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On Substantive Due Process and Discretionary Traditionalism

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ON SUBSTANTIVE DUE PROCESS AND DISCRETIONARY TRADITIONALISM

*Ronald Turner**

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This Article examines the role that tradition and traditionalism have long played and continue to play in the United States Supreme Court's and federal courts of appeals' interpretation and application of the Due Process Clauses of the United States Constitution, and the judicial determination that a claimed right is or is not a fundamental right that cannot be abridged absent a compelling state interest. Traditionalism—understood as a method of constitutional interpretation and the judicial recognition of only those rights deeply rooted in the nation's history and tradition, or implicit in the

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concept of ordered liberty—has been touted as an objective approach that reaches legal conclusions by applying neutral rules to verifiable evidence. On that view, traditionalism constrains judicial discretion, and impedes the introduction of a judge's subjective political and moral judgments into the due process calculus and fundamental rights determination. This Article contests that view and argues that traditionalism cloaks subjective and discretionary judging in the garb of a purportedly objective and discretion-limiting methodology. As argued herein, traditionalism is discretionary in at least three respects: (1) a judge selects traditionalism over and instead of other interpretive methodologies and jurisprudential approaches; (2) a traditionalist judge is free to frame the legal inquiry and to define the level of generality at which a claimed right is characterized; and (3) a traditionalist judge discretionarily determines the time frame within which she will look for evidence and confirmation that a claimed fundamental right did or did not—does or does not—exist. These decision points, necessarily involving a judge's discretion and subjective viewpoints and value judgments, belie the posited neutrality and objectivity of traditionalism. Recognition of this reality is essential to an informed understanding of the mechanics of the substantive due process inquiry.

I. INTRODUCTION

THE Due Process Clauses of the Fifth and Fourteenth Amendments to the United States Constitution provide that the federal and state governments shall not deprive persons of life, liberty, or property without due process of law.[1] More than a constitutional mandate of procedural due process and "a guarantee of fair procedure in connection with any deprivation of life, liberty, or property,"[2] it is now well settled that a "substantive component" of the clauses (the Due Substance Clauses)[3] also protects "individual liberty against 'certain government actions regardless of the fairness of the procedures used to implement them.'"[4] Thus, substantive due process review of laws and governmental

1. *See* U.S. CONST. amend. V (1791) ("No person shall . . . be deprived of life, liberty, or property, without due process of law . . . .").

2. Collins v. City of Harker Heights, Tex., 503 U.S. 115, 125 (1992).

3. *See* Charles L. Black, Jr., *"One Nation Indivisible": Unnamed Human Rights in the States*, 65 ST. JOHN'S L. REV. 17, 39 n.40 (1991) (positing the vulnerability of "the use of the 'due process' clause to reach substantive results" and the "perverse transgression of plain meaning" in the "metamorphosis of a 'due process' clause to a 'due substance' clause"); Henry P. Monaghan, *Our Perfect Constitution*, 56 N.Y.U. L. REV. 353, 355 (1981) (noting "a core issue in modern constitutional theory—the legitimacy of judicial review under the . . . 'due substance clauses': substantive due process and equal protection").

4. *Collins*, 503 U.S. at 125 (quoting Daniels v. Williams, 474 U.S. 327, 331 (1986)); *see also* Reno v. Flores, 507 U.S. 292, 301–02 (1993) (A "'substantive due process claim' relies upon our line of cases which interprets the Fifth and Fourteenth Amendments' guarantee of 'due process of law' to include a substantive component, which forbids the government to infringe certain 'fundamental' liberty interests *at all*, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest."); Nat'l Paint & Coatings Ass'n v. City of Chi., 45 F.3d 1124, 1129 (7th Cir. 1995) ("The doctrine that goes by the name 'substantive due process' is . . . derived from the many constitutional

actions is an established feature of this nation's constitutional law.[5]

This Article examines the role that tradition and traditionalism have long played and continue to play in the United States Supreme Court's interpretation and application of the Due Process Clauses, and the judicial determination that a claimed right is or is not "a right so fundamental that it cannot be abridged absent a 'compelling state interest.'"[6]

As discussed in Part I, tradition—understood here as "simply our name for the repository of accustomed practices that we withhold from scrutiny and accept on reflex"[7]—has long been one of the factors referenced by the Court and by individual Justices in decisions recognizing or rejecting claims that certain governmental conduct violates the due process guarantee.[8] For those who believe that a judge engaged in the decisional enterprise "must take into account past legal and political practice as well as what the framers themselves intended to say,"[9] respect for and consideration of tradition gives credence to the "central traditionalist idea . . . that one should be very careful about rejecting judgments made by people who were acting reflectively and in good faith, especially when those judgments have been reaffirmed . . . over time."[10] In the view of legal traditionalists,

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rules that protect personal liberty from unjustified intrusions. The fact that it is a doctrine owing its existence to constitutional structure rather than a clear grant of power to the judiciary has led the Supreme Court to be cautious in its use. . . . Only laws that affect 'fundamental rights' come within the purview of this doctrine.").

5. *See* McDonald v. City of Chi., 130 S. Ct. 3020, 3050 (2010) (Scalia, J., concurring) ("Despite my misgivings about Substantive Due Process as an original matter, I have acquiesced in the Court's incorporation of certain guarantees in the Bill of Rights because it is both long established and narrowly limited.").

Substantive due process theory and doctrine is an established but (for some) controversial aspect of constitutional law. *See McDonald*, 130 S. Ct. at 3062 (2010) (Thomas, J., concurring in part and concurring in the judgment) ("The notion that a constitutional provision that guarantees only 'process' before a person is deprived of life, liberty, or property could define the substance of those rights strains credulity for even the most casual user of words."); AKHIL REED AMAR, AMERICA'S UNWRITTEN CONSTITUTION: THE PRECEDENTS AND PRINCIPLES WE LIVE BY 119 (2012) (The "phrase—'substantive due process'—[ ] borders on oxymoron." "Substance and process' are typically understood as opposites."); JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 18 (1980) ("'[S]ubstantive due process' is a contradiction in terms—sort of like 'green pastel redness.'").

6. Chavez v. Martinez, 538 U.S. 760, 776 (2003).

7. David J. Luban, *Legal Traditionalism*, 43 STAN. L. REV. 1035, 1036 (1991); *see also* Rebecca L. Brown, *Tradition and Insight*, 103 YALE L.J. 177, 181 (1993) (understanding tradition as "any combination of acts or statements that together demonstrate a set of community values or illustrate a common belief system"). Professor Luban distinguishes "the traditional" from "the past," noting that the latter "can be recent as well as ancient, whereas tradition must emerge from the practices that by now have become relatively ancient." DAVID J. LUBAN, LEGAL MODERNISM: LAW, MEANING, AND VIOLENCE 105 (1997).

8. *See generally* Ronald J. Krotoszynski, Jr., *Dumbo's Feather: An Examination and Critique of the Supreme Court's Use, Misuse, and Abuse of Tradition in Protecting Fundamental Rights*, 48 WM. & MARY L. REV. 923 (2006).

9. RONALD DWORKIN, FREEDOM'S LAW: THE MORAL READING OF THE CONSTITUTION 9-10 (1996).

10. David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877, 891 (1996).

> [t]radition is . . . an objective criterion that prevents courts from substituting their own subjective preferences for those of legislatures . . . . If a tradition was not firmly established at the time of the Framers or when the Fourteenth Amendment was adopted, or if a particular tradition supports a legislative act, the substantive due process challenge at issue fails.[11]

Traditionalism—more specifically legal traditionalism, which is the interpretation of the Constitution "in accordance with the long-standing and evolving practices, experiences, and tradition of the nation"[12]—is a particular interpretive methodology formulated and employed by members of the Court in substantive due process cases.[13] A traditionalist "looks at what decentralized and representative bodies have done, over time, and treats their consensus as authoritative," and calls for an application of the words of the Constitution "as they have been understood by the people over the course of our constitutional history, from enactment through the present."[14] Burkean in conception and foundation,[15] tradi-

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11. Katharine T. Bartlett, *Tradition as Past and Present in Substantive Due Process Analysis*, 62 DUKE L.J. 535, 540–41 (2012).

12. Michael W. McConnell, *Textualism and the Dead Hand of the Past*, 66 GEO. WASH. L. REV. 1127, 1133 (1998); *see also* CASS R. SUNSTEIN, RADICALS IN ROBES: WHY EXTREME RIGHT-WING COURTS ARE WRONG FOR AMERICA 90 (2005) ("The basic idea" of traditionalism "is that privacy and liberty rights do not count as such unless they have been recognized by longstanding traditions.").

13. *See generally* CASS R. SUNSTEIN, A CONSTITUTION OF MANY MINDS: WHY THE FOUNDING DOCUMENT DOESN'T MEAN WHAT IT MEANT BEFORE 93–121 (2009) (discussing "due process traditionalism" and examining proffered justifications for the approach); *see also* Cass R. Sunstein, *Due Process Traditionalism*, 106 MICH. L. REV. 1543 (2008).

14. McConnell, *supra* note 12, at 1136; *see also* Anthony T. Kronman, *Precedent and Tradition*, 99 YALE L.J. 1029, 1044 (1990) ("[F]or most of the time that human beings have lived together in organized communities, every aspect of their communal lives—social, religious, political, and economic as well as legal—has to a large degree been organized on the assumption that the past has an inherent authority . . . a sanctity that obligates us to respect the patterns it prescribes. The name that we give this once-pervasive attitude is traditionalism.").

Traditionalism is distinct from and should not be confused with originalism. Originalists posit that the meaning of a constitutional provision is discoverable in and determinable by the original intent of the framers, the original understanding of the ratifiers, the original public meaning, or other originalist methodologies. *See generally* JACK M. BALKIN, LIVING ORIGINALISM 102 (2011); STEVEN G. CALABRESI, ORIGINALISMS: A QUARTER CENTURY OF DEBATE 162 (2007). Unlike traditionalism, originalist meaning is fixed and does not evolve. *See* John C. Jeffries, Jr. & Daryl J. Levinson, *The Non-Retrogression Principle in Constitutional Law*, 86 CAL. L. REV. 1211, 1241 (1998) ("Traditionalism thus differs from originalism, which draws its normative authority not from historical practice but from a social contract theory of precommitment by the American people.").

15. Edmund Burke, a proponent of traditionalism, cautioned that current generations should not ignore the past, "lest the temporary possessors and life-renters in it, unmindful of what they have received from their ancestors, or of what is due to their posterity, should act as if they were the entire masters; that they should not think it amongst their rights to cut off the entail, or commit waste on the inheritance, by destroying at their pleasure the whole original fabric of their society . . . ." For Burke, "[b]y this unprincipled facility of changing the state as often, and as much, and in as many ways as there are floating fancies or fashions, the whole chain and continuity of the commonwealth would be broken. No one generation could link with the other. Men would become little better than the flies of a summer." EDMUND BURKE, REFLECTIONS ON THE REVOLUTION IN FRANCE 192–93 (Conner Cruise O'Brien ed., 1969) (1790). Burke believed that there was an unbroken chain linking ancestors to the living and "a partnership . . . between those who are living, those

tionalism seeks to insure that judges are not "free to decide as they think best"[16] and will not resort to their personal predilections, policy preferences, and values as they decide cases.[17] Judicial recognition of only those rights "deeply rooted in our nation's history and tradition," Justice Antonin Scalia has urged, provides "an objective approach that reaches conclusions by applying neutral rules to verifiable evidence," which is the antithesis of "an inherently political, moral judgment" made in "[d]eciding what is essential to an enlightened, liberty-filled life."[18]

Consider, for instance, *Bowers v. Hardwick*,[19] wherein the Court held that a Georgia anti-sodomy[20] law did not violate the Fourteenth Amendment's Due Process Clause. In so holding, a five-Justice majority asked "whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy and hence invalidates the laws of many States that still make such conduct illegal and have done so for a very long time."[21] In answering that question in the negative, the Court looked to: the "ancient roots" of prohibitions against what it called "homosexual sodomy"; the common law; and state proscriptions circa 1791 (the year of the ratification of the Bill of Rights), 1868 (the year of the ratification of the Fourteenth Amendment), 1961, and the time of its 1986 decision.[22] "Against this background," the Court concluded, "to claim that a right to engage in such conduct is deeply rooted in this Nation's history and tradition or is implicit in the concept of ordered liberty is, at best, facetious."[23]

Seventeen years later, in *Lawrence v. Texas*,[24] the Court upheld a due process challenge to a Texas statute criminalizing "deviate sexual intercourse with another individual of the same sex."[25] Asking and answering in the affirmative the question whether individuals of the same sex "were free as adults to engage in the private conduct in the exercise of their

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who are dead, and those who are to be born." EDMUND BURKE, REFLECTIONS ON THE REVOLUTION IN FRANCE 80 (J. Pocock ed., 1987) (1790).
For more on Burke's traditionalism, see Ernest Young, *Rediscovering Conservatism: Burkean Political Theory and Constitutional Interpretation*, 72 N.C. L. REV. 619 (1994).

16. Michael H. v. Gerald D., 491 U.S. 110, 127 n.6 (1989) (opinion of Scalia, J.).

17. *See* Thomas B. Colby & Peter J. Smith, *Living Originalism*, 59 DUKE L.J. 239, 243 (2009) (noting the contention that another interpretive theory, originalism, "is essential to constraining judges' ability to impose their own views under the guise of constitutional interpretation").

18. McDonald v. City of Chi., 130 S. Ct. 3020, 3055 (2010) (Scalia, J., concurring).

19. 478 U.S. 186 (1986), *overruled by* Lawrence v. Texas, 539 U.S. 558 (2003); *see infra* notes 33–34 and accompanying text.

20. The term "sodomy," coined by eleventh century monks, *see Elsewhere*, LEGAL AFFAIRS, Nov.–Dec. 2003, at 61, stems from the Old Testament of the Bible and the story of Sodom and Gomorrah. *See* JOHN BOSWELL, CHRISTIANITY, SOCIAL TOLERANCE, AND HOMOSEXUALITY: GAY PEOPLE IN WESTERN EUROPE FROM THE BEGINNING OF THE CHRISTIAN ERA TO THE FOURTEENTH CENTURY 92–93 (1980) ("Sodom in fact gave its name to homosexual relations in the Latin language, and throughout the Middle Ages the closest word to 'homosexual' in Latin or any vernacular was 'sodomita.'").

21. *Bowers*, 478 U.S. at 190.

22. *See id.* at 191–93.

23. *Id.* at 194 (emphasis omitted).

24. 539 U.S. 558 (2003); *see infra* notes 239–68 and accompanying text.

25. *Lawrence*, 539 U.S. at 563 (addressing TEX. PENAL CODE ANN. § 21.06 (West 1994)).

liberty under the Due Process Clause,"[26] and finding "no longstanding history in this country of laws directed at homosexual conduct as a distinct matter,"[27] the Court reasoned that "[h]istory and tradition are the starting point but not in all cases the ending point of the substantive due process inquiry."[28] The Court surveyed the "laws and traditions of the past half century," finding therein "an emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex."[29] *Bowers* was overruled.[30]

Bowers and *Lawrence* are important and illustrative exemplars of *discretionary traditionalism* and the ways in which judges are free to—and do—make outcome-influential and even outcome-determinative choices in their substantive due process decisions. As demonstrated in Parts II and III, traditionalist methodology as employed by Supreme Court Justices and federal appeals court judges is discretionary in at least three ways. First, the traditionalist judge chooses that methodology instead of other available methodologies and jurisprudential approaches.[31] Second, the traditionalist judge defines and frames the inquiry before the court, choosing what she considers to be "the proper level of generality at which a right should be characterized for purposes of deciding whether it is 'fundamental' and therefore protected as a matter of substantive due process."[32] Characterizing a right narrowly (for example, do gays and lesbians have "a fundamental right . . . to engage in sodomy?")[33] or more abstractly (did Georgia's anti-sodomy law violate the plaintiff's "right to be let alone"?)[34] is a critical descriptive as well as normative matter necessarily involving and influenced by a jurist's value choices.[35] For example, in *Bowers* the Court's majority framed the claimed right narrowly and validated the statute, while the dissent framed the claimed right broadly and would have ruled for the individual. "Since the majority and the dissent ask different questions, it is not surprising that they give different answers."[36] Finally, the traditionalist judge has discretion to choose

26. *Id.* at 564.
27. *Id.* at 568.
28. *Id.* at 572.
29. *Id.* at 571–72.
30. *See id.* at 578.
31. Other interpretive methodologies and jurisprudential approaches available to judges include originalism, *see supra* note 14; constitutional text, structure, and purpose; the consequences of decisions; the application of precedent; and social values. *See* STEPHEN BRYER, ACTIVE LIBERTY, INTERPRETING OUR DEMOCRATIC CONSTITUTION 8 (2005); Neil S. Siegel, *The Virtue of Judicial Statesmanship*, 86 TEX. L. REV. 959, 996 n.193 (2008); *see also* PHILIP BOBBITT, CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION chs. 2–7 (1982) (setting forth a typology of constitutional argument: historical, textual, doctrinal, prudential, structural, and ethical).
32. Patrick S. Shin, *Discrimination Under a Description*, 47 GA. L. REV. 1, 33–34 (2012).
33. Bowers v. Hardwick, 478 U.S. 186, 190 (1986).
34. *See id.* at 199 (Blackmun, J., dissenting).
35. *See* LAURENCE H. TRIBE & MICHAEL C. DORF, ON READING THE CONSTITUTION 73 (1991).
36. *Id.* at 74.

the time frame within which she will look for evidence and confirmation that the claimed fundamental right did or did not, does or does not, exist. Does the relevant time frame begin with proscriptions having "ancient roots" and continue through the late 1790s and mid-1860s to modern times, as in *Bowers*, or is the pertinent period the past fifty years as in *Lawrence*, or is there some other time span?

