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THREE THEORIES OF SUBSTANTIVE DUE PROCESS*

DANIEL O. CONKLE**

Substantive due process is in serious disarray, with the Supreme Court simultaneously embracing two, and perhaps three, competing and inconsistent theories of decisionmaking. The first two theories, historical tradition and reasoned judgment, have explicit and continuing support in the Court's decisions. Under the theory of historical tradition, substantive due process affords presumptive constitutional protection only to liberties that are "deeply rooted in this Nation's history and tradition." By contrast, the theory of reasoned judgment is far more expansive, permitting the Court to identify rights independently, through a process that amounts to philosophical analysis or political-moral reasoning. The third theory, evolving national values, is a theory that may be implicit in Lawrence v. Texas *and that finds support by analogy in recent Eighth Amendment cases. Under this approach, substantive due process protects values that command widespread contemporary support, as evidenced by legal developments and societal understandings that may change over time. In this Article, I offer a detailed account of each of these three theories, explaining the decisionmaking methodology that each requires for the identification of unenumerated constitutional rights. The Article also develops and applies three criteria of evaluation, grounded in relevant considerations of constitutional policy: majoritarian self-government, judicial objectivity and competence, and functional justification. I contend that each theory can be defended as a matter of constitutional policy but that, on balance, the most defensible approach is the theory of evolving national values.*

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INTRODUCTION

Nothing in constitutional law is more controversial than substantive due process. Not only does the Supreme Court invoke this doctrine to resolve deeply contested questions of political morality, but the Court has yet to agree upon a theory of decisionmaking that can explain and justify its rulings. Each of the Court's rulings is important in its own right, and each warrants academic commentary on that basis. *Lawrence v. Texas*,[1] for example, is a landmark decision for sexual liberty and the advancement of gay rights. Yet as the Court's substantive due process decisionmaking continues apace, its overall doctrine demands more comprehensive evaluation, and this Article proceeds at that level. Using *Lawrence* as a point of departure, I will offer a close reading and a theoretical examination of the Court's contemporary doctrine. I also will suggest that *Lawrence*, viewed from this broader

1. 539 U.S. 558 (2003).

perspective, not only reveals a state of profound doctrinal confusion but also includes untapped insights—or at least unexplored hints and suggestions—that might inform a substantial reconceptualization and reformation of substantive due process. If my thesis is correct, it promises enhanced coherency and legitimacy for this embattled area of constitutional law.

In its historic decision in *Lawrence*, the Supreme Court declared that the Due Process Clause of the Fourteenth Amendment[2] protects the substantive "liberty" of consenting adults to engage in homosexual conduct.[3] In so doing, the Court overruled *Bowers v. Hardwick*,[4] which had derided such a claim as "facetious."[5] Academic commentators had been harshly critical of *Bowers*.[6] I myself, in the wake of *Bowers* and in light of the Court's continuing support for *Roe v. Wade*,[7] once argued that *Bowers* represented "the death of substantive due process as a principled doctrine of law."[8] One might suppose that by overruling *Bowers*, the Court has now put matters aright. Indeed, *Lawrence* has been praised as a victory for gay rights and, more broadly, a victory for liberty.[9] That it is, but *Lawrence*

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2. U.S. CONST. amend. XIV, § 1.

3. *Lawrence*, 539 U.S. at 578.

4. 478 U.S. 186 (1986); *see Lawrence*, 539 U.S. at 578.

5. *See Bowers*, 478 U.S. at 194.

6. For a sampling of this critical commentary, see Anne B. Goldstein, *History, Homosexuality, and Political Values: Searching for the Hidden Determinants of* Bowers v. Hardwick, 97 YALE L.J. 1073 (1988); David A.J. Richards, *Constitutional Legitimacy and Constitutional Privacy*, 61 N.Y.U. L. REV. 800 (1986); Jed Rubenfeld, *The Right of Privacy*, 102 HARV. L. REV. 737 (1989); Kendall Thomas, *Beyond the Privacy Principle*, 92 COLUM. L. REV. 1431 (1992). For additional citations, see Earl M. Maltz, *The Court, the Academy, and the Constitution: A Comment on* Bowers v. Hardwick *and Its Critics*, 1989 BYU L. REV. 59, 60–61 n.4.

7. 410 U.S. 113 (1973); *see* Thornburgh v. Am. Coll. of Obstetricians & Gynecologists, 476 U.S. 747, 759 (1986) ("Again today, we reaffirm the general principles laid down in *Roe* . . . .").

8. Daniel O. Conkle, *The Second Death of Substantive Due Process*, 62 IND. L.J. 215, 242 (1987).

9. *See, e.g.*, Randy E. Barnett, *Justice Kennedy's Libertarian Revolution:* Lawrence v. Texas, 2002–03 CATO SUP. CT. REV. 21 (applauding *Lawrence* on the basis of a broadly libertarian interpretation of the Court's decision); Nan D. Hunter, *Living with* Lawrence, 88 MINN. L. REV. 1103, 1137 (2004) ("Whatever its shortcomings, for lesbians and gay men, *Lawrence* is a breakthrough."); Laurence H. Tribe, Lawrence v. Texas: *The "Fundamental Right" That Dare Not Speak Its Name*, 117 HARV. L. REV. 1893, 1895, 1899 (2004) (suggesting that "*Lawrence* may well be remembered as the *Brown v. Board* of gay and lesbian America" and arguing, more broadly, that it is a "pathmarking decision" that "significantly alter[s] the historical trajectory of substantive due process and thus of liberty"). The Court's decision has attracted a range of commentary, mostly but not entirely favorable. *See, e.g.*, Colloquium, *The Boundaries of Liberty After* Lawrence v. Texas, 102 MICH. L. REV. 1447 (2004); Symposium, *Equality, Privacy, and Lesbian and Gay Rights After* Lawrence v. Texas, 65 OHIO ST. L.J. 1057 (2004); Symposium, *Gay*

does not stand alone, and, from a broader doctrinal perspective, the ruling highlights the conceptual chaos of modern substantive due process. The Supreme Court's welter of decisions and its confusing doctrinal standards have emboldened the Court's critics, who view the "doctrine" of substantive due process as little more than a judicial charade, an excuse for selective and unprincipled "legislating from the bench." *Lawrence* has done nothing to alleviate these concerns. If anything, it has compounded the problems of doctrinal clarity and judicial consistency, because *Lawrence* suggests that the Supreme Court may now endorse, simultaneously, three different—and inconsistent—theories of substantive due process.

The first theory—the theory of historical tradition—is that substantive due process affords presumptive constitutional protection[10] only to liberties that are " 'deeply rooted in this Nation's history and tradition.' "[11] The Court embraced this approach in *Bowers*,[12] and it explicitly reaffirmed it as recently as 1997, in *Washington v. Glucksberg*,[13] which refused to recognize a constitutional right[14] to physician-assisted suicide.[15] Under this type of historical inquiry, *Bowers* and *Glucksberg* were correctly decided. In *Lawrence*, the Court repudiated *Bowers*, but not *Glucksberg*, suggesting that the historical approach might still be controlling in certain contexts.

The second theory is the theory of reasoned judgment. According to this theory, substantive due process rights are not limited by historical tradition. Instead, the Supreme Court is free to identify rights independently, through a process that amounts to a type of philosophical analysis or political-moral reasoning. Under this approach, the Court itself evaluates the liberty interest of the

Rights After Lawrence v. Texas, 88 MINN. L. REV. 1017 (2004); Symposium, *Privacy Rights in a Post* Lawrence *World: Responses to* Lawrence v. Texas, 10 CARDOZO WOMEN'S L.J. 263 (2004).

10. When I say that a liberty is afforded "presumptive constitutional protection," I mean that governmental intrusions on the liberty are presumptively invalid and trigger serious judicial scrutiny, something more than a deferential review for minimal rationality.

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

12. *See id.*

13. 521 U.S. 702, 720–21 (1997).

14. Following the Court's own terminology, I use the term "right" to include an individual interest that warrants presumptive as opposed to absolute constitutional protection. *See supra* note 10; *see also Glucksberg*, 521 U.S. at 768 n.10 (Souter, J., concurring in the judgment) (noting the Court's conventional terminology but indicating that he would prefer to "reserv[e] the label 'right' for instances in which the individual's liberty interest actually trumps the government's countervailing interests").

15. *Glucksberg*, 521 U.S. at 735 (majority opinion).

individual and weighs it against competing governmental concerns, determining on this basis whether the liberty interest deserves protection as a constitutional right. The Court applied this approach in *Planned Parenthood of Southeastern Pennsylvania v. Casey*,[16] reaffirming the "central holding" of *Roe v. Wade*[17] not only as a matter of precedent but also, in part, on the basis of "reasoned judgment."[18] In so doing, the Court independently examined and evaluated the liberty interest of a woman seeking an abortion, and it concluded that this interest warrants special constitutional protection.[19] In *Lawrence*, the Court discussed *Casey* with approval, seemingly endorsing *Casey*'s reasoned judgment methodology.[20] But *Lawrence* also included a historical inquiry, with the Court questioning the reasoning of *Bowers* on its own terms.[21] More generally, *Lawrence* did nothing to explain how the theory of reasoned judgment might be reconciled with the competing approach of historical tradition.

These first two theories have dominated the Supreme Court's decisionmaking, and *Lawrence* appears to confirm a continuing role for each. At the same time, *Lawrence* also suggests the possible emergence of a third theory. After discussing the long history of sodomy regulation, the Court conspicuously turned to more recent developments, citing an "emerging awareness" concerning the proper scope of personal liberty and noting that "our laws and traditions in the past half century are of most relevance here."[22] The Court cited these developments in part to support its historical critique of *Bowers* and in part to support its own reasoned judgment that *Bowers* reflected an impoverished understanding of human liberty. The Court thus linked its discussion to each of the two prevailing theories of substantive due process.[23] But this discussion also planted the seeds for the potential emergence of an altogether different theory, a theory of evolving national values.

According to this third theory, substantive due process is informed by history, but it also includes a progressive dimension. More specifically, substantive due process protects a set of evolving

16. 505 U.S. 833 (1992).
17. 410 U.S. 113 (1973); *see Casey*, 505 U.S. at 853.
18. *Casey*, 505 U.S. at 849.
19. *See id.* at 846–53.
20. *See* Lawrence v. Texas, 539 U.S. 558, 571, 573–74 (2003).
21. *See id.* at 567–73.
22. *Id.* at 571–72.
23. *See infra* Part IV.B.

national values, values that command widespread contemporary support, as evidenced by legal developments and societal understandings that may change over time. Although the Court's opinion in *Lawrence* was ambiguous at best, the theory of evolving national values strongly supports the Court's decision. At the same time, this third theory is plainly at odds with each of the preexisting approaches.

These three competing theories promote radically different understandings of substantive due process and of the Supreme Court's authority to identify unenumerated constitutional rights. In this Article, I will discuss the Court's two prevailing theories, identifying their strengths and weaknesses as a matter of constitutional policy. I then will discuss the theory of evolving national values that may be implicit in *Lawrence*, and I will argue that this theory, properly elaborated and refined, is superior to either of the Court's preexisting approaches. Thus, I will contend that substantive due process should not be confined to historical liberties, but that reasoned judgment, standing alone, cannot justify the recognition of a constitutional right. Instead, substantive due process rights should be limited to rights that are supported not only by the Supreme Court's political-moral judgment but also by an objective determination of contemporary national values. I will discuss how the Court should ascertain the content of these values, and I also will address additional factors that the Court should consider in its decisionmaking.

In Part I, I will offer a brief history of modern substantive due process, highlighting the ebbs and flows of the Court's "privacy" and "liberty" decisions. In Part II, I will discuss general considerations of constitutional policy, considerations that will guide my evaluation of the three competing theories. Part III will evaluate the two theories that have dominated the Court's decisionmaking: the theory of historical tradition and the theory of reasoned judgment. Part IV will discuss *Lawrence*, examining those portions of the Court's opinion that relate to these two theories as well as the Court's suggestive reliance on evolving values. In Part V, I will elaborate, evaluate, and defend the evolving national values approach. In the course of this discussion, I will contend that the appropriate methodology under this theory is similar to that which the Court employs in Eighth Amendment capital cases, including the Court's recent invalidations

of the death penalty for mentally retarded and juvenile offenders.[24] I also will explain how foreign and international law plays into the analysis. Finally, I will offer concluding observations, noting the implications of my argument for existing precedents but emphasizing that my focus is primarily on the future.

I. MODERN SUBSTANTIVE DUE PROCESS: UNENUMERATED RIGHTS OF "PRIVACY" AND "LIBERTY"

The Due Process Clause of the Fourteenth Amendment provides that no state "shall . . . deprive any person of life, liberty, or property, without due process of law."[25] This language appears to afford constitutional protection that is purely procedural, requiring only that the government provide the "process" that is "due" before it deprives a person of life, liberty, or property. By its terms, the language suggests no limitation on procedurally proper deprivations, nor does it authorize the recognition of substantive constitutional rights. As Professor John Hart Ely famously suggested, "substantive due process" can be seen as "a contradiction in terms—sort of like 'green pastel redness.' "[26] But despite the strength of this textual argument, the Supreme Court has repeatedly rejected it. Instead, the Court has infused the Due Process Clause with substantive content. Focusing especially on the word "liberty," it has declared for itself the power to define otherwise unenumerated constitutional rights, rights that are protected from governmental deprivation, no matter the procedure.[27]

24. *See* Atkins v. Virginia, 536 U.S. 304 (2002) (mentally retarded offenders); Roper v. Simmons, 543 U.S. 551 (2005) (juvenile offenders).

25. U.S. CONST. amend. XIV, § 1. The Fifth Amendment constrains the Federal Government with its own Due Process Clause, the wording of which is substantially identical. *See id.* amend. V. The Fifth Amendment provision raises very similar issues, but the Fourteenth Amendment has been the primary vehicle for the Supreme Court's substantive due process decisionmaking, and it will be my focus in this Article.

26. JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 18 (1980); *see* John Harrison, *Substantive Due Process and the Constitutional Text*, 83 VA. L. REV. 493, 552 (1997) (offering a detailed analysis of various arguments by which substantive due process might be derived from the constitutional text, but concluding that "the textual plausibility of the various derivations of substantive due process are uniformly negative" and that none of them provides "a natural understanding of the language"). *But cf.* 1 LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1333 (3d ed. 2000) ("[T]here is a reasonable historical argument that, by 1868, a recognized meaning of the qualifying phrase 'of law' was substantive."); Harrison, *supra*, at 553–55 (leaving open the possibility of a "term of art" meaning of the Due Process Clause that, by 1868, might have included limited substantive content).

27. In addition to the Due Process Clause, the Fourteenth Amendment's Privileges or Immunities Clause as well as the Ninth Amendment sometimes have been invoked to support the judicial recognition of substantive constitutional rights not otherwise delineated in the constitutional text. According to the Privileges or Immunities Clause,

For the Supreme Court of a century past, substantive due process protected the "liberty" of contract, as exemplified by the Court's 1905 decision in *Lochner v. New York*.[28] In this notorious case, the Court invalidated a New York statute that established maximum hours for bakery employees.[29] The Court found that the statute violated the Due Process Clause by denying bakery employers and employees the right to determine contractual rights and duties for themselves.[30] Over the next thirty years, the Supreme Court closely examined—and frequently invalidated—a broad range of economic regulations,[31] thereby promoting and protecting the economic philosophy of laissez faire. In the 1930s, however, the Supreme Court dramatically reversed course.[32] Soon, the Court was categorically renouncing the judicial activism of the *Lochner* era.[33] Indeed, at least by the 1960s, it appeared that the Court had rejected substantive due process

"No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." U.S. CONST. amend. XIV, § 1. The Ninth Amendment provides that "[t]he enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people." *Id.* amend. IX. For competing judicial views concerning the meaning and relevance of the Ninth Amendment, compare Griswold v. Connecticut, 381 U.S. 479, 486–93 (1965) (Goldberg, J., concurring) (arguing that the Ninth Amendment supports the Supreme Court's recognition of individual rights not otherwise enumerated in the Constitution), with *id.* at 518–20 (Black, J., dissenting) (contending that the Ninth Amendment was enacted not to enhance the authority of the federal judiciary but to protect state powers from federal invasion), and *id.* at 529–30 (Stewart, J., dissenting) (agreeing with Justice Black and suggesting that Justice Goldberg's argument "turn[s] somersaults with history"). For academic commentary taking an expansive view of the Ninth Amendment as a rights-protecting provision, see RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY 234–52 (2004); CALVIN R. MASSEY, SILENT RIGHTS: THE NINTH AMENDMENT AND THE CONSTITUTION'S UNENUMERATED RIGHTS (1995). For commentary taking a more narrow view, see Kurt T. Lash, *The Lost Jurisprudence of the Ninth Amendment*, 83 TEX. L. REV. 597 (2005); Kurt T. Lash, *The Lost Original Meaning of the Ninth Amendment*, 83 TEX. L. REV. 331 (2004); Thomas B. McAffee, *The Original Meaning of the Ninth Amendment*, 90 COLUM. L. REV. 1215 (1990).

28. 198 U.S. 45 (1905).

29. *Id.* at 64.

30. *See id.* at 53–54.

31. *See* KATHLEEN M. SULLIVAN & GERALD GUNTHER, CONSTITUTIONAL LAW 500–03 (15th ed. 2004).

32. *See* W. Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937); *see also* Nebbia v. New York, 291 U.S. 502 (1934) (foreshadowing the Court's impending change of direction).

