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## Due Process Traditionalism

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# DUE PROCESS TRADITIONALISM

Cass R. Sunstein\*

*In important cases, the Supreme Court has limited the scope of “substantive due process” by reference to tradition, but it has yet to explain why it has done so. Due process traditionalism might be defended in several distinctive ways. The most ambitious defense draws on a set of ideas associated with Edmund Burke and Friedrich Hayek, who suggested that traditions have special credentials by virtue of their acceptance by many minds. But this defense runs into three problems. Those who have participated in a tradition may not have accepted any relevant proposition; they might suffer from a systematic bias; and they might have joined a cascade. An alternative defense sees due process traditionalism as a second-best substitute for two preferable alternatives: a purely procedural approach to the Due Process Clause, and an approach that gives legislatures the benefit of every reasonable doubt. But it is not clear that in these domains, the first-best approaches are especially attractive; and even if they are, the second-best may be an unacceptably crude substitute. The most plausible defense of due process traditionalism operates on rule-consequentialist grounds, with the suggestion that even if traditions are not great, they are often good, and judges do best if they defer to traditions rather than attempting to specify the content of “liberty” on their own. But the rule-consequentialist defense depends on controversial and probably false assumptions about the likely goodness of traditions and the institutional incapacities of judges.*

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## INTRODUCTION

The Supreme Court and individual Justices have often suggested that under the Due Process Clause, rights qualify as such only if they can claim firm roots in long-standing traditions.<sup>1</sup> In *Washington v. Glucksberg*, for example, the Court appeared to settle on a kind of due process traditionalism, captured in the view that long-standing cultural understandings are both necessary and sufficient for the substantive protection of rights under the Due Process Clause.<sup>2</sup> On this view, no interest qualifies for protection under that clause if it lacks historical credentials; and interests that can claim such credentials deserve protection for that very reason.

Due process traditionalism is hardly novel. It can itself claim firm roots in American traditions. In his dissenting opinion in *Lochner v. New York*, Justice Holmes wrote that the Due Process Clause would be violated only if “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.”<sup>3</sup> In the same vein, Justice Frankfurter explicitly urged that in assessing due process questions, courts should ask whether proceedings “offend those canons of decency and fairness which express the notions of justice of English-speaking peoples.”<sup>4</sup> In important cases, the Court has sought to cabin the reach of “substantive due process” by asking whether the relevant rights are firmly based on long-standing cultural commitments, rather than on novel ones, or on the commitments of particular litigants and particular judges.<sup>5</sup> In *Glucksberg*, for example, the Court appeared to entrench due process traditionalism by asking, very simply, whether the interest in question has long been protected by social practices.<sup>6</sup>

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1. *E.g.*, *Washington v. Glucksberg*, 521 U.S. 702, 720–21 (1997); *Michael H. v. Gerald D.*, 491 U.S. 110, 122–24 (1989); *Moore v. City of E. Cleveland*, 431 U.S. 494, 503 (1977).

2. 521 U.S. at 720–21.

3. 198 U.S. 45, 76 (1905) (Holmes, J., dissenting).

4. *Rochin v. California*, 342 U.S. 165, 169 (1952) (quoting *Malinski v. New York*, 324 U.S. 401, 416–17 (1945)).

5. *See supra* notes 1, 3–4.

6. *See Glucksberg*, 521 U.S. at 723, 728.

Importantly, those who embrace due process traditionalism do not claim that *judicial* practices, as they develop over time, deserve support; they offer no plea for common law constitutionalism<sup>7</sup> or for a strong rule of stare decisis.<sup>8</sup> On the contrary, their focus is on the claims of the long-standing practices of “our people,”<sup>9</sup> not of our judges. In fact, some due process traditionalists insist that judicial decisions that construct rights with reference to legal precedents in common law fashion are illegitimate and should be overruled.<sup>10</sup>

Although due process traditionalism has played a large role in the Court’s decisions, it is highly controversial. Indeed, the major fault line within the Court has long been between those who seek to limit the reach of the Due Process Clause to rights that long-standing traditions recognize as such, and those who believe either that evolving traditions are what matter<sup>11</sup> or that the Court legitimately brings its own moral judgments to bear on substantive due process questions.<sup>12</sup> A decade after *Glucksberg*, it is clear that the Court’s decision failed to entrench due process traditionalism. In striking down bans on same-sex relations, *Lawrence v. Texas* explicitly relies on evolving judgments, rather than long-standing practices.<sup>13</sup>

But the battle between traditionalist and more rationalist or critical approaches, requiring courts to scrutinize social practices, has yet to be authoritatively resolved. The Court remains sharply divided on the proper role of tradition,<sup>14</sup> which continues to play a large role in lower court decisions.<sup>15</sup>

7. See generally David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877 (1996) (proposing a common law approach to constitutional interpretation).

8. Such a rule was suggested in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 854–55 (1992).

9. See *Lawrence v. Texas*, 539 U.S. 558, 593 (2003) (Scalia, J., dissenting) (quoting *Reno v. Flores*, 507 U.S. 292, 303 (1993)). The full quotation—that a state regulation violates the Due Process Clause only when it “offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental”—comes from Justice Cardozo’s majority opinion in *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934).

10. See *Lawrence*, 539 U.S. at 586–92 (Scalia, J., dissenting). Of course it is true that due process traditionalists must come to terms with the Equal Protection Clause, which operates as a constraint on long-standing practices, such as discrimination on the basis of race. Due process traditionalists might well acknowledge the tradition-rejecting nature of the equal protection guarantee while also insisting that long-standing practices are the best guide to understanding the scope of substantive due process.

11. See *id.* at 571–72 (majority opinion).

12. See *Roe v. Wade*, 410 U.S. 113, 153–54 (1973).

13. 539 U.S. at 571–72.

14. Compare *id.* at 572 (rejecting exclusive use of tradition), with *id.* at 593–98 (Scalia, J., dissenting) (arguing that use of substantive due process should be disciplined by reference to tradition), and *Washington v. Glucksberg*, 521 U.S. 702, 720–21 (1997).

15. See, e.g., *Raich v. Gonzales*, No. 03–15481, 2007 U.S. App. LEXIS 5834, at \*34–40 (9th Cir. Mar. 14, 2007) (upholding a ban on use of marijuana by reference to tradition); *Williams v. Morgan*, 478 F.3d 1316, 1322–23 (11th Cir. 2007) (upholding a ban on sexual devices by reference to tradition); see also *Cook v. Rumsfeld*, 429 F. Supp. 2d 385, 391–96 (D. Mass. 2006) (upholding the U.S. Military’s “Don’t Ask, Don’t Tell” policy but reflecting ambivalence about role of tradition in due process cases).

Notwithstanding *Lawrence*, due process traditionalism often has a firm hold on reasoning within the courts of appeals.<sup>16</sup>

Due process traditionalists have yet to explain exactly why traditionalism might be an appealing approach to the Due Process Clause. In this Article, I explore three families of explanations. The first and most ambitious points to the fact that traditions have been supported by many minds across long periods of time. The second sees traditionalism as a second-best substitute for more radical restrictions on substantive uses of the Due Process Clause. The third justifies traditionalism on rule-consequentialist grounds, on the theory that traditionalism is likely to produce fewer errors, and less serious errors, than the plausible alternative approaches.

The first explanation, which I shall call “many minds traditionalism,” has intuitive appeal insofar as it attempts to anchor constitutional rights in practices that have wide and deep support. Many minds traditionalism has been defended in different ways by Edmund Burke<sup>17</sup> and Friedrich Hayek,<sup>18</sup> and under certain conditions, these defenses are more than plausible. Burke’s own account was largely *aggregative*, suggesting that numerous people have signed onto traditions and therefore given them epistemic credentials.<sup>19</sup> Hayek’s variety was *evolutionary*, suggesting that traditions have stood the test of time and are thus likely to serve valuable social functions.<sup>20</sup> On both the aggregative and evolutionary accounts, the persistence of a practice across many minds and many years makes it more likely to be correct, wise, or good. The two accounts might even be developed into a democratic defense of traditionalism, on the ground that participants in traditions are “voters,” to whom judges ought to defer. In the end, however, I conclude that neither the aggregative nor the evolutionary account adequately justifies due process traditionalism, and also that the democratic defense runs into serious objections.

If ambitious accounts of this kind fail, it might nonetheless be possible to defend due process traditionalism as a kind of second-best solution for those who would like to reject substantive due process altogether, but who accept the constraints of *stare decisis*. Suppose that the Due Process Clause is best seen as purely procedural,<sup>21</sup> or that courts should approach legislation with a strong presumption of validity.<sup>22</sup> If so, due process traditionalism can

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16. See Brian Hawkins, Note, *The Glucksberg Renaissance: Substantive Due Process Since Lawrence v. Texas*, 105 MICH. L. REV. 409, 426–27 (2006).