Is traditionalism an objective approach and methodology constraining judicial discretion and impeding the introduction of a judge's subjective political and moral judgments and personal predilections into the due process calculus and fundamental rights determination? The answer to that query is no, because, as argued herein, traditionalism cloaks discretionary judging and subjectivity in the garb of a purportedly objective and discretion-limiting methodology. That cloak is removed by the careful critique in the pages that follow.

II. THE TRADITION REFERENT

As discussed in this part, tradition has been referred to and relied upon by the Court and by individual Justices in various and sundry ways in Due Process Clause cases.[37] As a general matter, being cognizant of tradition means that one is aware of and interested in the established structures of social and legal life, conventions, and practices[38] communicated to others who may "accept beliefs and adopt customs and practices because of institutional authority."[39]

> Americans honor and laud traditions so routinely as to make the need to justify their value seem unnecessary. From religious services, military honor guards, national holidays, and weddings, to the (arguably) less important opening day pitch, summer-camp songs, and college football rivalries, traditions evoke pride, nostalgia, and community spirit."[40]

Given the tradition-protective nature of the Due Process Clauses,[41] it is understandable and anticipatable that jurists would be interested in preceding legal and social views when asked to decide cases presenting chal-

37. Tradition has also been discussed in Court decisions construing other provisions of the Constitution. *See, e.g.*, Plessy v. Ferguson, 163 U.S. 537, 550 (1896) (referring "to the established usages, customs, and traditions of the people" in an Equal Protection Clause challenge); Reynolds v. United States, 98 U.S. 145 (1878) (rejecting a First Amendment challenge to an anti-polygamy law and surveying the common law, early English history, and the laws of the American colonies).

38. *See* Eric Hobsbawm, The Invention of Tradition 1–3 (Eric Hobsbawm & Terence Ranger eds., 1983) (discussing what constitutes tradition).

39. J.M. Balkin, Cultural Software: A Theory of Ideology 85 (1998).

40. Kim Forde-Mazrui, *Tradition as Justification: The Case of Opposite-Sex Marriage*, 78 U. Chi. L. Rev. 281, 292 (2011); *see also* Jaroslav Pelikan, The Vindication of Tradition 53 (1984) ("[T]radition derives some of its vindication from the sheer facts of its existence, 'just because it's there' . . . . Coming to terms with the presence of the traditions from which we are derived is, or should be, a fundamental part of the process of growing up.").

41. *See* Cass R. Sunstein, *Foreword: Leaving Things Undecided*, 110 Harv. L. Rev. 4, 67 (1996) ("[T]he Due Process Clause is generally tradition-protecting.").

lenges to then-extant conduct and practices, "for such interest reflects respect for that 'which is transmitted or handed down from the past to the present.'"[42] While substantive due process analysis is thus "suitably backward-looking,"[43] what role does (and should) tradition play when it is contended that government has violated an individual's fundamental rights and liberty interests?

A. Earlier Decisions

Tradition was an important aspect of the Court's infamous decision in *Dred Scott v. Sandford*,[44] the "birthplace of the controversial idea of substantive due process."[45] Concluding that African slaves and their descendants were not and could not be citizens under the Constitution, Chief Justice Roger Taney, writing for the Court, looked to "the legislation and histories of the times, and the language used in the Declaration of Independence" as well as "the public history of every European nation."[46] Blacks had long "been regarded as beings of an inferior order, and altogether unfit to associate with the white race, either in social or political relations; and so far inferior, that they had no rights which the white man was bound to respect."[47] A black person was "reduced to slavery for his benefit . . . bought and sold, and treated as an ordinary article of merchandise and traffic," Taney proclaimed.[48] "This opinion was at that time fixed and universal in the civilized portion of the white race [and was] regarded as an axiom in morals as well as in politics."[49] Traditional views and then-extant moral and political opinions provided the

42. Ronald Turner, *Traditionalism, Majoritarian Morality, and the Homosexual Sodomy Issue: The Journey from* Bowers *to* Lawrence, 53 U. Kan. L. Rev. 1, 24 (2004) (quoting Edward Shils, Tradition 12 (1981)).

43. Laurence H. Tribe, Lawrence v. Texas*: The "Fundamental Right" That Dare Not Speak Its Name*, 117 Harv. L. Rev. 1893, 1897 (2004).

44. 60 U.S. (19 How.) 393 (1856), *superseded by constitutional amendment*, U.S. Const. Amend XIV.

45. Cass R. Sunstein, *The Dred Scott Case*, 1 Green Bag 2d 39, 40 (1997) (internal quotation marks omitted); *see also* Washington v. Glucksberg, 521 U.S. 702, 758 (1997) (Souter, J., concurring) (The "most salient instance" of substantive due process review prior to "the adoption of the Fourteenth Amendment" was *Dred Scott* wherein the "substantive protection of an owner's property in a slave taken to the territories was traced to the absence of any enumerated power to affect that property granted to the Congress by Article I of the Constitution."); Amar, *supra* note 5, at 119 ("The phrase [substantive due process] comes from judges, and the underlying concept has been deployed by judges in some of the most notorious Court opinions in American history, including the proslavery 1857 ruling in *Dred Scott v. Sanford* and the pro-sweatshop decision in *Lochner v. New York*."). Others have traced the origin of substantive due process judicial review to a dissenting opinion by Justice Stephen Johnson Field in the *Slaughter-House Cases*, 83 U.S. 36, 97 (1873). *See* John V. Orth, Due Process of Law: A Brief History 59 n.14 (2003).

46. *Dred Scott*, 60 U.S. at 407. According to Taney, while the words "all men are created equal" in the Declaration of Independence "would seem to embrace the whole human family . . . it is too clear for dispute, that the enslaved African race were not intended to be included, and formed no part of the people who framed and adopted this declaration." *Id.* at 410.

47. *Id.* at 407.

48. *Id.*

49. *Id.*

decisional backdrop for the Court's exclusion of African slaves and their progenies from constitutional citizenship.

In 1872, the Court held that the state of Illinois could deny to a married woman the right to practice law without violating the Fourteenth Amendment's Privileges or Immunities Clause.[50] *Bradwell v. State*[51] held that the "right to admission to practice in the courts of a State" was not protected by the Fourteenth Amendment, as that "right in no sense depends on citizenship of the United States."[52] In a concurring opinion, Justice Joseph P. Bradley wrote that, under the common law, "only men were admitted to the bar, and the legislature had not made any change in this respect."[53] Going beyond the common law, Bradley argued that "the civil law, as well as nature herself, has always recognized a wide difference in the respective spheres and destinies of man and woman."[54] Women's "natural and proper timidity" rendered them unfit for many jobs, Bradley avowed, and the "family organization . . . founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood."[55] A woman's "paramount destiny and mission" was "to fulfil the noble and benign offices of wife and mother. This is the law of the Creator. And the rules of civil society must be adapted to the general constitution of things . . . ."[56]

Tradition continued to be a factor of analytical and adjudicatory significance as the nation and the Court entered the twentieth century. In *Lochner v. New York*,[57] the Court struck down, as an arbitrary interference with the liberty and freedom to contract protected by the Due Process Clause, a New York law prohibiting the employment of bakers for more than sixty hours per week or more than ten hours per day. Justice Rufus Wheeler Peckham's opinion for the Court discerned "no reasonable foundation for holding [New York's law] to be necessary or appropriate as a health law to safeguard the public health, or the health of the individuals who are following the trade of a baker."[58]

50. *See* U.S. CONST. amend. XIV, § 1 (1868) ("No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States."); Bradwell v. State, 83 U.S. 130 (1987).

51. *Bradwell*, 83 U.S. at 139.

52. *Id.*

53. *Id.* at 140 (Bradley, J., concurring).

54. *Id.* at 141.

55. *Id.*

56. *Id.* Tradition did not always prevail. In *Hurtado v. California*, 110 U.S. 516 (1884), the Court held that a prosecution for murder in the first degree by information and without indictment by a grand jury did not violate the Due Process Clause of the Fourteenth Amendment. The Court declined to hold that due process was limited to and could not go beyond the settled legal usages of England, for doing so "would be to deny every quality of our law but its age, and to render it incapable of progress or improvement. It would be to stamp upon our jurisprudence the unchangeableness attributed to the laws of the Medes and Persians." *Id.* at 529.

57. 198 U.S. 45 (1905).

58. *Id.* at 58.

> We think that there can be no fair doubt that the trade of a baker, in and of itself, is not an unhealthy one to that degree which would authorize the legislature to interfere with the right to labor, and with the right of free contract on the part of the individual, either as an employer or employee. In looking through statistics regarding all trades and occupations, it may be true that the trade of a baker does not appear as healthy as some other trades, and is also more vastly healthy than still others. To the common understanding the trade of a baker has never been regarded as an unhealthy one . . . . There must be more than the mere fact of the possible existence of some small amount of unhealthiness to warrant legislative interference with liberty.[59]

In any event, the Court concluded that the law was not a health law but was "an illegal interference with the rights of individuals, both employers and employees, to make contracts regarding labor upon such terms as they may think best, or which they may agree upon with the other parties to such contracts."[60] Accordingly, "the individuals whose rights are thus made the subject of legislative interference are under the protection of the Federal Constitution regarding their liberty of contract as well as of person; and the legislature of the state has no power to limit their right as proposed in this statute."[61]

In this dissent, Justice Oliver Wendell Holmes argued that "the word 'liberty' . . . is perverted when it is held to prevent the natural outcome of a dominant opinion, unless it can be said that a rational and fair man necessarily would admit that the statute proposed would infringe fundamental principles as they have been understood by the traditions of our people and our law."[62] Justice John Marshall Harlan's separate dissent referred to workers' average daily hours in other countries, noted that such hours were "a subject of serious consideration among civilized peoples," and pointed out that Congress and half the states had passed laws addressing the issue of the number of hours individuals could work in a day.[63] "Many, if not most, of those enactments fix eight hours as the proper basis of a day's labor."[64]

Muller v. Oregon,[65] decided a few years after *Lochner*, upheld the mis-

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59. *Id.* at 59.
60. *Id.* at 61.
61. *Id.*
62. *Id.* at 76 (Holmes, J., dissenting). Justice Holmes opined that state constitutions and laws "regulate life in many ways which we as legislators might think as injudicious or if you like as tyrannical, as this, and which, equally with this, interfere with the liberty to contract." *Id.* at 75. Noting Sunday laws, usury legislation, and state prohibitions of lotteries, he opined that an individual's liberty "to do as he likes so long as he does not interfere with the liberty of others to do the same, which has been a shibboleth for some well-known writers, is interfered with by school laws, by the Post Office, by every state or municipal institution which takes his money for purposes thought desirable, whether he likes it or not." *Id.* Holmes then made the following well-known statement: "The [Fourteenth] Amendment does not enact Mr. Herbert Spencer's Social Statics." *Id.*
63. *Id.* at 71–72 (Harlan, J., dissenting).
64. *Id.* at 72.
65. 208 U.S. 412 (1908).

demeanor conviction of an employer who violated a state law by allowing a female employee to work more than ten hours in a day.[66] The Court, in an opinion by Justice David Josiah Brewer, noted that what it called the "widespread belief that woman's physical structure, and the functions she performs in consequence thereof, justify special legislation restricting or qualifying the conditions under which she should be permitted to toil."[67] That "widespread belief" was critical to the Court's analysis.[68] Constitutional questions "are not settled by even a consensus of present public opinion," the Court stated, and where there is a debatable issue of fact, and "the truth in respect to that fact, a widespread and long continued belief concerning it is worthy of consideration. We take judicial cognizance of all matters of general knowledge."[69] Men's liberty to contract, constitutionalized in *Lochner*, did not extend to women, for her "physical structure and the performance of maternal functions place her at a disadvantage in the struggle for subsistence . . . . This is especially true when the burdens of motherhood are upon her."[70] Because "history discloses the fact that woman has always been dependent upon man," and must "look to him for protection," the Court determined that the state was justified in enacting "legislation to protect her from greed as well as the passion of man."[71]

In *Twining v. New Jersey*,[72] the Court, per Justice William Henry Moody, rejected the argument that the exemption from compulsory self-incrimination secured against federal action by the Fifth Amendment[73] was not safeguarded against state action by the Fourteenth Amendment's Due Process Clause. Noting that "[f]ew phrases of the law are so elusive of exact apprehension as" the Due Process Clause,[74] the Court stated that it "has always declined to give a comprehensive definition of it, and has

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66. The Oregon law provided that "no female (shall) be employed in any mechanical establishment, or factory, or laundry in this State more than ten hours during any one day." *Id.* at 416 (quoting statute).

67. *Id.* at 420.

68. The Court noted that "[i]t may not be amiss, in the present case, before examining the constitutional question, to notice the course of legislation, as well as expressions of opinion from other judicial sources. In the brief filed by Mr. Louis D. Brandeis . . . is a very copious collection of all these matters . . . ." *Id.* at 419. For a discussion of the "Brandeis Brief" filed in *Muller*, see MELVIN I. UROFSKY, LOUIS D. BRANDEIS: A LIFE 212–18 (2009). For a critique of that brief, see David E. Bernstein, *Brandeis Brief Myths*, 15 GREEN BAG 2D 9, 14 (2011), referring to "the outright sexism of Brandeis's brief in *Muller*."

69. *Muller*, 208 U.S. at 420–21.

70. *Id.* at 421.

71. *Id.* at 421–22; *see also* Hoyt v. Florida, 368 U.S. 57, 62 (1961) (The Court held that a Florida law excluding women from jury service was not unconstitutional because "woman is still regarded as the center of home and family life" and it is constitutionally permissible "for a State, acting in pursuit of the general welfare, to conclude that a woman should be relieved from the civic duty of jury service unless she herself determines that such service is consistent with her own special responsibilities.").

72. 211 U.S. 78 (1908), *overruled in part by* Malloy v. Hogan, 378 U.S. 1, 9 (1964).

73. *See* U.S. CONST. amend. V (1791) ("No person shall . . . be compelled in any criminal case to be a witness against himself . . . .").

74. *Twining*, 211 U.S. at 99–100.

preferred that its full meaning should be gradually ascertained by the process of inclusion and exclusion in the course of the decisions of cases as they arise."[75] What constitutes

> 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.[76]

> Justice Moody asked whether the self-incrimination exemption 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 of such a government[.] If it is, and if it is of a nature that pertains to process of law, this court has declared it to be essential to due process of law."[77]

The right against self-incrimination was not established in English law "during the time when the meaning of due process was in a formative state, and before it was incorporated in American constitutional law."[78] During the debates over the ratification of the Constitution "it appears that four only of the thirteen original state [sic] insisted upon incorporating the privilege in the Constitution,"[79] and that, in framing their constitutions, states (with the exception of New Jersey and Iowa) including a "due process clause or its equivalent . . . thought [it] necessary to include separately the privilege clause."[80] In addition, the Court looked to its own decisions in search of helpful analogies and found no case or rule reconcilable "with the theory that an exemption from compulsory self-incrimination is included in the conception of due process of law."[81] Thus, Moody concluded, the privilege

> 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. It should, must, and will be rigidly observed where it is secured by specific constitutional safeguards, but there is nothing in it which gives it sanctity above and before constitutions themselves.[82]

75. *Id.* at 100.

> There are certain general principles, well settled, however, which narrow the field of discussion, and may serve as helps to correct conclusions. These principles grow out of the proposition universally accepted by American courts on the authority of Coke, that the words 'due process of law' are equivalent in meaning to the words 'law of the land' [contained in the Magna Charta].

Id.

76. *Id.*
77. *Id.* at 106.
78. *Id.* at 107.
79. *Id.* at 109.
80. *Id.* at 110.
81. *Id.* at 112.
82. *Id.* at 113.

