions amounts to 'consensus'?

Of course, Justice Stevens had an easy answer:

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329. Id. at 315.
330. Id. at 315-16.
331. Id. at 316.
332. Id.
333. See id. at 313-15.
334. Id. at 342 (Scalia, J., dissenting) (citation omitted).
335. Id. at 343.
336. Id.
the correct percentage is sixty percent of the states, rather than forty-seven percent of death penalty jurisdictions. One should aggregate the twelve states without a death penalty with the eighteen states that generally prohibit the execution of mentally retarded persons; thirty of fifty states yields a sixty percent, not a forty-seven percent, figure. At least arguably, sixty percent constitutes a "consensus."

The Supreme Court utilized state counting in another Eighth Amendment case, Stanford v. Kentucky. In that case, the majority concluded that a fifteen-state plurality of the thirty-seven states then imposing the death penalty did not establish a national consensus against executing persons sixteen years of age, and that a twelve-state plurality against executing persons seventeen years of age also failed to establish a consensus against the practice. Writing for the majority, Justice Scalia declared that "[t]his does not establish the degree of national consensus this Court has previously thought sufficient to label a particular punishment cruel and unusual." Moreover, the majority refused to consider the "14 States that do not authorize capital punishment" in the calculation:

It seems to us ... that while the number of those jurisdictions bears upon the question whether there is a consensus against capital punishment altogether, it is quite irrelevant to the specific inquiry in this case: whether there is a settled consensus in favor of punishing offenders under 18 differently from those over 18 insofar as capital punishment is concerned.

Justice Brennan, in dissent, aggregated states with no death penalty with those that exclude minors from its application. Using this approach, he concluded that "the governments in fully 27 of the States have concluded that no one under 18 should face the death penalty" and noted that "[a] further three States explicitly

338. Id. at 370-71 ("Of the 37 States whose laws permit capital punishment, 15 decline to impose it upon 16-year-old offenders and 12 decline to impose it on 17-year-old offenders.").
339. Id.
340. Id. at 370 n.2.
341. Id.
342. Id. at 384 (Brennan, J., dissenting).
refuse to authorize sentences of death for those who committed their offense when under 17, making a total of 30 States that would not tolerate the execution of petitioner Wilkins. 343

Thus, in Stanford, divisions of twenty-seven to twenty-three and thirty to twenty were insufficient evidence to establish a national consensus against the execution of minors. Justice O'Connor, who provided the crucial fifth vote in Stanford, authored a concurring opinion in which she noted that “[t]he day may come when there is such general legislative rejection of the execution of 16- or 17-year-old capital murderers that a clear national consensus can be said to have developed.” 344

In Thompson v. Oklahoma, a 5-3 majority of the Supreme Court found that, because all eighteen states specifying a minimum age for the imposition of the death penalty select sixteen years of age or older, Oklahoma could not constitutionally execute an offender who was fifteen years old at the time of his crime. 345 Lest there be any doubt about the importance of this unanimity, Justice O'Connor, in a concurring opinion, emphasized that “[t]he most salient statistic that bears on this case is that every single American legislature that has expressly set a minimum age for capital punishment has set that age at sixteen or above.” 346 Justice O'Connor also aggregated the 14 states, including the District of Columbia, “that have rejected capital punishment completely” to find “that almost two-thirds of the state legislatures have definitely concluded that no 15-year-old should be exposed to the threat of execution.” 347 Justice O'Connor argued that,

[w]here such a large majority [thirty-one of fifty] of the state legislatures have unambiguously outlawed capital punishment for 15-year-olds, and where no legislature in this country has affirmatively and unequivocally endorsed such a practice, strong

343. Id. (citation omitted).
344. Id. at 381-82 (O'Connor, J., concurring in part and concurring in the judgment).
345. 487 U.S. 815, 829 (1988) ("When we confine our attention to the 18 States that have expressly established a minimum age in their death penalty statutes, we find that all of them require that the defendant have attained at least the age of 16 at the time of the capital offense.").
346. Id. at 849 (O'Connor, J., concurring in the judgment).
347. Id.
counterevidence would be required to persuade me that a national consensus against this practice does not exist.\textsuperscript{348}

Accordingly, Justice O'Connor concluded that Oklahoma must establish an express policy of executing persons fifteen years of age—it could not rely on a general death penalty statute that contained no minimum age to accomplish this outcome.\textsuperscript{349} Justice O'Connor also voted with the majority in Atkins, which featured virtually the same statistical breakdown—an eighteen to nineteen split among death penalty states against executing mentally retarded persons and an overall thirty-one to nineteen split if one adds the states without a death penalty to those exempting mentally retarded defendants.\textsuperscript{350}

Justice Scalia displayed the same consistency and, as in Atkins, preferred to focus on the nineteen to eighteen split among death penalty states that set a minimum age for a death sentence:

It is beyond me why an accurate analysis would not include within the computation the larger number of States (19) that have determined that no minimum age for capital punishment is appropriate, leaving that to be governed by their general rules for the age at which juveniles can be criminally responsible.\textsuperscript{351}

The Supreme Court's recent decision in Roper v. Simmons,\textsuperscript{352} methodologically a reprise of Atkins, did not break any new ground in state counting. Writing for the majority, Justice Kennedy found that a thirty to twenty division of the states on the question of

\textsuperscript{348} Id.

\textsuperscript{349} See id. at 857-58 ("Were it clear that no national consensus forbids the imposition of capital punishment for crimes committed before the age of 16, the implicit nature of the Oklahoma Legislature's decision would not be constitutionally problematic. In the peculiar circumstances we face today, however, the Oklahoma statutes have presented this Court with a result that is of very dubious constitutionality, and they have done so without the earmarks of careful consideration that we have required for other kinds of decisions leading to the death penalty. In this unique situation, I am prepared to conclude that petitioner and others who were below the age of 16 at the time of their offense may not be executed under the authority of a capital punishment statute that specifies no minimum age at which the commission of a capital crime can lead to the offender's execution.").

\textsuperscript{350} Or, a thirty-two to nineteen split if one were to count the District of Columbia as a state. See Atkins v. Virginia, 536 U.S. 304, 314-15 (2002).

\textsuperscript{351} Thompson, 487 U.S. at 867-68 (Scalia, J., dissenting).

\textsuperscript{352} 543 U.S. 551, 564-65 (2005).
executing offenders younger than eighteen, coupled with a slight law reform movement in favor of abolishing capital punishment for minors, established a national consensus against the practice.\textsuperscript{353} This conclusion was bolstered by the rejection of the juvenile death penalty, at least officially, in all other nations.\textsuperscript{354} As in\textit{Atkins}, Justice Scalia, joined by Chief Justice Rehnquist and Justice Thomas, objected to the majority's math and invocation of foreign legal precedents in support of the abolition of the juvenile death penalty.\textsuperscript{355}

The Eighth Amendment cases suggest that a bare majority of states is not enough to establish the consensus necessary to show that a punishment is "unusual" for Eighth Amendment purposes. They also suggest that some number above thirty states comes close to the line for establishing that a punishment is unusual, particularly if the remaining twenty states impose the punishment infrequently and the other democracies have rejected the practice.\textsuperscript{356}

\begin{itemize}
  \item 353. See id. (aggregating both states without any death penalty (twelve) and states that prohibit the execution of minors (eighteen)).
  \item 354. See id. at 575-77.
  \item 355. See id. at 608-15, 622-28 (Scalia, J., dissenting).
  \item 356. In all four Eighth Amendment cases, Justices supporting the proposition that the punishment was cruel and unusual cited the practices of foreign nations. See id. at 575 (majority opinion) ("Our determination that the death penalty is disproportionate punishment for offenders under 18 finds confirmation in the stark reality that the United States is the only country in the world that continues to give official sanction to the juvenile death penalty."); \textit{Atkins} v. Virginia, 536 U.S. 304, 316-17 & n.20 (2002) (citing opposition of the "world community" to the execution of mentally retarded persons); Stanford v. Kentucky, 492 U.S. 361, 389-90 (1989) (Brennan, J., dissenting) (noting that "[m]any countries ... have formally abolished the death penalty," that "a majority" of nations that retain the death penalty expressly "prohibit the execution of juveniles," and concluding that "[w]ithin the world community, the imposition of the death penalty for juvenile crimes appears to be overwhelmingly disapproved"); \textit{abrogated by Roper} v. Simmons, 543 U.S. 551, 574-75 (2005); Thompson, 487 U.S. at 830 ("The conclusion that it would offend civilized standards of decency to execute a person who was less than 16 years old at the time of his or her offense is consistent with the views that have been expressed by respected professional organizations, by other nations that share our Anglo-American heritage, and by the leading members of the Western European community."). In these four cases, members of the Court who were opposed to that conclusion rejected such evidence as entirely irrelevant. See \textit{Roper}, 543 U.S. at 624 (Scalia, J., dissenting) ("More fundamentally, however, the basic premise of the Court's argument—that American law should conform to the laws of the rest of the world—ought to be rejected out of hand."); \textit{Atkins}, 536 U.S. at 324-25 (Rehnquist, C.J., dissenting) ("I fail to see, however, how the views of other countries regarding the punishment of their citizens provide any support for the Court's ultimate determination."); id. at 347-48 (Scalia, J., dissenting) ("Equally irrelevant are the practices of the 'world
B. State Counting in General Substantive Due Process Cases