17. EDMUND BURKE, REFLECTIONS ON THE REVOLUTION IN FRANCE (1790), reprinted in THE PORTABLE EDMUND BURKE 416 (Isaac Kramnick ed., 1999).

18. See F.A. Hayek, The Origins and Effects of Our Morals: A Problem for Science, Address at the Hoover Institution (Nov. 1, 1983), in THE ESSENCE OF HAYEK 318 (Chiaki Nishiyama & Kurt R. Leube eds., 1984); see also MICHAEL OAKESHOTT, *Rationalism in Politics*, in RATIONALISM IN POLITICS AND OTHER ESSAYS 1 (1962).

19. BURKE, *supra* note 17, at 451.

20. Hayek, *supra* note 18, at 321.

21. See JOHN HART ELY, DEMOCRACY AND DISTRUST 14–21 (1980).

22. See generally ADRIAN VERMEULE, JUDGING UNDER UNCERTAINTY (2006).

be understood as a precedent-preserving and indirect way of producing the results that would follow from either a procedural approach to the clause or a presumption of validity. But there are two problems with this defense of due process traditionalism. The first is that it depends on a controversial judgment about what counts as a first-best approach. The second is that it might turn out to be a wholly inadequate way of accomplishing the supposedly first-best goals.

A third justification for due process traditionalism is rule-consequentialist. The simple idea here is that whatever its faults, due process traditionalism produces better results than the likely alternatives. If judicial judgments about the substantive content of liberty were entirely unreliable, due process traditionalism might look plausible and even attractive by comparison. Traditions may not be especially good, but if they are not so bad, it might be better to tether judges to past practices than to ask them to think about the nature of "liberty" on their own. This conclusion depends on normative and empirical assumptions that are probably wrong. In the end, however, it points to the most promising basis for due process traditionalism. At the very least, it helps to show what those who disagree about due process traditionalism are disagreeing about.

My principal goal is to sort out that disagreement, rather than to persuade anyone to accept or to reject due process traditionalism. If traditions are very good, and if judges are very bad at identifying the ingredients of "liberty," the argument for due process traditionalism is quite strong. In a society in which traditions are very bad, and judges are very good at specifying the content of "liberty," due process traditionalism would not be easy to defend. We should be able to agree on these propositions even if we disagree on whether due process traditionalism makes sense for the contemporary United States.

In the end, I do not believe that courts should accept due process traditionalism. In my view, *Glucksberg* itself was rightly decided, because the argument for a right to physician-assisted suicide was too fragile in light of empirical realities; physician-assisted suicide might not, in fact, promote patient autonomy.<sup>23</sup> I also believe that *Lawrence v. Texas* was correctly decided, though I would have preferred a narrower rationale for the Court's conclusion.<sup>24</sup> For substantive due process, a form of minimalism seems best, embodied in a willingness to reject some traditions, but in a way that is usually respectful of democratic judgments and that attempts to avoid the most contentious debates among reasonable people. In light of the fact that some traditions are bad, a measure of rational scrutiny, building on existing doctrine, is appropriate—at least where the invasion of liberty is severe. But my

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23. See Cass R. Sunstein, *The Right to Die*, 106 YALE L.J. 1123 (1996).

24. See Cass R. Sunstein, *What Did Lawrence Hold? Of Autonomy, Desuetude, Sexuality, and Marriage*, 2003 SUP. CT. REV. 27 (arguing that the Court would have done better to root its decision in equal protection principles and that if the Due Process Clause was to be invoked, desuetude was a preferable approach).

interest is much less in the ultimate conclusion than in specifying the grounds on which the discussion is most sensibly founded.

My focus here is on traditionalist approaches to the Due Process Clause, but if the analysis is correct, it should have implications for many other constitutional problems to which traditions might seem relevant. It is easy to imagine a traditionalist approach to the separation of powers, with the suggestion that long-standing practices deserve respectful attention, even if they seem to deviate from the original understanding or from an independent analysis of the governing constitutional provisions.<sup>25</sup> Traditionalism might also be defended as the proper approach to the religion clauses. For example, Chief Justice Rehnquist's defense of the use of the words "under God" in the Pledge of Allegiance was an almost entirely traditionalist exercise, stressing the existence of long-standing practices rather than the reasons for those practices.<sup>26</sup> Indeed, Chief Justice Rehnquist's view of the Establishment Clause had a persistent traditionalist feature, at least insofar as he would permit public recognition of God by reference not to theories or principle but to history alone.<sup>27</sup>

In numerous domains, traditionalism might be defended as reflecting the judgments of many minds, as a second-best substitute for an account that is preferable but forbidden by *stare decisis*, or on rule-consequentialist grounds. Whether such a defense could be made convincing cannot be resolved without an exploration of the particular domains. But the discussion of these justifications for due process traditionalism will reveal considerations that bear on traditionalist approaches in numerous other areas.

The remainder of this Article comes in three parts. Part I explores many minds traditionalism. It begins with the test of numbers, captured in the view that traditions are likely to be good or right because they have been supported by numerous people over long periods of time. Part I also investigates the evolutionary account and the test of time; it culminates in an exploration of the claims of democratic traditionalism. Part II asks whether due process traditionalism might be adopted as a second-best solution by those who want to restrict the scope of the Due Process Clause in more radical ways. Part III explores the possibility of a rule-consequentialist defense of due process traditionalism.

### I. MANY MINDS TRADITIONALISM

This Part explores the most ambitious arguments on behalf of due process traditionalism, involving the aggregation of numerous views and the benefits of evolutionary pressures. For those who invoke the test of numbers and the test of time, traditions are highly likely to be wise, right, or good. A

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25. See *Youngstown Sheet & Tube Co. v. Sawyer (Steel Seizure)*, 343 U.S. 579, 594–97 (1952) (Frankfurter, J., concurring).

26. See *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 26–32 (2004) (Rehnquist, C.J., concurring).

27. See, e.g., *Van Orden v. Perry*, 545 U.S. 677, 686–92 (2005) (plurality opinion).

related argument points to the democratic credentials of long-standing practices. Such practices appear to have been supported by numerous people who have “voted” on their behalf. Judges might be asked to hesitate before disturbing practices that have obtained so many “votes” over long periods of time.

### A. *The Test of Numbers*

#### 1. *Prejudice as “Latent Wisdom”*

Might traditions deserve respect simply because they have been accepted by numerous people? Edmund Burke offered the canonical argument on behalf of this view.<sup>28</sup> Above all, Burke was skeptical of efforts to deploy reason in the service of “exploding general prejudices.”<sup>29</sup> He believed it best to try “to discover the latent wisdom which prevails in” those very prejudices.<sup>30</sup> Burke argued that the “science of government . . . requires experience, and even more experience than any person can gain in his whole life, however sagacious and observing he may be.”<sup>31</sup> In his view, sensible people “are afraid to put men to live and trade each on his own private stock of reason; because we suspect that the stock in each man is small, and that the individuals would do better to avail themselves of the general bank and capital of nations and of ages.”<sup>32</sup>

Burke’s central argument against the “private stock of reason,” and on behalf of society’s “general bank and capital,” points to the large number of people who are responsible for creating traditions.<sup>33</sup> The “latent wisdom” of traditions lies in the fact that so many people have subscribed to them.<sup>34</sup>

Suppose in this light that there is a long-standing tradition of allowing married people to decide how many children to have and that there is no tradition of allowing people to commit suicide. If so, it seems clear that numerous people have believed that married people should be permitted to decide how many children to have and that numerous people have also concluded people should not be allowed to kill themselves. On one view, it would be foolish for the Court to use any abstract account, perhaps especially one invoked by lawyers and the theorists they invoke, as the basis for

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28. I explore a Burkean approach in some detail in Cass R. Sunstein, *Burkean Minimalism*, 105 MICH. L. REV. 353 (2006). My goal there was to reconstruct, as sympathetically as possible, the nature and foundations of Burkean approaches to the Constitution; here I ask more critically whether that approach is proper for the Due Process Clause. For an especially illuminating discussion of these issues, see Adrian Vermeule, *Common Law Constitutionalism and the Limits of Reason*, 107 COLUM. L. REV. 1482 (2007).

29. BURKE, *supra* note 17, at 451.

30. *Id.*

31. *Id.* at 443.

32. *Id.* at 451.

33. *Id.* at 451–52.

34. *See id.* at 451.



challenging practices long accepted by many. The aggregative view suggests that if many people have reached these conclusions, the Court should pay careful attention to their judgments.