Snyder v. Massachusetts[83] held that the defendant's presence at the jury's view of a crime scene was not a due process right. The Court declared that the state was "free to regulate the procedures of its courts in accordance with its own conception of policy and fairness unless in doing so it offends some principle of justice *so rooted in the traditions and conscience of our people as to be ranked as fundamental*."[84] A few years later, in *Palko v. Connecticut*,[85] the Court held that the privilege against double jeopardy[86] was not applicable to the states via the Fourteenth Amendment's Due Process Clause. Justice Benjamin Cardozo's opinion for the Court, asking whether the claimed privilege is "implicit in the concept of ordered liberty,"[87] opined that due process protects only those rights making up "the very essence of a scheme of ordered liberty,"[88] such that "neither liberty nor justice would exist if [such rights] were sacrificed."[89]

Substantive due process challenges to state regulation of educational and parental control matters faced tradition-based defenses by states. In *Meyer v. Nebraska*, the Court struck down a Nebraska statute prohibiting the teaching of a foreign language to students who had not yet passed the eighth grade.[90] Acknowledging that it had not defined "liberty" with precision, the Court opined that the term included the right "to marry, establish a home and bring up children," and that "[t]he American people have always regarded education and acquisition of knowledge as matters of supreme importance which should be diligently promoted."[91] *Pierce v. Society of Sisters*[92] applied *Meyer* in ruling that an Oregon statute requiring children between the ages of eight and sixteen to attend public school "unreasonably interfere[d] with the liberty of parents and guardians to direct the upbringing and education of children under their control."[93] Liberty "excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only."[94]

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83. 291 U.S. 97 (1934).
84. *Id.* at 105 (emphasis added).
85. 302 U.S. 319 (1937), *overruled by* Benton v. Maryland, 395 U.S. 784, 794 (1969).
86. *See* U.S. CONST. amend. V ("No person shall . . . be subject for the same offence to be twice put in jeopardy of life or limb . . . .").
87. *Palko*, 302 U.S. at 325.
88. *Id.*
89. *Id.* at 326.
90. 262 U.S. 390, 403 (1923).
91. *Id.* at 399, 400.
92. 268 U.S. 510 (1925).
93. *Id.* at 534–35.
94. *Id.* at 535; *see also* Troxel v. Granville, 530 U.S. 57 (2000) (citing *Meyer*, *Pierce*, and other cases and stating that "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."); Washington v. Glucksberg, 521 U.S. 702, 720 (1997) ("In a long line of cases, we have held that, in addition to the specific freedoms protected by the Bill of Rights, the 'liberty' specially protected by the Due Process Clause includes the right[ ] . . . to direct the education and upbringing of one's children."); Santosky v. Kramer, 455 U.S. 745, 753 (1982) (referring to the "fundamental liberty interest of natural parents in the care, custody, and management of their child"); Parham v. J. R., 442 U.S. 584, 602 (1979) ("Our jurisprudence historically has reflected Western civilization concepts of the family as a unit with broad parental authority over

B. THE 1960S

In the 1960s the Court began to grapple with the constitutionality of state laws criminalizing certain reproductive choices and practices. In *Poe v. Ullman*,[95] the Court agreed to review and then dismissed as not justiciable cases challenging a Connecticut statute making it a crime to use or give medical advice concerning the use of contraceptives. Justice John Marshall Harlan wrote an important dissenting opinion setting forth his views of the meaning and substance of the Constitution's due process guarantee: due process cannot be reduced to a formula and is not found in any code, he opined.[96] "The best that can be said is that through the course of this Court's decisions it has represented the balance which our Nation, built upon postulates of respect for the liberty of the individual, has struck between that liberty and the demands of organized society."[97] That balance "is the balance struck by this country, having regard to what history teaches are the traditions from which it developed as well as the traditions from which it broke. That tradition is a living thing."[98] Cautioning that judges should not feel "free to roam where unguided speculation might take them," and "may not draw on . . . merely personal and private notions,"[99] Harlan maintained that "[n]o formula could serve as a substitute, in this area, for judgment and restraint"[100] or recognition of "considerations deeply rooted in reason and in the compelling traditions of the legal profession."[101]

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minor children."); Wisconsin v. Yoder, 406 U.S. 205, 232 (1972) ("The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition."); Stanley v. Illinois, 405 U.S. 645, 651 (1972) ("It is plain that the interest of a parent in the companionship, care, custody, and management of his or her children comes to this Court with a momentum for respect lacking when appeal is made to liberties which derive merely from shifting economic arrangements.") (brackets and internal quotation marks omitted); Prince v. Massachusetts, 321 U.S. 158, 166 (1944) ("It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder.").

95. *See* 367 U.S. 497 (1961).

96. *Id.* at 542 (Harlan, J., dissenting).

97. *Id.*

98. *Id.*; *see also* Dist. Attorney's Office for the Third Judicial Dist. v. Osborne, 129 S. Ct. 2308, 2340 (Souter, J., dissenting) ("We recognize the value and lessons of continuity with the past, but as Justice Harlan pointed out, society finds reasons to modify some of its traditional practices . . . .").

99. *Poe*, 367 U.S. at 542, 544.

100. *Id.* at 542.

101. *Id.* at 545 (quoting Rochin v. California, 342 U.S. 165, 170–71 (1952)). Interestingly, Justice Harlan would not have provided due process protection against state disapproval of same-sex sexual orientation or certain other sexual practices. *Id.* at 547. Observing that society was traditionally concerned with the "moral soundness of its people," he believed that the "attempt [to draw] a line between public behavior and that which is purely consensual or solitary would be to withdraw from community concern a range of subjects with which every society in civilized times has found it necessary to deal." *Id.* at 546. In his view, laws regarding marriage and prohibiting homosexual practices, fornication, and adultery "form a pattern so deeply pressed into the substance of our social life that any Constitutional doctrine in this area must be built upon that basis." *Id.* at 546.

The Connecticut anti-contraception law was again before the Court in *Griswold v. Connecticut*.[102] In that case, the Court held that the state's law unconstitutionally intruded on the right of marital privacy located in the "penumbras" of the guarantees of the Bill of Rights "formed by emanations from those guarantees that help give them life and substance."[103] Marriage is "older than the Bill of Rights" and "our school system" and "is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions."[104]

Justice Arthur Goldberg, joining in the Court's judgment and opinion, emphasized the Ninth Amendment[105] and observed that "judges are not left at large to decide cases in light of their personal and private notions. Rather, they must look to the 'traditions and [collective] conscience of our people' to determine whether a principle is 'so rooted [there] . . . as to be ranked as fundamental.'"[106] Responding to Goldberg, Justice Hugo Black (finding the Connecticut law "abhorrent, just viciously evil, but not unconstitutional")[107] did not know of "a gadget which the Court can use to determine what traditions are rooted" in the conscience of the people.[108] Rejecting the view that it was "the duty of [the] Court to keep the Constitution in tune with the times," Black wrote that "[t]he Constitution makers knew the need for change and provided for it"[109] in the amendment procedures of Article V of the document.[110] "That method . . . was good for our Fathers, and being somewhat old-fashioned I must add that it is good enough for me."[111]

In 1967 the Court considered the constitutionality of a Virginia statute criminalizing certain interracial marriages in *Loving v. Virginia*.[112] The

102. 381 U.S. 479 (1965).

103. *Id.* at 484 (noting that the zone of privacy is created and bound by the First, Third, Fourth, Fifth, and Ninth Amendments).

104. *Id.* at 486. This ode to marriage was written by Justice William O. Douglas, who was married and divorced several times. *See* BRUCE ALLEN MURPHY, WILD BILL: THE LEGEND AND LIFE OF WILLIAM O. DOUGLAS 392 (1st ed. 2003). *Griswold* was later applied in a case involving a Massachusetts statute prohibiting the distribution of contraceptives to unmarried persons. In *Eisenstadt v. Baird*, 405 U.S. 438 (1972), the Court held that such statute violated the Equal Protection Clause, stating that "[i]f the right of privacy means anything, it is 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." *Id.* at 453.

105. *See* U.S. CONST. amend. IX ("The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.").

106. *Griswold*, 381 U.S. at 493 (Goldberg, J., concurring) (quoting Snyder v. Commonwealth of Mass., 291 U.S. 97, 105 (1934)).

107. ROGER K. NEWMAN, HUGO BLACK: A BIOGRAPHY 557 (2d ed. 1997).

108. *Griswold*, 381 U.S. at 519 (Black, J., dissenting).

109. *Id.* at 522.

110. *See* U.S. CONST. art. V.

111. *Griswold*, 381 U.S. at 522 (Black, J., dissenting); *see also id.* at 531 (Dissenting, Justice Potter Stewart argued that those not satisfied with the Connecticut law can "persuade their elected representatives to repeal it. That is the constitutional way to take this law off the books.").

112. 388 U.S. 1 (1967).

state contended that the statute was constitutional and should be upheld, noting that "for over 100 years, since the Fourteenth Amendment was adopted, numerous states—as late as 1956, the majority of the states—and now even 16 states, have been exercising" the power to prohibit interracial marriages "without any question being raised as to the authority of the state to exercise this power."[113] Rejecting the state's position and holding that the statute violated the Equal Protection Clause,[114] the Court also concluded that the law deprived individuals of the liberty protected by the Due Process Clause.[115] "[T]he freedom to marry, or not marry, a person of another race resides with the individual and cannot be infringed by the State."[116] Traditional and historical practices did not provide legitimate grounds for, and therefore did not constitutionalize, the challenged racial discrimination.

C. THE 1970s

The Court's seminal decision in *Roe v. Wade*[117] determined, among other things, that the abortion right was not one that had been traditionally proscribed. Justice Harry Blackmun's opinion for the Court examined "[a]ncient attitudes," the origins of the Hippocratic Oath, common law, English statutory law, and the laws of the states.[118] "[A]t common law, at the time of the adoption of our Constitution, and throughout the major portion of the 19th century, abortion was viewed with less disfavor than under most American statutes currently in effect."[119] A woman's choice to terminate a pregnancy "was present in this country well into the 19th century," Blackmun wrote, and "[e]ven later, the law continued for some time to treat less punitively an abortion procured in early pregnancy."[120]

Then Justice (later Chief Justice) William H. Rehnquist, dissenting, premised his argument on a different view and formulation of tradition. He argued that a half-century of abortion restrictions in a majority of states was "a strong indication . . . 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.'"[121] Rehnquist noted that at least thirty-six state

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113. Oral Argument, Loving v. Virginia, 147 S.E. 2d 75 (Va. 1966) (No. 395), *in* 64 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW 41 (Philip B. Kurkland & Gerhard Casper, eds., 1975).

114. The Court concluded that Virginia's law was "obviously an endorsement of the doctrine of White Supremacy" and found "no legitimate overriding purpose independent of invidious racial discrimination" saving the law from invalidation under the Equal Protection Clause. *Loving*, 388 U.S. at 7, 11.

115. *See id.* at 12.

116. *Id.*

117. 410 U.S. 113 (1973) (holding that Texas's criminal law anti-abortion statute was unconstitutional).

118. *Id.* at 130–41.

119. *Id.* at 140.

120. *Id.* at 141.

121. *Id.* at 174 (Rehnquist, J., dissenting) (quoting Snyder v. Massachusetts, 291 U.S. 97, 105 (1934)).

or territorial laws limited abortion in 1868 (the year of the adoption of the Fourteenth Amendment); that the laws of twenty-one states in effect in 1868 were still in effect at the time of the Court's decision; and that the Texas law reviewed by the Court in *Roe* was first enacted in 1857 and was essentially the same law struck down by the *Roe* majority.[122] In his view, an abortion ban was constitutional because a majority of the states had prohibited the practice in the past.

Tradition was again front and center in *Moore v. City of East Cleveland*.[123] A city ordinance limiting the occupancy of a dwelling unit to members of a single nuclear family was challenged under the Due Process Clause.[124] Justice Lewis F. Powell's plurality opinion, joined by Justices William F. Brennan, Thurgood Marshall, and Harold A. Blackmun, noted that substantive due process cases present the concern that "[t]here are risks when the judicial branch gives enhanced protection to certain substantive liberties without the guidance of the more specific provisions of the Bill of Rights."[125] Referencing the *Lochner* era,[126] Powell wrote that "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. That history counsels caution and restraint. But it does not counsel abandonment."[127] Powell turned to and relied on the tradition and history of the family, a tradition including the nuclear family as well as the "tradition of uncles, aunts, cousins, and especially grandparents sharing a household . . . and equally deserving of constitutional recognition."[128] As extended family households were part of this nation's traditions, the city could not constitutionally standardize children and adults "by forcing all to live in certain narrowly defined family patterns."[129]

Justice Byron White criticized Justice Powell's approach as one suggesting "a far too expansive charter . . . . What the deeply rooted traditions of the country are is arguable; which of them deserve the protection

122. *Id.* at 175–77.

123. 431 U.S. 494 (1977).

124. The challenge to the city ordinance was made by Inez Moore who lived in her East Cleveland home with her son and two grandsons. The grandsons were first cousins and not brothers, as one child came to live with Moore and her son and his child after the death of the child's mother. *See id.* at 496–97.

125. *Id.* at 502 (plurality opinion).

126. *See supra* notes 57–58 and accompanying text.

127. *Moore*, 431 U.S. at 502 (plurality opinion).

128. *Id.* at 504. Justice Brennan, writing to "underscore the cultural myopia of the arbitrary boundary drawn by the East Cleveland ordinance," stated that "[i]n today's America, the 'nuclear family' is the pattern so often found in much of white suburbia . . . . The Constitution cannot be interpreted, however, to tolerate the imposition by government upon the rest of us of white suburbia's preference in patterns of family living." *Id.* at 507–08 (Brennan, J., concurring). Justice Potter Stewart did not "understand why it follows that the residents of East Cleveland are constitutionally prevented from following what Mr. Justice Brennan calls the 'pattern' of 'white suburbia,' even though that choice may reflect 'cultural myopia.' In point of fact, East Cleveland is a predominantly Negro community, with a Negro City Manager and City Commission." *Id.* at 537 n.7 (Stewart, J., dissenting).

129. *Id.* at 506 (plurality opinion).

of the Due Process Clause is even more debatable."[130] Warning that the plurality's analysis would unduly broaden the scope of substantive due process review, White stated:

> The Judiciary, including this Court, is the 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 even the design of the Constitution. Realizing that the present construction of the Due Process Clause represents a major judicial gloss on its terms, as well as on the anticipation of the Framers . . . the Court should be extremely reluctant to breathe still further substantive content into the Due Process Clause so as to strike down legislation adopted by a State or city to promote its welfare. Whenever the Judiciary does so, it unavoidably pre-empts for itself another part of the governance of the country without express constitutional authority.[131]

III. DISCRETIONARY TRADITIONALISM AND THE COURT

Traditionalism is more than an awareness of and reference to traditions, customs, conventions, practices and accepted (by some) beliefs.[132] As used and understood herein, traditionalism is a methodology in which the Constitution is interpreted in accordance with the long-standing and evolving practices and traditions of the nation.[133] This Part focuses on the resort to and use of traditionalism in substantive due process cases, and the concern expressed by proponents of the methodology that judges not tethered to tradition may feel "free to roam where unguided speculation might take them" and discretionarily "draw on . . . merely personal and private notions."[134]

Contrary to this discretion-limiting rationale, there are at least three ways in which traditionalism is in fact a discretionary and non-constraining interpretive approach. First, a judge's selection of traditionalism over and instead of other interpretive methodologies and jurisprudential approaches is in fact a choice and an exercise of discretion. Second, a traditionalist judge is free to frame the inquiry and to choose and define the level of generality at which a right is characterized narrowly or more abstractly. The judge's discretionary framing and choice of an operative level of generality are critical aspects of the substantive due process inquiry, for the question posed and the selected characterization of the claimed right can predictably foreshadow an answer recognizing or denying recognition of the asserted fundamental right. Finally, the traditionalist judge discretionarily determines the time frame she will explore and examine in her quest for evidence concerning the nation's deeply rooted traditions and confirmation that the claimed fundamental right does or does not exist.

130. *Id.* at 549 (White, J., dissenting).
131. *Id.* at 544.
132. *See supra* notes 7–15 and accompanying text.
133. *See supra* notes 12–15 and accompanying text.
134. Poe v. Ullman, 367 U.S. 497, 542, 544 (1961) (Harlan, J., dissenting).

A. *Bowers v. Hardwick*

In 1986, the Court issued its decision in *Bowers v. Hardwick*[135] wherein it validated the state of Georgia's anti-sodomy statute.[136] Writing for the Court, Justice White (joined by Chief Justice Warren Burger and Justices Rehnquist, Sandra Day O'Connor, and Powell)[137] set forth his view of the issue before the Court. The due process challenge was not about "whether laws against sodomy between consenting adults in general, or between homosexuals in particular, are wise or desirable."[138] Nor, in his view, did the case involve the question of states' rights to repeal legislation criminalizing such conduct or the power of state courts to strike down laws under state constitutions.[139] Rather, the issue was "whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy and hence invalidates the laws of many States that still make such conduct illegal and have done so for a very long time."[140]

Having articulated the majority's framing of the issue, Justice White rejected the argument that certain cases in the Court's privacy jurisprudence—involving child rearing and education, family relationships, marriage, procreation, contraception, and abortion—decided the aforementioned question.[141] Undertaking what has been described as a "flat and disdainful" review of the historical record,[142] White determined that there was no "fundamental right to engage in homosexual sodomy"[143] because sodomy proscriptions "have ancient roots;"[144] sodomy was a common-law criminal offense "forbidden by the laws of the original thirteen States when they ratified the Bill of Rights" in 1791; "all but 5 of the 37 States in the Union had criminal sodomy laws" when the Fourteenth Amendment was ratified in 1868; and "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

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135. 478 U.S. 186 (1986), *overruled by* Lawrence v. Texas, 539 U.S. 558 (2003). For more on this case, see Turner, *supra* note 42, at 47–59.