In Lawrence v. Texas, Justice Kennedy emphasized that the trend in law reform favored abolition of antisodomy laws; only nine states prohibited sodomy generally and only four states prohibited same-sex sodomy specifically.\(^{357}\) Although this was only one reason offered in support of the majority's conclusion that a national consensus existed against antisodomy laws, it was an important component of Justice Kennedy's argument.\(^{358}\) State counting appeared in substantive due process cases before Lawrence.

In Loving v. Virginia, Chief Justice Warren noted that "Virginia is now one of 16 States which prohibit and punish marriages on the basis of racial classifications."\(^{359}\) He also observed that "[o]ver the past 15 years, 14 States have repealed laws outlawing interracial marriages."\(^{360}\) In 1952, thirty states prohibited interracial marriages, whereas only eighteen states permitted them; during the next fifteen years, fourteen states repealed their proscriptions against such unions, leaving the split at thirty-four to sixteen in 1967.\(^{361}\) Although Loving's substantive due process holding did not directly reference the trend of law reform regarding interracial marriage,\(^{362}\) it undoubtedly played some role in the majority's thinking. In declaring that "[t]he freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men,"\(^{363}\) the fact that thirty-

\(^{357}\) 539 U.S. 558, 573 (2003).
\(^{358}\) See infra notes 417-28 and accompanying text.
\(^{359}\) 388 U.S. 1, 6 (1967).
\(^{360}\) Id. at 6 n.5.
\(^{361}\) See id.
\(^{362}\) See id. at 11-12.
\(^{363}\) Id. at 12.
four states would sanction the precise union at issue—and only sixteen would not—was clearly an important factor supporting the majority’s conclusion.

More recently, the *Bowers* Court engaged in state counting:

Sodomy was a criminal offense at common law and was forbidden by the laws of the original 13 States when they ratified the Bill of Rights. In 1868, when the Fourteenth Amendment was ratified, all but 5 of the 37 States in the Union had criminal sodomy laws. In fact, until 1961, all 50 States outlawed sodomy, and today, 24 States and the District of Columbia continue to provide criminal penalties for sodomy performed in private and between consenting adults.\(^{364}\)

Based on these numbers—a twenty-four to twenty-six split among the states—Justice White rejected as “facetious” the idea that sodomy was deeply rooted in this nation’s traditions.\(^{365}\)

Professor William Eskridge has done a brilliant job of deconstructing Justice White’s attempted history lesson.\(^{366}\) A careful observer should hesitate to accept as conclusive Justice White’s numbers prior to 1961, because the statutes at issue did not necessarily regulate the precise sexual practices at issue in *Bowers*.\(^{367}\) Even Eskridge, however, concedes that the 1961 figure is relevant: after 1961, the reform movement to repeal antisodomy laws stalled and antigay animus was sufficiently pervasive that many states enacted laws intentionally targeting homosexual sexual practices for criminal proscription.\(^{368}\) As Eskridge notes, the reform movement against such laws began in the 1950s and had already achieved some successes by the 1960s.\(^{369}\) The fact remains, however, that twenty-four of fifty states maintained formal legal prohibitions against sodomy, whether applicable to all forms of...
sodomy or only same-sex sodomy.\textsuperscript{370} If state counting can establish a new or emerging legal tradition, the picture in 1986 was less compelling than the comparable data for interracial marriage in 1967 or the abolition of poll taxes in 1966.\textsuperscript{371} Of course, by 2003, the numbers had shifted dramatically; a methodology yielding uncertain results in 1986, provided a much more definitive answer in 2003.

\textit{Lawrence} presents a very strong case for invalidation based on state counting: from 1961 to the present, thirty-seven states abandoned their laws proscribing sodomy, whether via legislative reform or judicial invalidation.\textsuperscript{372} In 2003, only thirteen states prohibited sodomy, and four of those states only prohibited same-sex sodomy.\textsuperscript{373} This background of state law presents a much stronger case than the Justices faced in 1986, when twenty-four states and the District of Columbia still maintained laws criminalizing sodomy.\textsuperscript{374} Put differently, between 1986 and 2004, twelve more states abandoned efforts to proscribe sodomy, if committed in private, between consenting adults, on a noncommercial basis. During that same period, no state added a generally applicable proscription against the practice or strengthened proscriptions against the practice under existing law. Moreover, the general background of almost total nonenforcement of existing sodomy laws remained unchanged.

To be clear, the tradition analysis should probably not stop with merely counting states that maintain formal rules in the lawbooks, the approach Justice White adopted in \textit{Bowers}. Laws in books are not necessarily laws that the community intends to enforce. If tradition refers to actual practices, rather than a code of legislatively defined “best practices,” the community’s commitment to enforcing a law should be relevant to ascertaining the law as a source of tradition. Thus, some attention to whether the states actually enforce these laws seems essential.\textsuperscript{375}

\textsuperscript{370} \textit{Bowers}, 478 U.S. at 193-94.
\textsuperscript{371} See \textit{supra} notes 150-53, 359-61 and accompanying text.
\textsuperscript{373} See \textit{id}.
\textsuperscript{374} See \textit{Bowers}, 478 U.S. at 192-94.
IV. AMENDING THE CONSTITUTION OUTSIDE THE FOUR CORNERS OF ARTICLE V

Substantive due process effectively represents a means of judicial amendment to the Bill of Rights and Fourteenth Amendment. If a practice seems sufficiently deeply rooted in the United States, and it relates to a sufficiently weighty interest, judges will limit the ability of legislators to burden or abrogate the practice. The reasonable doubt standard in criminal trials has such a long and storied history in Anglo-American law that New York was no longer free to abandon the standard, even as part and parcel of a comprehensive reform of the juvenile criminal law system.\(^{376}\) Similarly, the common law's treatment of unwanted medical treatment as a battery establishes a rule that cannot be abolished or amended casually; the government would have to assert a pressing concern to succeed in stripping or limiting a citizen of this right.\(^ {377}\)

For practices like the reasonable doubt standard in criminal trials and the right to refuse unwanted medical treatment, the rationale for disallowing government tinkering is self-evident: these rules are simply part of our legal and cultural backdrop; we assume these rules because we have always had them. Accordingly, cases like *In re Winship* and *Cruzan* do not present hard questions.

As one moves away from rights and interests that have deep roots in the common law, however, the water becomes a bit murkier. Short of an unbroken two-hundred-plus year history of observance, what conditions should exist before a judge, or group of judges, prohibit or limit legislative tinkering? How might we understand tradition in more dynamic terms without abandoning principled judicial decision making? Some of the methodologies employed to inform tradition are more plausible—and less objectionable—than others.


A. Tradition Reconsidered as a Means of Limiting Government Power To Abrogate Individual Autonomy

Tradition as a limit on substantive due process could serve as a powerful brake on the Supreme Court's inherent ability to declare and enforce unenumerated rights. For it to serve such a function, however, the Justices must do more to operationalize the test in a coherent fashion.