The aggregative view has become newly salient, for a great deal of recent attention has been given to the “wisdom of crowds.”<sup>35</sup> Those who emphasize crowd wisdom notice that on many questions, the average or majority answer of a large group of people is often better than the answer of an actual or appointed expert.<sup>36</sup> This proposition, and much of the wisdom of crowds, is best understood in light of the Condorcet Jury Theorem.<sup>37</sup> To understand the operation of the Jury Theorem, assume that a group consists of a number of people, each of whom has a greater than 50% chance of being right on some proposition. The Jury Theorem says that the likelihood that the group’s majority will be right approaches 100% as the size of the group expands. The same basic conclusion applies when most, rather than all, group members are more than 50% likely to be right.<sup>38</sup> The Jury Theorem provides an apparent basis for answering hard questions by asking about the views of large groups of people. On assumptions that I will explore below, such groups are highly likely to be right.

We can readily see how the Jury Theorem might support a great deal of faith in traditions. If the public has long rejected one alleged right and long supported another, there is reason to believe that many people have made relevant judgments, in a way that gives a long-standing practice a kind of epistemic credential. Even if evolutionary pressures are put to one side, the support of large numbers of people suggests that traditions are likely to have solid foundations. On this view, the Court should be reluctant to reject rights that are deeply rooted in actual practice or to create rights that are not so rooted, precisely because the Court’s judges are few and the supporters of traditions are many. If the Constitution is unclear, the Court might do best to investigate long-standing social practices, instead of imposing a view of its own.

## 2. Three Problems

In many domains, the aggregative view has considerable force.<sup>39</sup> But as a defense of due process traditionalism, the aggregative view runs into three serious problems. Taken as a whole, these problems raise real doubts about

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35. See, e.g., JAMES SUROWIECKI, *THE WISDOM OF CROWDS* (2004).

36. See SCOTT E. PAGE, *THE DIFFERENCE: HOW THE POWER OF DIVERSITY CREATES BETTER GROUPS, FIRMS, SCHOOLS, AND SOCIETIES* (2007); SUROWIECKI, *supra* note 35, at xiii-xiv.

37. For a clear outline of the Jury Theorem, see William P. Bottom et al., *Propagation of Individual Bias through Group Judgment: Error in the Treatment of Asymmetrically Informative Signals*, 25 *J. RISK & UNCERTAINTY* 147, 152-54 (2002). For an illuminating account of the wisdom of crowds, or large groups of diverse people, that does not rely on the Jury Theorem, see PAGE, *supra* note 36.

38. For an overview, see CASS R. SUNSTEIN, *INFOTOPIA: HOW MANY MINDS PRODUCE KNOWLEDGE* (2006).

39. See generally PAGE, *supra* note 36; SUNSTEIN, *supra* note 38.

the view that such traditionalism can be supported by reference to the judgments of many minds.

a. *What Proposition?*

The Jury Theorem is concerned with the truth of certain propositions. If a majority of people believe that proposition *X* is true, proposition *X* is highly likely to be true (under the stated conditions). But what proposition does a tradition support? By participating in the creation of a tradition, have people thereby “voted” in favor of some proposition, and if so, which one?

It would be easiest to answer these questions if the tradition reflects a judgment in favor of a proposition of fact. But is there a question of fact to which a tradition offers an implicit answer? Suppose that a society has long imposed capital punishment. It might be tempting to say that the tradition reflects a judgment that capital punishment has a deterrent effect. But such a tradition might persist not on deterrence grounds, but because most people believe that capital punishment is justified for reasons of retribution—in which case it would be hard to discern a factual proposition implicit in the tradition. Or suppose that a society has long permitted married couples to have as many children as they want, or has long forbidden people from committing suicide, smoking marijuana, or engaging in same-sex relations. It would be difficult to say that the long-standing practice suggests support for some identifiable proposition of fact.

Much more plausibly, a long-standing tradition is best taken to suggest the truth of some normative proposition that the tradition endorses by definition, such as, “married couples should be allowed to have as many children as they like,” or “people should be prevented from committing suicide.” If many people have independently accepted or rejected such a proposition, their judgment might be entitled to weight. At first glance, the Jury Theorem so suggests.

But there are two possible objections to this view. The first is that the Jury Theorem is best taken only to concern matters of fact, on which it is easy to speak of truth or falsity. It might well seem jarring to suggest that a judgment in favor of some tradition is “true.” Is it sensible to say that if many people believe that married people should be allowed to choose the number of children to have, they are likely to be right? Certain kinds of skeptics would say no; but if we agree these questions can have correct answers, it is sensible to believe that many minds could ascertain those answers. Those entrusted with the job of interpreting the Due Process Clause had better avoid moral skepticism, because it is difficult or even impossible to construe the clause without thinking it possible to give good or correct answers to normative questions.<sup>40</sup> And while I cannot explore the

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40. An ambitious version of this view can be found in RONALD DWORKIN, *JUSTICE IN ROBES* (2006). Contested moral or political arguments might seem to be avoidable if we could agree that the text of the clause forbids substantive due process, or if we conclude that the word “liberty” should be given content by reference to the original understanding. But the appearance is misleading. A controversial normative argument is needed on behalf of originalism, or of the view that the

philosophical issues here, the grounds for moral or political skepticism are exceedingly weak.<sup>41</sup> It follows that the Jury Theorem is indeed applicable to normative statements as well as to statements of fact.

The second objection is much more powerful. Even if a tradition may have settled on some proposition, and even if the settlement suggests that the proposition is true, the proposition may be more limited and less relevant than due process traditionalists realize. We might be able to agree that, for a long time, many people have accepted the proposition that married couples should be allowed to have as many children as they like. But suppose that in 2050, the nation imposes a ceiling—say, of three—on the number of children that people may have. Does the tradition set itself in opposition to that ceiling? The answer may not be so clear. If the nation, or even a state, imposes such a ceiling, circumstances are likely to be very different from what they were when the tradition was in force. And if this is so, the proposition supported by the tradition is properly described in the following way: “Under the circumstances prevailing between, say, 1800 and 2049, married couples should be permitted to have as many children as they want.” And if the tradition is so described, it does not, in fact, bear on the problem at hand.

Perhaps circumstances have changed because of a significant problem of overpopulation; perhaps a new disease has prompted the new policy. Whatever the reason for that policy, the proposition definitionally supported by the tradition may not definitionally decide the question that arises if and when the government imposes the ceiling.<sup>42</sup> Hence we may not be able to agree that many minds have, in fact, committed themselves to the relevant proposition: whether a ceiling on the number of children is acceptable in 2050. And if the nation does impose that ceiling at that time, many minds are likely to have supported it under the current conditions.<sup>43</sup> Is it so clear that they do not deserve priority over the many minds who came before?<sup>44</sup> By hypothesis, the current minds are speaking to the circumstances of the present; the minds of the past were not.

The problem, in short, is that traditions apply only to the circumstances in which they governed. When circumstances have changed, it is not clear that many minds have decided in favor of the particular tradition that is being invoked.

Whenever a long-standing tradition is being violated, there is a good chance that the existing situation is indeed relevantly different. This claim has general implications. Suppose that there is a tradition against physician-assisted suicide, extending from the Founding until the day before yester-

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text should be taken to forbid substantive due process in light of many decades of decisions employing substantive due process.

41. There is extensive philosophical literature on this point. *E.g.*, BERNARD WILLIAMS, *MORALITY* (1972); *see also* JOHN RAWLS, *A THEORY OF JUSTICE* (1971) (giving an account of reflective equilibrium).

42. I am grateful to Adrian Vermeule for pressing this point.

43. *See* Vermeule, *supra* note 28, at 1506–10.

44. *See id.*

day. It remains possible that physician-assisted suicide under contemporary conditions is meaningfully different from physician-assisted suicide under previous conditions. Perhaps physician-assisted suicide is now acceptable because of technological changes that have made it possible for physicians to honor people's requests for death in a humane way. In that event, the proposition supported by the tradition does not speak to the current problem.

It is true that due process traditionalists need not be entirely discomfited by this conclusion. They might readily agree that traditions often will not speak, with any kind of clarity, to the current question, but perhaps that is no problem for them. They believe that a clear tradition is a *necessary* condition for a convincing substantive due process claim; if no such tradition can be identified, the plaintiff loses. The real problem for due process traditionalism is the claim that a long-standing tradition is a *sufficient* condition for invalidation. If circumstances have changed, then the proposition for which the tradition speaks may not bear on the question at hand. To the extent that this is so, due process traditionalists will have to concede that even when a practice has endured for a long time, it may not justify invalidation of apparently tradition-rejecting enactments. Those enactments may not, on reflection, reject the proposition that the tradition actually supports.

#### b. Systematic Bias or "Prejudice"

The Jury Theorem says that if group members are more than 50% likely to be right, the likelihood that the majority will be right approaches 100% as the size of the group expands. But suppose that all or most members are *less* than 50% likely to be right. If so, the likelihood that the majority will be wrong approaches 100% as the size of the group expands!<sup>45</sup> Even if a proposition has passed the test of numbers, it will be incorrect if most people are more likely to be wrong than right. This point raises exceedingly serious problems for many minds traditionalism.