136. The statute provided that "a person commits the offense of sodomy when he or she performs or submits to any sexual act involving the sex organs of one person and the mouth or anus of another." GA. CODE ANN. § 16-6-2 (West 1981). Persons convicted of violating that provision were subject to the punishment of imprisonment for not less than one or more than twenty years. *See id.*

137. Justice Powell subsequently stated that he "probably made a mistake" when he voted with the majority in *Bowers*. *See* JOHN C. JEFFRIES, JR., JUSTICE LEWIS F. POWELL, JR.: A BIOGRAPHY 530 (1994).

138. *Bowers*, 478 U.S. at 190.

139. *See id.*

140. *Id.* The Court's framing of the issue is "somewhat problematical, because the statute on its face applied to all forms of sodomy, heterosexual as well as homosexual, and, given the history of its enforcement, Hardwick was in no greater danger of prosecution than any heterosexual." ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 117 (1990).

141. *See Bowers*, 478 U.S. at 190–91 (collecting cases).

142. Robert C. Post, *Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 HARV. L. REV. 4, 90 (2003).

143. *Bowers*, 478 U.S. at 191.

144. *Id.* at 193.

between consenting adults."[145] "Against this background," White concluded, "to claim that a right to engage in such conduct is 'deeply rooted in this Nation's history and tradition' or 'implicit in the concept of ordered liberty' is, at best, facetious."[146] (Interestingly, as Judge Richard Posner has noted, Michael Hardwick was arrested for conduct not prohibited by the common law: "common law sodomy did not include fellatio" and "sodomy at common law was limited to anal intercourse. The extension of the proscription to oral sex came late in the nineteenth century, after the Bill of Rights and the Fourteenth Amendment."[147])

Reprising the analysis of his dissent in *Moore v. City of East Cleveland*,[148] Justice White remarked that the Court sought "to assure itself and the public that announcing rights not readily identifiable in the Constitution's text involves much more than the imposition of the Justices' own choice of values on the States and the Federal Government."[149] Concerned about the Court's institutional vulnerability and legitimacy, and resisting the expansion of the Due Process Clause and a judicial definition/redefinition of the category of fundamental rights, White declined to take to the Court "further authority to govern the country without express constitutional authority. The claimed right pressed on us today falls far short of overcoming this resistance."[150]

Writing separately, Chief Justice Burger stated that homosexual sodomy had "been subject to state intervention throughout the history of Western civilization. Condemnation of those practices is firmly rooted in Judaeo-Christian moral and ethical standards."[151] Sodomy was prohibited during the English Reformation and criminalized by the common law, he noted, and Blackstone referred to sodomy as "an offense of 'deeper malignity' than rape."[152] "To hold that the act of homosexual sodomy is somehow protected as a fundamental right would be to cast aside millen-

145. *Id.* at 192–94. Commenting on this aspect of Justice White's opinion, one commentator argued that "[t]his kind of gross historical enumeration is not even conclusive in giving the best interpretation of the original meaning of a broad general principle." CHARLES FRIED, ORDER AND LAW: ARGUING THE REAGAN REVOLUTION—A FIRSTHAND ACCOUNT 82 (1991). "White invokes practices and understandings to preclude reasoning, not to assist it." *Id.*

146. *Bowers*, 478 U.S. at 194; *see* RICHARD A. POSNER, SEX AND REASON 343 (1992) (noting White's "facetious" argument and commenting that "the same thing could be said of the rights recognized in the earlier sexual privacy cases").

147. POSNER, *supra* note 146, at 343.

148. 431 U.S. 494 (1977); *see supra* notes 123–25 and accompanying text.

149. *Bowers*, 478 U.S. at 191.

150. *Id.* at 195. The Court also concluded that the belief by a majority of Georgia's electorate that homosexual sodomy was "immoral and unacceptable" was an adequate rationale for the anti-sodomy law. *Id.* at 196. "The law . . . is constantly based on notions of morality, and if all laws representing essentially moral choices are to be invalidated under the Due Process Clause, the courts will be very busy indeed." *Id.* Disagreeing with that view, Justice Blackmun opined that moral judgments that are "natural and familiar . . . ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States." *Id.* at 199 (Blackmun, J., dissenting).

151. *Id.* at 196 (Burger, C.J., concurring).

152. *Id.* at 197 (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES 215).

nia of moral teaching."[153]

Four Justices dissented. Justice Blackmun, joined by Justices Brennan, Marshall, and John Paul Stevens, rejected the majority's description of the issue before the Court. The claim made was not about the right to engage in homosexual sodomy, Blackmun argued, but was instead concerned with the right to be left alone free from exposure to criminal sanctions enforced against homosexuals but not heterosexuals.[154] He did not agree with the Court "that either the length of time a majority has held its convictions or the passions with which it defends them can withdraw legislation from this Court's scrutiny."[155]

Justice Blackmon echoed Justice Holmes in stating that

> "[i]t is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past." I believe we must analyze Hardwick's claim in the light of the values that underlie the constitutional right to privacy. If that right means anything, it means that, before Georgia can prosecute its citizens for making choices about the most intimate aspects of their lives, it must do more than assert that the choice they have made is an "abominable crime not fit to be named among Christians."[156]

In a separate dissent, Justice Stevens argued that "the Georgia statute expresses the traditional view that sodomy is an immoral kind of conduct regardless of the identity of the persons who engage in it."[157] Like Justice Blackmun, Justice Stevens rejected the Court's traditional-therefore-constitutional analysis: "the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice; neither history nor tradition could save a law prohibiting miscegenation from constitutional attack."[158] Justice Stevens looked to a tradition different from that formulated and relied upon by the majority. "Guided by history, our tradition of respect for the dignity of individual choice in matters of

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153. *Id.*

154. *See id.* at 199–200 (Blackmun, J., dissenting). Justice Blackmun noted that although the sex or status of the person engaging in sodomy was not relevant under the Georgia statute, *see supra* note 136, the state "enforce[d] against homosexuals a law it seems not to have any desire to enforce against heterosexuals." *Bowers*, 478 U.S. at 200–01 (Blackmun, J., dissenting).

155. *Bowers*, 478 U.S. at 210 (citing Roe v. Wade, 410 U.S. 113 (1973); Loving v. Virginia, 388 U.S. 1 (1967); Brown v. Bd. of Education, 347 U.S. 483 (1954)).

156. *Id.* at 199–200 (alteration in original) (citation omitted) (quoting initially Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897) and then Herring v. State, 46 S.E.2d 876, 882 (1904)). Justice Blackmun also rejected the state's invocation of the Bible as support for its position. Condemnation of homosexual sodomy by some religious groups "gives the State no license to impose their judgments on the entire citizenry." *Id.* at 211. Thus, "the invocation of Leviticus, Romans, St. Thomas Aquinas, and sodomy's heretical status during the Middle Ages undermines" the assertion that the Georgia law "represents a legitimate use of secular coercive power." *Id.*

157. *Id.* at 216 (Stevens, J., dissenting).

158. *Id.*

conscience and the restraints implicit in the federal system, federal judges have accepted the responsibility for recognition and protection of these rights in appropriate cases."[159] Acknowledging society's right to encourage individuals to adhere to certain traditions in matters of affection and gratification, Justice Stevens emphasized that liberty "surely embraces the right to engage in nonreprodutive, sexual conduct that others may consider offensive or immoral."[160]

Bowers reflected and gave operational effect to a specific form of traditionalism, one "found" in the common law; the laws of the original thirteen states at the time of the ratification of the Bill of Rights in 1791; the laws of the states at the time of the adoption of the Fourteenth Amendment in 1868; and in state-law prohibitions of sodomy circa 1961 and as of the date of the Court's 1986 decision. This methodology and count-the-states approach to constitutional interpretation and adjudication constitutionalized a Court-determined tradition, thereby allowing a Court openly concerned about its legitimacy and public standing to present its decision as one deferring to the traditional views of a majority of the Georgia electorate.[161] The Court's decision illustrates the importance of the identification and articulation of the (Court's description and choice of the) pertinent tradition by which the constitutionality of the challenged state law is to be assessed.

B. *Michael H. v. Gerald D.*

Traditionalism and the debate over the methodology were on display in *Michael H. v. Gerald D.*,[162] in which the Court held that California law presuming that a child born to a married woman was a child of the marriage did not violate the due process rights of the child's biological father, not married to the mother, who sought parental and visitation rights. Writing for a plurality of the Court, Justice Antonin Scalia declared that the purpose of the Due Process Clause "is to prevent future generations from lightly casting aside important traditional values—not to enable this Court to invent new ones."[163] Invoking societal tradition, he asked whether the relationship between the biological father and the child "has been treated as a protected family unit under the historic practices of our society" or "has been accorded special protection," and ultimately stated, "We think it impossible to find that it has."[164] For Justice Scalia, the tradition protecting the marital family unit from the biological father's claim

159. *Id.* at 217 (quoting Fitzgerald v. Porter Mem'l Hosp., 523 F.2d 716, 719–20 (7th Cir. 1975)).
160. *Id.* at 217–18.
161. "States could simply declare that legislators, speaking for a majority of the pertinent electorate, enacted laws banning homosexual sodomy because such sodomy is immoral; no other showing was required." Turner, *supra* note 42, at 59.
162. 491 U.S. 110, 127 (1989).
163. *Id.* at 122 n.2 (plurality opinion).
164. *Id.* at 124. Justice Scalia reasoned that the biological father had to establish that society traditionally accorded or did not traditionally deny to him parental rights. *See id.* at 126. It was not enough—in fact, it was "ultimately irrelevant"—that a number of states

was found in the common law as indicated in older sources, including Henry de Bracton's work *De Legibus*, Blackstone's and Kent's respective commentaries, and a 1957 American Law Reports annotation on the presumption of the legitimacy of children conceived and born in wedlock.[165]

In the sixth footnote to his opinion, joined only by Chief Justice Rehnquist, Justice Scalia set out a specific methodology governing the identification of the relevant tradition in due process cases. "We refer to the most specific level at which a relevant tradition protecting, or denying protection to, the asserted right can be identified."[166] Consulting the most specific tradition is necessary, in his view, because "general traditions provide such imprecise guidance . . . [and] permit judges to dictate rather than discern the society's views."[167]

Justice O'Connor, joined by Justice Kennedy, did not agree with Justice Scalia's most-specific-level approach. In her view, that method "sketches a mode of historical analysis to be used when identifying liberty interests protected by the Due Process Clause . . . that may be somewhat inconsistent with our past decisions in this area."[168] The Court had previously characterized rights-protecting traditions at "levels of generality that might not be 'the most specific level available.'"[169] Noting with approval Justice Harlan's due process analysis in his dissent in *Poe v. Ullman*,[170] she declined to "foreclose the unanticipated by the prior imposition of a single mode of historical analysis."[171]

Critiquing Justice Scalia's analysis, Justice Brennan opined that the concept of "tradition" "can be as malleable and as elusive as 'liberty' itself."[172] "[W]herever I would begin to look for an interest 'deeply rooted in the country's traditions,'" he stated,

> one thing is certain: I would not stop . . . at Bracton, or Blackstone, or Kent, or even the American Law Reports in conducting my search. Because reasonable people can disagree about the content of particular traditions, and because they can disagree even about which traditions are relevant to the definition of 'liberty,' the plurality has not found the objective boundary that it seeks.[173]

Nor had Justice Scalia supplied an "objective means" for determining "the point at which a tradition becomes firm enough to be relevant to our tradition of liberty and the moment at which it becomes too obsolete to

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gave the biological father "the theoretical power to rebut the marital presumption." *Id.* at 127.

165. *See id.* at 124–26.

166. *Id.* at 127 n.6.

167. *Id.*

168. *Id.* at 132 (O'Connor, J., concurring in part) (citing Griswold v. Connecticut, 381 U.S. 479 (1965); Eisenstadt v. Baird, 405 U.S. 438 (1972)).

169. *Id.* (citing Loving v. Virginia, 388 U.S. 1 (1967) and other Court decisions).

170. 367 U.S. 497 (1961); *see supra* notes 95–101 and accompanying text.

171. *Michael H.*, 491 U.S. at 132 (O'Connor, J., concurring in part).

172. *Id.* at 137 (Brennan, J., dissenting).

173. *Id.*

be relevant any longer."[174]

Justice Brennan believed that tradition was relevant to the Court's previous rulings in cases involving marriage, childbearing, childrearing, and other practices and interests. The Court's protection of those interests was partially "the result of the fact that the Due Process Clause would seem an empty promise if it did not protect them, and partly the result of the historical and traditional importance of those interests in our society."[175] As to what interest was at issue in *Michael H.*, Brennan did not adopt Justice Scalia's question of whether a specific type of parenthood ("a natural father's relationship with a child whose mother is married to another man") was protected.[176] Invoking legal—and not a posited societal—tradition, Justice Brennan asked instead "whether parenthood is an interest that historically has received our attention and protection; the answer to that question is too clear for dispute."[177] If the Court had asked whether the specific interest or practice was traditionally protected in its earlier cases involving the use of contraceptives[178] and other matters, "the answer would have been a resounding 'no.' That [they] did not ask this question in those cases highlights the novelty of the interpretive method that the plurality opinion employs today."[179]

For Justice Brennan, Justice Scalia "acts as if the only purpose of the Due Process Clause is to confirm the importance of interests already protected by a majority of the States. Transforming the protection afforded by the Due Process Clause into a redundancy mocks those who, with care and purpose, wrote the Fourteenth Amendment."[180] Noting that "[w]e are not an assimilative, homogeneous society, but a facilitative, pluralistic one,"[181] Brennan stated:

> The document that the plurality construes today is unfamiliar to me. It is not the living charter that I have taken to be our Constitution; it is instead a stagnant, archaic, hidebound document steeped in the prejudices and superstitions of a time long past. *This* Constitution does not recognize that times change, does not see that sometimes a practice or rule outlives its foundations. I cannot accept an interpretive method that does such violence to the charter that I am bound by oath to uphold.[182]

174. *Id.* at 138.

175. *Id.* at 139; *see also* Dist. Attorney's Office for the Third Judicial Dist. v. Osborne, 129 S. Ct. 2308, 2340 (2009) (Souter, J., dissenting) ("Tradition is of course one serious consideration in judging whether a challenged rule or practice, or the failure to provide a new one, should be seen as violating the guarantee of substantive due process as being arbitrary, or as falling wholly outside the realm of reasonable governmental action.").

176. *Michael H.*, 491 U.S. at 139 (Brennan, J., dissenting); *see supra* note 165 and accompanying text.

177. *Michael H.*, 491 U.S. at 139 (Brennan, J., dissenting).

178. *See* Eisenstadt v. Baird, 405 U.S. 438 (1972); Griswold v. Connecticut, 381 U.S. 479 (1965).

179. *Michael H.*, 491 U.S. at 140 (Brennan, J., dissenting).

180. *Id.* at 140–41.

181. *Id.* at 141.

182. *Id.*

As can be seen, Justice Scalia and Justice Brennan both refer to tradition as they analyzed the issue before the Court in *Michael H.* But:

> [t]he traditions on which they depend are different: Scalia prefers to defer to societal or communitarian tradition, whereas Brennan wants to rely on the traditions identified in the judicial precedent from a particular era. Both, nevertheless, define liberty in terms of past tradition rather than, for example, by reference to some understanding of the ideally free or autonomous individualist life.[183]

Both exercised discretion in their dissimilar framing of the due process inquiry (as did Justices O'Connor and Kennedy), the formulation of the level of generality, and the description of what constitutes a "deeply rooted tradition."