Easy cases, involving rights with roots running back to the time of the framing, are not likely to occur very often. Precisely because such interests are deeply seated in our nation's legal and cultural consciousness, only rarely will legislatures enact laws that encroach on such interests. Even in an era when elected politicians clamor to "get tough on crime," no state has attempted to reduce the government's burden of proof in a criminal trial to something less than guilt beyond a reasonable doubt. Indeed, the New York statute at issue in Winship itself was less an abrogation of the standard than a legislative judgment that juvenile criminal proceedings were not really the same thing as adult criminal proceedings. 378

A substantive due process doctrine limited to protecting the traditions maintained since time immemorial will not cause much ruckus. One would expect relatively few instances in which a state government, or the federal government, would attempt to overthrow baseline assumptions associated with the American ideal of the rule of law. Accordingly, the classic use of the tradition test would minimize judicial interventions and maximize legislative discretion in unsettled, or only recently settled, areas of the law. 379 This approach works well in those few cases in which a legislature acts bizarrely, such that its work product flies in the face of ancient understandings and practices. But it forecloses any possibility of establishing new or modified traditions; it fences out all claims that a new tradition has emerged, that a new national consensus exists regarding a particular claim of right.

378. See Winship, 397 U.S. at 361-65.
379. For example, Justice Harlan refused to credit the recent shift away from the imposition of poll taxes in Harper because such taxes enjoyed a long history in the United States. See Harper v. Va. State Bd. of Elections, 383 U.S. 663, 683-85 (1966) (Harlan, J., dissenting). For Justice Harlan, the imprimatur of history made the practice presumptively legitimate, even though forty-six of fifty states had abandoned it.
As an empirical matter, it seems most unlikely that the members of the Supreme Court would accept such a limitation. Justices O'Connor and Kennedy, for example, specifically have rejected an approach that limits substantive due process analysis to purely historical materials. They have argued consistently that "history and tradition are the starting point but not in all cases the ending point of the substantive due process inquiry." Their position is largely consequentialist: some outcomes are simply too jarring to be acceptable, even if, as an historical matter, the laws at issue were quite common. Thus, Justices O'Connor, Kennedy, and Souter, in their Casey joint opinion, observed that a purely historical approach to the tradition test would have precluded Loving's conclusion that interracial marriage is a fundamental right. Based on this example, they argued that "[n]either the Bill of Rights nor the specific practices of States at the time of the adoption of the Fourteenth Amendment marks the outer limits of the substantive sphere of liberty which the Fourteenth Amendment protects." Thus, although the Duncan/Winship approach remains a viable means of giving the tradition test content, it cannot be the only approach: some other approach, or combination of approaches, must also exist, unless the Supreme Court intends to retreat significantly from its post-Warren Court role as arbiter of contemporary social

380. See Michael H. v. Gerald D., 491 U.S. 110, 132 (1989) (O'Connor, J., concurring in part) ("I concur in all but footnote 6 of JUSTICE SCALIA's opinion. This footnote sketches a mode of historical analysis to be used when identifying liberty interests protected by the Due Process Clause of the Fourteenth Amendment that may be somewhat inconsistent with our past decisions in this area. On occasion the Court has characterized relevant traditions protecting asserted rights at levels of generality that might not be 'the most specific level' available. I would not foreclose the unanticipated by the prior imposition of a single mode of historical analysis." (citations omitted)); see also Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 848 (1992) (joint opinion of O'Connor, Kennedy, and Souter, JJ.) ("Neither the Bill of Rights nor the specific practices of States at the time of the adoption of the Fourteenth Amendment marks the outer limits of the substantive sphere of liberty which the Fourteenth Amendment protects.").


382. Casey, 505 U.S. at 847-48 (joint opinion of O'Connor, Kennedy, and Souter, JJ.) (noting that "[m]arriage is mentioned nowhere in the Bill of Rights and interracial marriage was illegal in most States in the 19th century, but the Court was no doubt correct in finding it to be an aspect of liberty protected against state interference by the substantive component of the Due Process Clause").

383. Id. at 848.
values. State counting presents an intriguing additional methodology; if states embrace law reform in large numbers, over a relatively short period of time, a strong argument can be made that this better reflects "tradition" than the content of the law during the colonial period.

In Lawrence, for example, Justice Kennedy said that "[i]n all events we think that our laws and traditions in the past half century are of most relevance here." Moreover, the Supreme Court has invoked state counting in a major substantive due process opinion: Washington v. Glucksberg. Chief Justice Rehnquist, after declaring the tradition test essential to evaluating the merits of any substantive due process claim, noted that "[t]he States' assisted-suicide bans are not innovations" but "[r]ather, they are longstanding expressions of the States' commitment to the protection and preservation of all human life." He then cited and quoted Stanford v. Kentucky, an Eighth Amendment case, for the proposition that "the primary and most reliable indication of [a national] consensus is ... the pattern of enacted laws."

Chief Justice Rehnquist also engaged in de facto state counting to bolster his conclusion that the necessary tradition regarding physician assisted suicide does not exist. "In almost every State—indeed, in almost every western democracy—it is a crime to assist a suicide." He noted the sole exception to this pattern, Oregon, which enacted a physician-assisted suicide measure in 1994 by referendum. He closed by noting that "[t]hroughout the Nation, Americans are engaged in an earnest and profound debate about the morality, legality, and practicality of physician-assisted suicide"

384. Cf. Washington v. Glucksberg, 521 U.S. 702, 710-16, 719-28 (1997) (applying a common law history approach to evaluate the claim that substantive due process protects the right of a terminally ill patient to physician assisted suicide). Glucksberg reflects a valiant effort by Chief Justice Rehnquist to put the substantive due process genie back into the bottle. "We begin, as we do in all due process cases, by examining our Nation's history, legal traditions, and practices." Id. at 710. This approach describes Bowers, Winship, and Duncan, but not Casey or Roe, much less Campbell.
387. Id. at 710.
388. Id. at 711 (alteration in original) (quoting Stanford v. Kentucky, 492 U.S. 361, 373 (1989), abrogated by Roper v. Simmons, 543 U.S. 551, 574-75 (2005)).
389. Id. at 710.
390. See id. at 717.
and emphasizing that "[o]ur holding permits this debate to continue, as it should in a democratic society."  

The implication of Chief Justice Rehnquist's logic is that at some point, if a strong consensus in favor of physician-assisted suicide develops, the time for debate would be over. Presumably, at that point, outlier states might be required to "update" their laws by accepting the new consensus. This happened with respect to poll taxes, and it also happened with respect to interracial marriage. The hard question is not whether the federal courts should recognize and enforce the consensus judgment, but rather identifying when such a consensus has been reached. The Supreme Court has done very little to indicate the tipping point for establishing a consensus position. _Harper_ involved a forty-six to four split; _Loving_ involved a thirty-six to fourteen division; and, most recently, _Lawrence_ featured a forty-one to nine, or thirty-seven to thirteen, divide. Attempting comprehensive operational rules for state counting lies beyond the scope of this Article—the immediate goal is to persuade the reader of the need for greater attention to operational rules as a general proposition. A few general observations, however, might be useful. 

The Supreme Court should consider using the thirty-eight to twelve mark as a logical baseline for finding that a consensus exists. To amend the Constitution, Article V requires ratification by three-fourths of the state legislatures, or by three-fourths of conventions called for that purpose. Similarly, if three-fourths of the state legislatures call for a constitutional convention, Congress must convene such a meeting. The formal amendment process

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391. _Id._ at 735.
393. _Loving v. Virginia_, 388 U.S. 1, 6 (1967).
395. Constitutional law scholars disagree sharply about whether such a convention could be limited to a single amendment, or topic, and the extent to which Congress could establish rules to govern such a convention. See generally Walter Dellinger, _The Legitimacy of Constitutional Change: Rethinking the Amendment Process_, 97 _Harv. L. Rev._ 386 (1983) (arguing that the judiciary, not Congress, should review the amendment process); Walter E. Dellinger, _The Recurring Question of the "Limited" Constitutional Convention_, 88 _Yale L.J._ 1623 (1979) (arguing that a constitutional convention must have the authority to explore all issues and cannot be limited to a single amendment); Michael Stokes Paulsen, _A General Theory of Article V: The Constitutional Lessons of the Twenty-seventh Amendment_, 103 _Yale L.J._ 677 (1993) (discussing the different amendment process theories and proposing a new
uses three-fourths as the supermajority required to establish consensus; logically, that number should serve as the presumptive baseline for establishing a new, or modified, tradition.