Condorcet himself emphasized that "prejudice" can introduce a distortion that makes aggregated judgments unlikely to produce good results: "In effect, when the probability of the truth of a voter's opinion falls below 1/2, there must be a reason why he decides less well than one would at random. This reason can only be found in the prejudices to which this voter is subject."<sup>46</sup> For due process traditionalists, the irony is that Burke himself wrote as if "prejudices" are reliable,<sup>47</sup> contending that a prejudice is "wisdom without reflection, and above it."<sup>48</sup> But if prejudices are systematic biases,

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45. See PAGE, *supra* note 36, at 205–14 (showing that if individuals are especially inaccurate, group average will be inaccurate too, though number of group errors will be lower than individual errors if group is diverse).

46. MARQUIS DE CONDORCET, *ESSAY ON THE APPLICATION OF MATHEMATICS TO THE THEORY OF DECISION-MAKING* (1785), *reprinted in* CONDORCET: *SELECTED WRITINGS* 33, 62 (Keith Michael Baker ed., 1976).

47. BURKE, *supra* note 17, at 451.

48. See *id.* at 428.

then they are wisdom without reflection, and below it; and endorsement of a proposition by many minds is no protection against error.

Suppose that traditions reject a certain right—say, the right to racial intermarriage, to same-sex relations, or to physician-assisted suicide. If those who create the tradition are systematically biased, the tradition lacks epistemic credentials.<sup>49</sup> For judges who believe that the Due Process Clause has a substantive dimension, it might be best not to entrench traditions but to ask whether there is, in principle, any distinction between a challenged practice and the practices that the tradition unambiguously supports. If no such distinction can be identified, a systematic bias might still be at work, and such a bias might mean that the proposition on which the tradition has converged is false. To the extent that this is so, the aggregative defense of many minds traditionalism, rooted in Burke, seems to be in tatters.

### *c. Independent Judgments*

For the aggregative view to work, those who contribute to a tradition must be making independent judgments. This point raises distinctive difficulties.

(i) *Authoritarianism and its analogues.* It should be obvious that on the aggregative view, long-standing practices would have no epistemic force in an authoritarian society. In such a society, many traditions are impositions; they are enforced by an oppressive government. If so, there is no reason to think that they reflect the judgments of large numbers of people. It follows that many minds arguments on behalf of long-standing practices are implausible in regimes that lack a high degree of freedom, at least if those practices are themselves imposed by the few on the many. Burke's claims have greatest weight in democratic societies whose citizens are able to assess and to refashion traditions; their force is greatly diminished in societies that have long lived under autocratic rule. We might therefore understand the conclusion that while many minds traditionalism makes sense for England and America, it is ill suited to such nations as China, Iraq, and Saudi Arabia.<sup>50</sup>

For purposes of substantive due process in the United States, the point about authoritarian societies might seem uninteresting. No one contends that judges in new democracies should decide on the content of rights by asking about the judgments of their authoritarian precursors.<sup>51</sup> But even in free societies, there may be analogous problems. Perhaps a relevant tradition has

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49. For purposes of constitutional law, Condorcet's reference to "prejudice" suggests the possibility that the Equal Protection Clause might be used to test the question whether the tradition embeds discrimination.

50. It remains possible that tradition-rejecting initiatives will cause serious problems in authoritarian societies, simply because citizens will refuse to accept those initiatives. See JAMES C. SCOTT, *SEEING LIKE A STATE* 101–02 (1998). But this pragmatic argument addresses the difficulty in overturning traditions, not the wisdom of those traditions, and hence is not a point in favor of many minds traditionalism.

51. Of course there are complex questions here about the relationship between culture and law. Perhaps legal initiatives cannot succeed if they fit poorly with culture, at least if they cannot change culture. For an illuminating discussion, see *id.*

been imposed by some on others through the force of law. The most obvious example is slavery. It is implausible to think that slavery can be defended by reference to the fact that many people lived in accordance with it. Or consider practices of discrimination on the basis of sex and disability. To the extent that these forms of discrimination have been imposed or encouraged by law, it is odd to say that they should be perpetuated on the ground that many people have accepted them. In these circumstances, the Jury Theorem does not suggest that the best way to evaluate social practices is to ask a large number of people and to accept the majority's answer.

The Equal Protection Clause is the natural source of judicial skepticism about long-standing practices. To the extent that it requires unequal treatment to be justified in principle, the equal protection guarantee explicitly rejects many minds traditionalism.<sup>52</sup> But suppose that no serious equal protection issue is present, and that a tradition is challenged by those who contend that it has long been imposed rather than freely accepted. If the contention is correct, the force of the aggregative view is sharply diminished.

(ii) *The Burkean paradox and social cascades*. Adrian Vermeule has drawn attention to the Burkean paradox<sup>53</sup>—the possibility that many minds traditionalism will turn out to be self-defeating. Suppose that people generally follow traditions, not because they believe that the traditions are good, but because they believe that traditions are likely to embody collective wisdom. To the extent that people have long behaved in this way, traditions lose their epistemic credentials, because they have been followed by people who have not made any judgment on behalf of those traditions.

For the aggregative view to work, it must be the case that many of those who have contributed to the tradition have made an independent judgment on its behalf. In Vermeule's account, this is the Burkean paradox.<sup>54</sup> Those who follow traditions, on Burkean grounds, end up undermining the Burkean defense of traditionalism.

This argument is devastating to due process traditionalism insofar as (a) established practices are being taken as a sufficient condition for judicial invalidation and (b) those practices are not a product of the independent judgments of many minds. But perhaps many minds traditionalism can be justified in terms that deny (b). Let us suppose that most of those who follow a tradition are usually not doing so mechanically: if the tradition is evidently silly or harmful, they will reject it. Perhaps there is always a sufficient level of independence in individual judgments. Even the most committed traditionalists should be willing to rethink their practices if they are evidently destructive or pointless.

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52. This point should be accepted even by those who seek to cabin the scope of the Equal Protection Clause by rooting its requirements in the defining case of discrimination on the basis of race. Even if the domain of the Equal Protection Clause is narrow, it rejects practices of discrimination that have been time-honored.

53. Vermeule, *supra* note 28, at 13.

54. *Id.*

We can make more systemic progress on the Burkean paradox—and the question of independence—by noticing that a real problem will arise with the aggregative argument *if people's judgments are a product of a cascade*.<sup>55</sup> In an informational cascade, most people form their judgments on the basis of the actual or apparent judgments of others.<sup>56</sup> Consider a stylized example. Adams says that in her view, physician-assisted suicide creates risks that physicians will actually kill people who have not given their consent. Barnes does not have a great deal of private information, but having heard Adams's belief, she agrees that the risks are serious. Carlton might well believe that he must have reliable independent information in order to reject the shared views of Adams and Barnes—and he lacks that information. If he follows Adams and Barnes on the ground that their belief is likely to be right, Carlton is in a cascade.

This cascade involves a question of fact: whether physician-assisted suicide creates a risk that doctors will kill people who have not consented. But it is easy to imagine normative analogues,<sup>57</sup> in which Carlton follows Adams and Barnes, not because he independently agrees with them, but because he, like Barnes, does not have enough confidence in his antecedent normative views to reject the judgments of others who came before. The general objection is that many traditions may persist only because of a cascade effect, depriving them of the epistemic credentials urged by the aggregative view. "Moral panics,"<sup>58</sup> for example, often reflect cascade effects. Some traditions may be, to a greater or lesser extent, a product of moral panics. And whether or not they are, it is easy to imagine traditions that continue through imitative behavior, ensuring the perpetuation of cascades, rather than independent support from many minds.<sup>59</sup>

The best response is that an informational cascade is most unlikely to account for a tradition, simply because such cascades are quite fragile.<sup>60</sup> Suppose that people engage in certain behavior or accept certain beliefs solely on the ground that other people have engaged in that behavior or accepted those beliefs. Once private information begins to emerge, it should defeat the cascade. If people learn that a supposed cure for the common cold

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55. See Eric A. Posner & Cass R. Sunstein, *The Law of Other States*, 59 STAN. L. REV. 131, 160 (2006) (discussing the possibility that decisions of other U.S. states may be uninformative because of cascades).

56. See Sushil Bikhchandani et al., *Learning from the Behavior of Others: Conformity, Fads, and Informational Cascades*, 12 J. ECON. PERSP. 151, 167 (1998).

57. See Cristina Bicchieri & Yoshitaka Fukui, *The Great Illusion: Ignorance, Informational Cascades, and the Persistence of Unpopular Norms*, in EXPERIENCE, REALITY, AND SCIENTIFIC EXPLANATION 89, 101 (Maria Carla Galavotti & Alessandro Pagnini eds., 1999). Of course moral judgments might well be a product of relevant information, in which case moral cascades are informational cascades too.