C. *Cruzan v. Director, Missouri Department of Health*

Whether Nancy Beth Cruzan, a patient in a persistent vegetative state, had "a right under the United States Constitution which would require the hospital to withdraw life-sustaining treatment" was the query, as framed by the Court, in *Cruzan v. Director, Missouri Department of Health.*[184] More specifically, the Court asked whether the Constitution prohibited the establishment of Missouri's procedural requirement that an incompetent person's wishes regarding the withdrawal of life-sustaining treatment be proved by clear and convincing evidence.[185]

The Court, in an opinion authored by Chief Justice Rehnquist, "assume[d] that the United States Constitution would grant a competent person a constitutionally protected right to refuse lifesaving hydration and nutrition."[186] Rejecting the argument that an incompetent person possessed the same right, the Court held that Missouri's clear-and-convincing evidence requirement did not violate the Due Process Clause.[187] A state may rely on its interest in the protection and preservation of human life and is not "required to remain neutral in the face of an informed and voluntary decision by a physically able adult to starve to death."[188] In the context presented in *Cruzan*, "Missouri may legitimately seek to safeguard the personal element of this choice [between life and death] through the imposition of heightened evidentiary requirements."[189] Furthermore, a state may appropriately "decline to make judgments about the 'quality' of life that a particular individual may enjoy, and simply assert an unqualified interest in the preservation of

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183. Robin L. West, *The Ideal of Liberty: A Comment on* Michael H. v. Gerald D., 139 U. PA. L. REV. 1373, 1377 (1991).
184. 497 U.S. 261, 269 (1990).
185. *See id.* at 280.
186. *Id.* at 279.
187. *Id.* at 284 ("[A] State may apply a clear and convincing evidence standard in proceedings where a guardian seeks to discontinue nutrition and hydration of a person diagnosed to be in a persistent vegetative state.").
188. *Id.* at 280.
189. *Id.* at 281.

human life to be weighed against the constitutionally protected interests of the individual."[190] While the individual and societal interests are both substantial, the Court determined that the state "may permissibly place an increased risk of an erroneous decision on those seeking to terminate an incompetent individual's life-sustaining treatment."[191]

Writing separately, Justice Scalia expressed his preference for an announcement, "clearly and promptly, that the federal courts have no business in this field."[192] A claimant seeking to maintain a substantive due process claim must demonstrate "that the State has deprived him of a right historically and traditionally protected against state interference."[193] Suicide was a crime under English common law, was generally held to be a criminal offense in case law existing at the time of the 1868 adoption of the Fourteenth Amendment, would have been criminalized by a penal law system presented to the House of Representatives in 1828, and was criminalized by "[m]ost States that did not explicitly prohibit assisted suicide in 1868 . . . when the issue arose in the 50 years following the Fourteenth Amendment's ratification."[194] Justice Scalia thus concluded that "there is no significant support for the claim that a right to suicide is so rooted in our tradition that it may be deemed fundamental or implicit in the concept of ordered liberty."[195]

In separate dissents Justices Brennan and Stevens articulated different conceptions of tradition. For Brennan, the "right to be free from medical attention without consent, to determine what shall be done with one's own body, *is* deeply rooted in this Nation's traditions . . . . This right has long been firmly entrenched in American tort law and is securely grounded in the earliest common law."[196] In his view, Nancy Cruzan's fundamental right was not outweighed by a state interest and "there is no good to be obtained here by Missouri's insistence that Nancy Cruzan remain on life-support systems if it is indeed her wish not to do so."[197] Justice Stevens looked to "decisional law, and the constitutional tradition which it illuminates."[198]

> Choices about death touch the core of liberty. Our duty, and the concomitant freedom, to come to terms with the conditions of our own mortality are undoubtedly so rooted in the traditions and conscience of our people as to be ranked as fundamental, and indeed are essential incidents of the unalienable rights to life and liberty en-

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190. *Id.* at 282.
191. *Id.* at 283.
192. *Id.* at 293 (Scalia, J., concurring).
193. *Id.* at 294 (citing Michael H. v. Gerald D., 491 U.S. 110, 122 (1989), and Bowers v. Hardwick, 478 U.S. 186, 192 (1986)).
194. *Id.* at 295.
195. *Id.* (internal quotation marks omitted).
196. *Id.* at 305 (Brennan, J., dissenting) (citations and internal quotation marks omitted); *see also id.* ("Thus, freedom from unwanted medical attention is unquestionably among those principles so rooted in the traditions and conscience of our people as to be ranked as fundamental." (internal quotation marks omitted)).
197. *Id.* at 312.
198. *Id.* at 343 (Stevens, J., dissenting).

dowed us by our Creator.[199]

Moreover, "[o]ur ethical tradition has long regarded an appreciation of mortality as essential to understanding life's significance."[200]

D. *Planned Parenthood of Southeastern Pennsylvania v. Casey*

The Court's 1992 *Planned Parenthood Southeastern Pennsylvania v. Casey*[201] decision, reaffirming the central holding of *Roe v. Wade*, continued the debate among Justices over the questions of whether and how tradition should be considered and used in substantive due process cases. A joint opinion[202] for a plurality of the Court, authored by Justices O'Connor, Kennedy, and Souter, stated that it was "tempting . . . to suppose that the Due Process Clause protects only those practices, defined at the most specific level, that were protected against governmental interference by other rules of law when the Fourteenth Amendment was ratified."[203] Rejecting that view, the joint opinion concluded: "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."[204]

Grounding their analysis in Justice Harlan's *Poe v. Ullman* dissent,[205] the joint opinion stated that the "inescapable fact is that adjudication of substantive due process claims may call upon the Court in interpreting the Constitution to exercise that same capacity which by tradition courts always have exercised: reasoned judgment. Its boundaries are not susceptible of expression as a simple rule."[206] The Court's "obligation is to define the liberty of all, not to mandate [the justices'] own moral code," with liberty including "matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy."[207] Liberty includes "the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State."[208]

Chief Justice Rehnquist (joined by Justices White, Scalia, and Thomas) expressed his belief "that *Roe* was wrongly decided, and that it can and

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199. *Id.* (citation and internal quotation marks omitted).

200. *Id.*

201. 505 U.S. 833, 845–46 (1992) (plurality opinion).

202. The second in the Court's history. *See* Kevin Yamamoto & Shelby A. D. Moore, *A Trust Analysis of a Gestational Carrier's Right to Abortion*, 70 FORDHAM L. REV. 93, 138 n.239 (2001) (explaining that prior to *Casey* the "writing of a joint opinion . . . occurred only one other time in the history of the Court").

203. *Casey*, 505 U.S. at 847 (plurality opinion).

204. *Id.* at 848 (citing U.S. CONST. amend. IX).

205. *See supra* notes 96–101 and accompanying text.

206. *Casey*, 505 U.S. at 849 (plurality opinion).

207. *Id.* at 850–51.

208. *Id.* at 851.

should be overruled."[209] In his view, "the historical traditions of the American people" did not "support the view that the right to terminate one's pregnancy is 'fundamental.'"[210] Relying on his dissent in *Roe*,[211] Rehnquist noted that abortion after "quickening" was a common-law offense this nation inherited from England, was prohibited by law in 1868 in twenty-eight of the thirty-seven states and eight territories, was prohibited or restricted by nearly all of the states at the beginning of the twentieth century, and was proscribed by twenty-one laws in effect in 1973.[212] "On 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."[213]

Justice Scalia took issue with the joint opinion's call for reasoned judgment and conception of liberty as protecting intimate and personal choices involving personal autonomy and bodily integrity. Noting *Bowers v. Hardwick*, he argued that the plurality's approach could be applied to homosexual sodomy, polygamy, adult incest, and suicide, "all of which can constitutionally be proscribed because it is our unquestionable constitutional tradition that they are proscribable. It is not reasoned judgment that supports the Court's decision; only personal predilection."[214] Accusing the Court of anti-traditional and anti-democratic behavior, Scalia opined that "the American people love democracy and the American people are not fools."[215]

E. *WASHINGTON V. GLUCKSBERG*

The Court in *Washington v. Glucksberg* held that the state of Washington's prohibition of physician-assisted suicide did not violate the Fourteenth Amendment's Due Process Clause.[216] According to the plaintiffs, the liberty interest protected by the Fourteenth Amendment extended to and protected the "liberty of competent, terminally ill adults to make end-of-life decisions free of undue government interference."[217] The Court, in an opinion by Chief Justice Rehnquist, did not accept that formulation and instead asked "whether the protections of the Due Process Clause include a right to commit suicide with another's assistance."[218]

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209. *Id.* at 944 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part).
210. *Id.* at 952.
211. *See supra* notes 121–22 and accompanying text.
212. *See Casey*, 505 U.S. at 952 (Rehnquist, C. J. concurring in the judgment in part and dissenting in part).
213. *Id.* at 952–53.
214. *Id.* at 984 (Scalia, J., concurring in the judgment in part and dissenting in part).
215. *Id.* at 1000.
216. 521 U.S. 702, 735 (1997).
217. *Id.* at 724 (quoting Brief for Respondents at 10).
218. *Id.*; *see also id.* at 736 (O'Connor, J., concurring) (agreeing with the Court's framing of the issue and seeing no need to reject the narrower question of "whether a mentally competent person who is experiencing great suffering has a constitutionally cognizable interest in controlling the circumstances of his or her imminent death"); *id.* at 741 (Stevens,

Chief Justice Rehnquist set forth two elements of the substantive due process analysis.

> First, we have regularly observed that the Due Process Clause specially protects those fundamental rights and liberties which are, objectively, "deeply rooted in this Nation's history and tradition," and "implicit in the concept of ordered liberty," such that "neither liberty nor justice would exist if they were sacrificed." Second, we have required in substantive-due-process cases a "careful description" of the asserted fundamental liberty interest.[219]

Turning to history and tradition, he wrote that "[i]n almost every State—indeed, in almost every western democracy—it is a crime to assist a suicide."[220] Citing Henry de Bracton's treatise and Blackstone's *Commentaries*, Rehnquist noted that suicide and assisting that act were punished by "the Anglo-American common-law tradition."[221] The American colonies adopted this view, and "colonial and early state legislatures and courts did not retreat from prohibiting assisted suicide."[222] "By the time the Fourteenth Amendment was ratified, it was a crime in most States to assist a suicide," and subsequently the Model Penal Code prohibited such conduct; the ban had been generally reaffirmed by voters and legislatures.[223]

Employing a restrained methodology,[224] the Chief Justice concluded that the asserted right to assisted suicide had no place in this country's traditions. The "consistent and almost universal tradition . . . has long rejected the asserted right, and continues explicitly to reject it today, even for terminally ill, mentally competent adults."[225] As

> [t]he history of the law's treatment of assisted suicide in this country has been and continues to be one of the rejection of nearly all efforts to permit it . . . our decisions lead us to conclude that the asserted 'right' to assistance in committing suicide is not a fundamental lib-

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J., concurring in the judgments) ("I fully agree with the Court that the 'liberty' protected by the Due Process Clause does not include a categorical 'right to commit suicide which itself includes a right to assistance in doing so.'"). Justice Breyer did not agree with the Court's formulation of the asserted liberty interest and offered a different formulation

> for which our legal traditions may provide greater support. That formulation would use words roughly like a "right to die with dignity." But irrespective of the exact words used, at its core would lie personal control over the manner of death, professional medical assistance, and the avoidance of unnecessary and severe physical suffering-combined.

Id. at 790 (Breyer, J., concurring in the judgments).

219. *Id.* at 720–21 (citations omitted).

220. *Id.* at 710.

221. *Id.* at 711–12.

222. *Id.* at 714.

223. *Id.* at 715–16.

224. A restrained methodology "tends to rein in the subjective elements that are necessarily present in due process judicial review" and "avoids the need for complex balancing of competing interests in every case." *Id.* at 722.

225. *Id.* at 723.

erty interest protected by the Due Process Clause.[226]

F. *County of Sacramento v. Lewis*

In light of *Glucksberg*, one could have understandably concluded that traditionalism was the interpretive methodology to be employed in due process cases.[227] However, in *County of Sacramento v. Lewis*, the Court did not apply that approach in a case involving the question whether a police officer violated constitutional due-process guarantees by causing the death of a suspect during a high-speed chase.[228] Answering that question in the negative, a Court majority (including Chief Justice Rehnquist, the author of the Court's decision in *Glucksberg*)[229] applied the "shocks the conscience" test set out in *Rochin v. California*,[230] *Collins v. City of Harker Heights*,[231] and other cases. "[F]or half a century now we have spoken of the cognizable level of executive abuse of power as that which shocks the conscience," the Court said; finding no intent to harm or worsen the suspect's legal interests, it concluded that the challenged conduct failed to meet the shocks-the-conscience standard.[232]

A concurring Justice Scalia, joined by Justice Thomas, argued that the Court's opinion was a "throw back to highly subjective substantive-due-process methodologies" and "resuscitates the *ne plus ultra*, the Napoleon Brandy, the Mahatma Gandhi, the Cellophane of subjectivity, th' ol' 'shocks-the-conscience' test."[233] Adhering to *Glucksberg*, he asked not "whether the police conduct here at issue shocks my unelected conscience," but "whether our Nation has traditionally protected the right respondents assert."[234] Finding no textual, historical, or precedential support for the claimed right, and refusing to "fashion a new due process right out of thin air," Scalia concluded that the Constitution had not been violated.[235]

G. *Lawrence v. Texas*

Was the Due Process Clause violated by a Texas statute criminalizing

226. *Id.* at 728; *see also* Vacco v. Quill, 521 U.S. 793 (1997) (New York law prohibiting assisted suicide did not violate the Fourteenth Amendment's Equal Protection Clause).
227. *See* Michael W. McConnell, *The Right to Die and the Jurisprudence of Tradition*, 1997 Utah L. Rev. 665, 672.
228. 523 U.S. 833, 836 (1998).
229. *See supra* notes 220–28 and accompanying text.
230. 342 U.S. 165, 172 (1952) (holding that the forced pumping of a suspect's stomach "shocks the conscience").
231. 503 U.S. 115, 128 (1992) (holding that substantive due process is violated by executive conduct when such conduct "can properly be characterized as arbitrary, or conscience shocking, in a constitutional sense").
232. *Lewis*, 523 U.S. at 846, 854–55.
233. *Id.* at 861 (Scalia, J., concurring in the judgment); *see also id.* at 861 n.1 ("For those unfamiliar with classical music, I note that the exemplars of excellence in the text are borrowed from Cole Porter's 'You're the Top' . . . .").
234. *Id.* at 862.
235. *Id.* (quoting Carlisle v. United States, 517 U.S. 416, 429 (1996)).

"deviate sexual intercourse with another individual of the same sex"?[236] In *Lawrence v. Texas*, the Court, by a 5-4 vote, held that the statute was unconstitutional.[237]

Justice Kennedy's opinion for the majority, joined by Justices Stevens, Ginsburg, Souter, and Breyer, opened as follows:

> Liberty protects the person from unwarranted government intrusions into a dwelling or other private places. In our tradition the State is not omnipresent in the home. And there are other spheres of our lives and existence, outside the home, where the State should not be a dominant presence. Freedom extends beyond spatial bounds. Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct. The instant case involves liberty of the person both in its spatial and more transcendent dimensions.[238]

Justice Kennedy then framed the question before the Court: "whether the petitioners [John Lawrence and Tyron Garner] were free as adults to engage in the private conduct in the exercise of their liberty under the Due Process Clause."[239] Recall that in *Bowers v. Hardwick*[240] the Court asked whether there was a fundamental right to engage in homosexual sodomy.[241] In Kennedy's view, the *Bowers* Court's framing of the issue "discloses the Court's own failure to appreciate the extent of the liberty at stake."[242]

> To say that the issue in *Bowers* was simply the right to engage in certain sexual conduct demeans the claim the individual put forward, just as it would demean a married couple were it to be said that marriage is simply about the right to have sexual intercourse. The laws involved in *Bowers* and here are, to be sure, statutes that purport to do no more than prohibit a particular sexual act. Their penalties and purposes, though, have more far-reaching consequences, touching upon the most private human conduct, sexual behavior, and in the most private of places, the home. The statutes do seek to control a personal relationship that, whether or not entitled to formal recognition in the law, is within the liberty of persons to choose without being punished as criminals.[243]

Concluding that *Bowers* had to be reconsidered, Justice Kennedy disagreed with the Court's 1986 view that anti-sodomy laws have "ancient roots."[244] He did not find any "longstanding history in this country of

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236. TEX. PENAL CODE ANN. § 21.06 (West 1994).
237. 539 U.S. 558, 578–79 (2003).
238. *Id.* at 562; *see also* JAMES E. FLEMING & LINDA C. MCCLAIN, ORDERED LIBERTY: RIGHTS, RESPONSIBILITIES, AND VIRTUES 266 (2013) (noting that *Lawrence* "frames the right asserted quite abstractly: liberty in its spatial and more transcendent dimensions").
239. *Lawrence*, 539 U.S. at 564.
240. 478 U.S. 186, 190 (1986).
241. *See supra* note 21 and accompanying text.
242. *Lawrence*, 539 U.S. at 567.
243. *Id.*
244. *Id.* at 567; *see supra* note 144 and accompanying text.

laws directed at homosexual conduct as a distinct matter"[245] and determined that "early American sodomy laws were not directed at homosexuals as such but instead sought to prohibit nonprocreative sexual activity more generally."[246] Applying a desuetude analysis,[247] Kennedy decided that the absence of a record of enforcement of anti-sodomy laws against consenting adults engaging in such conduct in private was significant, as the infrequency of prosecutions "makes it difficult to say that society approved of a rigorous and systematic punishment" of such acts.[248] Indeed, Kennedy noted, same-sex sodomy was not targeted until the latter third of the twentieth century, state laws criminalizing same-sex relations did not occur before the 1970s, and only nine states had prohibited the conduct.[249] Thus, he concluded, the history and tradition relied upon in *Bowers* "are not without doubt and, at the very least, are overstated."[250]

Having questioned the accuracy of the *Bowers* Court's traditionalist analysis, Justice Kennedy made clear that tradition was not determinative: "History and tradition are the starting point but not in all cases the ending point of the substantive due process inquiry."[251] Moreover, and significantly, he did not look back to colonial times, 1791, 1868, or other time periods as did the Court in *Bowers*.[252] Instead, he identified "our laws and traditions in the past half century"[253] as the relevant time period and found therein "an emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex."[254] Accordingly, "*Bowers* was not correct

245. *Lawrence*, 539 U.S. at 568. According to Justice Kennedy, English anti-sodomy laws prohibited "relations between men and women," and "[n]ineteenth-century commentators similarly read American sodomy, buggery, and crime-against-nature statutes as criminalizing certain relations between men and women and between men and men." *Id.*

246. *Id.* "This does not suggest approval of homosexual conduct. It does tend to show that this particular form of conduct was not thought of as a separate category from like conduct between heterosexual persons." *Id.* at 568–69.