Professor Pat Cain has observed that "a question of fundamental fairness arises when an individual's protection in something as important as personal intimacy can change significantly merely by the crossing of a state line."396 She suggests that "if most states (and arguably all but two) protect that intimacy, surely we come to expect that our interests in intimacy will be protected by the law."397 Cain then advances a novel theory of constitutional amendment by virtue of state consensus: "At some point, the notion of fundamental fairness requires that individual rights be ratcheted up to the prevailing level, especially in cases where the increased protection causes virtually no harm to anyone else's right other than the right to state a moral code publicly."398 Cain's suggestion for a process of state to federal de facto amendment seems persuasive; at least arguably, this is precisely what the Supreme Court did in Loving, Harper, and, most recently, Lawrence. Although she appreciates the importance of federalism and the role of the states as laboratories of experimentation, Cain suggests that "[a]t some point, it would seem to be the responsibility of [the Supreme] Court to say that enough experimentation has occurred."399

Along similar lines, Professor Michael Klarman, a prominent legal historian, has suggested that the Supreme Court engages in a kind of "updating" function that forces noncompliant states to adopt the majority approach after some period of repose.400

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397. Id.
398. Id.
399. Id. at 132; see also Althouse, supra note 58, at 1746 ("Even where disuniform regulation is tolerable, it may be better to substitute national uniformity at some later point when the best approach to policy has become so clear that the states that maintain their own approach to a matter no longer appear to be making a positive contribution to any process of experimentation or to be serving distinctive local conditions and preferences.").
400. Michael J. Klarman, Antifidelity, 70 S. Cal. L. Rev. 381, 391-98 (1997); Michael J.
Klarman's theory is more descriptive than prescriptive; that is to say, he asserts that the Supreme Court in fact engages in this project of "updating" laws to force outlying states to observe the new national consensus position. 401

The Court has yet to indicate how a consensus may be identified: a state counting approach, with a presumptive baseline of thirty-eight states abandoning a prior rule, in a relatively short period of time, would make for a good start. As Justice Stevens emphasized in Atkins, in some cases "[i]t is not so much the number" of states changing position "but the consistency of the direction of change" that provides compelling evidence of a new consensus position, or if one prefers, a new "tradition." 402 This is not to say that the support of thirty-eight states should be either a sufficient or necessary condition to establish a new consensus position. The point is more limited: the Supreme Court should provide some guidance about how law reform efforts establish a shift or change in preexisting legal rules and practices. Other relevant considerations would include the pattern of enforcement of a law in states that have not changed their approach; whether states have moved in the opposite direction, adopting new proscriptions rather than repealing old ones; and whether social science data indicates that most Americans engage in or accept the behavior or practice at issue. A case presenting an autonomy claim that thirty-eight states recognize, that has a pattern of consistent law reform toward deregulation and in favor of personal autonomy, and that features lax or no enforcement in nonamending states would present a paradigmatic case for updating.

Many other questions remain. For example, should a twenty-four to twenty-six split automatically lead to rejection of the due process claim? That is to say, if a majority of states proscribe or regulate, should that be given determinative weight in the tradition analysis? Moreover, are all states of equal weight in ascertaining an evolving "tradition"? To put the matter bluntly, should Wyoming's answer to a legal problem carry as much weight as California's in the due


401. See supra note 400.
process analysis? My preliminary answer would be “yes,” on the theory that under Article V, each state has equal voting rights with respect to the ratification of constitutional amendments. Justice Scalia has suggested that this is not the only possible approach—one could adopt the view that some states should count more than others when trying to assess whether a consensus exists.403

Turning from the existence of the consensus, one also should worry about the effect of a consensus. In Roe v. Wade, for example, the Supreme Court required a state regulation of abortion procedures to satisfy strict scrutiny to survive constitutional review.404 In other substantive due process cases, however, the Supreme Court has been less emphatic about the appropriate standard of review.405 Indeed, in the infamous Lochner decision, the majority

403. See id. at 346 (Scalia, J., dissenting) ("Of course if the percentage of legislators voting for the bill is significant, surely the number of people represented by the legislators voting for the bill is also significant: the fact that 49% of the legislators in a State with a population of 60 million voted against the bill should be more impressive than the fact that 90% of the legislators in a State with a population of 2 million voted for it."). Justice Scalia seemed to reject this approach in favor of the more traditional every-state-is-equal norm: "What we have looked for in the past to ‘evolve’ the Eighth Amendment is a consensus of the same sort ... that adopted the Eighth Amendment: a consensus of the sovereign States that form the Union, not a nose count of Americans for and against." Id.

404. 410 U.S. 113, 155 (1973) ("Where certain ‘fundamental rights’ are involved, the Court has held that regulation limiting these rights may be justified only by a ‘compelling state interest,’ and that legislative enactments must be narrowly drawn to express only the legitimate state interests at stake." (citations omitted)).

405. See Troxel v. Granville, 530 U.S. 57, 65, 72 (2000) (plurality opinion) (holding that the fundamental right to oversee the raising of a child triggers "heightened protection" of a parent's interest in control over a child and concluding that "the visitation order in this case was an unconstitutional infringement on [a mother's] fundamental right to make decisions concerning the care, custody, and control of her two daughters"); id. at 80 (Thomas, J., concurring) ("The opinions of the plurality, JUSTICE KENNEDY, and JUSTICE SOUTER recognize such a right, but curiously none of them articulates the appropriate standard of review. I would apply strict scrutiny to infringements of fundamental rights."); Turner v. Safley, 482 U.S. 78, 95-98 (1987) (declaring marriage to be "a fundamental right" but applying a "reasonable relationship" test to a Missouri prison rule that prohibited inmates from marrying while incarcerated, concluding that "the Missouri prison regulation, as written, is not reasonably related" to legitimate penological interests); Zablocki v. Redhail, 434 U.S. 374, 383 (1978) ("Since our past decisions make clear that the right to marry is of fundamental importance, and since the classification at issue here significantly interferes with the exercise of that right, we believe that 'critical examination' of the state interests advanced in support of the classification is required."); id. at 388 ("When a statutory classification significantly interferes with the exercise of a fundamental right, it cannot be upheld unless it is supported by sufficiently important state interests and is closely tailored to effectuate only those interests."); Moore v. City of E. Cleveland, 431 U.S. 494, 499 (1977) (plurality
purported to apply nothing more demanding than a rule of reasonableness or rationality.\footnote{408}

In framing the burden a state must meet to abrogate an unenumerated, yet fundamental, right, the Supreme Court should consider imposing a less demanding test in cases involving new or emerging traditions, or consensus, than would apply in cases involving traditions enjoying longer roots in the common law. Rather than imposing strict scrutiny, it might be more appropriate to test regulations of relatively new fundamental rights under a standard of intermediate scrutiny. In assessing the emergence of a new tradition, there is always the possible risk of a false positive; as the period of time that the right has existed shrinks, the risk of a false positive increases.\footnote{407} In addition, when a right lacks deep historical roots, states should enjoy some greater freedom to experiment with the scope and conditions associated with the exercise of the right. It might be unwise to move directly to a strict scrutiny model of review, even if a consensus has emerged that regulations affecting a particular interest should be subject to something more demanding than rational basis review.\footnote{408}
Although the Casey joint opinion does not directly explain its shift from strict scrutiny to de facto intermediate scrutiny, by virtue of the "undue burden" test, one could argue in favor of the less demanding standard of review on the theory that abortion rights represent a new tradition, or consensus; therefore, states should enjoy broader authority to regulate than would be the case for changing the standard for establishing guilt in a criminal trial. Justice Ginsburg, for example, has argued that Roe would have generated less controversy, and left the right to reproductive freedom on a firmer constitutional basis, had Justice Blackmun authored a less categorical opinion.