58. STANLEY COHEN, *FOLK DEVILS AND MORAL PANICS* (3d ed. Routledge 2002) (1972).

59. See Bicchieri & Fukui, *supra* note 57, at 104–05.

60. See David Hirshleifer, *The blind leading the blind: Social influence, fads, and informational cascades*, in THE NEW ECONOMICS OF HUMAN BEHAVIOR 188, 192 (Mariano Tommasi & Kathryn Terulli eds., 1995).

does not work, they will cease purchasing it. Informational cascades stop once people have sufficient information to outweigh the signals given by the acts and statements of their predecessors. Cascade effects can account for fads and fashions, but they should not be able to explain long-standing practices, simply because those practices should be exposed if they are based on falsehoods or do not properly serve the people who participate in them.

But the problem of cascade effects cannot be dismissed so easily. Reputational pressures might ensure that people do not break the cascade, even if their private information suggests that they ought to do so. As a result, unpopular practices can persist for long periods.<sup>61</sup> An additional problem is that in the relevant domains, people may not receive a clear signal that the general practice is a bad one.<sup>62</sup> An answer to this question requires a shift from the aggregative view to the evolutionary alternative; I will turn to that alternative momentarily.

For the moment, it should be clear that on purely aggregative grounds, it is very hard to defend due process traditionalism. Even if a tradition has been accepted by many minds, it may not reflect approval of any relevant proposition. Even if it does, those who created and perpetuated the tradition may suffer from a systematic bias. Even if they do not, many of them may have simply followed the tradition without independently agreeing to it. It follows that a long-standing practice provides a fragile basis for judicial invalidation of democratic outcomes.<sup>63</sup> It also follows that even if a practice has been long-standing, it may lack the credentials that justify deference to such practices according to the logic of many minds traditionalism. Condorcetian arguments, based on the wisdom of large groups, are often plausible,<sup>64</sup> but they provide a fragile foundation for due process traditionalism.

### B. *The Test of Time*

Perhaps due process traditionalists should emphasize the test of time. On this view, practices are likely to endure if and only if they are good. The central point is that an enduring tradition must be serving some valuable function; if it were not doing so, it would not be enduring. As we shall see, this point might ultimately form the foundation for a democratic conception of traditionalism, one that sees long-standing practices as a product of numerous "voters" extending over time.

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61. See TIMUR KURAN, *PRIVATE TRUTHS, PUBLIC LIES: THE SOCIAL CONSEQUENCES OF PREFERENCE FALSIFICATION* 105–17 (1995); Bicchieri & Fukui, *supra* note 57, at 89.

62. See Gregory J. Moschetti, *Individual Maintenance and Perpetuation of a Means/Ends Arbitrary Tradition*, 40 *SOCIOMETRY* 78, 79 (1977).

63. See Vermeule, *supra* note 28.

64. See PAGE, *supra* note 36, at 197–235; SUNSTEIN, *supra* note 38, at 25–38.



### 1. The "Grown Morals of Tradition"

The most elaborate version of this view comes from Hayek.<sup>65</sup> Like Burke, Hayek urges that existing moral commitments are not the product of any single mind; what Hayek adds is that our "undesigned moral tradition" is a product of evolutionary pressures.<sup>66</sup> That moral tradition covers the family and the rules of property, including "the rules of the stability of possessions, its transference by consent, and the keeping of promises."<sup>67</sup> Human beings were not "clever enough to design the order from which billions . . . now draw their sustenance."<sup>68</sup> On the contrary, that sustenance comes from our "obedience to traditional customs which were selected by group evolution without [our] understanding them."<sup>69</sup> The system of property rights developed "not because some liked or understood its effects, but because it made possible the growth of the groups practising it to grow faster than others."<sup>70</sup>

Hayek explicitly calls attention to evolution in this regard.<sup>71</sup> What is crucial is the process of group selection, which "will elect customs whose beneficial assistance to the survival of men are not perceived by the individuals."<sup>72</sup> Human beings are dependent for their survival on the observance of "practices which they cannot rationally justify, and which may conflict with both their innate instincts on the one hand, and their intellectual insight on the other."<sup>73</sup> At least this is so for "the grown morals of tradition."<sup>74</sup> In Hayek's hands, the villain of the piece is *rationalism*, which attempts to deduce moral principles from reason.<sup>75</sup> (The connection to constitutional debates should be plain.) In the end, the "moral tradition remains a treasure which reason cannot replace, but can only endeavour to improve by immanent criticism, that is, by endeavouring to make a system which we cannot create as a whole, serve more consistently the same set of effects."<sup>76</sup> What rationalists ridicule as "'the dead hand of tradition' may contain conditions for the existence of modern mankind."<sup>77</sup>

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65. See Hayek, *supra* note 18, at 324.

66. *Id.* at 321.

67. *Id.*

68. *Id.* at 322.

69. *Id.*

70. *Id.*

71. *Id.* at 324.

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.* at 325–26; see also OAKESHOTT, *supra* note 18.

76. Hayek, *supra* note 18, at 329.

77. *Id.*

## 2. Mechanisms and Criteria

Hayek's arguments, growing out of his work on the price system,<sup>78</sup> have considerable intuitive appeal, but they face a central problem.<sup>79</sup> Those who defend traditions by reference to evolutionary accounts must undertake two independent tasks. First, they must specify the mechanisms by which evolutionary pressures produce good outcomes. Second, they must offer some kind of account by which we can judge outcomes to be good. In biology, both the specification and the account are easy to produce. Natural selection ensures the survival of those who are most likely to be able to reproduce, and those who have survived are good by reference to the criterion of reproductive fitness. In the domain of social practices, what is the analogue?

Hayek drew directly on natural selection, and if we are speaking literally of survival, his argument may be on firm ground. Perhaps some moral principles, or commitments, are necessary—or at least extremely helpful—for survival of the species. In fact, it is plausible to say that some such principles are hardwired and have been specifically selected by their contribution to human survival.<sup>80</sup> Certain moral attitudes toward young children, or even respect for property rights, can be understood in these terms.<sup>81</sup> Indeed, Hayek's arguments might be developed into a defense of those forms of substantive due process that attempt to entrench the evolved moral order.<sup>82</sup> But principles of this kind are most unlikely to be tested in modern substantive due process cases. If people are given a right to use contraceptives, to use marijuana or sexual devices, to seek physician-assisted suicide, to ride motorcycles without helmets, or to engage in same-sex relations, the species will not be endangered. Human survival may well depend on some kind of system of property rights, but does it really depend on those aspects of traditional morality that are challenged in courts via a more critical or rationalist approach to the Due Process Clause? And even if it did, many due process claims do not reject traditions; they simply cannot claim strong roots in those traditions.

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78. See F.A. Hayek, *The Use of Knowledge in Society*, 35 AM. ECON. REV. 519 (1945), reprinted in THE ESSENCE OF HAYEK, *supra* note 18, at 211.

79. See Edna Ullmann-Margalit, *The Invisible Hand and the Cunning of Reason*, 64 SOC. RES. 181 (1997).

80. See THE ADAPTED MIND: EVOLUTIONARY PSYCHOLOGY AND THE GENERATION OF CULTURE (Jerome H. Barkow et al. eds., 1992).

81. This is one way to understand the striking finding in Michael Koenigs et al., *Damage to the prefrontal cortex increases utilitarian moral judgments*, 446 NATURE 908, 909–10 (2007), which shows that those with certain kinds of brain damage are willing to smother a small child to save other people. It is plausible to think that, in light of this study, certain moral proscriptions are embedded in certain sectors of the brain and that if those sectors are damaged, moral judgments will take a different form. Natural selection might well account for moral prohibitions of multiple kinds.

82. Thus the line of decisions associated with *Lochner v. New York*, 198 U.S. 45 (1905), might be defended on Hayekian grounds, at least to the extent that those decisions strike down legislation invalidating practices consistent with the evolved moral order. For Hayek's own views on these questions, see F.A. HAYEK, THE CONSTITUTION OF LIBERTY (1960).