33. *See, e.g.*, Williamson v. Lee Optical, 348 U.S. 483, 488 (1955) ("The day is gone when this Court uses the Due Process Clause of the Fourteenth Amendment to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought."); Lincoln Fed. Labor Union v. Nw. Iron & Metal Co., 335 U.S. 525, 535, 536 (1949) (noting that although the constitutional doctrine of *Lochner* and comparable cases "was for some years followed by this Court," the Court more recently "has steadily rejected the due process philosophy" of that period).

altogether. In its 1963 decision in *Ferguson v. Skrupa*,[34] for example, the Supreme Court declared that although "[t]here was a time when the Due Process Clause was used by this Court to strike down laws which were thought unreasonable, that is, unwise or incompatible with some particular economic or social philosophy,"[35] that doctrine "has long since been discarded."[36]

Only two years after *Ferguson*, however, in *Griswold v. Connecticut*,[37] the Supreme Court invalidated a state law that banned the use of contraceptives, as applied to married couples.[38] Emphasizing the sanctity and intimacy of marriage, the Court disavowed *Lochner* and claimed to rely on "penumbras" emanating from the Bill of Rights, penumbras justifying the recognition of a constitutional "right of privacy" that protected the marital conduct in question.[39] Such a right could not fairly be inferred from the Bill of Rights,[40] however, and it seemed plain that substantive due process was again at work.[41] Indeed, the Court in *Griswold* reaffirmed—purportedly on other grounds—two precedents from the *Lochner* era, *Meyer v. Nebraska*[42] and *Pierce v. Society of Sisters*.[43] *Meyer* and *Pierce* had extended substantive due process "liberty" to protect not only the "calling" of teachers[44] but also the right of parents to direct

34. 372 U.S. 726 (1963).

35. *Id.* at 729.

36. *Id.* at 730. One substantive component of the Fourteenth Amendment's Due Process Clause clearly had not been abandoned: the notion that this clause "incorporates" various provisions of the Bill of Rights for application to the states, including substantive provisions such as the First Amendment. *See* Duncan v. Louisiana, 391 U.S. 145, 147–48 (1968). When I refer to substantive due process, however, I am excluding the Court's doctrine of Fourteenth Amendment incorporation and am referring instead to substantive constitutional doctrine grounded neither directly nor by virtue of incorporation on any constitutional language more specific than the Due Process Clause itself.

37. 381 U.S. 479 (1965).

38. *See id.* at 485–86.

39. *See id.* at 481–86.

40. *Cf. id.* at 509–10 (Black, J., dissenting) ("I get nowhere in this case by talk about a constitutional 'right of privacy' as an emanation from one or more constitutional provisions.").

41. In hindsight, one can see *Skinner v. Oklahoma*, 316 U.S. 535 (1942), as a forerunner to *Griswold*, both in its protection of an unenumerated liberty relating to reproduction and in its attempt to defend this liberty without resort to substantive due process. Thus, in the course of invalidating a compulsory sterilization requirement for certain habitual felons, the Court in *Skinner* called procreation "one of the basic civil rights of man" and "a basic liberty," *id.* at 541, but it relied on equal protection, not substantive due process, as the formal basis for its constitutional ruling. *See id.* at 538–43.

42. 262 U.S. 390 (1923); *see Griswold*, 381 U.S. at 482–83.

43. 268 U.S. 510 (1925); *see Griswold*, 381 U.S. at 482–83.

44. *Meyer*, 262 U.S. at 401.

the education of their children.[45] Taken together with these early precedents, *Griswold* suggested that the Court was protecting matters of personal choice within conventional—and traditionally state-supported—family relationships.[46]

Within a decade, however, it became clear that the newly discovered "right of privacy" had a far more expansive reach. In its 1972 decision in *Eisenstadt v. Baird*,[47] the Court extended *Griswold* to protect access to contraceptives even outside the confines of marriage, asserting 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."[48] And a year later, in *Roe v. Wade*,[49] the Court boldly declared that the right of privacy "is broad enough to encompass a woman's decision whether or not to terminate her pregnancy."[50] In *Eisenstadt*, the Court struggled to avoid express reliance on substantive due process,[51] but it was more candid in *Roe*, attributing the right of privacy to "the Fourteenth Amendment's concept of personal liberty and restrictions upon state action."[52]

Roe brought modern substantive due process into full flower. Governmental intrusions on the right of privacy triggered strict judicial scrutiny, and they typically could not survive this review. The Court invalidated a broad range of contraceptive and abortion regulations, including waiting periods for abortion and special requirements of informed consent.[53] It also found that the right of

45. *See id.*; *Pierce*, 268 U.S. at 534–35.

46. *Cf.* Loving v. Virginia, 388 U.S. 1, 12 (1967) (citing substantive due process and its protection of marriage as an additional ground, beyond equal protection, for invalidating a ban on interracial marriage).

47. 405 U.S. 438 (1972).

48. *Id.* at 453.

49. 410 U.S. 113 (1973).

50. *Id.* at 153. The Court went on to announce elaborate constitutional guidelines for each of the three trimesters of pregnancy. *See id.* at 162–66. In a companion decision, the Court considered and invalidated a variety of abortion regulations. *See* Doe v. Bolton, 410 U.S. 179 (1973).

51. The Court asserted that the statute violated equal protection by distinguishing between single and married persons in a manner that could not satisfy rational basis scrutiny. *See Eisenstadt*, 405 U.S. at 446–55.

52. *Roe*, 410 U.S. at 153.

53. *See, e.g.*, Thornburgh v. Am. Coll. of Obstetricians & Gynecologists, 476 U.S. 747 (1986) (invalidating abortion reporting and informed consent requirements as well as special regulations for post-viability abortions); City of Akron v. Akron Ctr. for Reprod. Health, Inc., 462 U.S. 416 (1983) (invalidating an abortion ordinance regulating informed consent and parental consent, imposing a twenty-four-hour waiting period, requiring

privacy protected other personal choices concerning family and marriage relationships, thereby reaffirming and extending the rationale of *Meyer, Pierce,* and *Griswold*.[54]

By the end of the 1980s, however, after years of intense political battles in the context of judicial appointments and otherwise,[55] the right of privacy had passed its zenith and begun a descent. The Supreme Court's 1986 ruling in *Bowers v. Hardwick*,[56] refusing to protect intimate homosexual conduct, appeared to ignore the logical implications of the Court's privacy precedents, especially *Eisenstadt* and *Roe*.[57] Three years later, in *Webster v. Reproductive Health Services*,[58] the Court's fractured decision suggested a weakening of abortion rights and the potential that *Roe* soon might be abandoned altogether.[59] Meanwhile, the Court was offering mixed results—and

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hospitalization for second trimester abortions, and mandating the humane and sanitary disposal of fetal remains); Carey v. Population Servs. Int'l, 431 U.S. 678 (1977) (invalidating contraceptive regulations prohibiting distribution to minors under the age of sixteen and precluding distribution to adults except by licensed pharmacists); Planned Parenthood v. Danforth, 428 U.S. 52 (1976) (invalidating various abortion regulations, including a requirement of spousal consent). The Court did approve some abortion restrictions, including parental consent requirements (but only if accompanied by judicial bypass procedures) and prohibitions on governmental funding. *See, e.g.*, Planned Parenthood Ass'n of Kan. City v. Ashcroft, 462 U.S. 476 (1983) (upholding several abortion regulations, including a parental consent requirement that included an appropriate judicial alternative); Harris v. McRae, 448 U.S. 297 (1980) (upholding "Hyde Amendment" restrictions on federal reimbursement for abortions); Maher v. Roe, 432 U.S. 464 (1977) (upholding state law restrictions on abortion funding).

54. *See, e.g.*, Zablocki v. Redhail, 434 U.S. 374, 384 (1978) (invalidating economic restrictions on the right to marry and noting that "the right to marry is part of the fundamental 'right of privacy' implicit in the Fourteenth Amendment's Due Process Clause"); Moore v. City of E. Cleveland, 431 U.S. 494 (1977) (invalidating a housing ordinance that limited the occupancy of a dwelling unit to members of a single nuclear family, holding that the ordinance violated the substantive due process rights of other relatives who wished to live together). *See generally Developments in the Law—The Constitution and the Family*, 93 HARV. L. REV. 1156 (1980) (offering an extended analysis of substantive due process and other constitutional doctrines as they bear on family-related issues in various contexts).

55. *See* Conkle, *supra* note 8, at 237–40.

56. 478 U.S. 186 (1986).

57. *See* Conkle, *supra* note 8, at 221–37.

58. 492 U.S. 490 (1989).

59. Extending its abortion funding precedents, the Court in *Webster* approved a prohibition on the performance of abortions by state employees or in state facilities, even if patients paid for the abortions themselves. *See id.* at 507–11. More generally, addressing other provisions in the law, four Justices stated or implied that *Roe v. Wade* should be substantially modified or overruled outright, and a fifth, Justice O'Connor, suggested that she might be open to reconsidering *Roe* if and when the question was directly presented. *See id.* at 517–21 (plurality opinion of Rehnquist, C.J., joined by White and Kennedy, JJ.); *id.* at 532–37 (Scalia, J., concurring in part and concurring in the judgment); *id.* at 525–26 (O'Connor, J., concurring in part and concurring in the

contested reasoning—in the context of family and marriage relationships.[60]

In 1990, the Court extended substantive due process to a new arena, end-of-life decisionmaking, but the Court's ruling was measured, and its opinion reflected the right of privacy's declining constitutional status. Thus, in *Cruzan v. Director, Missouri Department of Health*,[61] the Court found that "[t]he principle that a competent person has a constitutionally protected liberty interest in refusing unwanted medical treatment may be inferred from our prior decisions."[62] But the Court's terminology and reasoning had shifted. Citing *Bowers* with approval, the Court conspicuously rejected the "right of privacy" nomenclature and with it the strict scrutiny that would follow. Instead, the Court found only that the interest in refusing medical treatment was a specially protected "liberty interest" under the Due Process Clause, an interest that triggered serious judicial review but not the strong presumptive invalidity of strict scrutiny.[63] Applying a balancing approach, the Court concluded that in the case of a person who was no longer competent, substantive due process did not prevent a state from insisting that the person's desire to terminate treatment be established by clear and convincing evidence.[64]

Two years later, in *Planned Parenthood of Southeastern Pennsylvania v. Casey*,[65] the Court returned to the question of abortion. To the surprise of many, a five-four majority reaffirmed the "central holding" of *Roe*,[66] but the Court reconceptualized and weakened the constitutional status of abortion rights. As in *Cruzan*, the Court spoke of a protected liberty interest, not the right of privacy,[67] and it abandoned strict scrutiny in favor of a less protective

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judgment); *see also* Rust v. Sullivan, 500 U.S. 173 (1991) (further extending the abortion funding cases to uphold a restriction on abortion counseling within federally funded family planning programs).

60. *Compare* Michael H. v. Gerald D., 491 U.S. 110 (1989) (fractured decision rejecting a claim of parental rights asserted by the alleged biological father of the child of a married woman, with the Court upholding a state law presumption that the child was fathered by the woman's husband), *with* Turner v. Safley, 482 U.S. 78 (1987) (holding that the right to marry extends to some degree even to prison inmates and invalidating a prison regulation that could not be defended on the basis of rehabilitation or security concerns).

61. 497 U.S. 261 (1990).

62. *Id.* at 278.

63. *See id.* at 278–79 & n.7.

64. *See id.* at 279–87.

65. 505 U.S. 833 (1992).

66. *See id.* at 853.

67. *See id.* at 846 ("The controlling word in the cases before us is 'liberty.' ").

balancing approach, one that precluded abortion regulations only if they prohibited pre-viability abortions or otherwise imposed an "undue burden" on abortion decisionmaking prior to viability.[68] Under this newly minted standard, the Court concluded that some of its post-*Roe* decisions had gone too far and should be overruled.[69] More generally, the Court found that the states, within the limits of the undue burden test, should be free to encourage and promote childbirth over abortion.[70]

More recently, the Supreme Court's substantive due process decisions have run the gamut. The Court's 1997 decision in *Washington v. Glucksberg*[71] refused to recognize a constitutional right to physician-assisted suicide. Distinguishing *Cruzan* and *Casey*, the Court found no special liberty interest and, as a result, no need for anything more than a deferential review of the challenged law.[72] Three years later, by contrast, the Court in *Troxel v. Granville*[73] reaffirmed and invigorated parental rights, ruling that substantive due process gives presumptive protection to the visitation decisions of custodial parents, even their decisions to preclude visitation by grandparents.[74] In another 2000 decision, *Stenberg v. Carhart*,[75] the Court relied upon *Casey* to invalidate a "partial birth abortion" prohibition. The Court found the law infirm because it was broadly worded and because it did not include an exception for women facing non-life-threatening health risks.[76]

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68. *See id.* at 869–79 (plurality opinion). In *Casey*, Justices O'Connor, Kennedy, and Souter wrote a joint opinion that was a majority opinion in certain parts and a plurality opinion in others. Of the six remaining Justices, two urged stronger constitutional protection for the right to abortion and four urged weaker protection. *See id.* at 911–22 (Stevens, J., concurring in part and dissenting in part); *id.* at 922–43 (Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting in part); *id.* at 944–79 (Rehnquist, C.J., joined by White, Scalia, and Thomas, JJ., concurring in the judgment in part and dissenting in part); *id.* at 979–1002 (Scalia, J., joined by Rehnquist, C.J., and by White and Thomas, JJ., concurring in the judgment in part and dissenting in part). As a result, the joint opinion stated a controlling "middle ground" even when it took the form of a plurality opinion.

69. *See id.* at 881–87 (plurality opinion) (overruling various holdings in City of Akron v. Akron Ctr. for Reprod. Health, Inc., 462 U.S. 416 (1983), and in Thornburgh v. Am. Coll. of Obstetricians & Gynecologists, 476 U.S. 747 (1986)).

70. *See id.* at 869–79, 881–87, 899–900.

71. 521 U.S. 702 (1997).

72. *See id.* at 728–35.

73. 530 U.S. 57 (2000).

74. *See id.*

75. 530 U.S. 914 (2000).

76. *See id.* at 929–46. The Supreme Court is revisiting this issue in pending challenges to the federal Partial-Birth Abortion Ban Act of 2003, Pub. L. No. 108-105, 117 Stat. 1201 (codified as amended at 18 U.S.C. § 1531 (Supp. IV 2004)), which likewise fails to include

And in 2003, of course, *Lawrence v. Texas*[77] found and protected a liberty interest in intimate homosexual relationships, an interest that the Court had readily dismissed less than two decades earlier. Eschewing a more narrow ruling based on equal protection,[78] the Court self-consciously (and, to many, surprisingly) elected to decide the case on substantive due process grounds, a choice that permitted and required the Court to revisit and overrule *Bowers*.[79] In the course of its analysis, the Court spoke of privacy as well as liberty, but it did not resurrect the "right of privacy" of old, complete with the strict scrutiny that would follow. Instead, as in *Cruzan* and *Casey*, the Court in *Lawrence* applied a somewhat more lenient balancing approach. Even so, the Court scrutinized the challenged sodomy prohibition with care, not only invalidating the law but also suggesting, more generally, a clear presumption favoring the special liberties of substantive due process.[80]

II. GENERAL CRITERIA OF EVALUATION

As I have just explained, the contemporary Supreme Court has shifted its terminology from the "right of privacy" to "liberty," and it has replaced strict scrutiny with a more open-ended balancing test. In so doing, the Court has formally and significantly moderated the doctrine of substantive due process. At the same time, however, the Court's increasingly flexible approach is more malleable than its previous doctrine, making it all the more obvious that the Court is picking and choosing the liberties that it deems worthy of special protection. And the Court continues to be bold and aggressive, albeit on a highly selectively basis. In *Stenberg*, for example, the Court invalidated a "partial birth abortion" prohibition despite the broad

an exception for non-life-threatening health risks and which lower courts have invalidated on the basis of *Stenberg*. *See* Gonzales v. Carhart, 126 S. Ct. 1314 (2006) (mem.) (granting certiorari to review Carhart v. Gonzales, 413 F.3d 791 (8th Cir. 2005)); Gonzales v. Planned Parenthood Fed'n of Am., Inc., 126 S. Ct. 2901 (2006) (mem.) (granting certiorari to review Planned Parenthood Fed'n of Am., Inc., v. Gonzales, 435 F.3d 1163 (9th Cir. 2006)).

77. 539 U.S. 558 (2003).

78. The challenged law prohibited homosexual but not heterosexual sodomy, creating a strong argument that the law was invalid under the equal protection reasoning of *Romer v. Evans*, 517 U.S. 620 (1996). *See Lawrence*, 539 U.S. at 574–75; *id.* at 579–85 (O'Connor, J., concurring in the judgment). For suggestions that an equal protection ruling in *Lawrence* could have had broader implications than might be apparent, see Pamela S. Karlan, *Loving* Lawrence, 102 MICH. L. REV. 1447, 1458–63 (2004); Tribe, *supra* note 9, at 1908–09 n.56.

79. Bowers v. Hardwick, 478 U.S. 186 (1986); *see Lawrence*, 539 U.S. at 574–75, 578.

80. *See infra* Part IV.

political sentiment that favors such a ban.[81] And in *Lawrence*, the Court reached out to overrule an existing precedent, and a relatively recent one at that,[82] thereby thrusting itself once again onto the cultural battlefield of contemporary America.