In light of the risk of a false positive, and the possibility of useful further experimentation by the states, a standard of review less demanding than strict scrutiny should probably apply when the Supreme Court considers the constitutional status of regulations burdening fundamental rights of more recent vintage. Although this approach will not avoid all problems, it would reduce the risk of the Supreme Court recognizing and overenforcing a phantom fundamental right. Moreover, to the extent that a consensus is fresh, persistent dissenting states should be afforded some opportunity to engage in voluntary law reform efforts. Applying strict scrutiny to

but rather that the "justices' failure was in a sense a lack of humility: an inability, or refusal, to understand that although they were vindicating an important value, matters were more complicated than they thought").

409. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 874 (1992) (joint opinion of O'Connor, Kennedy, and Souter, JJ.) ("Only where state regulation imposes an undue burden on a woman's ability to make this decision does the power of the State reach into the heart of the liberty protected by the Due Process Clause."); cf. id. at 929 (Blackmun, J., concurring in part, concurring in the judgment, and dissenting in part) ("The Court has held that limitations on the right of privacy are permissible only if they survive 'strict' constitutional scrutiny—that is, only if the governmental entity imposing the restriction can demonstrate that the limitation is both necessary and narrowly tailored to serve a compelling governmental interest."); id. at 964 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part) (noting that Roe "adopted a 'fundamental right' standard under which state regulations could survive only if they met the requirement of 'strict scrutiny'" and observing that "[w]hile we disagree with that standard, it at least had a recognized basis in constitutional law at the time Roe was decided"); id. at 988 (Scalia, J., concurring in the judgment in part and dissenting in part) ("The rootless nature of the 'undue burden' standard, a phrase plucked out of context from our earlier abortion decisions, is further reflected in the fact that the joint opinion finds it necessary expressly to repudiate the more narrow formulations used in JUSTICE O'CONNOR's earlier opinions.").

state legislation tends to end, rather than encourage, continued dialogue between the federal courts and the political branches of the state governments.

In sum, the Supreme Court should engage in state counting as a means of ascertaining the emergence of a new consensus regarding a claimed fundamental right. State counting should not be used in isolation, without regard to the actual pattern or practice of law enforcement, or the overall legal background against which reform efforts have occurred. In addition, the Court should perhaps make some effort to differentiate new fundamental rights from old by adjusting the standard of review to allow states a greater margin of appreciation in attempting to regulate emerging fundamental rights.

B. The Theory Applied: Lawrence as an Example of Bottom Up Federalism

Taking into account all the considerations discussed to this point, how does Lawrence stack up as a substantive due process decision applying the tradition test? All in all, Lawrence holds up very well indeed.

1. The Majority Opinion: The State Counting Methodology in Action

Lawrence involved a Texas prosecution of John Geddes Lawrence and Tyron Garner for engaging in anal sex in their Houston, Texas apartment. Police entered the apartment based on a report of a weapons disturbance; upon entering the apartment, they found Lawrence and Garner engaged in anal sex. Both men were subsequently charged and convicted of violating Texas’s statute

411. See Post, supra note 193, at 8, 10, 82-87 (arguing that federal courts can and must adjust constitutional understandings to reflect changes in cultural understandings, in part because “[c]hanging cultural norms and practices quintessentially constitute ‘new conditions’ that justify such constitutional pliability,” and suggesting that “[i]nstead of pursuing the chimerical objective of neutrality, the Court would do better to analyze the conditions under which courts should properly make cultural judgments”).
413. Id.
proscribing “deviate sexual intercourse.” The state trial judge sentenced each man to a fine of $200 and court costs. Lawrence and Garner then pursued unsuccessful appeals of their convictions through the Texas state courts; after exhausting these appeals, the couple sought and obtained review in the U.S. Supreme Court.

Justice Kennedy opened the majority opinion in Lawrence by observing that “[l]iberty protects the person from unwarranted government intrusions into a dwelling or other private places.” This concept of liberty “presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct.” Justice Kennedy was painting with a very broad brush; indeed, the initial pages of the majority opinion are very high on rhetoric, but rather low on specifics. As one would expect, Justice Kennedy then engaged the question of the “tradition” Bowers identified against according due process protection to same-sex intimacy: “At the outset it should be noted that there is no long-standing history in this country of laws directed at homosexual conduct as a distinct matter.” Moreover, “[l]aws prohibiting sodomy do not seem to have been enforced against consenting adults acting in private.” When prosecutions took place, it was usually to “ensure there would be no lack of coverage if a predator committed a sexual assault that did not constitute rape as defined by the criminal law;” thus, there was no “rigorous and systematic” attempt to enforce such laws. More recent laws, generally dating from the 1970s, did target homosexuals as a class, but these laws

414. TEX. PENAL CODE ANN. § 21.06(a) (Vernon 2003).
415. Lawrence, 539 U.S. at 563.
416. Id.
417. Id. at 562.
418. Id.
419. See id. at 567 (“When sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring. The liberty protected by the Constitution allows homosexual persons the right to make this choice.”).
420. Id. at 568. This is true, if by that one means laws targeting homosexuals as a distinct cultural subgroup and attempting to proscribe sexual practices associated with this subgroup. See Eskridge, supra note 16, at 644-65.
421. Lawrence, 539 U.S. at 569.
422. Id. at 569-70.
were significantly different from the "crimes against nature" statutes that preexisted them.\textsuperscript{423}

Justice Kennedy conceded that, as an historical matter, "for centuries there have been powerful voices to condemn homosexual conduct as immoral."\textsuperscript{424} But, he added that "[i]n all events we think that our laws and traditions in the past half century are of most relevance here."\textsuperscript{425} Looking at this tradition, Justice Kennedy noted that the "25 States with laws prohibiting the relevant conduct ... are reduced now to 13, of which 4 enforce their laws only against homosexual conduct."\textsuperscript{426} And, even in these thirteen states "there is a pattern of nonenforcement with respect to consenting adults acting in private."\textsuperscript{427}

These observations, standing alone, more than justified the majority's decision to break with \textit{Bowers} and to recognize a fundamental right of privacy that extends, in spacial terms, to consensual intimacy between adults, in private. The states have moved, \textit{en masse}, to dump their laws regulating noncommercial, consensual sex acts between adults in private. Even those states that retain legal proscriptions against sodomy do not bother to enforce them very much or very often. Absent a substantial or important state interest to justify imposing a burden on the right of privacy, Lawrence and Garner should be free to conduct their private lives as they think best.\textsuperscript{428}

Justice Kennedy, however, offered an additional rationale for invalidating the Texas sodomy statutes, which had nothing to do with domestic legal traditions: "To the extent \textit{Bowers} relied on values we share with a wider civilization, it should be noted that the reasoning and holding in \textit{Bowers} have been rejected elsewhere."\textsuperscript{429} Justice

\begin{footnotesize}
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\bibitem{423} Id. at 570.
\bibitem{424} Id. at 571.
\bibitem{425} Id. at 571-72.
\bibitem{426} Id. at 573.
\bibitem{427} Id.; see also id. at 576 ("The courts of five different States have declined to follow \textit{Bowers} in interpreting provisions in their own state constitutions parallel to the Due Process Clause of the Fourteenth Amendment.").
\bibitem{428} See Pamela S. Karlan, Lecture, "Pricking the Lines": The Due Process Clauses, Punitive Damages, and Criminal Punishment, 88 MINN. L. REV. 880, 913 (2004) (arguing that "[a]lthough the states are free to adopt different positions on how to impose punishment and on how much punishment to impose, there is some constitutional limit on the degree of permissible deviation from national norms").
\bibitem{429} Lawrence, 539 U.S. at 576.
\end{footnotesize}
Kennedy referenced the case law of the European Court of Human Rights and the domestic law of "[o]ther nations" to support the claim that "[t]he right the petitioners seek in this case has been accepted as an integral part of human freedom."\textsuperscript{430} Unlike the relatively recent vintage of antisodomy statutes targeting homosexuals, the law reform movement in the states to abolish antisodomy laws, and the consistent lack of meaningful enforcement of such laws in the states that retained them, the content of foreign law does not seem at all relevant to ascertaining whether a consensus, or tradition, existed in the United States that recognized the right of gay and lesbian couples to private intimate acts free and clear of state regulation. Justice Kennedy actually undermined the strength of his argument by invoking foreign legal sources in this context.