Perhaps survival is beside the point. We might think that an enduring practice is likely, by definition, to promote economic efficiency (or some other conception of human welfare). If evolution is not at work, perhaps the mechanism is a form of market competition. The notion of customary law, emphasized by Hayek himself, is helpful here.<sup>83</sup> To the extent that commercial practices are a product of a spontaneous order, those practices might well operate to promote efficiency through the operation of an invisible hand mechanism.<sup>84</sup> If efficiency is desirable in the commercial arena, judges and legislatures might build on those practices, rather than displacing them by reference to theories of their own.<sup>85</sup> But this claim raises some immediate questions. What, exactly, is the market that produces traditional morality, and why is it so clear that this particular market functions well? Why should invisible hand mechanisms or spontaneous orders be celebrated in the moral domain?<sup>86</sup>

Consider the set of practices that have been or might be challenged in due process cases: bans on the use of contraceptives, on abortion, on same-sex relations, on certain living arrangements, on same-sex marriage, on physician-assisted suicide, on the use of sexual aids or certain drugs. To the extent that such bans are time-honored, it is clear that the political market, or the market for morality, has long favored them. But in a democracy, the political market and the market for morality hardly guarantee efficiency, and they need not promote welfare.<sup>87</sup> The role of collective action problems, incomplete information, and interest-group pressures need not be belabored here.<sup>88</sup>

Even if the relevant “market” did promote efficiency, it remains necessary to defend the proposition that efficient traditions should be upheld because they are efficient.<sup>89</sup> In the commercial realm, it is plausible to say that courts should generally respect practices that have evolved in a way that ensures efficiency. But why should the Due Process Clause be read to promote economic efficiency? It is true that if traditions promoted welfare, they might deserve respect even if they were inefficient; but we have no reason to think that traditions as such always promote welfare.

The evolutionary defense of many minds traditionalism turns out to be no less fragile than the aggregative defense, at least in due process cases. To accept the evolutionary defense, we would need to identify mechanisms that

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83. See 1 F.A. HAYEK, *LAW, LEGISLATION AND LIBERTY: RULES AND ORDER* 22 (1973).

84. Cf. Ullmann-Margalit, *supra* note 79 (exploring uses and limits of invisible hand arguments).

85. See HAYEK, *supra* note 83, at 5–36.

86. The question is illuminatingly pressed in Ullmann-Margalit, *supra* note 79.

87. I put to one side questions about the relationship between welfare and efficiency. For such an inquiry, see MATTHEW D. ADLER & ERIC A. POSNER, *NEW FOUNDATIONS FOR COST-BENEFIT ANALYSIS* (2006).

88. For discussion of such issues, see, for example, *CHICAGO STUDIES IN POLITICAL ECONOMY* (George J. Stigler ed., 1988).

89. See Vermeule, *supra* note 28, at 32–33.

ensure that long-standing practices are good by reference to some constitutionally relevant criterion. In the absence of such mechanisms, the most that might be said is that even if evolutionary practices offer no guarantees, the likelihood of judicial error is so high that judges do best if they attend to traditions. I will explore this claim below. But unless judges are wholly at sea, it might be best to explore whether the practice in question is, in fact, good, or good enough, by reference to a constitutionally relevant criterion.<sup>90</sup> Evolutionary pressures are beside the point.

### C. Democratic Traditionalism

It is possible to understand many minds traditionalism in general, and the tests of numbers and time in particular, in a different way. For those who adopt this alternative view, the judgments of many people extending over long periods deserve respect on essentially democratic grounds. The claim is not that those judgments are necessarily right or true. Instead, they are, in a sense, votes; and if the same votes have been made by multiple generations, then they deserve respect. We might describe this approach as a kind of democratic traditionalism. It supports traditionalist approaches to the Due Process Clause not on the epistemic grounds suggested by the aggregative and evolutionary accounts, but on the theory that if so many citizens have committed themselves to a practice, their judgments deserve judicial deference. Justice Scalia has argued in just these terms, suggesting that consultation of specific traditions ensures that judges will remain faithful to “the society’s views.”<sup>91</sup>

To be sure, it is not possible to see either Burke or Hayek themselves as thoroughgoing democrats; both had serious reservations about self-government as an organizing ideal.<sup>92</sup> But if traditions have been created and repeatedly affirmed by free citizens, they might well be defended on democratic grounds. Courts might be asked to consult those traditions—and to uphold them—on the ground that the judges’ “private stock of wisdom” has far less legitimacy than do practices that so many people have voluntarily accepted.

The initial problem for this defense of due process traditionalism is that democratic processes might and often do reject long-standing practices. Suppose, for example, that a democratic public challenges practices of discrimination on the basis of sex or sexual orientation, or that a democratic public concludes that the occupancy of buildings should be narrowly limited to “a few categories of related individuals.”<sup>93</sup> On democratic grounds, why

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90. Cf. Ullmann-Margalit, *supra* note 79, at 183–84 (arguing that this question must be asked to evaluate the outcome of invisible hand processes).

91. See *Michael H. v. Gerald D.*, 491 U.S. 110, 127 n.6 (1989).

92. On Burke’s skepticism about democracy, see DON HERZOG, *POISONING THE MINDS OF THE LOWER ORDERS* 183–84 (1998). For Hayek’s complex and ambivalent view, see F.A. Hayek, *Whither Democracy?*, Lecture at the Institute of Public Affairs (Oct. 8, 1976), in *THE ESSENCE OF HAYEK*, *supra* note 18, at 352.

93. See *Moore v. City of E. Cleveland*, 431 U.S. 494, 496 (1977).

should the old tradition prevail over the current judgment? Democratic traditionalists will want to reply that long-standing practices have survived the test of time, but we have seen many problems with that particular test. For this reason, democratic traditionalists might have to agree that long-standing practices must yield before an explicit democratic repudiation. Perhaps they will ask for a clear democratic judgment in opposition to the tradition, but if such a judgment has been made, traditions will have to bow before democracy.<sup>94</sup>

What remains, for such traditionalists, is the narrower but nonetheless important claim that courts should not lightly reject long-standing practices on their own. If a plaintiff's claim cannot find support in such practices, judges should reject it. This approach is undoubtedly attractive, for it might be seen as doubly democratic. First, it refuses to permit plaintiffs to attack long-standing practices; second, the refusal operates to support existing legislation against judicial attack. The problem with this position is that for reasons explored above, traditions may lack anything like a good democratic pedigree. They might be an imposition. They might reflect a systematic bias. People might have supported traditions not because they are good, but because they are following those who preceded them. The problems with the aggregative and evolutionary accounts turn out to beset democratic traditionalism as well.

To be sure, those problems need not be seen as devastating. We could imagine domains in which practices are not an imposition, are unlikely to reflect a bias, and have been perpetuated by a large number of independent judgments. Consider, as merely one example, the practice of forbidding suicide. That practice was not imposed by any identifiable group on any other; no bias accounts for it; many people have independently supported it. Whatever we think of physician-assisted suicide, suicide in general is often a product of short-term distress that can be handled or reduced, and it is desirable to have a strong norm, and legal limits, on the practice of taking one's own life. But in many cases in which long-standing practices are challenged, democratic traditionalism will not have much force. In the case of physician-assisted suicide, it is hard to contend that numerous people have, in fact, supported existing bans under conditions akin to those under which we now live. In the case of bans on same-sex relations, the likelihood of a systematic bias is very high.

## II. TRADITIONALISM AS A SECOND-BEST SOLUTION

Even if the aggregative and evolutionary accounts turn out to be unconvincing, and even if democratic traditionalism is rejected, we can imagine other grounds for due process traditionalism. Most obviously, the effort to

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94. For valuable discussion, see Vermeule, *supra* note 28. Perhaps a deliberative democrat might fear that the public, swept up by short-term considerations, may not show sufficient deliberation and that long-standing practices are preferable because they embed a degree of reflection over time. If true, this point might be understood as part of the democratic form of many minds traditionalism, with the ideal of democracy being specified in deliberative terms.

root substantive due process in long-standing practices might operate as a second-best substitute for another, preferable approach.

A. *First-Best, Second-Best*

Many people believe that the Due Process Clause is purely procedural and that the whole idea of substantive due process is not legitimately rooted in the text of the Constitution.<sup>95</sup> On this view, the best approach would be to abandon substantive due process altogether. But even if this is so, it would seem too late in the day to take that approach, which would challenge not merely the most controversial exercises in substantive due process,<sup>96</sup> but also a range of decisions that are firmly entrenched in constitutional law.<sup>97</sup> If the latter decisions are taken as given, due process traditionalism might be seen as a second-best substitute for the complete abandonment of substantive due process. With due process traditionalism, it should be possible to prevent other ventures in substantive due process while also preserving a great deal of the doctrinal status quo.

There is a second view for which due process traditionalism might be a second-best substitute. Suppose that we embrace some version of the position associated with James Bradley Thayer, which asks judges to defer to any plausible understanding of the Constitution.<sup>98</sup> Emphasizing the need to respect the judgments of Congress, Thayer insisted that because the American Constitution is often ambiguous, those who decide on its meaning must inevitably exercise discretion.<sup>99</sup> Thayer thought that courts should strike down national legislation only “when those who have the right to make laws have not merely made a mistake, but have made a very clear one,—so clear that it is not open to rational question.”<sup>100</sup> The question for courts “is not one of the mere and simple preponderance of reasons for or against, but of what is very plain and clear, clear beyond a reasonable doubt.”<sup>101</sup> For committed Thayerians, aggressive decisions under the Due Process Clause are objectionable not because substantive due process does not exist, but solely because of their aggressiveness; courts should give democratic processes the benefit of every doubt. Whether or not Thayerism makes sense in general, it may make sense in the domain of substantive due process in particular—above all because of the difficulty in giving principled content to the idea of “liberty.”