That substantive due process continues to flourish is hardly enough to justify the doctrine's constitutional legitimacy.[83] The Court's decisions—from *Lochner*[84] to *Lawrence*—have little or no support in the constitutional text. "Liberty" is a very fine thing, but only its deprivation "*without due process of law*" violates the text of the Fourteenth Amendment. Nor is there any persuasive evidence that the framers and ratifiers of the Due Process Clause, despite their chosen language, nonetheless intended to protect the substantive liberties that the Court has elected to privilege. Likewise, and perhaps more to the point, there is no persuasive evidence that these liberties were embraced by the original, objective public meaning[85] of the clause.[86] It seems plain that substantive due process grants constitutional protection to rights that are neither enumerated in the text nor grounded in the original meaning of the Fourteenth

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81. *See* Stenberg v. Carhart, 530 U.S. 914 (2000); *id.* at 979 (Kennedy, J., dissenting) (noting that the Court's decision had the effect of repudiating comparable prohibitions in some thirty states).

82. *See* Lawrence v. Texas, 539 U.S. 558, 578 (2003) (overruling Bowers v. Hardwick, 478 U.S. 186 (1986)).

83. On the various meanings and interrelated components of constitutional legitimacy—legal, sociological, and moral—in the context of judicial decisionmaking, see Richard H. Fallon, Jr., *Legitimacy and the Constitution*, 118 HARV. L. REV. 1787, 1813–42, 1847–51 (2005).

84. Lochner v. New York, 198 U.S. 45 (1905).

85. According to Vasan Kesavan and Michael Stokes Paulsen, originalist theories of constitutional interpretation have evolved and matured over the last several decades, with the focus gradually shifting from the "original intent" of the framers to the "original understanding" of the ratifiers and then on to the "original meaning" of the constitutional text. Vasan Kesavan & Michael Stokes Paulsen, *The Interpretive Force of the Constitution's Secret Drafting History*, 91 GEO. L.J. 1113, 1134–48 (2003). Endorsing the "original meaning" approach, Kesavan and Paulsen explain that it "asks not what the Framers or Ratifiers meant or understood subjectively, but what their words would have meant objectively—how they would have been understood by an ordinary, reasonably well-informed user of the language, in context, at the time, within the relevant political community that adopted them." *Id.* at 1144–45 (footnote omitted); *see id.* at 1127–33, 1139–48.

86. One might creatively argue otherwise, but only by reading the original meaning of the Fourteenth Amendment at an extremely general—and therefore largely unconstraining—level of abstraction. *See, e.g.*, William N. Eskridge, Jr., Lawrence*'s Jurisprudence of Tolerance: Judicial Review to Lower the Stakes of Identity Politics*, 88 MINN. L. REV. 1021, 1051–58 (2004) (contending that the Court's decision in *Lawrence* can be defended under a "legal process" reading of the Fourteenth Amendment's original meaning).

Amendment. Instead, the Court is protecting values that emerge from a process of nonoriginalist judicial decisionmaking.[87]

Needless to say, the identification and protection of unenumerated, nonoriginalist constitutional rights by the unelected Supreme Court—with the Court nullifying legislative judgments on fundamental questions of political morality—is a highly controversial practice. As a result, it is hardly surprising that some have condemned the entire enterprise of substantive due process, calling it an unjustified judicial usurpation of political power and a flagrant

87. Even though the Supreme Court's particular decisions cannot be traced to the original meaning of the Fourteenth Amendment, one might argue, more generally, that the original meaning supports the Court's recognition of unenumerated rights that were not specifically contemplated when the Fourteenth Amendment was adopted. An originalist argument of this sort might rely not only on the Due Process Clause but also on the Privileges or Immunities Clause, perhaps read in conjunction with the Ninth Amendment. Professor (now Judge) Michael W. McConnell, for example, has argued that the original meaning of the Privileges or Immunities Clause, read alongside the Due Process Clause, supports the protection of unenumerated rights identified in accordance with the theory of historical tradition. *See* Michael W. McConnell, *The Right to Die and the Jurisprudence of Tradition*, 1997 UTAH L. REV. 665, 691–98. More controversially, one might argue that the original meaning of the Fourteenth Amendment supports the judicial recognition of a broader set of evolving constitutional rights. *See* ELY, *supra* note 26, at 28 (contending that "the most plausible interpretation of the Privileges or Immunities Clause is ... that it was a delegation to future constitutional decision-makers to protect certain rights that the document neither lists, at least not exhaustively, nor even in any specific way gives directions for finding"); *cf. Lawrence*, 539 U.S. at 578–79 (stating that the framers and ratifiers of the Due Process Clause did not presume to know "the components of liberty in its manifold possibilities," leaving it to "later generations" to determine when "laws once thought necessary and proper in fact serve only to oppress"). *See generally* Suzanna Sherry, *The Founders' Unwritten Constitution*, 54 U. CHI. L. REV. 1127, 1161–67 (1987) (arguing that the founding generation, including the framers and ratifiers of the Ninth Amendment, intended the judiciary to protect unenumerated natural rights, including rights that might be newly discovered).

In effect, historical claims along these lines amount to originalist arguments for nonoriginalist judicial decisionmaking. Thus, even under the approach of historical tradition, as discussed by McConnell, the Supreme Court is required to look beyond the constitutional text and its original meaning. *See* McConnell, *supra*, at 695 (noting that rights protected as a matter of historical tradition "may change as society changes"). Likewise, of course, the more expansive theories of substantive due process also take the Court beyond the text and original meaning of the Fourteenth Amendment.

As Kesavan and Paulsen have explained, originalism comes in various forms, but, in its essence, originalism "maintain[s] that constitutional interpretation should be constrained by the 'original intent' of the Framers, the 'original understanding' of the Ratifiers, or the hypothesized, objective 'original meaning' of the Constitution's text." Kesavan & Paulsen, *supra* note 85, at 1127. For present purposes, the key word in this definition is "constrained." In my view, the Court's substantive due process decisionmaking is not meaningfully constrained by the original intent, the original understanding, or the original meaning of the Fourteenth Amendment. As a result, the Court's decisionmaking is best described as nonoriginalist, and it is properly evaluated as such.

violation of the basic principle of majoritarian self-government.[88] But even in the midst of our contemporary culture wars, categorical critics of substantive due process are remarkably few in number. To be sure, the Supreme Court's particular decisions are hotly contested, both in dissenting opinions and in the broader political community. But substantive due process, in one form or another, has been endorsed or accepted by a wide range of contemporary Justices,[89] and there likewise appears to be broad political support for at least a limited judicial role in protecting unenumerated constitutional rights.[90] It seems that the language and original meaning of the Due Process Clause have been overtaken by a contemporary consensus that the Supreme Court should protect, as constitutional rights, not only rights that were originally contemplated when the Fourteenth Amendment was adopted but also other rights that somehow call out for judicial protection.

Taking this consensus as a given, the debatable question is not whether the Supreme Court should maintain a doctrine of substantive due process.[91] Rather, the question is how this doctrine should be formulated and applied. Even so, this latter inquiry has implications for the more general question of the legitimacy of substantive due process. Some conceptions or theories of substantive due process

88. The most prominent such critic undoubtedly is Robert H. Bork. *See* ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 31–32, 110–26, 180 (1990); *see also, e.g.*, Nelson Lund & John O. McGinnis, Lawrence v. Texas *and Judicial Hubris*, 102 MICH. L. REV. 1555, 1557 (2004) (calling substantive due process "the most anticonstitutional branch of constitutional law").

89. On the current Supreme Court, only Justices Thomas and Scalia have suggested that they might be prepared to repudiate substantive due process categorically. *See, e.g.*, Troxel v. Granville, 530 U.S. 57, 80 (2000) (Thomas, J., concurring in the judgment) (leaving open the possibility "that our substantive due process cases were wrongly decided and that the original understanding of the Due Process Clause precludes judicial enforcement of unenumerated rights under that constitutional provision"); Albright v. Oliver, 510 U.S. 266, 275–76 (1994) (Scalia, J., concurring) (rejecting "the proposition that the Due Process Clause guarantees certain (unspecified) liberties" but acknowledging that "this Court's current jurisprudence is otherwise").

90. This political support can be traced in part to 1987, when, after highly publicized hearings, the Senate refused to confirm Robert H. Bork's nomination to the Supreme Court. Professor Laurence H. Tribe has described this episode as a national "seminar on constitutional law" and "a virtual national referendum" on the Constitution's protection of unenumerated rights. *See* Tribe, *supra* note 9, at 1902 n.28.

91. As Professor Richard B. Saphire has written, "it is hard to know what to say to someone who [completely rejects substantive due process]," because "it is difficult to imagine anything less probable in the modern world of constitutional jurisprudence than the prospect that the Court (anytime soon) will repudiate its substantive due process doctrine." Richard B. Saphire, *Doris Day's Constitution*, 46 WAYNE L. REV. 1443, 1469–70 (2000).

may be more defensible than others, and, indeed, if none is defensible, then the consensus favoring substantive due process might itself be put in question.[92]

Particular conceptions or theories of substantive due process can be evaluated under three criteria.[93] First, how or to what extent can the Court's decisionmaking be reconciled with the principle of majoritarian self-government?[94] Whatever its continuing salience in other contexts, Professor Alexander M. Bickel's "countermajoritarian difficulty"[95] is alive and well—both as a matter of constitutional theory and as a matter of popular debate—when the Court invokes substantive due process to invalidate legislation and thus to repudiate

92. As indicated earlier, I believe that substantive due process is properly regarded as a nonoriginalist constitutional doctrine. *See supra* note 87. But even if I am mistaken in that conclusion, the analysis that I am about to develop might be relevant and helpful nonetheless. Thus, even if the original meaning of the Fourteenth Amendment could be read to justify substantive due process, the original meaning might not resolve the more specific question of how the Supreme Court should formulate and apply this doctrine; that is, it might not resolve the methodological question of how the Court should determine the content of substantive due process rights. *Cf.* MICHAEL J. PERRY, THE CONSTITUTION IN THE COURTS: LAW OR POLITICS? 58 (1994) (arguing that "[t]he originalist approach ... leaves ample room for the play of competing views about how the Court should resolve indeterminate inquiries into original meaning"); Saphire, *supra* note 91, at 1445–46, 1454–59 (noting that the distinction between originalism and nonoriginalism is not clear-cut, at least not when originalism is conceived as broadly as Professor Perry and others have lately conceived it). Conversely, even if the original meaning did provide clear guidance on the substantive due process methodology that the Court should utilize, the Court might not agree that it should be confined to that original meaning. To the extent that the Supreme Court either cannot or will not rely on the original meaning of the Fourteenth Amendment to answer the question of methodology, of course, it necessarily will resolve this question by other means. And in so doing, the Court would do well to consider criteria of the sort that I describe in the text.

93. Needless to say, there may be other criteria as well.

94. This principle is fundamental and longstanding in the American constitutional system, tracing its ancestry to the Declaration of Independence itself. *See* THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) ("Governments are instituted among Men, deriving their just powers from the consent of the governed ...."). As the late Professor John Hart Ely explained, constitutional amendments have repeatedly expanded the franchise and thereby have "substantially strengthened the original commitment to control by a majority of the governed." *See* ELY, *supra* note 26, at 7. Although Ely agreed that there are limitations on this commitment, he concluded that "rule in accord with the consent of a majority of those governed is the core of the American governmental system." *Id. But cf.* Rebecca L. Brown, *Accountability, Liberty, and the Constitution*, 98 COLUM. L. REV. 531, 535 (1998) (conceding the importance of political accountability but contending that its primary purpose is not so much to serve majoritarianism as to advance liberty in a constitutional system that includes a judicial branch empowered to protect individual rights).

95. *See* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 16–23 (1962).

the judgments of elected officials.[96] Let us call this first criterion of evaluation *the criterion of majoritarian self-government.*

Second, how or to what extent does the Court's methodology provide a basis of decisionmaking that is appropriate and fitting for judges? Courts are not "naked power organ[s]."[97] Rather, as Justice Cardozo insisted, their task is that "of a translator, the reading of signs and symbols given from without."[98] Judicial decisionmaking should be principled and consistent. It should be based upon objectively determined values, not merely the judges' own,[99] and the determination of these governing values should be within the judicial ken. Let us call this second criterion *the criterion of judicial objectivity and competence.*[100]

Third, how or to what extent does the Court's decisionmaking serve an important function in contemporary American government? As a nonoriginalist constitutional doctrine, substantive due process requires a contemporary justification, a justification based on the function that it serves. Even if substantive due process can be reconciled with the principle of majoritarian self-government and

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96. For a general discussion of the countermajoritarian difficulty, its influential role in contemporary constitutional theory, and an argument that this difficulty has been overstated, see DANIEL A. FARBER & SUZANNA SHERRY, DESPERATELY SEEKING CERTAINTY: THE MISGUIDED QUEST FOR CONSTITUTIONAL FOUNDATIONS 142–51 (2002).

97. Courts "are bound to function otherwise than as a naked power organ; they participate as courts of law." Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 19 (1959).

98. BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 174 (1921).

99. To be sure, judges cannot completely immunize their judicial decisionmaking from their personal beliefs and values. As Cardozo conceded, "We may try to see things as objectively as we please. None the less, we can never see them with any eyes except our own." *Id.* at 13. Even so, and despite the claims of legal realism, judicial objectivity has been and remains a fundamental legal norm and a professional ethic that responsible judges embrace and strive to honor. *Cf.* William P. Marshall, *Constitutional Law as Political Spoils*, 26 CARDOZO L. REV. 525, 537 (2005) ("The problem with wholly succumbing to the realist vision . . . is that it completely abandons the notion that judges should at least aspire to decide cases on grounds other than their own pre-existing philosophical or political dispositions.").

100. As Professor William P. Marshall has explained, there is a growing political perception, both on the left and the right, that the Supreme Court does not honor this criterion, and this perception has triggered a damaging and polarizing "downward spiral" of ideological battles over Supreme Court nominations. Marshall, *supra* note 99, at 541; *see id.* at 527–41. *See generally* Symposium, *Jurocracy and Distrust: Reconsidering the Federal Judicial Appointments Process*, 26 CARDOZO L. REV. 331 (2005) (offering other perspectives and additional commentary). The Court cannot by itself resolve the judicial nominations problem, but it can facilitate its potential resolution by adopting decisionmaking methodologies that honor and (re)affirm the importance of judicial objectivity and competence, even—and perhaps especially—in the resolution of controversial constitutional questions.

even if it can be conducted in a manner befitting the judicial role, there is no reason to embrace it unless it advances or improves contemporary governance and policymaking in the United States. We can label this final criterion *the criterion of functional justification.*[101]

Each of these three criteria is a matter of degree. Moreover, the relative importance of each criterion, as compared to the others, is a matter of debate. Nevertheless, these criteria establish a useful framework for evaluating competing theories of substantive due process, including the theories of historical tradition, reasoned judgment, and evolving national values.

III. THE THEORIES OF HISTORICAL TRADITION AND REASONED JUDGMENT

At least prior to *Lawrence*,[102] two theories dominated the Supreme Court's decisionmaking: historical tradition and reasoned judgment. In its 1986 decision in *Bowers*,[103] and again in *Glucksberg*,[104] decided in 1997, the Court insisted—and emphasized—that substantive due process protects only those liberties, narrowly and specifically defined, that are " 'deeply rooted in this Nation's history and tradition.' "[105] Under this theory, neither homosexual conduct nor physician-assisted suicide qualified for constitutional protection. Falling midway between these two rulings, however, was the Court's 1992 decision in *Casey*,[106] reaffirming *Roe v. Wade*'s

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101. What Professor Bickel wrote of judicial review in general is especially fitting in the context of substantive due process:

> The search must be for a function which might (indeed, must) involve the making of policy, yet which differs from the legislative and executive functions; which is peculiarly suited to the capabilities of the courts; which will not likely be performed elsewhere if the courts do not assume it; which can be so exercised as to be acceptable in a society that generally shares Judge [Learned] Hand's satisfaction in a "sense of common venture"; which will be effective when needed; and whose discharge by the courts will not lower the quality of the other departments' performance by denuding them of the dignity and burden of their own responsibility.

BICKEL, *supra* note 95, at 24.

102. Lawrence v. Texas, 539 U.S. 558 (2003).

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

104. Washington v. Glucksberg, 521 U.S. 702 (1997).

105. *See Bowers*, 478 U.S. at 192 (quoting Moore v. City of E. Cleveland, 431 U.S. 494, 503 (1977) (plurality opinion)); *Glucksberg*, 521 U.S. at 721 (quoting *Moore*, 431 U.S. at 503 (plurality opinion)).

106. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992).

protection of abortion rights.[107] In apparent recognition that *Roe* could not be defended on the basis of historical tradition, *Casey* invoked a much broader theory, that of reasoned judgment.[108] *Casey* simply ignored *Bowers*. In *Glucksberg*, the Court acknowledged *Casey* and its reaffirmation of *Roe*, but it did little to explain the radically different methodologies in the Court's two competing lines of substantive due process decisions.[109] In reality, as the following discussion will demonstrate, each of these competing approaches has substantial grounding in the Supreme Court's precedents, and each can be defended as a matter of constitutional policy.[110]

A. *The Theory of Historical Tradition*

1. *Bowers*, *Glucksberg*, and Their Jurisprudential Antecedents

The approach of *Bowers* and *Glucksberg* was foreshadowed by earlier opinions. Perhaps the most celebrated judicial invocation of tradition came from the eloquent pen of Justice Harlan, writing in the 1961 case of *Poe v. Ullman*.[111] *Poe* involved a substantive due process challenge to the same Connecticut statute that the Supreme Court later would invalidate in *Griswold v. Connecticut*[112]—a statute criminalizing the use of contraceptives, even by married couples. The Court dismissed the challenge in *Poe* for lack of justiciability,[113] but Harlan dissented, reaching the merits and finding a violation of due process.[114] Harlan's understanding of due process included the notion of a living tradition, but he also emphasized the importance of history and the need for objective judicial decisionmaking:

> Due process has not been reduced to any formula; its content cannot be determined by reference to any code. 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. If the supplying of content to this Constitutional

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107. *See* Roe v. Wade, 410 U.S. 113 (1973).
108. *See Casey*, 505 U.S. at 849.
109. *See Glucksberg*, 521 U.S. at 726–28.
110. Here and in the discussion that follows, when I speak of "constitutional policy" I am referring to the criteria of evaluation that I set out earlier. *See supra* Part II.
111. 367 U.S. 497 (1961).
112. 381 U.S. 479 (1965).
113. *See Poe*, 367 U.S. at 508–09 (plurality opinion); *id.* at 509 (Brennan, J., concurring in the judgment).
114. *See id.* at 522–55 (Harlan, J., dissenting).

> concept has of necessity been a rational process, it certainly has not been one where judges have felt free to roam where unguided speculation might take them. The balance of which I speak 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. A decision of this Court which radically departs from it could not long survive, while a decision which builds on what has survived is likely to be sound.[115]

Utilizing this analysis, Harlan concluded that "a statute making it a criminal offense for *married couples* to use contraceptives is an intolerable and unjustifiable invasion of privacy in the conduct of the most intimate concerns of an individual's personal life."[116] Harlan accepted the constitutionality of state laws regulating marriage and banning nonmarital sexual relations, noting that they "form a pattern so deeply pressed into the substance of our social life that any Constitutional doctrine in this area must build upon that basis."[117] But he noted that "the intimacy of husband and wife is necessarily an essential and accepted feature of the institution of marriage, an institution which the State not only must allow, but which always and in every age it has fostered and protected."[118] Harlan also emphasized "the utter novelty" of the Connecticut statute: "Although the Federal Government and many States have at one time or other had on their books statutes forbidding or regulating the distribution of contraceptives, none, so far as I can find, has made the *use* of contraceptives a crime."[119]

Another elaboration and application of a tradition-based approach came some years later, in the Court's 1977 decision in *Moore v. City of East Cleveland*.[120] In *Moore*, the Court invalidated an East Cleveland housing ordinance that limited the occupancy of a dwelling unit to members of a single nuclear family, holding that the ordinance violated the due process rights of a grandmother who

115. *Id.* at 542. Later I will contend that Harlan's opinion need not be read to support the theory of historical tradition, as applied in *Bowers* and *Glucksberg*. Instead, his opinion can be read more broadly, in a manner that might support the theory of evolving national values. *See infra* Part V.

116. *Poe*, 367 U.S. at 539 (Harlan, J., dissenting).

117. *Id.* at 546.

118. *Id.* at 553.

119. *Id.* at 554.

120. 431 U.S. 494 (1977).

wished to live with her son and two grandsons, who were cousins.[121] Writing for a plurality of four, Justice Powell quoted Harlan's description of the Court's function in giving substantive content to the Due Process Clause, emphasizing the importance of that function but also noting its risks, "lest the only limits to such judicial intervention become the predilections of those who happen at the time to be Members of this Court."[122] "Appropriate limits on substantive due process," Powell stated, "come not from drawing arbitrary lines but rather from careful 'respect for the teachings of history [and] solid recognition of the basic values that underlie our society.' "[123] Powell argued that "an approach grounded in history imposes limits on the judiciary that are more meaningful" than any that might arise from a more abstract evaluation of "the concept of ordered liberty."[124]

Turning to the case at hand, Powell cited the historical stature of the family in American law and culture, and he concluded that "the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition."[125] This historical tradition, moreover, is not limited to the nuclear family. Instead, Powell wrote, "[t]he tradition of uncles, aunts, cousins, and especially grandparents sharing a household along with parents and children has roots equally venerable and equally deserving of constitutional recognition."[126] This tradition, Powell continued, reflects "the accumulated wisdom of civilization, gained over the centuries and honored throughout our history."[127] As a result, the challenged housing ordinance was not entitled to judicial deference; it demanded careful judicial review, and it could not survive that scrutiny.[128]

121. *See id.* at 506 (plurality opinion); *id.* at 521 (Stevens, J., concurring in the judgment).

122. *See id.* at 502 (plurality opinion).

123. *Id.* at 503 (quoting Griswold v. Connecticut, 381 U.S. 479, 501 (1965) (Harlan, J., concurring)).

124. *See id.* at 503 n.12 (citing and criticizing the "abstract formula" of Palko v. Connecticut, 302 U.S. 319, 325, 326 (1937), a standard calling for special protection of rights that are "implicit in the concept of ordered liberty" such that "neither liberty nor justice would exist if they were sacrificed"). *But cf. Moore*, 431 U.S. at 548–50 (White, J., dissenting) (suggesting that the *Palko* formulation would protect a more restricted set of liberties than Powell's tradition-based approach).

125. *Moore*, 431 U.S. at 503 (plurality opinion).

126. *Id.* at 504.

127. *Id.* at 505.

128. *See id.* at 498–500, 505–06.

Dissenting from the Court's decision in *Moore*, Justice White grudgingly accepted the doctrine of substantive due process even as he highlighted its tenuous constitutional underpinnings:

> Although the Court regularly proceeds on the assumption that the Due Process Clause has more than a procedural dimension, we must always bear in mind that the substantive content of the Clause is suggested neither by its language nor by preconstitutional history; that content is nothing more than the accumulated product of judicial interpretation . . . .[129]

Continuing, White noted that the Supreme 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."[130] Although he did not suggest that existing precedents should be overruled, White argued that "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."[131] Otherwise, he concluded, the Court would "unavoidably pre-empt[] for itself another part of the governance of the country without express constitutional authority."[132]

Nine years after *Moore*, Justice White found himself writing for the Court in *Bowers v. Hardwick*.[133] Echoing his dissenting opinion in *Moore* but speaking now for a majority, White reiterated that substantive due process has "little or no cognizable roots in the language or design of the Constitution,"[134] and he stated that "[t]here should be, therefore, great resistance to expand the substantive reach of [due process], particularly if it requires redefining the category of rights deemed to be fundamental."[135] Although White had criticized the use of historical tradition as a source of rights in *Moore*,[136] he now embraced *Moore*'s emphasis on history and suggested that substantive due process protection—at least in the absence of preexisting precedent—should be confined to "those liberties that are 'deeply rooted in this Nation's history and tradition.' "[137] Justice

129. *Id.* at 543–44 (White, J., dissenting).
130. *Id.* at 544.
131. *Id.*
132. *Id.*
133. 478 U.S. 186 (1986).
134. *Id.* at 194.
135. *Id.* at 195.
136. *See Moore*, 431 U.S. at 549–50 (White, J., dissenting).
137. *Bowers*, 478 U.S. at 192 (quoting *Moore*, 431 U.S. at 503 (plurality opinion)).

White also recited the more abstract formulation of *Palko v. Connecticut*,[138] which would protect rights that are " 'implicit in the concept of ordered liberty,' such that 'neither liberty nor justice would exist if [they] were sacrificed.' "[139] But this alternative formulation appeared to be doing no work at all. Instead, White's analysis for the Court was strictly historical.[140]

Applying *Moore*'s historical approach to the substantive due process claim presented in *Bowers*, Justice White had little difficulty rejecting it:

> Sodomy was a criminal offense at common law and was forbidden by the laws of the original 13 States when they ratified the Bill of Rights. In 1868, when the Fourteenth Amendment was ratified, all but 5 of the 37 States in the Union had criminal sodomy laws. In fact, until 1961, all 50 States outlawed sodomy, and today, 24 States and the District of Columbia continue to provide criminal penalties for sodomy performed in private and between consenting adults.[141]

"Against this background," Justice White concluded, any claim of a historical right to engage in such conduct "is, at best, facetious."[142] Applying an exceedingly deferential standard of review and noting that the law "is constantly based on notions of morality," White upheld Georgia's criminal sodomy prohibition based on "the presumed belief of a majority of the electorate in Georgia that homosexual sodomy is immoral and unacceptable."[143]

The dissenters in *Bowers* condemned the Court's narrow focus on historical tradition,[144] arguing that the Court instead should play a far more creative role in defining " 'the most comprehensive of rights and the right most valued by civilized men,' namely, 'the right to be

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138. 302 U.S. 319 (1937).

139. *See Bowers*, 478 U.S. at 191–92 (quoting *Palko*, 302 U.S. at 325, 326).

140. *See id.* at 191–95.

141. *Id.* at 192–94 (footnotes omitted); *see also id.* at 192 (noting that proscriptions against sodomy have "ancient roots").

142. *Id.* at 194; *see also id.* at 197 (Burger, C.J., concurring) ("To hold that the act of homosexual sodomy is somehow protected as a fundamental right would be to cast aside millennia of moral teaching."); *cf. id.* at 198 n.2 (Powell, J., concurring) (noting that recent decades of prosecutorial nonenforcement and legislative repeal suggest "the moribund character today of laws criminalizing this type of private, consensual conduct," but concluding that, "for the reasons stated by the Court, I cannot say that conduct condemned for hundreds of years has now become a fundamental right").

143. *Id.* at 196 (majority opinion).

144. *See id.* at 199–200 (Blackmun, J., dissenting).

let alone.' "[145] Some years later, in *Casey*,[146] the *Bowers* dissenters may have found partial vindication in the Court's reasoned judgment methodology, as discussed below.[147] But later still, in *Washington v. Glucksberg*,[148] the approach of *Moore* and *Bowers* returned to center stage.

In *Glucksberg*, the Supreme Court held that there is no substantive due process right to physician-assisted suicide, not even for competent adults facing terminal illnesses.[149] Sounding themes very similar to those invoked in *Bowers*, the Court noted its reluctance to expand the scope of substantive due process, and it emphasized the importance of objective judicial standards.[150] As in *Bowers*, the Court also mentioned "the concept of ordered liberty," but it now appeared that the only function of this language might be to *further confine* the set of historical rights warranting constitutional protection. "Our established method of substantive-due-process analysis," the Court declared, gives special protection to "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.' "[151] In any event, the Court made it clear that no claim would succeed in the absence of historical support for the asserted liberty interest, specifically and narrowly defined on the basis of "careful description":[152] "Our Nation's history, legal traditions, and practices ... provide the crucial 'guideposts for responsible

145. *Id.* at 199 (Brandeis, J., dissenting) (quoting Olmstead v. United States, 277 U.S. 438, 478 (1928)).

146. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992).

147. *See infra* Part III.B.1.

148. 521 U.S. 702 (1997).

149. *Id.* at 735. The Court was unanimous in rejecting the constitutional claim, but it was more divided in its reasoning. Even so, five Justices fully joined the majority opinion, including its discussion of substantive due process methodology. Justice O'Connor was among these five, although she also wrote a brief concurring opinion. In her separate opinion, O'Connor questioned the majority's characterization of the precise issue at hand and left open the possibility of a viable constitutional claim in extreme circumstances, in particular, if the dying individual was experiencing great pain or suffering that could not be alleviated by medication. *See id.* at 736–38 (O'Connor, J., concurring).

150. *See id.* at 720 (majority opinion).

151. *Id.* at 720–21 (emphasis added) (citation omitted) (quoting Moore v. City of E. Cleveland, 431 U.S. 494, 503 (1977) (plurality opinion); Palko v. Connecticut, 302 U.S. 319, 325, 326 (1937)).

152. *Id.* at 721 (quoting Reno v. Flores, 507 U.S. 292, 302 (1993)); *see also id.* at 722–23 (narrowly defining the asserted liberty interest in the case at hand); *cf.* Michael H. v. Gerald D., 491 U.S. 110, 127 n.6 (1989) (Scalia, J., joined by Rehnquist, C.J.) ("We refer to the most specific level at which a relevant tradition protecting, or denying protection to, the asserted right can be identified.").

decisionmaking' that direct and restrain our exposition of the Due Process Clause."[153] Explicitly rejecting a more expansive methodology advocated by Justice Souter in his separate opinion,[154] the Court argued that its tradition-based approach was a "restrained methodology" that minimized the risk of subjective judicial decisionmaking.[155]

Based upon its detailed historical review[156] of "our Nation's traditions" as they relate to suicide and assisted suicide, the Court found "a consistent and almost universal tradition that has long rejected the asserted right, and continues explicitly to reject it today, even for terminally ill, mentally competent adults."[157] It noted that "[f]or over 700 years, the Anglo-American common-law tradition has punished or otherwise disapproved of both suicide and assisting suicide,"[158] and that, with rare exception, "our laws have consistently condemned, and continue to prohibit, assisting suicide."[159] As a matter of contemporary law, the Court observed, "[i]n almost every State—indeed, in almost every western democracy—it is a crime to assist a suicide."[160] To recognize the asserted constitutional right in this case, the Court concluded, would require it "to reverse centuries of legal doctrine and practice, and strike down the considered policy choice of almost every State."[161] Applying rational basis review, the Court readily upheld Washington's criminal prohibition on assisted suicide, citing, among other grounds, the State's " 'unqualified interest in the preservation of human life' "[162] as well as the State's

153. *Glucksberg*, 521 U.S. at 721 (quoting Collins v. Harker Heights, 503 U.S. 115, 125 (1992)).

154. *See id.* at 765–73 (Souter, J., concurring in the judgment). For a discussion of Souter's opinion and the methodology it employs, see *infra* Part V.A.

155. *See Glucksberg*, 521 U.S. at 721–22. *See generally* Robert C. Post, *The Supreme Court, 2002 Term—Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 HARV. L. REV. 4, 91 (2003) (arguing that *Glucksberg* "proposed a profound reconceptualization of substantive due process" by restricting the Court to a tradition-based inquiry and by "impos[ing] a straitjacket" on that inquiry).

156. *See Glucksberg*, 521 U.S. at 710–19.

157. *Id.* at 723.

158. *Id.* at 711.

159. *Id.* at 719.

160. *Id.* at 710.

161. *Id.* at 723.

162. *Id.* at 728 (quoting Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261, 282 (1990)). The Court explained that states " 'may properly decline to make judgments about the "quality" of life that a particular individual may enjoy,' ... even for those who are near death." *Id.* at 729–30 (quoting *Cruzan*, 497 U.S. at 282).

interests in protecting vulnerable patients and in preserving the role of the physician as healer.[163]

The Court distinguished its earlier decision in *Cruzan*[164] as one that protected "the traditional right to refuse unwanted lifesaving medical treatment,"[165] a right derived from "the common-law rule that forced medication was a battery" and "the long legal tradition protecting the decision to refuse unwanted medical treatment."[166] The Court could not distinguish *Roe* or *Casey* on the basis of tradition, however, and it made no attempt to do so, stating only that substantive due process protection for personal autonomy in certain contexts, including abortion, does not mean that "any and all important, intimate, and personal decisions are so protected."[167] In fact, as we will see, the decisionmaking methodology that the Court employed in *Casey* (and that it had employed in *Roe*) might well have required a different result in *Glucksberg*.[168] But the Court in *Glucksberg* appeared to view *Casey* (and therefore *Roe*) as aberrational, asserting that whatever the methodology of *Casey*, it should not be understood to "jettison our established approach" to substantive due process.[169]

2. Evaluating the Theory of Historical Tradition

Notwithstanding the Court's bold assertions in *Glucksberg*, the theory of historical tradition was not then and is not now the Court's "established approach" to substantive due process. Instead, it was then and is now a deeply contested theory, one that the Court has followed in some but not all of its contemporary decisionmaking. Even so, this theory has much to commend it as a matter of constitutional policy.

Recall my three criteria of evaluation: majoritarian self-government, judicial objectivity and competence, and functional justification.[170] Under the first criterion, the question is how or to what extent a particular theory can be reconciled with the principle of majoritarian self-government. By its very nature, substantive due process permits the Supreme Court, with little or no support from the

163. *See id.* at 728–35.
164. Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261 (1990).
165. *Glucksberg*, 521 U.S. at 720.
166. *Id.* at 725.
167. *See id.* at 726–27.
168. *See infra* Part IV.
169. *See Glucksberg*, 521 U.S. at 721 n.17.
170. *See supra* Part II.

text or original meaning of the Constitution, to invalidate legislation and thus to repudiate the judgments of elected officials. As a result, *all* theories of substantive due process—that is, all theories that countenance this doctrine in any form—are in serious tension with the principle of majoritarian self-government. Nevertheless, the theory of historical tradition permits substantive due process to operate in *relative* harmony with this basic and longstanding democratic precept.

In the words of Justice Harlan's opinion in *Poe*, this theory calls for the Court to identify "the balance which our Nation . . . has struck between [the liberty of the individual] and the demands of organized society," that is, "the balance struck by this country."[171] As elaborated in *Moore* and *Bowers*, and as further refined in *Glucksberg*, this approach requires the Court to define the constitutional claim narrowly and with precision. The Court then must canvass American social and legal history (and its antecedents), working from the past to the present, to determine whether the claim has broad and longstanding historical as well as contemporary support.[172] Only if the asserted individual right is "deeply rooted" in American history will the right be eligible for special constitutional protection, that is, protection from aberrational legal policies that depart from the national historical pattern. As Justice Harlan argued in *Poe* and as Justice Powell concluded in *Moore*, the requisite historical support can be found for the protection of marital intimacy from intrusive regulation[173] and for the right of families, including extended families, to live together as family units.[174] But as the Court held in *Bowers* and *Glucksberg*, the same cannot be said of homosexual intimacy[175] or physician-assisted suicide.[176]

Under this theory of substantive due process, it is our national history that delimits and circumscribes the rights that qualify for special protection. And this national history is itself revealed by "deeply rooted" societal patterns and legal policies. These societal patterns and legal policies, especially those that have been embodied in legislation, can fairly be described as majoritarian. It is more

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171. Poe v. Ullman, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting).