247. The desuetude doctrine "forbids the use of old laws lacking current public support, to require more in the way of accountability and deliberation." CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT 27 (1999). For further discussion of this doctrine, see ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 155 (1st ed. 1962); GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 19–26 (1982).

248. *Lawrence*, 539 U.S. at 569–70. Responding to Justice Kennedy on this point, Justice Scalia argued that "[i]f all the Court means by 'acting in private' is 'on private premises, with the doors closed and windows covered,' it is entirely unsurprising that evidence of enforcement would be hard to come by." *Id.* at 597 (Scalia, J., dissenting).

249. *See id.* at 570 (majority opinion).

250. *Id.* at 571.

251. *Id.* at 572.

252. *See supra* notes 142–45 and accompanying text.

253. *Lawrence*, 539 U.S. at 571–72.

254. *Id.* at 572. Justice Kennedy identified as indicators of the emerging awareness the American Law Institute's 1955 *Model Penal Code*, the non-enforcement of anti-sodomy laws, a British Parliament committee's 1957 proposal for the repeal of anti-sodomy criminal laws, a 1981 decision by the European Court of Human Rights holding that laws prohibiting consensual sodomy by adults of the same sex violated the European Convention on Human Rights, and the post-*Bowers* reduction in the number of states prohibiting sodomy from twenty-five to thirteen states, with four states specifically prohibiting homosexual sodomy. *See id.* at 572–73.

when it was decided, and it is not correct today. It ought not to remain binding precedent. *Bowers v. Hardwick* should be and now is overruled."[255] Lawrence and Garner were "entitled to respect for their private lives," lives that could not be demeaned by criminalizing their private sexual behavior under a law furthering "no legitimate state interest which can justify [the state's] intrusion into the personal and private life of the individual."[256]

Closing his opinion with a decidedly non-traditionalist observation, Justice Kennedy stated:

> Had those who drew and ratified the Due Process Clause of the Fifth Amendment or the Fourteenth Amendment known the components of liberty in its manifold possibilities, they might have been more specific. They did not presume to have this insight. They knew times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom.[257]

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255. *Id.* at 578.

256. *Id.* In his dissent, Justice Scalia agreed with the state's argument that a belief that homosexual sodomy was immoral constituted a legitimate state interest. "State laws against bigamy, same-sex marriage, adult incest, prostitution, masturbation, adultery, fornication, bestiality, and obscenity are likewise sustainable only in light of *Bowers*' validation of laws based on moral choices." *Id.* at 590 (Scalia, J., dissenting). "If, as the Court asserts, the promotion of majoritarian sexual morality is not even a *legitimate* state interest, none of the above-mentioned laws can survive rational-basis review." *Id.* at 599.
As for Justice Scalia's reference to masturbation, one commentator has noted that "[a]s there are no laws against masturbation in the United States, and none seem likely to be adopted in the future, this is one destination on the slippery slope to which we have already come." Dale Carpenter, *Is* Lawrence *Libertarian?*, 88 MINN. L. REV. 1140, 1154 n.70 (2004); *see also* Andrew Koppelman, Lawrence's *Penumbra*, 88 MINN. L. REV. 1171, 1175 n.21 (2004) ("Justice Scalia also gets carried away here. Whatever he may think of masturbation, no state has ever criminalized it.").

257. *Lawrence*, 539 U.S. at 578–79. Although the petitioners and several amici argued that the Texas statute violated the Equal Protection Clause, Justice Kennedy's majority opinion declined to address that issue: "Were we to hold the statute invalid under the Equal Protection Clause some might question whether a prohibition would be valid if drawn differently, say, to prohibit the conduct both between same-sex and different-sex participants." *Id.* at 575. Interestingly, Kennedy reasoned that both "[e]quality of treatment and the due process right to demand respect for conduct protected by the substantive guarantee of liberty are linked in important respects" where the criminalization of same-sex sexual conduct "in and of itself is an invitation to subject homosexual persons to discrimination both in the public and in the private spheres." *Id.* As one analyst noted, this language "sounds almost entirely in equal protection." Post, *supra* note 142, at 99.
Justice O'Connor, concurring and declining to overrule *Bowers*, analyzed the case under the Equal Protection Clause. *Lawrence*, 539 U.S. at 579. In her view, the Texas statute violated the equal protection mandate because the law prohibited same-sex, but not different-sex, sodomy. *Id.* at 581. "That is, Texas treats the same conduct differently based solely on the participants. Those harmed by this law are people who have a same-sex sexual orientation and thus are more likely to engage in behavior" proscribed by the law. *Id.* at 581 (O'Connor, J., concurring in the judgment). That differential treatment presented an issue not before the Court in *Bowers*: "whether, under the Equal Protection Clause, moral disapproval is a legitimate state interest to justify by itself a statute that bans homosexual sodomy, but not heterosexual sodomy." *Id.* at 582. She answered that question in the negative: "Moral disapproval of this group . . . is an interest that is insufficient to satisfy rational basis review under the Equal Protection Clause." *Id.*; *see also id.* at 583 (the state's moral

A vigorous dissent, joined by Chief Justice Rehnquist and Justice Thomas, was issued by Justice Scalia. Citing *Washington v. Glucksberg*,[258] he opined that a state may infringe fundamental liberty interests through means narrowly tailored to serve compelling governmental interests, with only fundamental rights deeply rooted in the nation's history and traditions entitled to protection under the Due Process Clause.[259] Other non-fundamental liberty interests "may be abridged or abrogated pursuant to a validly enacted state law if that law is rationally related to a legitimate state interest."[260] In his view, the right to engage in homosexual sodomy was not fundamental, and the majority erred in concluding there was no longstanding tradition of legal proscriptions of such conduct by same-sex or different-sex couples.[261] *Bowers* found an established tradition of "prohibiting *sodomy in general*," whether performed by same-sex or different-sex couples.[262] It was irrelevant whether the traditional criminalization of sodomy was targeted at homosexuals in particular or at homosexuals and heterosexuals more generally, he argued, as under either view the outlawing of homosexual sodomy sufficed to exclude the conduct from those rights "deeply rooted in this Nation's history and tradition."[263]

Justice Scalia also rejected the majority's "emerging awareness" analytic and focus on the last fifty years.[264] An "'emerging awareness' does not establish a 'fundamental right,'" and anti-sodomy laws have been enforced in that fifty-year period.[265] "In any event," he continued, "an 'emerging awareness' is by definition not 'deeply rooted in this Nation's history and traditions,'" and "[c]onstitutional entitlements do not spring into existence because some States choose to lessen or eliminate criminal sanctions on certain behavior."[266]

Bowers reflected and gave operational effect to a specific formulation of traditionalism, one found in the common law, the laws of the original

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disapproval of homosexual sodomy "proves nothing more than Texas' desire to criminalize" such conduct and "serve[d] more as a statement of dislike and disapproval against homosexuals than as a tool to stop criminal behavior"); *see also id.* at 599–600 (Scalia, J., dissenting) (disagreeing with Justice O'Connor's equal protection analysis and arguing that because the Texas law applied to both men and women and to homosexuals and heterosexuals, "this cannot itself be a denial of equal protection, since it is precisely the same distinction regarding partner that is drawn in state laws prohibiting marriage with someone of the same sex").

258. 521 U.S. 702 (1997); *see supra* notes 45, 90 and accompanying text.

259. *Lawrence*, 539 U.S. at 593 (Scalia, J., dissenting).

260. *Id.*

261. *Id.* at 594.

262. *Id.* at 596.

263. *Id.* at 594. It is difficult to square this analysis with Justice Scalia's earlier call for the identification of a tradition at its most specific level so as to avoid the "imprecise guidance" provided by "general traditions," which allow "judges to dictate rather than discern the society's views." Michael H. v. Gerald D., 491 U.S. 110, 127 n.6 (1989); *see supra* note 167 and accompanying text.

264. *Lawrence*, 539 U.S. at 598 (Scalia, J. dissenting); *see supra* note 254 and accompanying text.

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

266. *Id.*

thirteen states at the time of the ratification of the Bill of Rights in 1791, the laws of the states at the time of the adoption of the Fourteenth Amendment in 1868, and in state-law prohibitions of sodomy circa 1961 and as of the date of the Court's decision in 1986. In the Court's view, that tradition pointed in one and only one direction—states could criminalize homosexual sodomy because they had done so in the past—and any argument to the contrary was not only incorrect, it was "facetious."[267] *Lawrence* repudiated *Bowers*'s traditionalist analysis.[268] The common law and the laws existing in 1791 and 1868 did not provide an answer to the twenty-first century challenge to the Texas deviate sexual intercourse law. The Court looked, instead, to the half-century preceding its ruling and determined that the earlier traditional views of some regarding a state's ability to lawfully criminalize certain same-sex intimate relationships did not bind later generations, and did not foreclose an approach to and application of substantive due process principles different from that taken in *Bowers*. The ban that was constitutionally permissible in 1986 was unconstitutional in 2003.

H. *McDonald v. City of Chicago*

In *District of Columbia v. Heller*[269] the Supreme Court held that the Second Amendment to the Constitution[270] conferred an individual right to keep and bear arms, and that the District of Columbia's "ban on handgun possession in the home" and "prohibition against rendering any lawful firearm in the home operable for the purpose of immediate self-defense" violated that amendment.[271]

Thereafter, in *McDonald v. City of Chicago, Illinois*,[272] the Court addressed a similar prohibition.[273] The Court asked:

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267. Bowers v. Hardwick, 478 U.S. 186, 194 (1986).

268. It should be noted that in rejecting *Bowers*'s holding that there was no fundamental right to engage in homosexual sodomy; *Lawrence* did not expressly state that the right to engage in same-sex intimacies was fundamental. *See Lawrence*, 539 U.S. at 586 (Scalia, J., dissenting) ("[N]owhere does the Court's opinion declare that homosexual sodomy is a 'fundamental right' under the Due Process Clause; nor does it subject the Texas law to the standard of review that would be appropriate (strict scrutiny) if homosexual sodomy *were* a 'fundamental right.'"); RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY 334 (2004) ("*Lawrence* is especially noteworthy because it protects *liberty*, rather than privacy, without any discussion of whether that liberty [is] 'fundamental.'"). This salient silence allowed the Court to strike down the challenged Texas statute without engaging in the fundamentality analysis, which asks whether the state is pursuing a compelling governmental interest through narrowly tailored means.

269. 554 U.S. 570 (2008).

270. *See* U.S. CONST. amend. II (1791) ("A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.").

271. *Heller*, 554 U.S. at 635.

272. 130 S. Ct. 3020 (2010).

273. The Chicago law, which required the registration of firearms and prohibited the registration of most handguns, was also challenged as violative of the Fourteenth Amendment's Privileges or Immunities Clause. *Id.* at 3028; *see also* U.S. CONST. amend. XIV, § 1 (1868) ("No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States . . . ."). The Court declined to consider that claim

> whether the Second Amendment's right to keep and bear arms is incorporated in the concept of due process. In answering that question, . . . we must decide whether the right to keep and bear arms is fundamental to *our* scheme of ordered liberty, or . . . whether this right is "deeply rooted in this Nation's history and tradition."[274]

Relying on *Heller*, Justice Samuel A. Alito, Jr. stated that "[s]elf-defense is a basic right, recognized by many legal systems from ancient times to the present day," and that "individual self-defense is the *central component* of the Second Amendment right."[275] Tracing the origins of the right from the 1689 English Bill of Rights to Blackstone's 1765 assertion that "the right to keep and bear arms was 'one of the fundamental rights of Englishmen'"[276] and to "the American colonists,"[277] Alito opined that the "right to keep and bear arms was considered no less fundamental by those who drafted and ratified the Bill of Rights."[278] Following the ratification of the Bill of Rights, nine states adopted state constitutional provisions protecting the individual right to keep and bear arms between 1789 and 1820, joining four states that "had adopted Second Amendment analogues before ratification."[279]

The "right to keep and bear arms was highly valued for purposes of self-defense" in the 1850s,[280] and following the Civil War, the efforts of the 39th Congress "to safeguard the right to keep and bear arms demonstrate that the right was still recognized to be fundamental."[281] At that time "systematic efforts were made to disarm" African Americans who had served in the Union army and other black persons,[282] and "armed parties, often consisting of ex-Confederate soldiers serving in the state militias, forcibly took firearms from newly freed slaves."[283] Congress provided a legislative response to this development in the Freedmen's Bureau Act of 1866:

> "the right . . . to have full and equal benefit of all laws and proceedings concerning personal liberty, personal security, and the acquisition, enjoyment, and disposition of estate, real and personal, *including the constitutional right to bear arms*, shall be secured to and

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or to disturb its holding in the *Slaughter-House Cases*, 83 U.S. 36 (1872). *See McDonald*, 130 S. Ct. at 3030. *But see id.* at 3059 (Thomas, J., concurring in part and concurring in the judgment) ("The right to keep and bear arms is a privilege of American citizenship that applies to the States through the Fourteenth Amendment's Privileges or Immunities Clause.").

274. *Id.* at 3036 (quoting Washington v. Glucksberg, 521 U.S. 702, 721 (1997)).

275. *Id.* (internal quotation marks omitted).

276. *Id.*

277. *Id.* at 3037.

278. *Id.* "[T]hose who were fearful that the new Federal Government would infringe traditional rights such as the right to keep and bear arms insisted on the adoption of the Bill of Rights as a condition for ratification of the Constitution . . . . This is surely powerful evidence that the right was regarded as fundamental in the sense relevant here." *Id.*

279. *Id.*

280. *Id.* at 3038.

281. *Id.* at 3040.

282. *Id.* at 3038.

283. *Id.* at 3039.

> enjoyed by all the citizens . . . without respect to race or color, or previous condition of slavery."[284]

The Civil Rights Act of 1866[285] "similarly sought to protect the right of all citizens to keep and bear arms."

> Representative Bingham believed that the Civil Rights Act protected the same rights as enumerated in the Freedmen's Bureau Bill, which of course explicitly mentioned the right to keep and bear arms . . . . The unavoidable conclusion is that the Civil Rights Act, like the Freedmen's Bureau Act, aimed to protect "the constitutional right to bear arms."[286]

Moreover, Justice Alito opined, during the debates on the Fourteenth Amendment, that "the 39th Congress referred to the right to keep and bear arms as a fundamental right deserving of protection," and "[e]vidence from the period immediately following the ratification of the Fourteenth Amendment only confirms that the right to keep and bear arms was considered fundamental."[287]

> The right to keep and bear arms was also widely protected by state constitutions at the time when the Fourteenth Amendment was ratified. In 1868, 22 of the 37 States in the Union had state constitutional provisions explicitly protecting the right to keep and bear arms. Quite a few of these state constitutional guarantees, moreover, explicitly protected the right to keep and bear arms as an individual right to self-defense. What is more, state constitutions adopted during the Reconstruction era by former Confederate States included a right to keep and bear arms. A clear majority of the States in 1868, therefore, recognized the right to keep and bear arms as being among the foundational rights necessary to our system of Government.
>
> In sum, it is clear that the Framers and ratifiers of the Fourteenth Amendment counted the right to keep and bear arms among those fundamental rights necessary to our system of ordered liberty.[288]

Accordingly, the Court held that the Fourteenth Amendment's Due Process Clause incorporates the Second Amendment right recognized by the Court in *Heller*.[289]

Justice Stevens, dissenting, referenced Justice Cardozo's test set out in *Palko v. Connecticut*:[290] "we must ask whether the allegedly unlawful practice violates values 'implicit in the concept of ordered liberty.'"[291] That test "undeniably requires judges to apply their own reasoned judg-

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284. *Id.* at 3040 (alterations in original) (quoting Freedman's Bureau Act of 1866, 14 Stat. 17, 176–77, 1866).
285. 14 Stat. 27 (1866).
286. *McDonald*, 130 S. Ct. at 3040–41.
287. *Id.* at 3041.
288. *Id.* at 3042 (footnotes and citations omitted).
289. *See id.* at 3050.
290. 302 U.S. 319 (1937); *see supra* notes 85 and accompanying text.
291. *McDonald*, 130 S. Ct. at 3096 (Stevens, J., dissenting) (quoting Palko v. Connecticut, 302 U.S. 319, 325 (1937)).

ment" via an analysis grounded in "historical and empirical data of various kinds" and with consideration of other "critical variables," such as "[t]extual commitments laid down elsewhere in the Constitution, judicial precedents, English common law, legislative and social facts, scientific and professional developments, practices of other civilized societies, and, above all else, the traditions and conscience of our people."[292]

Justice Stevens criticized the way Justice Alito's opinion hinged "on one mode of intellectual history, culling selected pronouncements and enactments from the 18th and 19th centuries to ascertain what Americans thought about firearms."[293] Such a rigid historical test was not appropriate, Stevens contended, as the Court's substantive due process doctrine "has never evaluated substantive rights in purely, or even predominately, historical terms,"[294] and the answer to the question before the Court "cannot be found in a granular inspection of state constitutions or congressional debates."[295] In his view, a liberty guarantee recognizing "only those rights so rooted in our history, tradition, and practice as to require special protection . . . would serve little function, save to ratify those rights that state actors have *already* been according the most extensive protection."[296]