After performing a careful analysis of the history, pattern of enforcement, and direction of legal change associated with antisodomy laws, along with the gratuitous consideration of foreign law on the subject, Justice Kennedy announced that "\textit{Bowers v. Hardwick} should be and now is overruled."\textsuperscript{431} In stirring language, Justice Kennedy validated the significance of the relationships that same-sex couples create and maintain:

\begin{quote}
The petitioners are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making their private sexual conduct a crime. Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government.\textsuperscript{432}
\end{quote}

Because the "Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual,"\textsuperscript{433} Lawrence and Garner's substantive due process rights took precedence on the facts presented.\textsuperscript{434}

\textsuperscript{430} \textit{Id.} at 576-77; see also id. at 572-73 (discussing the 1967 repeal of British antisodomy laws and other foreign developments).

\textsuperscript{431} \textit{Id.} at 578.

\textsuperscript{432} \textit{Id.}

\textsuperscript{433} \textit{Id.}

\textsuperscript{434} Justice Kennedy was careful to limit the scope of the right being recognized:

The present case does not involve minors. It does not involve persons who might be injured or coerced or who are situated in relationships where consent
2. The Dissent's Attempt To Turn Back the Clock to Palko/Twining

Justice Scalia's intemperate dissent in Lawrence longed for a time gone by, best characterized by the pre-Duncan approach to substantive due process. Accordingly, most of his arrows fell quite wide of the mark. Justice Scalia argued, for example, that establishing a tradition in U.S. law is not a sufficient condition for conveying substantive due process recognition to a right. He argued that "[a]n asserted 'fundamental liberty interest' must not only be 'deeply rooted in this Nation's history and tradition,' but it must also be 'implicit in the concept of ordered liberty,' so that 'neither liberty nor justice would exist if [it] were sacrificed.'" But this attempted reversion to the Palko/Twining formulation flies in the face of Duncan and Winship. A domestic legal tradition has been sufficient, at least since 1968, to establish the existence of a fundamental right.

Moreover, given Chief Justice Rehnquist's importation of the Eighth Amendment state counting practice in Glucksberg, it seems odd for Justice Scalia to demand something more than a contemporary consensus regarding the existence of a fundamental right. Scalia thundered that "[c]onstitutional entitlements do not spring into existence because some States choose to lessen or eliminate criminal sanctions on certain behavior." This simply is not true; Eighth Amendment jurisprudence relies extensively on contempo...
rary state practices to determine whether a particular practice is "cruel and unusual." And, even if one might claim that the text of the Eighth Amendment justifies a more contemporary focus than the text of the Due Process Clauses, the fact remains that the Supreme Court has used state law reform efforts to inform fundamental rights since the Warren Court's time. Loving and Harper engaged in just this sort of analysis, as did Glucksberg. If the absence of a consensus counts against recognition of a new fundamental right, then surely the existence of a consensus counts toward recognition of a fundamental right.

Justice Scalia's attack on the majority's historical predicate is not significantly more persuasive than his doctrinal attack. For example, he contested the notion that sodomy laws are not enforced on the basis of "134 reported cases involving prosecutions for consensual, adult, homosexual sodomy" over the course of the last fifty years. That represents less than three prosecutions per state, over the course of half a century! If one compared those statistics with prosecutions for heroin possession, the relative commitment to enforcement would be clear. It must be that Justice Scalia views the existence of a law in the books, even without any effort, ever, to enforce it, as precluding the recognition of an unenumerated, fundamental right.

Justice Scalia also made much of Justice Kennedy's conclusion that Texas lacked a legitimate state interest to justify its anti-sodomy law. He stated that, "[n]ot once does [the majority] describe homosexual sodomy as a 'fundamental right' or a 'fundamental liberty interest,' nor does it subject the Texas statute to strict scrutiny." He suggested that "the Court concludes that the application of Texas's statute to petitioners' conduct fails the rational-basis test." As Professor Laurence Tribe has argued,

439. Eighth Amendment jurisprudence is, after all, a subset of substantive due process, given that it is the Due Process Clause, rather than the Eighth Amendment itself that the Supreme Court enforces against the states. See, e.g., Solem v. Helm, 463 U.S. 277, 292 (1983) (holding that "the sentences imposed for commission of the same crime in other jurisdictions" is one factor to consider when determining if a punishment is cruel and unusual).


441. Lawrence, 539 U.S. at 598 (Scalia, J., dissenting).

442. Id. at 594.

443. Id.
Justice Scalia grossly overstated the significance of the majority's "legitimate state interest" language. Only in the pre-Casey abortion cases did the Supreme Court routinely use the phrase "strict scrutiny" to describe the government's burden in saving a regulation that infringes a fundamental right. In many, if not most, substantive due process cases, including Troxel, the Court either specified no level of review or defaulted to tests involving rationality, reasonableness, or arbitrariness.

The most serious objection one could make to Justice Kennedy's opinion—his reliance on foreign law to inform domestic legal tradition—received only a short, glancing blow. Justice Scalia pouted that constitutional rights do not "spring into existence, as the Court seems to believe, because foreign nations decriminalize conduct." The relatively short shrift that Justice Scalia gave the majority's use of foreign law probably reflects the gratuitous nature of those citations; because the majority's opinion would stand without the invocation of foreign law, a sustained attack on this aspect of Justice Kennedy's opinion would do little to undermine its overall persuasive force.

Perhaps Justice Scalia's best point was his rejection of the notion that moral disapprobation cannot serve as the basis for law. Such an approach "effectively decrees the end of all morals legislation." The easy answer to this objection is that the majority really did not mean what it seemed to be saying; community morals remain a valid basis for legal proscription. The real question in Lawrence was whether the community actually has a serious moral objection to same-sex intimacy, an objection so deeply seated as to justify criminalization of such conduct. Justice Kennedy mustered objective evidence establishing that, by 2003, most communities no longer viewed such regulation as necessary—and, even in those communities that still maintained formal regulation of such conduct, enforcement was virtually nonexistent.

444. See Tribe, supra note 6, at 1916-17.
445. See supra notes 404-08 and accompanying text.
446. Lawrence, 539 U.S. at 598 (Scalia, J., dissenting).
447. Id. at 599.
3. The Real Reason for the Lawrence Decision

The most compelling factor Justice Kennedy invoked in his majority opinion in Lawrence was the shift in state laws from 1961 to 2003. In 1961, every state and the District of Columbia maintained a prohibition against sodomy; in the intervening forty-two years, thirty-seven states and the District of Columbia changed their minds.448 This kind of sea change, especially when viewed against the virtual nonenforcement of the laws in the remaining thirteen states, made Lawrence a very easy case.

The majority also recognized that more was at stake than just the demoralizing effect of a precatory law: "When homosexual conduct is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual persons to discrimination both in the public and in the private spheres."449 Such state laws, and Bowers's endorsement of them as consistent with the American constitutional tradition, "demeans the lives of homosexual persons."450

Lawrence fits very comfortably into the line of cases, including Loving and Harper, that force resistant states to accept a new national consensus on an important autonomy interest. The right to pursue intimacy with a person of one's choice in 2003 stands on the same cultural footing as interracial marriage in 1967 and voting without payment of a poll tax in 1966. These decisions all deploy substantive due process to measure the pace of constitutional change and, if a consensus has developed, to nationalize that consensus.451 These decisions take seriously Justice Harlan's admonition that due process rights incorporate not only the traditions from which we have come, but also those traditions with

448. Id. at 572-73 (majority opinion).
449. Id. at 575. Justice Kennedy went on to explain that "[t]he stigma this criminal statute imposes, moreover, is not trivial." Id. Those convicted of the offense would have a permanent criminal record, might have to register in some states as sex offenders, and would suffer the "other collateral consequences always following a conviction, such as notations on job application forms." Id. at 575-76.
450. Id. at 575.
451. But see Bernstein, supra note 20, at 60 ("The recent Lawrence opinion asserting a Fourteenth Amendment right for adults to engage in homosexual sodomy is even more Lochnerian because the Court has fully shifted from protecting 'privacy,' which at least had the pretense on relying on penumbral rights, to protecting 'liberty.'").
which we have broken. An approach that gives dispositive effect to the prior existence of laws proscribing a particular course of conduct, and no effect whatsoever to the rampant repeal or invalidation of such laws, fails to honor the notion that "tradition is a living thing"\textsuperscript{452} or to engage "tradition" in a meaningful fashion.