172. *See* McConnell, *supra* note 87, at 671 (noting that the Court's inquiry properly extends to the present in order to ensure that historical practices "continue[] to reflect the mores of the nation").

173. *See Poe*, 367 U.S. at 539, 553–55 (Harlan, J., dissenting).

174. *See* Moore v. City of E. Cleveland, 431 U.S. 494, 503–05 (1977) (plurality opinion).

175. *See* Bowers v. Hardwick, 478 U.S. 186, 192–94 (1986).

176. *See* Washington v. Glucksberg, 521 U.S. 702, 710–19, 723 (1997).

difficult to make this claim for common law doctrines, but they, too, have at least been subject to the possibility of legislative control or correction. In short, the theory of historical tradition is in relative harmony with the principle of majoritarian self-government because it protects liberties that, over time, have been recognized, approved, and maintained by the American people and by their elected representatives.[177]

This theory also fares well under my second criterion, that of judicial objectivity and competence. Before embracing this approach in *Bowers*, Justice White had argued earlier, in *Moore*, that it does not provide an adequate standard for judicial decisionmaking. "What the deeply rooted traditions of the country are is arguable," he wrote, and "which of them deserve the protection of the Due Process Clause is even more debatable."[178] Especially as refined in *Glucksberg*, however, the approach of historical tradition provides an objective standard of decisionmaking, and it is a standard that judges are competent to employ on a consistent and principled basis. This standard substantially restricts the Court's discretion, precluding it from recognizing an unenumerated constitutional right—no matter how attractive the Justices otherwise might find it—unless the right can be derived, objectively, from an examination of the Nation's history and traditions.

To be sure, this approach does not create a litmus test, but it does provide clear guidelines. According to *Glucksberg*, the Court is to test the asserted claim of constitutional protection, narrowly and specifically defined, against the Nation's traditional treatment of the claim—as revealed by historical practices, including especially our legal traditions. The Court's focus on the particular claim at hand, narrowly defined, is a critical element of this theory. As Professors Laurence H. Tribe and Michael C. Dorf have noted, "historical traditions, like rights themselves, exist at various levels of generality."[179] Tribe and Dorf contend that determining the proper level of generality is a value-laden choice and is prone to judicial

177. *Cf.* McConnell, *supra* note 87, at 682 (noting that, like formally adopted constitutional text, "[l]ongstanding consensus similarly reflects a supermajority of the people, expressed through decentralized institutions"); Michael W. McConnell, *Textualism and the Dead Hand of the Past*, 66 GEO. WASH. L. REV. 1127, 1136 (1998) ("[T]he interpreter looks at what decentralized and representative bodies have done, over time, and treats their consensus as authoritative.").

178. *Moore*, 431 U.S. at 549 (White, J., dissenting).

179. Laurence H. Tribe & Michael C. Dorf, *Levels of Generality in the Definition of Rights*, 57 U. CHI. L. REV. 1057, 1088 (1990).

manipulation.[180] But under the theory of historical tradition, as articulated in *Glucksberg*, the potential for value-laden judicial manipulation is substantially reduced.

In deciding any case, whether constitutional or otherwise, the Supreme Court (like any court) must describe the scope of the legal issue or legal claim at hand. In the context of substantive due process, according to *Glucksberg*, the Court is to describe the claim narrowly rather than broadly. In particular, the claim should be defined narrowly enough to reflect its salient political-moral components. For example, an asserted right to same-sex marriage has salient political-moral dimensions that are not included in a more general or abstract definition of the asserted right, one that would omit the same-sex dimension and simply assert a right to marriage. Deciding what is salient for any particular claim is a matter of discernment, but the Court is not exercising its own political-moral judgment at this stage. Rather, it is discerning the precise nature of the political-moral issue at hand so that it can determine whether an asserted claim of liberty has the affirmative support of a historical tradition, thereby providing the claim with a majoritarian sanction. Defining the claim more broadly, in a manner that omitted salient political-moral features, would make it impossible to conclude that the claim has the requisite, tradition-based support.

Having thus defined the claim at hand, the Court evaluates its validity primarily on the basis of a historical inquiry—historical, but not originalist. As Professor (now Judge) Michael W. McConnell has explained, "it is not necessary to show that a challenged practice was protected at the time of adoption of the Fourteenth Amendment, but only that it has enjoyed protection over the course of years."[181] In conducting its historical inquiry, the Court examines conventional legal sources, including the common law and patterns of legislation. There might be close questions concerning whether these sources

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180. *See id.* at 1085–93.

181. McConnell, *supra* note 87, at 671 (footnote omitted). *See generally* Michael W. McConnell, *Tradition and Constitutionalism Before the Constitution*, 1998 U. ILL. L. REV. 173, 174 ("Like originalism, the ['traditionalist'] approach is historical; but instead of viewing authoritative history as a snapshot of a particular moment, it views as authoritative the gradually evolving moral principles of the nation."). For a contrary view, see Steven G. Calabresi, Lawrence, *The Fourteenth Amendment, and the Supreme Court's Reliance on Foreign Constitutional Law: An Originalist Reappraisal*, 65 OHIO ST. L.J. 1097, 1110 (2004) (contending that constitutional recognition is warranted only for tradition-based rights that have enjoyed protection "since 1776 or at least since the Fourteenth Amendment was ratified in 1868" (footnote omitted)). *See also id.* at 1115 (extending this conclusion to the identification of unenumerated rights under either the Due Process Clause or the Privileges or Immunities Clause).

demonstrate a tradition that is sufficiently longstanding and broad based to qualify as "deeply rooted" and therefore to justify the recognition of a tradition-based right. And even if a tradition is "deeply rooted," there is the further, nonhistorical and normative question that Justice White suggested in *Moore*: is this a tradition that warrants contemporary constitutional protection? In answering this normative question, the Court must decide for itself whether the claim of liberty, however traditional, is valuable and worthy of constitutional recognition. After all, the tradition in question might be outdated and in need of revision. But close questions are unavoidable at the margins of any legal standard, and substantive due process, in the end, will inevitably require a normative judgment from the Court.[182] What is critical for present purposes is the requirement that, at a minimum, the right must be "deeply rooted." This is an objective inquiry, based on conventional legal sources, "given from without,"[183] that "direct and restrain [the Court's] exposition of the Due Process Clause."[184] The Justices are not left "free to roam where unguided speculation might take them."[185]

My third criterion, that of functional justification, asks whether a theory of substantive due process includes a contemporary, functional justification for the judicial decisionmaking that it authorizes. In other words, does the Supreme Court's protection of unenumerated constitutional rights, in accordance with the prescribed decisional methodology, advance or improve contemporary governance and policymaking in the United States? Under the theory of historical tradition, substantive due process arguably serves at least three functions.

First, substantive due process—regardless of the theory employed—serves a *nationalizing function*. When the Court recognizes substantive due process rights, they are national rights that every state and locality must honor. Federalism is an important constitutional value, of course, but the United States is a single nation, and the fundamental rights of our citizens are properly

182. *But cf.* McConnell, *supra* note 87, at 672 (contending that the tradition-based approach, as expounded in *Glucksberg*, eliminates the need for any independent normative judgment by the Court); Post, *supra* note 155, at 92–95 (same).

183. CARDOZO, *supra* note 98, at 174.

184. Washington v. Glucksberg, 521 U.S. 702, 721 (1997).

185. Poe v. Ullman, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting). In light of this discussion, it should be clear that I strongly disagree with Professor Neal Devins's contention that "[t]he methodology employed in *Glucksberg* is indeterminate to the point of being irrelevant." Neal Devins, *Substantive Due Process, Public Opinion, and the "Right" to Die*, *in* THE REHNQUIST LEGACY 327, 332 (Craig M. Bradley ed., 2006).

defined and protected as a matter of national constitutional law.[186] This function is not adequate, in itself, to support any particular theory of substantive due process, because no theory can withstand scrutiny unless it can justify the substantive content of the rights that it protects. But the protection of national constitutional rights, however defined, helps ensure that we identify ourselves as "Americans first and Georgians or New Yorkers second."[187] Like other theories of substantive due process, the theory of historical tradition serves this function by identifying national rights that help define Americans as members of a national political community.[188]

Second, the national rights that this particular theory would protect are rights that reflect conventional and longstanding legal principles. Thus, under this theory, substantive due process serves a *conserving function*, furthering stability in the law and protecting societal expectations concerning individual freedom. It protects traditional forms of liberty, as long as they continue to find broad support in the national society. In so doing, substantive due process guards " 'the basic values that underlie our society,' "[189] ensuring historical continuity and precluding precipitous departures from time-honored traditions.[190]

Third, the theory of historical tradition would protect these basic values not only to provide continuity and to protect settled expectations, but also because traditional American values should be regarded as presumptively sound—if not as a matter of general truth,

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186. *See* Daniel O. Conkle, *Nonoriginalist Constitutional Rights and the Problem of Judicial Finality*, 13 HASTINGS CONST. L.Q. 9, 26–30 (1985). *But cf.* Lund & McGinnis, *supra* note 88, at 1599–1603 (arguing that competitive federalism is the best way to generate new norms of liberty in the United States).

187. "Some minimum homogeneity of social institutions is necessary if people are to consider themselves Americans first and Georgians or New Yorkers second." RICHARD A. POSNER, THE FEDERAL COURTS: CRISIS AND REFORM 193 (1985); *cf.* The Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 112 (1873) (Bradley, J., dissenting) ("The question is now settled by the fourteenth amendment itself, that citizenship of the United States is the primary citizenship in this country; and that State citizenship is secondary and derivative, depending upon citizenship of the United States and the citizen's place of residence.").

188. *Cf.* McConnell, *supra* note 87, at 690 ("A jurisprudence based on tradition ... leaves room for experimentation and variation among the states," but when "a stable national consensus has emerged and persisted ... it may be advisable to force remaining outlier states to conform to the national norm.").

189. Moore v. City of E. Cleveland, 431 U.S. 494, 503 (1977) (plurality opinion) (quoting Griswold v. Connecticut, 381 U.S. 479, 501 (1965) (Harlan, J., concurring)).

190. *See* Michael H. v. Gerald D., 491 U.S. 110, 122 n.2 (1989) (plurality opinion) (claiming 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").

then at least for the United States. In other words, as Professor McConnell has argued, substantive due process should be understood to serve a *Burkean function*.[191] According to this theory, as Justice Powell wrote in *Moore*, our longstanding values represent "the accumulated wisdom of civilization."[192] These values are "deeply rooted"—they are "treasured by both past and present"[193]—for good reason: they are probably the right values for American society to honor and maintain. This third function, like the first two, supports substantive due process as a vehicle for protecting traditional liberties from aberrational policies, such as Connecticut's intrusion on marital intimacy[194] or East Cleveland's on the right of families to live together as they choose.[195]

These three functions, taken together, provide a plausible and credible functional justification for the theory of historical tradition. But this claim of functional utility can be challenged on either of two grounds. First, one might argue that substantive due process in accordance with this model could be harmful, not useful, to

191. A British statesman and political philosopher of the eighteenth century, Edmund Burke maintained that traditional practices reflect an inherited wisdom that should not lightly be discarded. In his classic *Reflections on the Revolution in France*, for instance, Burke wrote that "[t]he 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." EDMUND BURKE, REFLECTIONS ON THE REVOLUTION IN FRANCE 53 (J.G.A. Pocock ed., 1987) (1790). When closely examined, he continued, the enduring "general prejudices" of society typically reflect a "latent wisdom." *Id.* at 76. As a result, longstanding societal habits and opinions should not be "cast[] away," but instead should be "cherish[ed]," and all the more so "the longer they have lasted and the more generally they have prevailed." *Id.* Professor McConnell embraces Burke's insights and advances complementary arguments in defending the substantive due process theory of historical tradition. *See* McConnell, *supra* note 87, at 682–85 & n.96; *see also* McConnell, *supra* note 177, at 1133–34 (extending the argument for Burkean traditionalism to constitutional interpretation more generally).

For an argument that Burke's political theory can be understood to support a more creative, common law method of constitutional interpretation, see Ernest Young, *Rediscovering Conservatism: Burkean Political Theory and Constitutional Interpretation*, 72 N.C. L. REV. 619 (1994). (As I explain below, this type of common law methodology, as applied to substantive due process, can be seen as a refinement of the approach of reasoned judgment. *See infra* Part V.A.) For a nuanced account of "Burkean minimalism" in constitutional law, including an assessment of its strengths and limitations, see Cass R. Sunstein, *Burkean Minimalism*, 105 MICH. L. REV. 353 (2006).

192. *Moore*, 431 U.S. at 505 (plurality opinion).

193. "[T]he search ... is for values deeply embedded in the society, values treasured by both past and present, values behind which the society and its legal system have unmistakably thrown their weight." Ira C. Lupu, *Untangling the Strands of the Fourteenth Amendment*, 77 MICH. L. REV. 981, 1040 (1979) (emphasis omitted).

194. *See Griswold*, 381 U.S. at 485–86; Poe v. Ullman, 367 U.S. 497, 553–55 (1961) (Harlan, J., dissenting).

195. *See Moore*, 431 U.S. at 503–06 (plurality opinion).

contemporary legal policymaking. Second, one might contend that even if the doctrine of substantive due process under this theory is not harmful, its functional utility is minimal at best, because the doctrine is so narrowly confined that it hardly affects contemporary governance at all.

According to the first critique, the constitutional enshrinement of traditional values can operate as a deadening force, giving constitutional weight to past political thought that ought to be rejected and cast aside. But according to this theory of substantive due process, a traditional liberty warrants constitutional protection only if it continues to have broad support in the contemporary society and legal culture. In addition, the Supreme Court is required to determine for itself, as a matter of normative judgment, that the liberty is valuable and worthy of constitutional recognition. The Court's normative judgment might be mistaken, of course, and its protection of conventional liberties through the invalidation of aberrational policies could have the effect of preventing desirable experimentation. Witness, for example, the Court's protection of traditional economic liberty during the *Lochner* era.[196] Under a proper understanding of the theory of historical tradition, however, the Court was wildly in error during the *Lochner* period, not only in its normative judgment, but also in its persistent protection of a traditional value that clearly and increasingly lacked the requisite contemporary support. Properly understood and properly employed, the theory of historical tradition is unlikely to prevent progressive changes in the law, that is, legal changes emerging from the ordinary political process. More generally, it is unlikely to result in the improper or excessive invalidation of contemporary legal policies.

The second critique is more telling. According to this critique, the theory of historical tradition calls for *too little* invalidation of contemporary policymaking. Its requirements of longstanding historical support in addition to broad contemporary support are so demanding that the Supreme Court is hardly ever justified in protecting an unenumerated right in the face of a conflicting law. The statutes at issue in *Poe* and *Moore* were properly subject to invalidation, but those statutes were exceptional departures from historical and contemporary American values. Far more often, this theory requires the approval of contemporary legal policies, including policies that ought to be repudiated. In his dissenting opinion in *Bowers*, for instance, Justice Blackmun lambasted the majority's

196. *See supra* notes 28–36 and accompanying text.

reliance on the historical and continuing presence of sodomy prohibitions as reason enough to reject the claim of constitutional protection. In so doing, he invoked the words of Justice Holmes:

> It 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.[197]

According to Blackmun, the Supreme Court should not approve laws, even commonplace laws, merely because they are old or merely because they have continuing contemporary support. But under the theory of historical tradition, such laws are immune from invalidation. Must substantive due process be so feeble, or might it serve a more powerful and important contemporary function?

B. The Theory of Reasoned Judgment

1. *Casey* and Its Jurisprudential Antecedents

In the view of Justice Blackmun and others, substantive due process can and should play a much more vibrant role, one that does not confine the Supreme Court to historical tradition, nor even to prevailing contemporary values. Instead, under this competing approach, the Supreme Court is free to identify rights independently, through a process that amounts to philosophical analysis or political-moral reasoning. In the words of Professor Ronald Dworkin, the Justices should consult their "own views about political morality" as they seek "to find the best conception of constitutional moral principles ... that fits the broad story of America's historical record."[198] More precisely, the Supreme Court should itself evaluate

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197. Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897), *quoted in* Bowers v. Hardwick, 478 U.S. 186, 199 (1986) (Blackmun, J., dissenting).

198. RONALD DWORKIN, FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION 3–4, 11 (1996). In an argument not limited to substantive due process, Professor Dworkin contends that judges should give the Constitution a "moral reading" that "brings political morality into the heart of constitutional law." *Id.* at 2; *see* McConnell, *supra* note 87, at 668 (noting that this approach "makes judging an application of moral philosophy"). *See generally* RONALD DWORKIN, JUSTICE IN ROBES (2006) (elaborating and defending the view that political morality should play a central role in judicial decisionmaking).