> That approach is unfaithful to the expansive principle Americans laid down when they ratified the Fourteenth Amendment and to the level of generality they chose when they crafted its language; it promises an objectivity it cannot deliver and masks the value judgments that pervade any analysis of what customs, defined in what manner, are sufficiently 'rooted'; it countenances the most revolting injustices in the name of continuity, for we must never forget that not only slavery but also the subjugation of women and other rank forms of discrimination are part of our history; and it effaces this Court's distinctive role in saying what the law is, leaving the development and safekeeping of liberty to majoritarian political processes. It is judicial abdication in the guise of judicial modesty.[297]

Justice Stevens did not ask, as did Justice Alito, whether the Second Amendment right to keep and bear arms has been incorporated into the Fourteenth Amendment and therefore applies to the states.[298] "The question, rather, is whether the particular right asserted by petitioners applies to the States because of the Fourteenth Amendment itself, standing on its own bottom."[299] While he agreed with the Court that its substantive due process precedents provided a "principled basis for holding that petitioners have a constitutional right to possess a usable firearm in the home," Stevens concluded that "a better reading of our case law supports the city

292. *Id.* (footnote and internal quotation marks omitted).
293. *Id.* at 3097.
294. *Id.*
295. *Id.* at 3098.
296. *Id.* (citation and internal quotation marks omitted).
297. *Id.* at 3098–99 (footnote omitted).
298. *See supra* notes 286–88 and accompanying text.
299. *McDonald*, 130 S. Ct. at 3103 (Stevens, J., dissenting).

of Chicago."[300] He found no post-*Lochner* substantive due process case "that holds, states, or even suggests that the term 'liberty' encompasses either the common-law right of self-defense or a right to keep and bear arms."[301] And "although it may be true that Americans' interest in firearm possession and state-law recognition of that interest are 'deeply rooted' in some important senses, it is equally true that the States have a long and unbroken history of regulating firearms."[302]

> The idea that States may place substantial restrictions on the right to keep and bear arms short of complete disarmament is, in fact, far more entrenched than the notion that the Federal Constitution protects any such right. Federalism is a far older and more deeply rooted tradition than is a right to carry, or to own, any particular kind of weapon.[303]

Furthermore and significantly, Justice Stevens rejected the claim made by Justice Scalia that traditionalism is "an 'objective,' 'neutral' method of substantive due process analysis."[304]

> At what level of generality should one frame the liberty interest in question? What does it mean for a right to be deeply rooted in this Nation's history and tradition? By what standard will that proposition be tested? Which types of sources will count, and how will those sources be weighed and aggregated? There is no objective, neutral answer to these questions. There is not even a theory—at least, Justice Scalia provides none—of how to go about answering them.[305]

"[H]istory is not an objective science, and . . . its use can therefore point in any direction the judges favor."[306] A judge "canvas[sing] the entire landscape of American law as it has evolved through time, and perhaps older laws as well" does so "pursuant to a standard (deeply rootedness) that has never been defined."[307] A judge who has embarked on "this rudderless, panoramic tour of American legal history . . . has more than ample opportunity to look over the heads of the crowd and pick out [his] friends."[308] Pointing out that under his approach "the judge's cards are laid on the table for all to see, and to critique,"[309] Ste-

300. *Id.* at 3107.
301. *Id.* at 3109.
302. *Id.* at 3112 (citation omitted).
303. *Id.* (internal quotation marks omitted).
304. *Id.* at 3116; *see also id.* at 3055 (Scalia, J., concurring) ("Deciding what is essential to an enlightened, liberty-filled life is an inherently political, moral judgment—the antithesis of an objective approach that reaches conclusions by applying neutral rules to verifiable evidence.").
305. *Id.* at 3116–17 (Stevens, J., dissenting) (citation and internal quotation marks omitted); *see also* Bartlett, *supra* note 11, at 545 ("Tradition is not fixed, nor can it be easily or reliably retrieved. It represents not fixed facts, but accumulated values that cannot be ascertained through some precise, scientific method.").
306. *McDonald*, 130 S. Ct. at 3117 (Stevens, J., dissenting) (internal quotation marks omitted).
307. *Id.*
308. *Id.* (alteration in original) (internal quotation marks omitted).
309. *Id.* at 3118.

vens opined that in "answering a constitutional question to which the text provides no clear answer, there is always some amount of discretion; our constitutional system has always depended on judges' filling in the document's vast open spaces."[310]

In a separate dissent, Justice Breyer, joined by Justices Ginsburg and Sotomayor, expressed his concern about "the reefs and shoals that lie in wait for those nonexpert judges who place virtually determinative weight upon historical considerations."[311] In his view, "the Court should not look to history alone but to other factors as well.... It should, for example, consider the basic values that underlie a constitutional provision and their contemporary significance" and "should examine as well the relevant consequences and practical justifications that might, or might not, warrant removing an important question from the democratic decision-making process."[312] He argued that

> the specific question before us is not whether there are references to the right to bear arms for self-defense throughout this Nation's history—of course there are—or even whether the Court should incorporate a simple constitutional requirement that firearms regulations not unreasonably burden the right to keep and bear arms.[313]

Rather, the question is "whether there is a consensus that *so substantial* a private self-defense right as the one described in *Heller* applies to the States."[314] Surveying the historical record,[315] he concluded that the "record is insufficient to say that the right to bear arms for private self-defense . . . is fundamental in the sense relevant to the incorporation inquiry.... States and localities have consistently enacted firearm regulations ... throughout our Nation's history. Courts have repeatedly upheld such regulations."[316] Accordingly, Breyer could not "find sufficient historical support for the majority's conclusion that that right is 'deeply rooted in this Nation's history and tradition.'"[317]

During the almost twenty-five years beginning with the Court's decision in *Bowers* and ending with its ruling in *McDonald*, the Court and individual Justices have employed some form of traditionalism in considering and resolving substantive due process and fundamental rights claims. *Bowers*-style traditionalism resulted in the validation of a state law criminalizing certain sexual conduct engaged in by persons of the same sex; the joint opinion in *Casey* declared that the outer limits of the substantive sphere of liberty were not marked by the Bill of Rights or state practices at the time of the ratification of the Fourteenth Amendment; a majority of the Court in *Glucksberg* did look to and relied on

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310. *Id.*
311. *Id.* at 3122 (Breyer, J., dissenting).
312. *Id.*
313. *Id.* at 3130.
314. *Id.*
315. *See id.* at 3131–36.
316. *Id.* at 3131.
317. *Id.*

state practices at the time of the Fourteenth Amendment's ratification as well as other historical and traditional practices and views; a year later, the *Lewis* Court applied its non-traditionalist "shock-the-conscience" precedent; *Lawrence*, overruling *Bowers*, formulated and employed yet another type of traditionalism and proclaimed that tradition is the starting but not the ending point of the substantive due process inquiry; and *McDonald* canvassed the nation's history and tradition in finding that the right to keep and bear arms is a fundamental right. Discretionary traditionalism is on display in and is common to all of the foregoing cases as evidenced by the Justices' differing methodological, interpretive, and value choices relative to the operative meaning and content of the Due Process Clauses.

IV. DISCRETIONARY TRADITIONALISM IN THE FEDERAL COURTS OF APPEALS

Examples of discretionary traditionalism in cases decided by the federal courts of appeals provide further evidence of the importance of this approach to substantive due process analysis and the fundamentality question. This Part discusses the choices made and the discretion enjoyed and exercised by judges in cases involving plaintiffs' claims of a constitutionally protected right of access to medical marijuana, experimental drugs, and sexual devices, and a right to freedom from the individual mandate provision of the recently enacted federal health care law.

A. Access To Medical Marijuana

In *Raich v. Gonzales*, Angela McClary Raich claimed that she had a constitutionally protected right to use medical marijuana on the recommendation of her physician.[318] Diagnosed with a number of serious medical conditions,[319] Raich contended that she had "a fundamental right to mak[e] life-shaping medical decisions that are necessary to preserve the integrity of her body, avoid intolerable physical pain, and preserve her life."[320]

The court did not agree with Raich's framing of the asserted fundamental right.[321] "Conspicuously missing . . . is its centerpiece: that she seeks the right to use *marijuana* to preserve bodily integrity, avoid pain, and preserve her life."[322] Citing, among other cases, *Washington v. Gluck-*

318. 500 F.3d 850, 864 (9th Cir. 2007). This case was heard by the United States Court of Appeals for the Ninth Circuit on remand following the Supreme Court's decision in *Gonzales v. Raich*, 545 U.S. 1 (2005), which held that intrastate cultivation and use of marijuana may be prohibited by Congress acting under its Commerce Clause power as set forth in the Controlled Substances Act, 21 U.S.C. §§ 801–971.

319. "Raich has been diagnosed with more than ten serious medical conditions, including an inoperable brain tumor, a seizure disorder, life-threatening weight loss, nausea, and several chronic pain disorders." *Raich*, 500 F.3d at 855.

320. *Id.* at 864 (internal quotation marks omitted). Raich also presented, and the court rejected, claims grounded in common-law necessity and the Tenth Amendment. *Id.* at 869.

321. *Id.* at 864.

322. *Id.*

sberg[323] and *Cruzan v. Director, Missouri Department of Health*,[324] the Ninth Circuit opined that "the right must be carefully stated and narrowly identified before the ensuing analysis can proceed. Accordingly, we will add the centerpiece—the use of marijuana—to Raich's proposed right."[325] The court thus reframed and narrowed the question before it as "whether the liberty interest specially protected by the Due Process Clause [of the Fifth Amendment] embraces a right to make a life-shaping decision on a physician's advice to use medical marijuana to preserve bodily integrity, avoid intolerable pain, and preserve life, where all other prescribed medications and remedies have failed."[326]

Was the fundamental right as described by the court deeply rooted in the nation's history and tradition, and implicit in the concept of ordered liberty? No, said the Ninth Circuit. Although there was "considerable evidence that efforts to regulate marijuana use in the early-twentieth-century targeted recreational use, but permitted medical use,"[327] by 1965 all fifty states had criminalized the possession of marijuana with exceptions in almost every state for individuals using the drug for medicinal purposes.[328] In the 1970 Controlled Substances Act, Congress prohibited all uses of marijuana, including medical use, and no state allowed the use of medical marijuana until California did so in its Compassionate Use Act of 1996.[329] While the "mere enactment of a law, state or federal, that prohibits certain behavior does not necessarily mean that the behavior is not deeply rooted in this country's history and traditions," the court deemed it "noteworthy . . . that over twenty-five years went by [after the enactment of the 1970 federal law] before any state enacted a law to protect the alleged right."[330]

Raich relied on the "emerging awareness" analysis set out in *Lawrence v. Texas*,[331] focusing on the ten years preceding her legal action and contending that that time span had been "characterized by an emerging awareness of marijuana's medical value."[332] The Ninth Circuit was not persuaded: "the use of medical marijuana has not obtained the degree of recognition today that private sexual conduct had obtained by 2004 in *Lawrence*."[333] Looking to the states, the court noted that since 1996 ten

323. 521 U.S. 702 (1997); *see supra* notes 216–26 and accompanying text.
324. 497 U.S. 261 (1990); *see supra* notes 184–200 and accompanying text.
325. *Raich*, 500 F.3d at 864.
326. *Id.*
327. *Id.* at 865.
328. *See id.*
329. *Id.*; *see* CAL. HEALTH & SAFETY CODE § 11362.5 (West 2007). "[S]eriously ill Californians have the right to obtain and use marijuana for medical purposes where that medical use is deemed appropriate and has been recommended by a physician who has determined that the person's health would benefit from the use of marijuana in the treatment of cancer, anorexia, AIDS, chronic pain, spasticity, glaucoma, arthritis, migraine, or any other illness for which marijuana provides relief." HEALTH & SAFETY § 1132.5(b)(1)(A).
330. *Raich*, 500 F.3d at 865 n.14.
331. 539 U.S. 558, 571 (2003); *see supra* notes 237–68 and accompanying text.
332. *Raich*, 500 F.3d at 865.
333. *Id.*

states had decriminalized certain uses of marijuana by seriously ill persons; other states recognized that the drug could have therapeutic value, while other states permitted the use of marijuana in experimental treatment programs.[334] Agreeing "that medical and conventional wisdom that recognizes the use of marijuana for medical purposes is gaining traction in the law as well," the court concluded that such "legal recognition has not yet reached the point where a conclusion can be drawn that the right to use medical marijuana is 'fundamental' and 'implicit in the concept of ordered liberty.'"[335] Thus, "[f]or the time being, this issue remains in the arena of public debate and legislative action."[336]

B. Access To Experimental Drugs

Abigail Alliance for Better Access to Developmental Drugs v. Eschenbach[337] answered in the negative the following question (as framed by the plaintiff):

> Whether the liberty protected by the Due Process Clause embraces the right of a terminally ill patient with no remaining approved treatment options to decide, in consultation with his or her own doctor, whether to seek access to investigational medications that the [Food and Drug Administration] concedes are safe and promising enough for substantial human testing.[338]

Assuming *arguendo* that the foregoing description of the asserted right satisfied *Glucksberg's* "careful description" requirement,[339] the court (in an opinion authored by Judge Thomas B. Griffith) rejected the argument that the right could be found in the nation's history and legal traditions because the federal government had "never interfered with the judgment of individual doctors about the medical *efficacy* of particular drugs until 1962."[340] That "focus on efficacy regulation ignores one simple fact: it is unlawful for the Alliance to procure experimental drugs not only because they have not been proven effective, but because they have not been proven safe."[341] "Thus, to succeed on its claim of a fundamental right of access for the terminally ill to experimental drugs, the Alliance must show not only that there is a tradition of access to drugs that have not yet been proven effective, but also a tradition of access to drugs that have not

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334. *See id.* at 865–66.
335. *Id.* at 866 (citation omitted).
336. *Id.* (citation and internal quotation marks omitted); *see also id.* ("For now, federal law is blind to the wisdom of a future day when the right to use medical marijuana to alleviate excruciating pain may be deemed fundamental. Although that day has not yet dawned, considering that during the last ten years eleven states have legalized the use of medical marijuana, that day may be upon us sooner than expected.").
337. 495 F.3d 695 (D.C. Cir. 2007) (en banc).
338. *Id.* at 701 (citing Appellants' Brief at 1).
339. *Id.* at 702; *see supra* note 219 and accompanying text.
340. *Abigail Alliance*, 495 F.3d at 703.
341. *Id.* "Although the Alliance contends that it only wants drugs that 'are safe and promising enough for substantial human testing' . . . current law bans access to an experimental drug on safety grounds until it has successfully completed all phases of testing." *Id.*

yet been proven safe."[342]

Citing *Glucksberg*, the court concluded that "our Nation has long expressed interest in drug regulation, calibrating its response in terms of the capabilities to determine the risks associated with both drug safety and efficacy."[343] The regulation of drugs in the United States began in the colonies and states with Virginia's passage of a 1736 law, followed by an 1808 act passed in the territory of Orleans (Louisiana), an 1817 South Carolina law requiring the licensing of pharmacists, and laws in Georgia and Alabama passed in 1825 and 1852, respectively.[344]

> By 1870, at least twenty-five states or territories had statutes regulating adulteration (impure drugs), and a few others had laws addressing poisons. In the early history of our Nation, we observe not a tradition of protecting a right of access to drugs, but rather governments responding to the risks of new compounds as they become aware of and able to address those risks.[345]

As for federal regulation,[346] the court noted the Import Drug Act of 1848; the Biologics Controls Act of 1902; the Pure Food and Drugs Act of 1906; the Food, Drug, and Cosmetic Act of 1938 (FDCA); and the 1962 amendments to the FDCA in which "Congress amended the FDCA . . . to explicitly require that the [Food and Drug Administration] only approve drugs deemed effective for public use."[347]

The defendant FDA, relying on *Lawrence v. Texas*, urged that the "'history of the FDCA over the past seventy years is entitled to particular weight in the substantive due process calculus.'"[348] The court determined that it did not have to decide "whether recent history [was] particularly relevant in measuring the scope of rights under the Due Process Clause . . . [because] there [was] no evidence of a deeply rooted right of terminally ill patients to gain access to experimental drugs—either throughout our Nation's history or during the past half century."[349] Furthermore, the court continued, the Alliance's argument that a drug's effectiveness was not required before 1962 did not withstand scrutiny.[350] "[A]t least some drug regulation prior to 1962 addressed efficacy"[351] and "an arguably limited history of efficacy prior to 1962 does not establish a fundamental right of access to unproven drugs" because "amendments made to the FDCA by Congress throughout the twentieth century demonstrate that Congress and the FDA have continually responded to new risks presented by an evolving technology."[352] The court recognized