C. From Bowers to Lawrence: Social Change and De Facto Amendments Through State Government Practice

The Supreme Court reached the right result in \textit{Lawrence} and offered the right reasons in support of its decision. The sea change in state law regarding the regulation of noncommercial, private sexual intimacy establishes that the nation has a new social—and legal—consensus regarding the scope of sexual autonomy. When coupled with the lack of serious enforcement efforts in those states that still maintained antisodomy laws, the case for "updating" the Constitution through substantive due process becomes even more compelling.

Justice Kennedy's focus on the direction of legal change over the last fifty years, rather than the preceding 250 years, also seemed justified if the tradition test is to honor not only old traditions, but also new ones. A tradition test that does not look beyond Lord Coke will largely eliminate substantive due process review for contemporary legal claims. Moreover, Justices O'Connor, Kennedy, and Souter have repeatedly said they will not limit substantive due process to a purely retrospective, long term history, methodology.\textsuperscript{453}

\textit{Lawrence} reaffirmed the methodology employed in \textit{Harper} and \textit{Loving}; a methodology that seems to have become the primary approach to giving meaning to the Eighth Amendment's prohibition against cruel or unusual punishments.\textsuperscript{454} State governments, acting through the state legislature or state courts, can amend the federal Constitution by collectively establishing a new national consensus position regarding the regulation, or nonregulation, of particular behavior. Contrary to Justice Scalia's outraged assertion that "[c]onstitutional entitlements do not spring into existence because

\begin{itemize}
\item 453. See supra notes 380-83 and accompanying text.
\end{itemize}
some States choose to lessen or eliminate criminal sanctions on certain behavior."\footnote{Lawrence v. Texas, 539 U.S. 558, 598 (2003) (Scalia, J., dissenting).}

contemporary state law reform efforts can and should inform the meaning of "due process of law."

In some cases, state counting will lead to the expansion of due process rights; in others, however, this approach might require the Justices to permit the period of state experimentation to continue. This is not necessarily a bad thing; as Justice White warned in \textit{Bowers}: "The Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution.\footnote{Bowers v. Hardwick, 478 U.S. 186, 194 (1986), overruled by Lawrence v. Texas, 539 U.S. 558, 578 (2003).} To be sure, Justice White was a persistent, but not entirely implacable, critic of the post-\textit{Griswold} renaissance of substantive due process.\footnote{See, e.g., Doe v. Bolton, 410 U.S. 179, 221-22 (1973) (White, J., dissenting) (arguing that "[t]he Court simply fashions and announces a new constitutional right for pregnant mothers and, with scarcely any reason or authority for its action, invests that right with sufficient substance to override most existing state abortion statutes" and criticizing the majority's decision as "an improvident and extravagant exercise of the power of judicial review that the Constitution extends to this Court"); \textit{but see} Griswold v. Connecticut, 381 U.S. 479, 502, 504 (1965) (White, J., concurring in the judgment) (joining the majority to invalidate the Connecticut ban on the sale and use of contraceptive devices but suggesting that the test for invalidating the law is whether the statute is "reasonably necessary for the effectuation of a legitimate and substantial state interest, and not arbitrary or capricious in application").} Even Justices generally sympathetic to substantive due process, however, have cautioned against its overuse.\footnote{See, e.g., Moore v. City of E. Cleveland, 431 U.S. 494, 502 (1977) (plurality opinion) (Powell, J.) ("As the history of the \textit{Lochner} era demonstrates, there is reason for concern lest the only limits to such judicial intervention become the predilections of those who happen at the time to be Members of this Court.").}

To the extent that the Supreme Court can ground substantive due process in an empirical inquiry into the current state of the law, the direction of law reform, and the commitment of states to enforcing their preexisting laws, the danger of the doctrine morphing into \textit{Lochner}-ism seems quite remote. On the other hand, when the Supreme Court invalidates state laws without any basis other than a "raised eyebrow" or a sense of outrage, the risk of an appearance of illegitimacy becomes much stronger.
1. The BMW v. Gore Line of Cases Lacks a Tradition-based Predicate and Oversteps the Proper Limits of Substantive Due Process

From the vantage point of tradition, the Supreme Court's punitive damages cases raise the specter of Lochnerizing. This is because they do not have any serious claim to the imprimatur of tradition, nor has the tort reform movement established a clear consensus position on limiting punitive damages to, say, a nine to one ratio with respect to compensatory damages. To be sure, state tort reform efforts are an ongoing project in many, if not most, jurisdictions. But just as the Supreme Court refused to end the debate regarding physician-assisted suicide in the absence of a clear national consensus regarding the practice, the Supreme Court should not be nationalizing tort law through substantive due process. "Throughout the Nation, Americans are engaged in an earnest and profound debate about the morality, legality, and practicality of tort reform; the Supreme Court's holdings should "permit this debate to continue, as it should in a democratic society." There is no principled distinction to be drawn between tort reform, on the one hand, and physician-assisted suicide (PAS), on the other. In neither case does tradition, viewed over a long period, validate a right to PAS or to limits on punitive damages. Viewed

459. Of course, some legal scholars have leveled this criticism at the Roe/Casey line of precedents. See Bernstein, supra note 20, at 56 ("For better or for worse, Griswold and Roe's protection of the unenumerated right to privacy raises many of the same issues as Lochner's protection of the unenumerated right to liberty of contract, a conclusion that cannot be glossed over with the fallacious claim that Lochner was really about prohibiting class legislation."); Strauss, supra note 408, at 378 ("Today, the attack on Lochner has to acknowledge that a judicial practice that has important similarities to Lochner—the systematic judicial elaboration of constitutional rights, in the face of a significant degree of popular opposition—has been accepted by, in fact celebrated by, mainstream legal thought.").

460. Indeed, one of the most persuasive defenses of these decisions, authored by Professor Marty Redish, does not even attempt to justify them on substantive due process grounds—instead, Professor Redish argues that the decisions should be understood solely in procedural due process terms. See Martin H. Redish & Andrew L. Mathews, Why Punitive Damages Are Unconstitutional, 53 Emory L.J. 1, 48-53 (2004). This is an intriguing way of reframing the debate and provides, at least potentially, a more persuasive basis for imposing federal constitutional limits on state punitive damage awards.


462. Id.
over a shorter time frame, say the last fifty years, it is obvious that
the tradition against PAS and in favor of unlimited, jury-controlled
punitive damages is giving way. Precisely how and where the
various law reform projects will leave us as a people remains to be
determined.

On these facts, it is enough for the Supreme Court to indicate
that the claims implicate due process concerns, but that no pre-
existing or emerging tradition precludes existing state practices.
Employing Justice O'Connor's language, originally applied in an
Eighth Amendment context, "[t]he day may come when there is
such general legislative rejection" of proscriptions against PAS, or
unlimited jury punitive damages awards, "that a clear national
consensus can be said to have developed." In both cases, however,
again borrowing Justice O'Connor's language in Stanford, "I do not
believe that day has yet arrived." And, "[b]y leaving open for now
the broader ... question[s] ..., the approach I take allows the
ultimate moral issue[s] at stake in the constitutional question[s] to
be addressed in the first instance by those best suited to do so, the
people's elected representatives."