In a similar vein, Professor Michael J. Perry once argued that constitutional interpretation calls for judges "to engage in the pursuit of political-moral knowledge" as they seek to advance "the fundamental aspirations signified by the Constitution," adding that judges (without ignoring history or precedent) "should rely on [their] *own beliefs* as to

the liberty interest of the individual and weigh it against competing governmental concerns, determining on this basis whether the liberty interest deserves protection as a constitutional right.[199] Using the language of the Court's 1992 decision in *Casey*, I am calling this the theory of "reasoned judgment."[200] But this approach—under one label or another—is evident in earlier cases as well.

In *Bowers*, for instance, four Justices clearly embraced this type of methodology, albeit in dissent. Speaking for these four Justices, Justice Blackmun declared that the doctrine of substantive due process should be understood to protect " 'the most comprehensive of rights and the right most valued by civilized men,' namely, 'the right to be let alone.' "[201] In defining the scope of this potentially limitless right and in determining its reach in the case at hand, Blackmun relied neither on history nor on contemporary national values. Instead, he offered a direct—and frankly philosophical—analysis of the interests at stake. Citing the " 'moral fact that a person belongs to himself and not others nor to society as a whole,' "[202] Blackmun argued that substantive due process properly protects personal decisions that are important to an individual's life and especially to "an individual's self-definition," because it is "the 'ability

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what the aspiration[s] require[]." MICHAEL J. PERRY, MORALITY, POLITICS, AND LAW: A BICENTENNIAL ESSAY 147, 149 (1988). Notably, Perry no longer subscribes to this position. Much to the contrary, he now advocates (a version of) originalist constitutional interpretation, and, embracing the insights of James Bradley Thayer, he contends that American-style judicial review should include judicial deference to the reasonable judgments of elected officials on contested constitutional questions. *See* MICHAEL J. PERRY, TOWARD A THEORY OF HUMAN RIGHTS: RELIGION, LAW, COURTS 87–140 (2007). For Thayer's classic argument, see James Bradley Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129 (1893).

199. In fact, balancing may occur at each of two levels of analysis. First, the Supreme Court balances competing interests at a relatively general or abstract level in order to determine whether the Court should recognize a presumptively protected constitutional right and, if so, how it should define the content of that right, including the degree of presumptive protection it should be accorded. Second, depending on the nature of the presumptive protection the Court has afforded, further balancing may be needed to determine whether the right has been violated in the case at hand. *Cf.* MELVILLE B. NIMMER, NIMMER ON FREEDOM OF SPEECH: A TREATISE ON THE THEORY OF THE FIRST AMENDMENT §§ 2.02 to 2.03. (1984) (explaining a somewhat similar distinction, between "definitional" and "ad hoc" balancing, in the context of the First Amendment). My focus here is primarily on the first type of balancing, that is, the general comparison of competing interests that informs the Supreme Court's recognition and definition of an unenumerated constitutional right.

200. *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 849 (1992).

201. *Bowers*, 478 U.S. at 199 (Blackmun, J., dissenting) (quoting Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting)).

202. *Id.* at 204 (quoting Thornburgh v. Am. Coll. of Obstetricians & Gynecologists, 476 U.S. 747, 777 n.5 (1986) (Stevens, J., concurring)).

independently to define one's identity that is central to any concept of liberty.' "[203] These self-defining decisions, he added, include decisions about personal relationships, because "we all depend on the 'emotional enrichment from close ties with others.' "[204]

Turning more specifically to the issue presented in *Bowers*, Blackmun asserted that individuals "define themselves in a significant way through their intimate sexual relationships with others" and that "there may be many 'right' ways of conducting those relationships."[205] As a result, Blackmun argued, individuals have a strong interest in determining the nature of these "intensely personal" relationships for themselves.[206] Blackmun was equally forthright in his evaluation of the State's primary interest in this context, an interest in promoting traditional sexual morality. For Blackmun, this interest warranted neither respect nor accommodation, because it represented nothing more than illicit prejudice and religious intolerance, an improper attempt to "enforce private morality."[207] Toward the end of his opinion, Blackmun made a passing reference to values "deeply rooted in our Nation's history,"[208] but he claimed neither historical nor contemporary societal support for his specific constitutional conclusions. Instead, for Blackmun and his fellow dissenters, it was their own evaluation of the particular interests at stake that led them to find a constitutional violation.

Justice Blackmun did not speak for a majority in *Bowers*, but, as he explained, the Supreme Court had endorsed a similar approach in earlier cases, notably including the Court's 1973 decision in *Roe v. Wade*.[209] Authored by Blackmun himself, the Court's opinion in *Roe* included an extensive historical discussion, recounting and explaining abortion regulation from ancient times to the present.[210] But this discussion served as little more than background for the Court's decision. The Court could not, and did not, defend its protection of the right to abortion on the basis of America's historical or contemporary treatment of this issue. The Court suggested that the law governing abortion at common law, and therefore in the very early history of the United States, had been relatively lenient,[211] but it

203. *Id.* at 205 (quoting Roberts v. U.S. Jaycees, 468 U.S. 609, 619 (1984)).
204. *Id.* (quoting *Roberts*, 468 U.S. at 619).
205. *Id.*
206. *Id.*
207. *Id.* at 212; *see id.* at 211–13.
208. *Id.* at 214.
209. 410 U.S. 113 (1973); *see Bowers*, 478 U.S. at 203–06 (Blackmun, J., dissenting).
210. *See Roe*, 410 U.S. at 129–52.
211. *See id.* at 132–36, 138–39.

conceded that a majority of the states, by legislation, had imposed significant restrictions on abortion for at least the last century.[212] The Court noted a liberalizing trend in more recent legislation, but liberalization had occurred in only a minority of states, and, in almost all of them, the changes permitted abortions only in specified and limited circumstances.[213] Only four states had adopted legislation even approaching the liberality of the position that the Court would adopt in *Roe* as a constitutional rule.[214] Quite clearly, the Court's decision in *Roe* was supported neither by historical tradition nor by prevailing contemporary values.

In reality, the Supreme Court's decision in *Roe* was based upon the Court's own evaluation of the relevant political-moral considerations. Extending substantive due process well beyond the Court's existing privacy precedents, the Court announced that the "right of privacy ... is broad enough to encompass a woman's decision whether or not to terminate her pregnancy."[215] As support for this declaration, the Court engaged in a candid appraisal of the interests at stake.

Speaking to the interests of a pregnant woman seeking an abortion, the Court noted that the woman's health, both psychological and physical, might be directly and immediately impaired by the continuation of her pregnancy. In any event, the Court continued, "[m]ental and physical health may be taxed by child care."[216] If the woman is unmarried, she might face "the additional difficulties and continuing stigma of unwed motherhood."[217] More generally, "[m]aternity, or additional offspring, may force upon the woman a distressful life and future."[218] And "[t]here is also the distress, for all concerned, associated with the unwanted child, and

212. *See id.* at 138–39; *see also id.* at 174–75 & n.1 (Rehnquist, J., dissenting) (noting that the legislatures of at least thirty-six states and territories had abortion restrictions in place by 1868).

213. *See id.* at 139–40 (majority opinion). Most of the legislative revisions were patterned on section 230.3 of the Model Penal Code, which permitted an abortion only if—as certified in writing by two physicians—the pregnancy carried a substantial and grave risk to the physical or mental health of either the mother or the developing child, or if the pregnancy had resulted from rape, incest, or other felonious intercourse. *See* MODEL PENAL CODE § 230.3(2)–(3) (1962).

214. *See Roe*, 410 U.S. at 140 n.37.

215. *Id.* at 153.

216. *Id.*

217. *Id.*

218. *Id.*

there is the problem of bringing a child into a family already unable, psychologically and otherwise, to care for it."[219]

On the other side of its political-moral scales, the Court recognized that "a State may properly assert important interests in safeguarding health, in maintaining medical standards, and in protecting potential life."[220] But in the Court's estimation, these interests were inadequate to justify the prevailing approach to abortion regulation. In particular, these interests could not justify prohibitions on abortion, or even most types of lesser regulation, prior to the point of fetal viability.[221] The Court asserted that it was "not resolv[ing] the difficult question of when life begins," noting that this question had divided, among others, "those trained in the respective disciplines of medicine, philosophy, and theology."[222] Despite its disclaimer, however, the Court clearly did adopt a particular view about the beginning of human life, because it ruled that a state generally can intervene to protect human life after the point of fetal viability, but not before. "This is so," the Court wrote, "because the fetus [after viability] presumably has the capability of meaningful life outside the mother's womb."[223] If the Court did not literally rule that life begins at viability, it at least determined that viability marks a critical point in human development. After but not before viability, the Court ruled, a human fetus has sufficient political-moral status to warrant legal protection against the competing interests of a woman seeking an abortion.

Needless to say, the Court's political-moral judgment in *Roe*, independently determined by the Justices themselves, was and remains deeply contested and exceedingly controversial. As Justice White observed in dissent, the Court's decision nullified most existing abortion statutes and had the effect of precluding the states from weighing for themselves "the relative importance of the continued existence and development of the fetus, on the one hand, against a

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219. *Id.*

220. *Id.* at 154.

221. *See id.* at 162–66; *see also* Doe v. Bolton, 410 U.S. 179 (1973) (invalidating various regulations, including requirements that abortions be performed in accredited hospitals and that they be approved by special hospital committees and independent physicians).

222. *Roe*, 410 U.S. at 159.

223. *Id.* at 163. Earlier in its opinion, the Court had described viability as the point at which a fetus becomes "potentially able to live outside the mother's womb, albeit with artificial aid." *Id.* at 160. In an important additional ruling, the Court declared that even after viability, abortion must be permitted "when it is necessary to preserve the life or health of the mother." *Id.* at 163–64.

spectrum of possible impacts on the mother, on the other hand."[224] Instead, it was the Court's own "marshaling of values" that prevailed, and Justice White could "find no constitutional warrant for imposing such an order of priorities on the people and legislatures of the States."[225]

In the years following *Roe*, the Court faced repeated attacks on its decision. During the Reagan administration, for instance, the solicitor general argued in an amicus brief that "the textual, doctrinal and historical basis for *Roe v. Wade* is so far flawed and . . . is a source of such instability in the law that this Court should reconsider that decision and on reconsideration abandon it."[226] Although the Court rejected this request in 1986 in *Thornburgh v. American College of Obstetricians & Gynecologists*,[227] its reaffirmation of *Roe*, which was originally joined by seven Justices,[228] could garner only a bare majority of five.[229] And three years later, the Court's decision in *Webster v. Reproductive Health Services*[230] suggested that *Roe* might soon be discarded.[231] But in 1992, just when it seemed that *Roe* might finally be overturned, the Court issued its surprising decision in *Casey*.[232]

In *Casey*, a five-four majority reaffirmed the "central holding" of *Roe*.[233] Speaking through an unusual joint opinion by Justices O'Connor, Kennedy, and Souter,[234] the Court constructed an elaborate theory of stare decisis in support of its ruling.[235] But the Court did not rely on stare decisis alone, nor did it reaffirm *Roe* and its progeny in their entirety. As it had in *Roe*, the Court strongly

224. *Id.* at 222 (White, J., dissenting).

225. *Id.* For intriguing variations on the majority and dissenting views expressed in *Roe*, see WHAT *ROE V. WADE* SHOULD HAVE SAID (Jack M. Balkin ed., 2005).

226. Brief for the United States as Amicus Curiae in Support of Appellants at 2, filed jointly in Thornburgh v. Am. Coll. of Obstetricians & Gynecologists, 476 U.S. 747 (1986) (No. 84-495), and Diamond v. Charles, 476 U.S. 54 (1986) (No. 84-1379). During the Reagan administration and that of the first President Bush, the United States repeatedly urged the Court to overrule *Roe*. *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 844 (1992).

227. 476 U.S. 747 (1986).

228. *See Roe*, 410 U.S. at 113.

229. *See Thornburgh*, 476 U.S. at 747.

230. 492 U.S. 490 (1989).

231. *See supra* note 59.

232. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992).

233. *See id.* at 853.

234. The joint opinion was a majority opinion in certain parts and a plurality opinion in others, but it stated a controlling "middle ground" even when it took the form of a plurality opinion. *See supra* note 68.

235. *See Casey*, 505 U.S. at 854–69.

protected the right to abortion prior to viability. But it otherwise reconfigured the constitutional law of abortion in important ways—replacing *Roe*'s strict scrutiny with the undue burden test;[236] overruling selected post-*Roe* decisions;[237] and declaring that, in the absence of an undue burden, the right to choose abortion no longer would bar the states from encouraging women to choose childbirth instead.[238] Beyond stare decisis, the Court invoked a methodology of "reasoned judgment," explicitly in its evaluation of the liberty interest of a woman seeking an abortion[239] and implicitly in its newly calibrated reconciliation of this interest with the State's competing interest in protecting fetal life. Quite plainly, the Court's "reasoned judgment" in *Casey*, no less than in *Roe*, was drawn neither from American tradition nor from an objective determination of contemporary national values. Instead, it was a product of the Court's own political-moral calculations, albeit in an opinion that was likewise informed by the values of stare decisis.

Offering what it called an "explication of individual liberty,"[240] the Court announced a presumptive right of personal autonomy and self-definition. "At the heart of liberty," the Court wrote, "is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life."[241] In the context of abortion, moreover, "the liberty of the woman is at stake in a sense unique to the human condition," because a woman who carries a child to term "is subject to anxieties, to physical constraints, to pain that only she must bear."[242] Moreover, it might be "difficult . . . to provide for the child and ensure its well-being."[243] Although some women might welcome their pregnancy nonetheless, for others, "the inability to provide for the nurture and care of the infant is a cruelty to the child and an anguish to the parent."[244] More broadly, the Court concluded, "[t]he destiny of the woman must be shaped to a large

236. *See id.* at 869–79 (plurality opinion).

237. *See id.* at 881–87 (overruling various holdings in City of Akron v. Akron Ctr. for Reprod. Health, Inc., 462 U.S. 416 (1983), and in Thornburgh v. Am. Coll. of Obstetricians & Gynecologists, 476 U.S. 747 (1986)).

238. *See id.* at 869–79, 881–87, 899–900.

239. *Id.* at 849 (majority opinion).

240. *Id.* at 853.

241. *Id.* at 851.

242. *Id.* at 852.

243. *Id.* at 853.

244. *Id.*

extent on her own conception of her spiritual imperatives and her place in society."[245]

Even so, according to the joint opinion, liberty in this context is qualified, not absolute:

> The woman's liberty is not so unlimited . . . that from the outset the State cannot show its concern for the life of the unborn, and at a later point in fetal development the State's interest in life has sufficient force so that the right of the woman to terminate the pregnancy can be restricted.[246]

The Court's refined appraisal of the State's interest in fetal life supported its adoption of the undue burden test and its approval of abortion regulations that encourage childbirth without imposing such a burden.[247] But the Court's revised calculations did not displace *Roe*'s controversial claim about the political-moral status of a human fetus, because the Court continued to hold that "[b]efore viability, the State's interests are not strong enough to support a prohibition of abortion or the imposition of a substantial obstacle to the woman's effective right to elect the procedure."[248]

Citing "the urgent claims of the woman to retain the ultimate control over her destiny and her body" and noting that "it falls to us to give some real substance to the woman's liberty,"[249] the Court in *Casey* concluded that "the line should be drawn at viability."[250] The Court relied in part on stare decisis, adding that "*Roe* was a reasoned statement, elaborated with great care."[251] It also advanced a "second reason" for its conclusion:

> [T]he concept of viability, as we noted in *Roe*, is the time at which there is a realistic possibility of maintaining and nourishing a life outside the womb, so that the independent existence of the second life can in reason and all fairness be the object of state protection that now overrides the rights of the woman.[252]

The Court suggested that this approach was fair to women "as a practical matter," because "[i]n some broad sense it might be said that

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245. *Id.* at 852.
246. *Id.* at 869 (plurality opinion).
247. *See id.* at 869–79, 881–87, 899–900.
248. *Id.* at 846 (majority opinion).
249. *Id.* at 869 (plurality opinion).
250. *Id.* at 870.
251. *Id.*
252. *Id.* (citing Roe v. Wade, 410 U.S. 113, 163 (1973)).

a woman who fails to act before viability has consented to the State's intervention on behalf of the developing child."[253] More generally, the Court stated that no other line would be "more workable."[254] On the basis of its own understandings of "reason" and "fairness," then, the Court in *Casey* concluded, as it had in *Roe*, that there is no political-moral warrant for protecting a nonviable fetus by means that frustrate a woman's right to choose abortion.

Vehemently rejecting the Court's decision, the four dissenters in *Casey* were prepared to overrule *Roe* outright and to adopt a highly deferential approach to abortion regulations.[255] They objected not only to the specific holdings and doctrine that emerged from *Casey* but also to the Court's substantive due process methodology. The dissenters complained that the reasoned judgment approach improperly addressed constitutional questions at "a level of philosophical abstraction, in ... isolation from the traditions of American society," permitting the Court to "decorate a value judgment and conceal a political choice," one that rested ultimately on nothing more than the "personal predilection" of the Justices.[256] The *Casey* dissenters argued that the proper methodology was that of historical tradition, and under that approach there was no justification for the Court's decision.[257]

2. Evaluating the Theory of Reasoned Judgment

Despite the criticisms of the *Casey* dissenters, the theory of reasoned judgment can be defended as a matter of constitutional policy. The primary strength of this theory relates to my third criterion of evaluation, that of functional justification. As discussed earlier, the theory of historical tradition permits substantive due process to serve a nationalizing function, a conserving function, and a Burkean function.[258] But that theory narrowly confines the Court's substantive due process decisionmaking and severely limits its

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253. *Id.*

254. *Id.*

255. *See id.* at 944, 966 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part); *id.* at 979–81 (Scalia, J., concurring in the judgment in part and dissenting in part).