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95. See ELY, *supra* note 21.

96. See, e.g., *Roe v. Wade*, 410 U.S. 113 (1973).

97. See, e.g., *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Pierce v. Soc’y of Sisters*, 268 U.S. 510 (1925); *Meyer v. Nebraska*, 262 U.S. 390 (1923).

98. See VERMEULE, *supra* note 22; James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129 (1893).

99. See Thayer, *supra* note 98, at 144 (noting that laws “will seem unconstitutional to one man, or body of men, [that] may reasonably not seem so to another; that the constitution often admits of different interpretations; that there is often a range of choice and judgment”).

100. *Id.*

101. *Id.* at 151.

It should be easy to see how due process traditionalism might be a second-best substitute for a Thayerian approach to the Constitution. Suppose it is believed that very few legislative decisions will actually violate long-standing understandings of rights, and that most plaintiffs invoking the Due Process Clause will be attempting not to vindicate traditions but to create new rights grounded in some theory of what people should be able to do—as, for example, in *Washington v. Glucksberg*,<sup>102</sup> *Roe v. Wade*,<sup>103</sup> and *Lawrence v. Texas*.<sup>104</sup> If this is so, then due process traditionalism is likely to operate as a kind of shield for government, one that produces results identical to those that would be achieved by a Thayerian approach. It is for this reason that committed Thayerians, aware that their general approach is both inconsistent with current law and unlikely to receive widespread assent, might be drawn to due process traditionalism. In fact, it is easy to imagine an incompletely theorized agreement between proceduralists and Thayerians, both taking traditionalism as an acceptable second best.

Here is a different way to understand the basic point. To decide difficult cases, judges must identify their preferred approach to constitutional provisions; they must also ask how that approach can be squared with existing law. If judges are committed to *stare decisis*, they might have to depart from the reasoning and the results suggested by their preferred approach. From one perspective, the departure is actually the first best, because it incorporates the (principled) commitment to respecting past rulings. When I describe traditionalism as a second best, it is with the understanding that for some judges, a procedural approach or a Thayerian approach would be preferable if the slate were clean.

### B. Three Problems

For both camps, however, there are serious problems. Traditionalism might turn out to be quite aggressive; there are real difficulties in defining traditions, which do not come with labels or in packages; and many people will question whether Thayerism or proceduralism counts as first-best.

#### 1. Traditions Can Be Swords

Traditionalism can operate as a sword for judges to use against the legislative and executive branches, not merely a shield to protect those branches against judges. To that extent, it disserves the goals of those who seek to cabin the role of substantive due process. In striking down President Bush's effort to use military commissions to try suspected terrorists, the Court relied heavily on its judgment that conspiracy counts had not, by tradition, been subject to trial in military courts.<sup>105</sup> The Court's decision was not based

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102. 521 U.S. 702 (1997).

103. 410 U.S. 113 (1973).

104. 539 U.S. 558 (2003).

105. *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2780–86 (2006).

on the Due Process Clause, but it would not exactly be stunning to find that traditionalism could lead to invalidations as well as validations under the Due Process Clause. Indeed, two of the most prominent due process cases do exactly that. In *Griswold*, Justice Harlan defended the outcome, and attempted to discipline the use of substantive due process, by reference to long-standing traditions,<sup>106</sup> and this view is now taken to provide the most plausible understanding of *Griswold*.<sup>107</sup> In any event, Justice Powell's plurality opinion in *Moore v. City of East Cleveland* struck down a ban on family living arrangements on the ground that the ban was inconsistent with long-standing traditions.<sup>108</sup>

Second-best defenses of due process traditionalism might recognize that on some occasions, the approach will require invalidation. But perhaps the fear of invalidation is not devastating to the second-best project, because new practices will frequently be distinguishable from those that came before and hence will rarely be struck down under a traditionalist approach. On this view, *Griswold* and *Moore* are outliers and are unlikely to have many successors.

## 2. Traditions Unleashed

Traditions can be read at many different levels of generality, ranging from the highly particularistic to the very abstract.<sup>109</sup> Because traditions can be read abstractly, due process traditionalism might not constrain discretion at all. On the contrary, due process traditionalism might be an invitation for judges to invalidate practices however they see fit. In characterizing traditions, a degree of discretion is inevitable. If judges read American traditions to create a right to sexual autonomy, bans on prostitution and incest would run into serious constitutional doubts. If judges read American traditions to create a right of bodily integrity, the decisions of the Food and Drug Administration, forbidding people from having access to certain medicines, might seem invalid. Perhaps any characterization of a tradition must be interpretive in the sense that it is inevitably an effort not simply to describe something, but to cast past practices in the best constructive light.<sup>110</sup> If this is so, judges will disagree about the appropriate characterization, because they will disagree about what counts as the best constructive light. These disagreements will defeat the goals of those who favor proceduralism or Thayerism.

To avoid these problems, and to ensure that due process traditionalism will actually operate as a second best, proceduralists and Thayerians have to

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106. *Griswold v. Connecticut*, 381 U.S. 479, 499–500 (1965) (Harlan, J., concurring).

107. *See, e.g., Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 848–49 (1992); *Moore v. City of E. Cleveland*, 431 U.S. 494, 499–503 (1977).

108. 431 U.S. at 504–06.

109. *See* Jack M. Balkin, *Tradition, Betrayal, and the Politics of Deconstruction*, 11 *CARDOZO L. REV.* 1613, 1619 (1990).

110. *See, e.g.,* RONALD DWORKIN, *LAW'S EMPIRE* 53–55 (1986).



urge that traditions must be read at a level of great specificity.<sup>111</sup> Specific readings are necessary both to cabin judicial discretion and to ensure that judges behave (roughly) in a way that proceduralists and Thayerians approve.<sup>112</sup> Thus Justice Scalia has urged that the problem with general readings is that they provide “such imprecise guidance, they permit judges to dictate rather than discern the society’s views.”<sup>113</sup> And if judges are not bound “by any particular, identifiable tradition,” they are not bound by the “rule of law at all.”<sup>114</sup> If these cautionary notes are kept in mind, perhaps due process traditionalism can operate as a second best, and in any case succeed in disciplining judicial discretion, if past practices are read at a level of great specificity.

Attentive to the arguments made thus far, a skeptic might respond that if past practices are so read, they will not offer guidance at all. Read specifically, traditions govern only the periods and persons to whom they actually applied. There does appear to be a tradition in favor of allowing parents to have as many children as they like. But as we have seen, that tradition, read at a level of great specificity, may not “apply” in any context in which democratic processes have repudiated them. A traditionalist must acknowledge that specific readings of past practices will have an irreducible interpretive dimension—which, at a minimum, requires the judge to ask whether current circumstances are relevantly different, thus rendering the tradition inapplicable. If a due process traditionalist will not allow states to restrict couples to two children, or to ban married people from using contraceptives, it must be because any difference between the past and the present should be deemed irrelevant.

But perhaps Justice Scalia, and other traditionalists, need not be disturbed by this concession. Of course judges must characterize traditions, and of course the characterization cannot be discretion-free. In insisting that traditions must be read at a level of great specificity, traditionalists are saying only that judges must avoid general characterizations that turn into a license for open-ended judgments about the substantive content of liberty. If this is the traditionalists’ claim, the real problem is empirical, not conceptual: if judges are unlikely to adopt specific readings in practice, then due process traditionalism will fail to serve as a second best.

Optimistic proceduralists and Thayerians may think this failure is avoidable, and they will work hard to vindicate their optimism. They will devote every effort to reading traditions in such a way as to reduce the risks of

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111. See *Michael H. v. Gerald D.*, 491 U.S. 110, 127 n.6 (1989).

112. At the same time, specific readings will appeal to many minds traditionalists, who believe that the specific traditions have epistemic credentials, because those are the traditions of which many minds have approved. To see the point, suppose that someone claims that there is a general tradition in favor of respect for personal autonomy. Many minds traditionalists will ask: have many people, in fact, signed on to general respect for personal autonomy? If the answer is “no,” the general reading will lack epistemic credentials. Of course many minds traditionalists will accept general readings to the extent that many people have, in fact, assented to them.

113. *Michael H.*, 491 U.S. at 127 n.6.

114. *Id.*

open-ended judicial judgments. But as a matter of actual practice, they cannot exclude the possibility that their efforts will fail. Traditionalist approaches to individual rights might well turn out to be unstable.