At bottom, the Supreme Court's punitive damages jurisprudence,
which considers whether a particular award is "grossly excessive,"
rests on little more than application of "a suspicious judicial
eyebrow." Surely Justice White was correct when he argued that
constitutional "judgments should not be, or appear to be, merely
the subjective views of individual Justices; judgment should be
informed by objective factors to the maximum possible extent."
Yet, because of the lack of a consensus among the states regard-
ing appropriate limits to punitive damages, the Supreme Court's

and concurring in the judgment), abrogated by Roper v. Simmons, 543 U.S. 551, 574-75
(2005).
464. Id. at 382.
judgment).
dissenting).
specifically endorsed this proposition in the context of her advocacy of federal constitutional
review of state jury punitive damages awards. See TXO, 509 U.S. at 480 (O'Connor, J.,
dissenting) ("As an initial matter, constitutional judgements should not be, or appear to be,
merely the subjective views of individual Justices." (quotation and citation omitted)).
jurisprudence appears to be little more than an ad hoc review by a jury of nine.468

2. Foreign Law Should Play a Very Limited Role in Substantive Due Process Adjudication

Although Lawrence provides a persuasive rationale for disallowing the continued maintenance of antisodomy laws, it also offers a superfluous rationale that works against the persuasive force of the majority’s claim that a new consensus has emerged. In two places, Justice Kennedy invoked the rejection of antisodomy laws in foreign jurisdiction as persuasive evidence against Texas’s ability to maintain and enforce such a law today.469 Given that Lawrence is not a close case if one confines the evidence of tradition to domestic sources, this recourse to foreign law seems very strange indeed. At one time, the Supreme Court routinely referenced foreign law when deciding whether a particular rule or practice was “implicit in the concept of ordered liberty.”470 Since Duncan v. Louisiana, however, the Supreme Court’s application of the tradition test has focused solely on domestic, or “Anglo-American,” legal traditions.471 This is as it should be.

If one allows consideration of foreign legal materials to validate a claim, it seems only fair to permit introduction of such materials to defeat a claim. For example, the German Federal Constitutional Court has found that personhood begins at conception and has struck down German laws liberalizing access to abortion.472 Would it be appropriate, in considering whether a fetus is a person for

468. BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 602, 606 (1996) (Scalia, J., dissenting) (objecting that the majority “provides virtually no guidance to legislatures, and to state and federal courts, as to what a ‘constitutionally proper’ level of punitive damages might be” and characterizing the majority’s self-described “guideposts” as little more than “crisscrossing platitudes” that will “yield no real answers in no real cases”).
470. See supra Part II.D.
purposes of the Fourteenth Amendment, to import Germany's conception of personhood? Certainly a litigant opposed to abortion on demand would think it as relevant as the materials cited in Lawrence.

The Supreme Court has been engaged, for the past twenty or so years, in a running battle over whether foreign law should influence domestic constitutional interpretation. Justice Breyer has been a forceful advocate of efforts to internationalize the Supreme Court's decision process; he routinely cites foreign legal precedents and practices in support of interpretative positions involving the Constitution. Justices O'Connor and Ginsburg have endorsed recourse to foreign legal materials, although they have not incorporated references to such materials in their opinions with the same alacrity as Justices Breyer or Stevens. Justice Breyer, commenting on the practice, has acknowledged that "[o]bviously, this foreign authority does not bind us." He argues, however, that "this Court has long considered as relevant and informative the way in which foreign courts have applied standards roughly comparable to our own constitutional standards in roughly comparable circum-


474. See Foster v. Florida, 537 U.S. 990, 992-93 (2002) (mem.) (Breyer, J., dissenting from denial of certiorari) (noting that "[c]ourts of other nations have found that delays in execution of capital sentence "can render capital punishment degrading, shocking, or cruel" and citing authorities from the United Kingdom, Canada, and the European Court of Human Rights); Knight v. Florida, 528 U.S. 990, 995-98 (1999) (mem.) (Breyer, J., dissenting from denial of certiorari) (citing authorities from Canada, India, Jamaica, and the European Court of Human Rights in support of proposition that long delay between capital sentence and execution can constitute "cruel and unusual" punishment).

475. See Atkins v. Virginia, 536 U.S. 304, 316 n.21 (2002) (citing in opinion for the Court practices of foreign nations regarding the execution of the mentally retarded); Thompson v. Oklahoma, 487 U.S. 815, 830, 831 n.34 (1988) (plurality opinion) (citing the practices of Western European nations regarding the execution of individuals less than sixteen years of age).

476. Knight, 528 U.S. at 996 (Breyer, J., dissenting from denial of certiorari).
stances.” Justice Breyer then cited a half-dozen cases invoking foreign law. What he failed to mention, however, was that in many of these cases, the majority cited foreign law incident to rejecting a constitutional claim; the Supreme Court has relied on foreign legal authority far less frequently to recognize or expand constitutional rights.

On the other side of the fence, former Chief Justice Rehnquist, and Justices Scalia and Thomas, have been persistent foes of this practice.

477. Id. at 997.


479. See, e.g., Lawrence v. Texas, 539 U.S. 558, 598 (Scalia, J., dissenting) (2003) (objecting to the majority’s “discussion of ... foreign views” and arguing that “this Court ... should not impose foreign moods, fads, or fashions on Americans” (quotation and citation omitted); Foster, 537 U.S. at 990 n.* (Thomas, J., concurring in denial of certiorari) (“While Congress, as a legislature, may wish to consider the actions of other nations on any issue it likes, this Court’s Eighth Amendment jurisprudence should not impose foreign moods, fads, or fashions on Americans.”); Atkins, 536 U.S. at 322, 325 (Rehnquist, C.J., dissenting) (objecting to the majority’s “decision to place weight on foreign laws,” suggesting consideration of such matters “is antithetical to considerations of federalism,” and questioning “how the views of other countries regarding the punishment of their citizens provide any support for the Court’s ultimate determination”); id. at 347-48 (Scalia, J., dissenting) (“Equally irrelevant are the practices of the ‘world community,’ whose notions of justice are (thankfully) not always those of our people.”); Knight, 528 U.S. at 990 (Thomas, J., concurring in denial of certiorari) (“I write only to point out that I am unaware of any support in the American constitutional tradition or in this Court’s precedent for the [appellant’s position] .... Indeed, were there any such support in our own jurisprudence, it would be unnecessary for proponents of the claim to rely on the European Court of Human Rights, the Supreme Court of Zimbabwe, the Supreme Court of India, or the Privy Council.”); Stanford v. Kentucky, 492 U.S. 361, 369 n.1 (1989) (“We emphasize that it is American conceptions of decency that are dispositive, rejecting the contention of petitioners and their various amici ... that the sentencing practices of other countries are relevant.”), abrogated by Roper v. Simmons, 543 U.S. 551, 574-75 (2005); Thompson, 487 U.S. at 868 n.4 (Scalia, J., dissenting) (arguing that “[t]he practices of other nations, particularly other democracies, can be relevant to determining whether a practice uniform among our people is not merely a historical accident, but rather so ‘implicit in the concept of ordered liberty’ that it occupies a place not merely in our mores but, text permitting, in our Constitution as well”) (quoting Palko v. Connecticut, 302 U.S. 319, 325 (1937)), overruled by Benton v. Maryland, 395 U.S. 784, 794 (1969).
Where a national consensus exists regarding the viability of an autonomy value, as in *Lawrence*, recourse to foreign legal materials is at best superfluous. At worst, recourse to such sources undermines the claim that a domestic consensus exists regarding the claim at bar. Sometimes, less really is more, if by "tradition" the Supreme Court means the values and practices of the people of the United States.

**CONCLUSION**

Legal scholars like Herbert Wechsler, John Hart, Henry Wellington, and Albert Saks all advocate the "passive virtues," the idea that sometimes the best judicial decision might be no decision at all, at least on the merits. The Legal Process school also advances the idea that the legitimacy of judicial review rests on the perception and reality that judges are engaged in an interpretive, rather than wholly creative, enterprise. If the public comes to believe that judges are merely imposing their own subjective moral preferences, rather than enforcing determinate constitutional constraints, judicial review might come under popular attack. In no area does the Supreme Court risk its appearance of principled decision making more than when it identifies and protects unenumerated, yet fundamental, rights.

Substantive due process would benefit immeasurably if the Dumbo's feather of tradition could be reworked into something resembling an operational test that not only serves as justification for results that a majority of the Justices might like to reach, but also as a brake against results that a majority of the Justices might like to reach—but that tradition, or consensus, does not yet sanction.

In particular, state counting could provide an important means of cabining judicial discretion in substantive due process cases, by making the application of the tradition test turn on less subjective considerations. A carefully theorized and operationalized effort at state counting might provide a useful way of identifying and

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protecting the traditions from which we have broken, which are no less deserving of constitutional protection than those traditions from which we have come. A commitment to maintain tradition as a living concept demands no less.