256. *Id.* at 982, 983, 984 (Scalia, J., concurring in the judgment in part and dissenting in part); *see id.* at 1000 ("'[R]easoned judgment' ... turns out to be nothing but philosophical predilection and moral intuition.").

257. *See id.* at 952–53 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part); *id.* at 980–81 (Scalia, J., concurring in the judgment in part and dissenting in part).

258. *See supra* Part III.A.2.

contemporary significance. As a result, the case for its functional utility is relatively weak. The theory of reasoned judgment, by contrast, calls for a far more robust judicial role, one that permits the Supreme Court to protect new rights and to invalidate governmental policies even if those policies have longstanding and continuing support in American law and society. Under this theory, substantive due process might have a far more significant—and potentially salutary—impact on contemporary governance and policymaking in the United States.

Like the theory of historical tradition, the theory of reasoned judgment permits substantive due process to perform a *nationalizing function* through the recognition and protection of fundamental rights as a matter of national constitutional law. More important, the substantive content of these national rights is potentially expansive. Under the theory of reasoned judgment, the Court does not merely protect conventional rights in order to provide continuity and to honor a Burkean sense of traditional wisdom.[259] Instead, under the theory of reasoned judgment, the Court is directly engaged in the identification of personal liberties that it deems appropriate for our contemporary society. This theory thus permits substantive due process to serve a *liberty-maximizing function*, which dramatically increases the doctrine's functional significance.

When applying substantive due process in this fashion, the Supreme Court reads the Constitution to safeguard unenumerated liberties that warrant protection as a matter of political-moral philosophy. In conducting its political-moral analysis, the Court does not ignore American traditions or contemporary societal values, but it considers them only at a relatively general level of abstraction, so the Court is not confined to the protection of rights that have specific historical or contemporary support. Indeed, one of the Court's tasks is to identify and secure the rights of politically disempowered minorities, whose legitimate claims may have gone unanswered in the ordinary political process.[260] More broadly, the Court takes it upon itself, as a matter of reasoned judgment, to evaluate and reconcile competing interests and values, attempting to reach sound judgments concerning particular constitutional claims even as it creates an overall pattern of contemporary constitutional rights that is logical

259. *See supra* note 191 and accompanying text.

260. To this extent, Ely-esque political process considerations may be relevant and helpful. *See generally* ELY, *supra* note 26 (arguing that the Supreme Court should police the process of representative government, correcting participational defects that work to the disadvantage of minorities).

and coherent. Under this approach, liberty is not without limit, but the Court "maximizes" liberty in the sense that it protects liberty to a greater degree than other theories of substantive due process would permit.

Under this theory of constitutional decisionmaking, the Supreme Court's consideration of substantive due process claims begins with something like a presumptive "right to be let alone," as invoked by Justice Blackmun's dissenting opinion in *Bowers*.[261] This notion of a "right to be let alone" is decidedly ambiguous, but it is generally consistent with the libertarian philosophy of John Stuart Mill, who argued famously that personal liberty should be honored in the absence of "harm to others."[262] In opinions advancing this approach, the Court and individual Justices have refined the libertarian philosophy that they find implicit in the doctrine of substantive due process, making it clear that the liberty that they value sounds largely in individual autonomy and self-definition. This libertarian philosophy therefore is selective, not all encompassing. It protects personal decisions that fundamentally affect a person's self-understanding, basic life direction, and core personal relationships. Thus, in *Bowers*, Justice Blackmun spoke of "the 'ability independently to define one's identity that is central to any concept of liberty,' "[263] and he argued, more specifically, that individuals "define themselves in a significant way through their intimate sexual relationships with others."[264] Likewise, in *Casey*, the Court noted not only the relational consequences of pregnancy and abortion but also the significance of a woman's abortion decision for her sense of self and for her destiny in life. According to the Court, "[t]he destiny of the woman must be shaped to a large extent on her own conception of her spiritual imperatives and her place in society,"[265] because "[a]t the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life."[266]

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261. *See* Bowers v. Hardwick, 478 U.S. 186, 199 (1986) (Blackmun, J., dissenting) (quoting Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting)).

262. According to Mill, "the only purpose for which power can be rightfully exercised over any member of a civilised community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant." JOHN STUART MILL, ON LIBERTY 10–11 (David Spitz ed., W.W. Norton & Co. 1975) (1859) (footnote omitted).

263. *Bowers*, 478 U.S. at 205 (Blackmun, J., dissenting) (quoting Roberts v. U.S. Jaycees, 468 U.S. 609, 619 (1984)).

264. *Id.*

265. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 852 (1992).

266. *Id.* at 851.

The approach of reasoned judgment calls for the Court to consider not only the individual's general interest in self-definition and autonomy, including autonomy in the formation of personal relationships, but also other, more particular individual interests, and competing governmental interests as well. In *Casey*, for instance, the Court cited a woman's specific interests and concerns in the context of pregnancy and abortion.[267] The Court also linked its protection of the right to abortion to its contraceptive decisions[268] and to its recognition in *Cruzan*[269] of a right to refuse unwanted medical treatment, a right that protected, to some extent, a personal interest in bodily integrity.[270] Although the issue of abortion raised very different issues, the Court's analysis suggested a plausible coherence in the overall pattern of the special liberties that it had chosen to protect.

In considering the governmental side of the balance when these special liberties are at stake, the Court is inclined to follow a version of the Millian "harm to others" principle, rejecting governmental paternalism, at least if the government is attempting merely to advance an interest in personal morality. In the words of Justice Blackmun's dissenting opinion in *Bowers*, the government (despite traditional understandings to the contrary)[271] has no business "enforc[ing] private morality."[272] In most contexts, however,

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267. *Id.* at 852–53.

268. *See id.*

269. Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261 (1990).

270. *See Casey*, 505 U.S. at 857.

271. According to traditional understandings of the police power, the government legitimately may act to promote the morality of its citizens as well as their health and safety. *See, e.g.*, Barnes v. Glen Theatre, Inc., 501 U.S. 560, 569 (1991) (plurality opinion) ("The traditional police power of the States is defined as the authority to provide for the public health, safety, and morals, and we have upheld such a basis for legislation."); Poe v. Ullman, 367 U.S. 497, 545–46 (1961) (Harlan, J., dissenting) ("[S]ociety is not limited in its objects only to the physical well-being of the community, but has traditionally concerned itself with the moral soundness of its people as well."). *See generally* Suzanne B. Goldberg, *Morals-Based Justifications for Lawmaking: Before and After* Lawrence v. Texas, 88 MINN. L. REV. 1233, 1243–83 (2004) (canvassing the Supreme Court's frequent endorsements of this traditional view, but arguing that the Court, in reality, has rarely approved governmental action exclusively and explicitly on the basis of morality).

272. Bowers v. Hardwick, 478 U.S. 186, 212 (1986) (Blackmun, J., dissenting); *see id.* at 211–13.

Quite apart from substantive due process, one might argue that the Establishment Clause of the First Amendment imposes limits on morality-based legislation, but this argument is contested and controversial. *Compare* Arnold H. Loewy, *Morals Legislation and the Establishment Clause*, 55 ALA. L. REV. 159 (2003) (arguing that the Establishment Clause forbids the government from prohibiting conduct on the basis of "morality simpliciter," i.e., morality that serves no legitimate secular function), *with* MICHAEL J.

including abortion, the state asserts broader and more tangible interests, requiring the Court to appraise those interests and to weigh them against the presumptively protected individual liberty. In the abortion context, for example, the interest of an "other"—indeed, an interest in preserving an "other's" very life—is or might be at stake, depending on the status of the unborn fetus. In *Casey*, the Court forthrightly evaluated this interest in fetal life and balanced it against the liberty interest of the pregnant woman, finding, on the basis of "reason" and "fairness," that "the line should be drawn at viability."[273] Prior to this point, as Justice Blackmun wrote in his *Casey* concurrence, " 'a fetus . . . cannot reasonably and objectively be regarded as a subject of rights or interests distinct from, or paramount to, those of the pregnant woman.' "[274]

Although the *Casey* dissenters suggested otherwise,[275] reasoned judgment cannot be equated with "personal predilection." Reasoned judgment is not a matter of taste. Rather, it is based on reason and therefore on reasons, albeit reasons grounded ultimately on considerations of philosophical, moral, and political theory. The Court's decisionmaking is informed by an elaborate process of adjudication, including arguments and counterarguments from the parties and from amici curiae, as well as arguments among the Justices themselves. And in the end, the Court must defend its judgment in a written opinion. As long as the Court is candid—both in its adoption of a reasoned judgment methodology and in the reasons for its particular judgment—the Court's judgment, unlike a matter of taste, is subject to meaningful critique and evaluation. In *Casey* itself, for example, the dissenters understood the Court's reasoned judgment methodology (even though they rejected its propriety), and they included, as an alternative ground for their dissent, a critique of the Court's reasoning on its own terms.[276]

PERRY, UNDER GOD?: RELIGIOUS FAITH AND LIBERAL DEMOCRACY 20–34 (2003) (arguing that the Establishment Clause does not forbid outlawing conduct on the basis of a religiously grounded belief that the conduct is immoral, even if the belief lacks a plausible, independent secular ground). For a systematic doctrinal and policy analysis, concluding that laws informed by religious moral premises generally do not, for that reason alone, violate the Establishment Clause, see Scott C. Idleman, *Religious Premises, Legislative Judgments, and the Establishment Clause*, 12 CORNELL J.L. & PUB. POL'Y 1 (2002).

273. *Casey*, 505 U.S. at 870 (plurality opinion).

274. *Id.* at 932–33 (Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting in part) (quoting Webster v. Reprod. Health Servs., 492 U.S. 490, 553 (1989) (Blackmun, J., concurring in part and dissenting in part)).

275. *See id.* at 984 (Scalia, J., concurring in the judgment in part and dissenting in part).

276. *See id.* at 982–84; *see also id.* at 989 n.5 (criticizing the Court's justification for treating fetal viability as a critical line of demarcation).

Applied consistently and cogently, the theory of reasoned judgment would promote the Supreme Court's development and enforcement of a coherent set of unenumerated constitutional rights, rights the Court deems appropriate for the contemporary United States. Substantive due process would constitutionalize a libertarian philosophy of individual autonomy and self-definition. It would not countenance the coercive imposition of personal morality, at least not on questions of central importance to self-definition. It would accommodate tangible governmental interests, but only those deemed worthy of accommodation and of a magnitude sufficient to outweigh the individual interests at stake.

This is an attractive vision of substantive due process—attractive, that is, if one embraces a libertarian philosophy along these lines and accepts the Supreme Court's implementation of this philosophy.[277] But what if the contemporary United States would be better served by a more communitarian philosophy, or what if, in any event, the Supreme Court's judgments in particular settings are not sound? If the Supreme Court's political-moral reasoning is mistaken, of course, the functional utility of substantive due process is fundamentally undermined. Mistaken political-moral judgments can hardly advance or improve contemporary governance and policymaking in the United States. The risk of error is considerable: the Court could lead the country in the wrong direction.

The reasoned judgment approach raises difficult questions of political-moral philosophy, and the functional utility of this approach hinges on the Court's proper resolution of these questions. If the Court's answers are generally sound, substantive due process can be said to serve not only a nationalizing function, but a powerful and positive liberty-maximizing function as well. But whether the Court's answers are generally sound is debatable, and that brings us back to my first and second criteria of evaluation: the criterion of majoritarian self-government and the criterion of judicial objectivity and competence.

The criterion of majoritarian self-government creates obvious and serious problems. As discussed previously, the theory of historical tradition permits substantive due process to operate in relative harmony with the principle of majoritarian self-government,

277. *Cf.* Tribe, *supra* note 9, at 1939–40 (defending a comparable vision of substantive due process, focused especially on the formation of personal relationships, by linking it to a capacious reading of the First Amendment as well as "the premise of self-rule implicit in the entire constitutional edifice").

because that theory limits unenumerated rights to rights specifically sanctioned by American history. It draws these rights from longstanding social and legal traditions, traditions that themselves reflect a form of majoritarian approval or assent.[278] The same cannot be said for the theory of reasoned judgment. Under this theory, the Court does not ignore American traditions or contemporary societal values, but it does not confine itself to rights that have specific historical or contemporary support. Instead, the Court's consideration of American traditions and values is part of a broader and more abstract political-moral inquiry, one that calls for the Court to itself evaluate and reconcile competing interests and values. As a result, the Court is free to invalidate legislation, and thus to repudiate the policymaking of elected officials, based on the Court's own political-moral judgment, its own determination that the legislation improperly interferes with individual liberty. To be sure, there are political checks on the Supreme Court, including the appointment of new Justices, but these checks have limited efficacy, especially in the short term. They certainly do not convert the Court into a politically accountable body that, like a legislature, can properly create law simply on the basis of political-moral arguments that it finds persuasive. There is no need to belabor the obvious. Quite clearly, the methodology of reasoned judgment is exceedingly difficult to reconcile with the principle of majoritarian self-government.[279]

Concerns arising from the principle of majoritarian self-government also highlight an additional weakness in the theory of reasoned judgment, a weakness relating to the criterion of functional justification and, in particular, to the nationalizing function of substantive due process. The nationalizing function depends on the premise that the fundamental rights of Americans should not vary from one state to the next, but instead should be defined at the national level. As noted earlier, this function, standing alone, cannot support any particular theory of substantive due process,[280] but it may be that this function is at its weakest under the reasoned judgment

278. *See supra* Part III.A.2.

279. As currently understood, the reasoned judgment approach tends to favor libertarian positions associated with the political left. Yet this approach could readily be transformed into one that favors libertarian positions associated with the right, or perhaps libertarian positions across the board. *See generally* BARNETT, *supra* note 27 (arguing that the Constitution and its amendments, taken as a whole, support a broadly libertarian constitutional philosophy, including a general "presumption of liberty" that should be enforced by the courts). As a result, those of all political persuasions have reason to pause before conceding to the Court such a robust and uncabined judicial role.

280. *See supra* text accompanying notes 186–88.

approach. Under this theory, substantive due process protects rights that are supported neither by historical tradition nor by contemporary national values as they relate to the specific issues at hand. As a result, it protects rights that may be deeply divisive in the national political community, rights around which the national polity is unlikely to coalesce. At the same time, the citizens of the various states, individually, might be far less divided than citizens nationally, and, within many states, there might be solid majoritarian support favoring one side of the controversy or the other. In such circumstances, it is not obvious that rights—even rights on basic and fundamental matters—should be defined and protected at the national level. Instead, as the dissenters argued in *Casey*, a state-by-state resolution might be preferable, both to honor divergent majoritarian preferences in the various states and to achieve a resolution that, in the long run, might prove more stable than a nationwide ruling from the Supreme Court.[281]

The criterion of judicial objectivity and competence creates additional difficulties. Under the theory of reasoned judgment, the Supreme Court does not act as a "naked power organ."[282] Reasoned judgment requires philosophical analysis or political-moral reasoning, this reasoning is linked in a general way to American history and contemporary values, and the Court's decisions concerning particular issues are framed by a broader pattern of substantive due process rights that the Court must explain as a coherent body of doctrine. To this extent, the Justices are constrained and are not left "free to roam where unguided speculation might take them."[283] But the methodology of reasoned judgment is far less constraining than that of historical tradition, because the Court is not limited to rights derived from an objectively determined, external source of values. In the words of Justice Cardozo, the Court is doing much more than "the task of a translator, . . . reading . . . signs and symbols given from without."[284] Rather, it is independently deciding, on the basis of the reasoning it finds most persuasive, important questions of American political morality.

Beyond the issue of objectivity is the issue of judicial competence. On the one hand, the Supreme Court may be better equipped than other governmental bodies to address and resolve

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281. *See Casey*, 505 U.S. at 995–96 (Scalia, J., concurring in the judgment in part and dissenting in part).

282. *See* Wechsler, *supra* note 97, at 19.

283. Poe v. Ullman, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting).

284. CARDOZO, *supra* note 98, at 174.

these fundamental questions and to resolve them in a consistent and principled fashion. Unlike legislatures, for example, the Court enjoys a significant measure of political independence. As a result, it can fairly address the claims of political minorities despite their lack of political power. More generally, the Court's independent posture facilitates the thoughtful and uninhibited pursuit of political-moral wisdom. Indeed, at its core, the judicial process rests on logic and reason, and the traditional process of judging bears a family resemblance to that of philosophical reasoning more generally. But on the other hand, decisionmaking on this basis necessarily includes the making of value judgments as to which the Justices can claim no special expertise or wisdom. As the *Casey* dissenters complained, the Justices' value judgments might be no better than those of the citizenry at large.[285] In any event, the Justices are neither trained as political philosophers nor selected on that basis. For the Supreme Court to make decisions simply on the basis of political-moral reasoning—acting, in effect, as a "bevy of Platonic Guardians"[286]—reflects an extravagant conception of the judicial role, one that takes the Court well beyond the customary limits of judging.[287] In the words of the *Casey* dissenters, the methodology of reasoned judgment belies the conventional understanding that the Justices are "ascertaining an objective law" and "doing essentially lawyers' work up here."[288]

If the theory of historical tradition unduly cabins the doctrine of substantive due process, the theory of reasoned judgment goes too far in the other direction. It permits substantive due process to perform an important and powerful function—a function that, at its best, facilitates the recognition of liberties that warrant protection as a matter of contemporary political morality. But substantive due process can achieve this objective only if the Supreme Court's political-moral reasoning is sound. Whether the Court's reasoning is sound is debatable and, indeed, it is debated even among the Justices themselves. In any event, the theory of reasoned judgment calls for a

285. *See Casey*, 505 U.S. at 1001 (Scalia, J., concurring in the judgment in part and dissenting in part).