### 3. *First-Best?*

The second-best defense of due process traditionalism will lack much appeal for those who count neither proceduralism nor Thayerism as a first-best. It is true that the text of the Due Process Clause is naturally read to be purely procedural, but there are countervailing indications in the history of the Fourteenth Amendment, and in any event the existence of a substantive component is well settled.<sup>115</sup> Within the legal culture, there seems to be broad and deep convergence on some form of substantive due process, captured in the view that certain intimate choices deserve protection against democratic intrusions—at least if those intrusions cannot be convincingly justified. To the extent that a purely procedural reading of the Due Process Clause is unappealing, second-best justifications of due process traditionalism will seem weak.

Thayerism has been defended quite powerfully,<sup>116</sup> but it has no supporters on the Supreme Court, and it will hardly seem a first-best to those who believe that in some domains, relatively aggressive forms of substantive due process are both legitimate and desirable. To defend due process traditionalism as a second-best for Thayerism, it is necessary to convince skeptics both that they should support a Thayerian approach to the Due Process Clause and that traditionalism is a reasonable way of adopting the basic goals of that approach. Skeptics will not be easily persuaded.

### III. RULE-CONSEQUENTIALISM

There is a final possibility. Due process traditionalism might be justified on rule-consequentialist grounds.<sup>117</sup> The basic idea is that if judges are unleashed from traditions, they will produce many bad results, and that if judges are tethered to traditions, they will do fairly well—simply because our particular traditions outperform any list or catalogue of substantive rights likely to be produced by judges. At least this might be so if we consider the fact that democratic majorities, at the state and federal level, can create substantive rights if they choose to do so. On this view, due process traditionalism is likely to produce fewer mistakes, and less damaging mistakes, than the alternatives.

A basic concern here is that the idea of “liberty,” taken in the abstract, can be read in diverse ways, and there is no particular reason to trust judicial

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115. See Lawrence H. Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 *YALE L.J.* 1063, 1066 n.9 (1980).

116. See VERMEULE, *supra* note 22.

117. On rule-consequentialism, see BRAD HOOKER, *IDEAL CODE, REAL WORLD: A RULE-CONSEQUENTIALIST THEORY OF MORALITY* (2000).

readings, even or perhaps especially if they are morally infused. It is true that the aggregative and evolutionary accounts offer insufficient reason to accept many minds traditionalism in its most ambitious forms. But the real question is comparative, and perhaps we can agree that at least in the United States, traditional conceptions of individual rights are a good place to start. When such conceptions prove inadequate, political processes can and often do pick up the slack, as for example through statutory protections accorded to privacy rights.<sup>118</sup> If courts refuse to give constitutional protection to certain interests, it always remains possible for democratic arenas to do so. And when traditions are palpably unjust, the Equal Protection Clause is the natural route by which they might be challenged. If judicial judgments about the substantive content of "liberty" are highly unreliable, due process traditionalism might turn out to be the best imaginable approach.

The underlying questions cannot be answered in the abstract; they call for both normative and predictive judgments. Due process traditionalists might reasonably fear that judicial judgments will reflect normative commitments that do not deserve special respect and that in any case ought not to be imposed on citizens. *Lochner v. New York*,<sup>119</sup> prompting Holmes's traditionalism, is the obvious example for most, whereas *Roe v. Wade*<sup>120</sup> is the salient example for many. By contrast, those who reject due process traditionalism insist that judicial elaboration of the content of "liberty" is far more likely to produce better outcomes than an approach that is tied to long-standing practices. They favor a more rationalist or critical approach to the Due Process Clause, in which judges question traditions by the light of reason, ensuring that they can survive the appropriate standard of review. They are likely to insist that the more rationalist or critical approach is not untethered, but builds carefully and incrementally on existing law. They might well contend that a minimalist form of due process rationalism, rejecting some traditions as baseless, is superior to traditionalism.<sup>121</sup>

If due process rationalism is to be defended, it might be on the institutional grounds sketched by Alexander Bickel, who insisted that "courts have certain capacities for dealing with matters of principle that legislatures and executives do not possess."<sup>122</sup> In Bickel's view, "[j]udges have, or should have, the leisure, the training, and the insulation to follow the ways of the scholar" in thinking about those enduring values.<sup>123</sup> "Their insulation and the marvelous mystery of time give courts the capacity to appeal to men's better

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118. *E.g.*, Right to Financial Privacy Act of 1978, Pub. L. No. 95-630, 92 Stat. 3697 (codified as amended at 12 U.S.C. §§ 3401 (2000)); Privacy Act of 1974, Pub. L. No. 93-579, 88 Stat. 1896 (codified as amended at 5 U.S.C. § 552a (2000)).

119. 198 U.S. 45 (1905).

120. 410 U.S. 113 (1973).

121. On minimalism in general, see CASS R. SUNSTEIN, *ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT* (1999).

122. ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 25 (1962).

123. *Id.*

natures, to call forth their aspirations, which may have been forgotten in the moment's hue and cry."<sup>124</sup> Thus Bickel concluded that "[n]o other branch of the American government is nearly so well equipped to conduct" a kind of vital national seminar, through which the most basic principles are discovered and announced.<sup>125</sup>

To those who fear the exercise of judicial discretion, due process rationalists might respond that the appointments process, together with judicial self-restraint and analogical reasoning, creates sufficient protection against the relevant risks. Judges do not create due process doctrine out of whole cloth; they rely on their previous decisions, and they rarely depart radically from them. If Bickel is right about judicial capacities, and if the external and internal constraints on judicial discretion are real, the rule-consequentialist defense of due process traditionalism is unlikely to seem convincing. For due process rationalists, we are better off if traditions are a place to start but not to end. We should prefer a situation in which courts occasionally deploy a more rationalist approach, asking whether the tradition is sensible in principle.

For judicial interpretation of the Due Process Clause, it is not clear that the disagreement between rationalists and traditionalists can be resolved in the abstract. One of my principal goals has been to show that any resolution must depend on both normative judgments and predictions about judicial performance. Suppose that judicial rationalism is likely to produce confused and unappealing understandings of liberty; if so, the argument for traditionalism gains force. Or suppose that traditional understandings suffer from a systematic bias; if so, the argument for a dose of rationalism is strengthened. At the very least, we should now be in a position to identify the questions on which reasonable people might disagree.

If the tension (or choice) between *Glucksberg* and *Lawrence* is to be resolved, it must be on the basis of considerations of this kind. In my view, *Glucksberg* was correctly decided, because the argument for physician-assisted suicide depends on highly contestable empirical assumptions about what is, in fact, in the interest of patients.<sup>126</sup> But the American constitutional system benefits from the Court's occasional willingness to subject traditions to critical scrutiny, even under the Due Process Clause. For federal judges, the appropriate approach is cautious and incremental, to be sure; courts should be willing to give the democratic process the benefit of the reasonable doubt. But there is little to deplore, and something to celebrate, about a situation in which judges are willing to build cautiously on their own practices, and on evolving social norms, in order to forbid states from criminalizing same-sex relationships.

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124. *Id.* at 26.

125. *Id.*

126. See Sunstein, *supra* note 23, at 1146.

## CONCLUSION

The most ambitious defenses of due process traditionalism, drawing on Burke and Hayek, emphasize that many minds are necessary to constitute a tradition, and that many minds are far more likely to be right than those who deploy their private stock of reason. The aggregative version of this view runs into three problems. First, numerous people may not have accepted a proposition that is relevant to the legal issue at hand. Second, many minds might suffer from a systematic bias. Third, many minds may not have reached their judgments independently, depriving the tradition of the degree of support that the aggregative view demands.

The problem with the evolutionary account is that it is hard to identify a mechanism to ensure that traditional practices are good, or even good enough, in any relevant sense. Democratic traditionalists insist that long-standing practices are supported by numerous "votes." But at least for the questions typically raised in due process cases, the same difficulties that undermine the aggregative and evolutionary accounts beset efforts to defend traditions on democratic grounds.

Alternative defenses see due process traditionalism as a kind of second-best substitute for a procedural understanding of the Due Process Clause or for a form of Thayerism. Ideas of this sort undoubtedly help explain the appeal of due process traditionalism within certain segments of the judiciary. If "substantive due process" is constitutionally baseless but firmly entrenched, a traditionalist approach might seem the best way out of a bad situation. Unfortunately, the substitute is likely to be quite crude, and it is not clear that a procedural account or Thayerism can be convincingly described as first-best.

From these arguments, it seems clear that some appealing defenses of due process traditionalism turn out to be quite fragile. The final and ultimately most reasonable defense speaks in rule-consequentialist terms. The central idea is that notwithstanding the failures of the aggregative and evolutionary accounts, our own traditions are generally good, and judicial judgments about the content of "liberty" are systematically unreliable. The rule-consequentialist argument, favoring traditionalism over rationalism, cannot easily be rejected in the abstract. On the one hand, it is easy to imagine a world in which the rule-consequentialist argument might be persuasively defended; if traditions are always very good and judges are always very bad, the argument would be hard to resist. On the other hand, it is most doubtful that this world is our own.