342. *Id.*
343. *Id.*
344. *See id.* at 704.
345. *Id.*
346. *See id.* at 704–05.
347. *Id.* at 705.
348. *Id.* at 705 n.10. (quoting Appellee's Brief at 31).
349. *Id.*
350. *Id.* at 706.
351. *Id.*
352. *Id.*

that "a lack of government interference throughout history might be some evidence that a right is deeply rooted. But standing alone, it cannot be enough."[353] If the absence of such interference established a deeply rooted tradition, it could be argued that marijuana use, the use of narcotics, and the freedom to drive a car as fast as one pleases would be fundamental rights.[354] "But this is most certainly not the law. A prior lack of regulation suggests that we must exercise care in evaluating the untested assertion of a constitutional right to be free from new regulation."[355]

A dissenting Judge Judith W. Rogers, joined by then Chief Judge Douglas H. Ginsburg, did not agree with the court's framing of the issue for decision. She noted that "the description of the right is of crucial importance—too broad and a right becomes all-encompassing and impossible to evaluate; too narrow and a right appears trivial."[356] She did not ask, as did the majority, whether the Due Process Clause embraced a terminally ill patient's right to seek access to investigational medications that the FDA concedes are safe and promising.[357] Rather, Rogers asked whether a terminally ill patient has the right "to save her own life,"[358] a right "deprived without due process of law when the FDA makes it practically impossible for Alliance members for whom conventional treatments have failed to access investigational new drugs that have been approved for substantial human testing."[359] That claimed right has a "textual anchor" in the Due Process Clause's "right to life."[360]

Judge Rogers determined that the right of a person to attempt to preserve her life can be found in the nation's history and tradition. In her view, "this Nation has long entrusted in individuals those fundamentally personal medical decisions that lie at the core of personal autonomy, self-determination, and self-defense."[361] The claimed right predates the founding of the United States;[362] was recognized in the common law right of self-defense, necessity, and protection against interference with rescue;[363] and can be located in "a sizable body" of Supreme Court case law

353. *Id.*
354. *Id.* at 707.
355. *Id.* Having concluded that the Alliance's claimed right was not fundamental, the court subjected the claim to rational basis scrutiny and the Alliance was required to prove that the governmental restrictions bore no rational relationship to a legitimate state interest. The court held that "the FDA's policy of limiting access to investigational drugs is rationally related to the legitimate state interest of protecting patients, including the terminally ill, from potentially unsafe drugs with unknown therapeutic effects." *Id.* at 713.
356. *Id.* at 716 (Rogers, J., dissenting).
357. *See id.* at 701 (majority opinion).
358. *Id.* at 714 (Rogers, J., dissenting).
359. *Id.* at 715.
360. *Id.* at 727.
361. *Id.* at 717. *See generally*, Eugene Volokh, *Medical Self-Defense, Prohibited Experimental Therapies, and Payment for Organs*, 120 HARV. L. REV. 1813 (2007).
362. *See Abigail Alliance*, 495 F.3d at 717.
363. *See id.* at 717–19. Regarding the common law right of self-defense, Judge Rogers opined that "[a]lthough the concept of self-defense is most often thought of in terms of the response to an assault by another human being, its premise compels the same response in the face of other forms of aggression against life and limb, whether the aggressor be an animal or a diseased cell within one's body." *Id.* at 717–18.

"regarding the right to a potentially life-saving medical *procedure* when the life or health of a pregnant woman is on the line."[364] Given this historical record and backdrop, Rogers reasoned that it was not coincidental that neither the majority nor the FDA could point to evidence from the nation's early history demonstrating governmental restraint of the terminally ill seeking to access medical treatments and procedures of unknown efficacy that had not been proven to be unsafe.[365]

As for the majority's opinion that the lack of government interference throughout history was not enough to demonstrate that a right was deeply rooted,[366] Judge Rogers set forth three reasons supporting her conclusion that the court's position was misguided.

> First, the most fundamental rights are those that no government of the people would contemplate abridging—it is doubtful that many courts or legislatures have discussed whether the government can determine whether we are allowed to breathe air, but this does not make our access to oxygen any less grounded in history.[367]

Second, in *Glucksberg* "the Supreme Court did not say . . . that a right can be fundamental only if it has been acknowledged by statute or decisional law."[368] Finally, any concern that a deeply rooted right established by the absence of government interference would result in sweeping claims of fundamental rights neglects the second *Glucksberg* requirement that the right be implicit in the concept of ordered liberty.[369]

Turning to the ordered liberty criterion, Judge Rogers noted that the Supreme Court has declared that this requirement "'encompasses and protects the personal intimacies of the home, the family, marriage, motherhood, procreation, and child rearing,'"[370] as well as other rights and freedoms. The right claimed by the Alliance "also falls squarely within the realm of rights implicit in ordered liberty. The core of liberty is autonomy . . . . It is difficult to imagine any context in which this liberty interest would be stronger than in trying to save one's own life."[371] The government is not being asked to provide treatment or a subsidy; it is being asked to "step aside" and not interfere with the terminally ill patient's right of self-determination.[372] Denying that right with no strict showing of governmental necessity is paternalistic and "is directly at odds with this Nation's history and traditions giving recognition to individual self-determination and autonomy where one's own life is at stake and should ex-

364. *Id.* at 719.
365. *See id.* at 722.
366. *See supra* note 353 and accompanying text.
367. *Abigail Alliance*, 495 F.3d at 722 (Rogers, J., dissenting).
368. *Id.*; *see also* Michael H. v. Gerald D., 491 U.S. 110, 122 n.2 (1989) (plurality opinion) ("[Historical] protection need not take the form of an explicit constitutional provision or statutory guarantee, but it must at least exclude . . . a societal tradition of enacting laws *denying* the interest.").
369. *Abigail Alliance*, 495 F.3d at 723 (Rogers, J., dissenting).
370. *Id.* at 727 (quoting Paris Adult Theatre I v. Slaton, 413 U.S. 49, 65 (1973)).
371. *Id.*
372. *Id.* at 728.

tend no further than the result in this case."[373]

C. Sexual Devices

Now consider substantive due process challenges to state prohibitions of the sale and distribution of sexual devices.

In *Williams v. Attorney General of Alabama*,[374] the United States Court of Appeals for the Eleventh Circuit considered a challenge to an Alabama law prohibiting the commercial distribution of "any device designed or marketed as useful primarily for the stimulation of human genital organs for any thing of pecuniary value."[375] Rejecting the American Civil Liberties Union's invocation of "privacy" and "personal autonomy" as matters protected under the concept of substantive due process ("there is no fundamental right to either"),[376] and declining to extrapolate a right to sexual privacy from "scattered *dicta*"[377] in *Lawrence v. Texas*,[378] the court applied the two-step *Glucksberg* analysis: (1) a careful description of the asserted right and (2) determining whether the carefully described asserted right is a fundamental right that is deeply rooted in the nation's history and tradition, and is "'implicit in the concept of ordered liberty such that neither liberty nor justice would exist if [it] were sacrificed.'"[379]

Regarding step one, the district court had characterized the claimed right as "a fundamental right to *sexual privacy* between married persons and between unmarried persons which, in turn, encompasses a right to use sexual devices."[380] The Eleventh Circuit determined that this formulation of the right "potentially encompasses a great universe of sexual activities, including many that historically have been, and continue to be, prohibited"[381] such as adult incest, obscenity, and prostitution.[382] Narrowing the inquiry, the appeals court asked whether the Constitution protects the right to use sexual devices when engaging in lawful, private sexual activity.[383]

Continuing to step two of the *Glucksberg* analysis, the Eleventh Circuit concluded that the record before it did not show that the right as framed

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373. *Id.*

374. 378 F.3d 1232 (11th Cir. 2004).

375. Ala. Code § 13A-12-200.2 (2006).

376. *Williams*, 378 F.3d at 1235.

377. *Id.* at 1236.

378. 539 U.S. 558 (2003).

379. *Williams*, 378 F.3d at 1239 (quoting Washington v. Glucksberg, 521 U.S. 702, 720–21 (1997)); *see also* Randy E. Barnett, *Scrutiny Land*, 106 Mich. L. Rev. 1479, 1488–93 (2008) (discussing the *Glucksberg* two-step analysis).

380. Williams v. Pryor, 220 F. Supp. 2d 1257, 1277 (N.D. Ala. 2002) (quotation marks omitted), *rev'd*, *Williams*, 378 F.3d 1232 (11th Cir. 2004). The district court limited the claimed right to consenting adults. *See id.* at 1292.

381. *Williams*, 378 F.3d at 1239–40.

382. *See id.* at 1240.

383. *See id.* at 1242. The court also criticized and rejected the district court's focus on contemporary practices and emphasis on contemporary trends of legislative and social liberalization of attitudes toward adults' consensual sexual activities. *See id.* at 1243. *But see id.* at 1258 (Barkett, J., dissenting) ("*Lawrence* looked to modern trends and practices.").

by the court was a deeply rooted one; that record did suggest, however, that "sex toys historically have attracted the attention of the law . . . in the context of proscription, not protection."[384] For example, the Comstock Act of 1873[385] prohibited the importation and use of the mails for transporting "every article or thing intended or adapted for any indecent or immoral use."[386] In addition, the sale of such articles was prohibited by several states in the late 1800s and early 1900s.[387] The existence of such laws "undermines the argument that sexual devices historically have been free from state interference."[388] The court also considered the district court's observation that the Comstock Act and federal case reporters did not specifically refer to dildos and vibrators.[389] The absence of statutory references to particular sexual devices "is relatively meaningless without evidence that commerce in these devices was sufficiently widespread, or sufficiently in the public eye, to merit legislative attention, at least beyond general anti-obscenity laws."[390] And the argument based on the absence of references to certain devices in federal case reporters unjustifiably assumed "that reported cases are reliable proxies for actual prosecutions, the vast majority of which would have never appeared in the court reporters" and "overlooks the possibility of prosecutions under *state* law."[391]

In dissent, Judge Rosemary Barkett argued that the case was not about sex or sexual devices, but "the tradition of American citizens from the inception of our democracy to value the constitutionally protected right to be left alone in the privacy of their bedrooms and personal relationships."[392] Applying the analytical framework of the Court's post-*Glucksberg* decision in *Lawrence*, Barkett stated that "the proper inquiry is simply whether adults have a right to engage in private sexual conduct in the exercise of their liberty under the Due Process Clause of the Fourteenth Amendment."[393] The *Lawrence* Court's affirmative answer to that question was not, as the majority suggested, "scattered *dicta*," but was a "direct response to the question it granted certiorari to answer and that it found was necessary to resolve before disposing of the case."[394]

In Judge Barkett's view, the *Williams* majority erroneously reduced and limited the claimed liberty interest to a specific sexual act, "asking not whether consenting adults have a right to sexual privacy, but whether an Alabama citizen has the right to use sex toys."[395] That narrow framing

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384. *Id.* at 1245.
385. 17 Stat. 599 (1873).
386. United States v. Chase, 135 U.S. 255, 257 (1890).
387. *See Williams*, 378 F.3d at 1245 (citing CONN. GEN. STAT. § 1325 (1902); MASS. GEN. LAWS ch. 272 § 21 (enacted 1879)).
388. *Id.*
389. *See id.*
390. *Id.*
391. *Id.*
392. *Id.* at 1250 (Barkett, J., dissenting).
393. *Id.* at 1255.
394. *Id.* at 1256.
395. *Id.* at 1257.

of the at-issue right "severely discounts the extent of the liberty at stake in this case," because the law goes beyond restricting the sale of particular sexual devices and burdens the private sexual activity of adults within their homes.[396] Furthermore, the majority's use of history and its reading of *Glucksberg* was flawed. Judge Barkett accused the majority of inventing "the requirement that there must be a history of affirmative legislative protection before a right can be judicially protected"; that requirement "redefin[es] the doctrine of substantive due process to protect only those rights that are *already* explicitly protected by law."[397] The affirmative-governmental-protection requirement would have resulted in a different outcome in *Roe v. Wade* as "there was no lengthy tradition of protecting abortion and the use of contraceptives, yet both were found to be protected by a right to privacy under the Due Process Clause."[398]

A different result was reached in *Reliable Consultants, Inc. v. Earle*.[399] Texas law prohibited the promotion of "obscene devices" "designed or marketed as useful primarily for the stimulation of human genital organs," with a violation of the statute resulting in imprisonment for up to two years.[400] The plaintiffs, operators of retail stores carrying sexual devices, claimed "that the right at stake is the individual's substantive due process right to engage in private intimate conduct free from government intrusion."[401] The defendant-state proposed a different right: "the right to stimulate one's genitals for non-medical purposes unrelated to procreation or outside of an interpersonal relationship."[402]

Guided by *Lawrence*,[403] a majority of the three-member panel of the United States Court of Appeals for the Fifth Circuit, in an opinion authored by Judge Reavley, described the issue as "whether the Texas statute impermissibly burdens the individual's substantive due process right to engage in private intimate conduct of his or her choosing."[404] Texas's law heavily burdened that constitutional right, the court concluded, because an individual who desires to lawfully "use a safe sexual device during private intimate moments alone or with another is unable to legally purchase a device in Texas."[405] The court explained:

> Just as in *Lawrence*, the State here wants to use its laws to enforce a public moral code by restricting private intimate conduct. The case is not about public sex. It is not about controlling commerce in sex. It is about controlling what people do in the privacy of their own homes because the State is morally opposed to a certain type of consensual

396. *Id.*
397. *Id.* at 1258.
398. *Id.*
399. 517 F.3d 738 (5th Cir. 2008).
400. Tex. Penal Code Ann. §§ 43.21(a)(5)–(7), 43.23(a), (d). The statute did not prohibit the use or possession of such devices. *See Reliable*, 517 F.3d at 741.
401. *Reliable*, 517 F.3d at 743.
402. *Id.*
403. Lawrence v. Texas, 539 U.S. 558 (2003); *see supra* notes 237–68.
404. *Reliable*, 517 F.3d at 744.
405. *Id.*

private intimate conduct. This is an insufficient justification for the statute after *Lawrence*.[406]

D. Refusing Unwanted Medical Care

Recently, a constitutional challenge to the individual mandate provision of the Patient Protection and Affordable Care Act was before the United States Court of Appeals for the Sixth Circuit in *U.S. Citizens Association v. Sebelius*.[407] The challengers argued, inter alia, that the individual mandate violated their right "to be let alone, including the right to make choices not to receive medical treatment of a particular kind or at all; not to pay for unwanted treatments or pay for insurance that covers unwanted treatments; and not to divulge medical confidences to a private insurer or its agents in order to obtain health insurance."[408]

Rejecting that contention, the court concluded that the individual mandate did not implicate the claimed fundamental liberty right, as the plaintiffs were "free to choose their medical providers" as well as the medical treatments they would or would not accept.[409] Citing *Glucksberg*, the court reasoned that "[r]egardless of whether plaintiffs' claim is cast as a freedom to remain uninsured or a freedom to refuse to pay for unwanted medical care, the right asserted cannot be characterized as 'fundamental' so as to receive heightened protection under the Due Process Clause."[410]

V. CONCLUSION

The observation that constitutional law is "largely the result of discretionary judgments made by judges"[411] is especially true where plaintiffs invoke the substantive component of the Due Process Clauses of the Constitution as the source of a claimed fundamental right. As discussed in the preceding pages, judges' discretionary and subjective judgments can be critical to analysis of and the outcomes in substantive due process cases where tradition and traditionalism are made part of the adjudicative calculus.

Is traditionalism the appropriate or preferred methodology? How is the applicable level of generality selected and framed? What is—or is

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406. *Id.* at 746. Judge Barksdale dissented from the court's substantive-due-process analysis and invalidation of the statute. In her view, *Lawrence* invalidated laws that targeted both private and non-commercial conduct and not the public and commercial conduct regulated by the Texas statute. *See id.* at 749 (Barksdale, J., concurring in part and dissenting in part); *see also* Reliable Consultants, Inc. v. Earle, 538 F.3d 355, 361 (5th Cir. 2008) (Jones, C.J., dissenting from the denial of rehearing en banc) (arguing, inter alia, that the court failed to apply the two-step *Glucksberg* analysis).

407. 705 F.3d 588 (6th Cir. 2013). The individual mandate "requires each individual to purchase a health insurance policy providing a minimum level of coverage or make a shared responsibility payment." *Id.* at 592.

408. *Id.* at 601.

409. *Id.*

410. *Id.*

411. Lee Epstein, William N. Landes & Richard A. Posner, The Behavior of Federal Judges: A Theoretical and Empirical Study of Rational Choice 27 (2013).

there always a discernible—relevant history and tradition, and how does one "objectively" identify and determine that such history and tradition are "deeply rooted"? How does one even objectively define the deeply rootedness standard?[412] These and other queries have been asked and answered in varying ways by users of and participants in the debate over traditionalist methodology in ways that belie the notion that this approach provides neutral rules for—and an objective approach to—the resolution of fundamentality issues. Rather, judicial discretion and subjectivity and reasoned judgment have played and continue to play a significant role in the interpretation and application of the Due Process Clauses and the judicial determination that a claimed right is or is not a "liberty" and fundamental right protected by the Constitution. Recognition of that reality is essential to an informed understanding of the Court's substantive due process jurisprudence.

412. *See* McDonald v. City of Chi., 130 S. Ct. 3020, 3116 (2010) (Stevens, J., dissenting).