286. LEARNED HAND, THE BILL OF RIGHTS 73 (1958).

287. *Cf.* Cass R. Sunstein, *Virtues and Verdicts*, NEW REPUBLIC, May 22, 2006, at 32, 37 (reviewing RONALD DWORKIN, JUSTICE IN ROBES, *supra* note 198) (arguing that judicial decisionmaking based on political morality, as advocated by Dworkin, disregards "the risk of judicial error in the moral domain" and the need for "humility about judges' own capacity for abstract moral reasoning").

288. *Casey*, 505 U.S. at 1000 (Scalia, J., concurring in the judgment in part and dissenting in part).

decisionmaking methodology that is radically at odds with the principle of majoritarian self-government and that severely tests the limits of judicial objectivity and competence. As we have seen, this theory is not without justification, and it certainly cannot be dismissed as a theory of "personal predilection." In the end, however, taking all of my three criteria into account, it is a theory that is difficult to accept.

IV. *LAWRENCE V. TEXAS* AND THE COURT'S COMPETING THEORIES OF SUBSTANTIVE DUE PROCESS

By the time the Supreme Court came to decide *Lawrence v. Texas*,[289] its substantive due process doctrine was in serious disarray. Although *Casey*[290] had firmly embraced the theory of reasoned judgment, the Court had just as firmly rejected it five years later, in *Washington v. Glucksberg*.[291] In *Glucksberg*, the Court, drawing on earlier precedents, had instead articulated a narrowly drawn theory of historical tradition, a theory requiring it to reject an asserted right to physician-assisted suicide.[292] Coming on the heels of *Casey*, *Glucksberg* demonstrated not only the theoretical inconsistency of the Court's two approaches, but also that these two approaches may support very different results.

If the Court had invoked the approach of reasoned judgment in *Glucksberg*, that approach, coupled with the Court's more specific reasoning in *Casey*, might well have supported a right to physician-assisted suicide—at least, as the court of appeals had held, for competent adults facing terminal illnesses.[293] Under *Casey*'s libertarian philosophy of individual autonomy and self-definition, the decision of a terminally ill person to choose the manner and timing of her own death would seem to cry out for constitutional protection. The person's own body is at stake, as is her conception of personal dignity and of the meaning of human life itself. As Justice Stevens wrote in his separate opinion in *Glucksberg*, the right to make this decision would permit the person to "choos[e] a final chapter that

289. 539 U.S. 558 (2003).

290. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992).

291. 521 U.S. 702 (1997).

292. *See supra* Part III.A.1.

293. *See* Compassion in Dying v. Washington, 79 F.3d 790, 793–94 (9th Cir. 1996) (en banc), *rev'd sub nom.* Washington v. Glucksberg, 521 U.S. 702 (1997). As the Supreme Court noted, "[t]he Court of Appeals, like the District Court, found *Casey* ' "highly instructive" ' and ' "almost prescriptive" ' for determining ' "what liberty interest may inhere in a terminally ill person's choice to commit suicide." ' " *Glucksberg*, 521 U.S. at 726 (quoting *Compassion in Dying*, 79 F.3d at 813).

accords with her life story, rather than one that demeans her values and poisons memories of her."[294] Needless to say, procedural safeguards to ensure that an individual's decision is deliberate and well informed might properly be required (just as *Casey* permits for a woman's abortion decision). But an outright ban on physician-assisted suicide, as applied to terminally ill persons, is difficult to defend under the methodology of *Casey*. Such a ban rests largely on governmental paternalism and on a contentious moral claim that human life has continuing value even when an individual, nearing death's door, regards her life as no longer worth living. Indeed, as a matter of political-moral reasoning, one might argue that a right to physician-assisted suicide, if anything, is easier to defend than the right to abortion. Whereas abortion directly harms what is arguably an "other" by extinguishing the life or potential life of the unborn fetus, the suicide of a dying individual directly affects only the person herself.[295]

In any event, it would seem that under the approach of reasoned judgment, the right of terminally ill adults to physician-assisted suicide would qualify for at least presumptive constitutional protection.[296] In rejecting this result in *Glucksberg*, of course, the Court also disavowed the theory of reasoned judgment itself, complete with its expansive understanding of substantive due process. Instead, the Court invoked the competing approach of historical tradition. The Court noted *Casey* but sidestepped its reasoning, confronting neither its substantive due process methodology nor its more specific implications for the question at hand. Instead, the Court was left to assert, without meaningful explanation, that substantive due process protection for personal autonomy in certain contexts, including abortion, does not mean that "any and all important, intimate, and personal decisions are so protected."[297]

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294. *Glucksberg*, 521 U.S. at 747 (Stevens, J., concurring in the judgment).

295. The suicide decision, of course, is likely to have important indirect and intangible effects on others, but the significance of these effects is mitigated by the fact that the individual is terminally ill and facing imminent death in any event.

296. In his separate opinion in *Glucksberg*, Justice Souter argued that presumptive constitutional protection might well be appropriate. *See Glucksberg*, 521 U.S. at 782 (Souter, J., concurring in the judgment). But he concluded that the claim of right was defeated in the case at hand by the State's competing interests. In particular, he credited the State's concern that despite possible procedural safeguards, recognition of the asserted right might lead to involuntary suicide or to euthanasia. *See id.* at 782–89. For additional discussion of Souter's opinion and the theoretical approach that it employs, see *infra* Part V.A.

297. *Glucksberg*, 521 U.S. at 727 (citing San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 33–35 (1973)).

Such was the uneven doctrinal and theoretical landscape that lay before the Court in *Lawrence*. The Court's decisions in *Casey* and *Glucksberg* were in obvious and serious tension. The reasoning of *Casey* would have supported a different conclusion in *Glucksberg*, and *Glucksberg*'s theory of historical tradition plainly would have required a different result in *Casey*. With two competing and radically inconsistent theories in play, the outcome in *Lawrence* appeared to hinge on which of these theories the Court would follow. The approach of historical tradition would call for a reaffirmation of *Bowers v. Hardwick*,[298] whereas the approach of reasoned judgment, as articulated in *Casey*, would strongly support a substantive due process right to engage in intimate homosexual relationships. In fact, the Court in *Lawrence* overruled *Bowers* and found a constitutionally protected right,[299] but it issued a decidedly ambiguous opinion, nodding in the direction of both historical tradition and reasoned judgment even as it also suggested the possibility of a third theory, that of evolving national values.

A. Lawrence, *Historical Tradition, and Reasoned Judgment*

As we have seen, the theory of historical tradition accords substantive due process protection only to liberties that are " 'deeply rooted in this Nation's history and tradition.' "[300] More specifically, as the Supreme Court made clear in *Glucksberg*, this theory permits the recognition of an unenumerated constitutional right only if the claim of right, narrowly defined, has broad and longstanding support in American social and legal history.[301] Applying this approach in *Bowers*, the Court refused to accept "a fundamental right [of] homosexuals to engage in sodomy," a right that would have "invalidate[d] the laws of the many States that still make such conduct illegal and have done so for a very long time."[302]

Under the theory of historical tradition, the Court's holding in *Bowers* would seem both unexceptional and unassailable. In *Lawrence*, the Court did not repudiate this theory as a general proposition, and it left intact, without mention, its recent reaffirmation of this approach in *Glucksberg*. Yet the Court in

298. 478 U.S. 186 (1986).

299. *See* Lawrence v. Texas, 539 U.S. 558, 578 (2003).

300. *See Glucksberg*, 521 U.S. at 721 (quoting Moore v. City of E. Cleveland, 431 U.S. 494, 503 (1977) (plurality opinion)); *Bowers*, 478 U.S. at 192 (quoting *Moore*, 431 U.S. at 503 (plurality opinion)).

301. *See supra* Part III.A.1.

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

Lawrence challenged the historical reasoning of *Bowers*, implying that *Bowers* may have been wrongly decided even on its own terms. Focusing specifically on homosexual conduct, *Bowers* had rejected a right to engage in *homosexual* sodomy due to its lack of historical support.[303] But as the Court explained and emphasized in *Lawrence*, the longstanding historical condemnation of sodomy, both in America and in Western civilization generally, actually had extended to heterosexual and homosexual sodomy alike, meaning that there was "no longstanding history ... of laws directed at homosexual conduct as a distinct matter."[304] The Court also noted the infrequency of actual prosecutions for consensual adult sodomy, "mak[ing] it difficult to say that society approved of a rigorous and systematic punishment of the consensual acts committed in private and by adults."[305] Apart from legal prohibition, the Court conceded that homosexual conduct had historically been regarded as immoral, but it questioned the significance and breadth of this societal disapprobation, especially with respect to "private homosexual conduct between consenting adults."[306]

Even if entirely accurate, however, the Court's historical clarifications in *Lawrence* did nothing to undermine the holding of *Bowers* under the theory of historical tradition. The fact that American law and its antecedents banned heterosexual as well as homosexual sodomy hardly supports a history-based right to engage in such conduct. And even if society did not condemn homosexual conduct as broadly or as strongly as *Bowers* had asserted, society plainly did not support this conduct as a traditional and time-honored liberty. Under the theory of historical tradition, *Bowers* was undeniably correct. There simply was no traditional liberty that warranted constitutional protection.

The Court's historical discussion in *Lawrence*, coupled with its refusal to address *Glucksberg*, was unhelpful at best and confusing (or confused) at worst. The Court left the theory of historical tradition standing even as it refused to follow its clear implications. This theory was firmly supported by *Glucksberg* and *Bowers* alike, as well as earlier precedents, but the Court in *Lawrence* refused to confront either the theory's jurisprudential pedigree or its strengths and weaknesses as a matter of constitutional policy. Instead, the Court

303. *See id.* at 192–94.

304. *Lawrence*, 539 U.S. at 568; *see id.* at 567–71. American laws targeting homosexual conduct as such, the Court stated, did not appear until the 1970s. *See id.* at 570.

305. *See id.* at 569–70.

306. *See id.* at 571.

simply sidestepped these questions, feinting toward history with its largely irrelevant historical commentary.

In addition to its historical discussion, the Court's opinion included reasoning that appeared to rely on a very different theoretical approach, that of reasoned judgment. In these portions of the opinion, the Court spoke more abstractly and philosophically, suggesting a libertarian approach to substantive due process along the lines of Justice Blackmun's dissenting opinion in *Bowers*.[307] At the outset of its opinion, for instance, the Court declared that "liberty of the person" includes both spatial and "more transcendent dimensions" and that it "presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct."[308] Focusing further on the individual interest in the context at hand, the Court later identified the specific adverse effects of criminal sodomy statutes, arguing that the statutes not only prohibit private sexual conduct but also impair and demean the personal relationships in which such conduct finds expression.[309] The sexual conduct may be "but one element in a personal bond that is more enduring," the Court explained, and "[t]he liberty protected by the Constitution allows homosexual persons the right to make this choice."[310] Still later, the Court invoked *Casey*'s vigorous protection of personal autonomy and self-definition, including " 'the right to define one's own concept of existence,' " and it extended this reasoning to the formation of homosexual relationships.[311] "The petitioners are entitled to respect for their private lives," the Court concluded.[312] "The State cannot demean their existence or control their destiny by making their private sexual conduct a crime."[313]

As for the governmental side of the political-moral balance, the Court indicated that, "as a general rule," the State ought not attempt to control protected personal relationships "absent injury to a person or abuse of an institution the law protects."[314] Unlike Blackmun's dissenting opinion in *Bowers*, the Court did not dismiss the State's interest in traditional sexual morality as a matter of prejudice and

307. *Bowers*, 478 U.S. at 199–214 (Blackmun, J., dissenting); *see supra* text accompanying notes 201–08.

308. *Lawrence*, 539 U.S. at 562.

309. *Id.* at 567.

310. *Id.*

311. *See id.* at 573–74 (quoting Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 851 (1992)).

312. *Id.* at 578.

313. *Id.*

314. *See id.* at 567.

intolerance. Instead, it conceded that this perspective may reflect, for many individuals, "profound and deep convictions accepted as ethical and moral principles."[315] But the Court concluded that a majority cannot "enforce these views on the whole society through operation of the criminal law."[316] This analysis drew upon a version of the Millian "harm to others" principle.[317] In particular, the Court appeared to reject governmental paternalism in furtherance of personal morality, at least in the context of criminal laws impairing special liberty interests, interests that are entitled to presumptive constitutional protection.[318] At the same time, however, the Court left open the possibility that a state might be permitted to advance a similar morality interest through its official support of particular institutions, such as heterosexual marriage, even if those institutions exclude personal relationships, such as same-sex partnerships, that fall within the zone of special liberty.[319]

To the extent that *Lawrence* rests on reasoned judgment, the Court's opinion is eloquent and powerful. The Court's Millian philosophy is eminently reasonable in this context, given the nature of the individual autonomy that is at stake—autonomy to define one's own sexual identity and basic life direction, to form a personal human

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315. *See id.* at 571.

316. *See id.*; *see also id.* at 577 (" '[T]he 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.' " (quoting Bowers v. Hardwick, 478 U.S. 186, 216 (1986) (Stevens, J., dissenting))).

317. *See supra* note 262 and accompanying text.

318. One could read the Court's opinion to adopt a Millian principle for the criminal law in general, without regard to whether any *special* liberty is at stake. *Cf.* Barnett, *supra* note 9, at 35–37 (reading *Lawrence* to adopt a general "presumption of liberty" and to disfavor moral justifications whenever liberty is restricted). The Court did not expressly adopt a heightened standard of review, and it stated at the end of its opinion that the challenged law "furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual." *Lawrence*, 539 U.S. at 578. The Court's reference to "legitimate state interest" might suggest a deferential, rational basis standard of constitutional scrutiny, applicable to any and all intrusions on liberty. But the rest of this sentence conveys a balancing inquiry, and the Court's full opinion strongly suggests that the Court was recognizing a special liberty interest and was conducting some type of heightened review. *See* Tribe, *supra* note 9, at 1917 ("[T]he strictness of the Court's standard in *Lawrence*, however articulated, could hardly have been more obvious."); *cf.* Mark Strasser, Lawrence, *Mill, and Same-Sex Relationships: On Values, Valuing, and the Constitution*, 15 S. CAL. INTERDISC. L.J. 285, 293 (2006) (contending that the Court in *Lawrence* went beyond a straightforward Millian analysis by "attributing positive constitutional weight to same-sex relationships").

319. *See Lawrence*, 539 U.S. at 578 ("The present case . . . does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter."); *see also id.* at 575–76 (emphasizing the stigma and collateral consequences of criminal convictions for sexual conduct).

relationship of love and affection, and to express and fulfill that relationship through private acts of sexual intimacy. Moreover, when considered in light of the Court's other substantive due process precedents, including its contraceptive and abortion decisions, the Court's decision in *Lawrence* can be seen as part of a logical whole, a body of doctrine that protects personal relationships and activities relating not only to reproduction but also to sexual expression more generally.[320] Thus, by overruling *Bowers*, the Court, as a matter of consistent political-moral reasoning, arguably created a more coherent overall pattern of contemporary unenumerated rights.

However powerful and well reasoned it might seem, of course, the Supreme Court's political-moral judgment in *Lawrence* is not unassailable. It depends on a contentious libertarian philosophy and on the Court's rejection, in this context, of the State's conventional power to promote the personal morality of its citizens.[321] More generally, this type of decisionmaking assumes that the Court properly can make constitutional judgments on the basis of its own political-moral calculations, without linking its judgments more objectively and specifically to historical or contemporary American social and legal practices.

B. Lawrence *and Evolving Values*

In fact, the Supreme Court's decision in *Lawrence* did not rest on philosophical analysis alone. In addition to its unhelpful historical commentary and its helpful but debatable political-moral reasoning, the Court discussed and relied upon recent developments in the legal treatment of consensual sodomy. This analysis suggests the possible emergence of a different and distinctive theory of substantive due process, a theory of evolving national values.

The Supreme Court's historical discussion in *Lawrence* did not stop with the Court's argument that *Bowers* had misstated or overstated the centuries-long legal and social condemnation of sodomy. Instead, the Court went on to state that "[i]n all events we think that our laws and traditions in the past half century are of most relevance here,"[322] and it argued that recent developments in the United States revealed "an emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct

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320. *See id.* at 564–66, 573–74, 577.

321. *See id.* at 589–90 (Scalia, J., dissenting) (deploring the Court's abandonment of "the ancient proposition" that a state generally is free to regulate sexual morality and citing recent lower court decisions that had relied on that principle).

322. *Id.* at 571–72 (majority opinion).

their private lives in matters pertaining to sex."[323] More specifically, the Court referred to the Model Penal Code of 1955, which recommended the repeal of laws forbidding consensual sodomy.[324] The Court noted that roughly half the states had adopted this approach by 1986, when *Bowers* was decided, and that additional states had since followed suit.[325] These legislative developments, coupled with five state court invalidations on the basis of state constitutional law,[326] left only thirteen states with sodomy laws on the books at the time of *Lawrence*.[327] Even in these thirteen states, moreover, consensual sodomy was rarely prosecuted,[328] suggesting that legal and social disapproval was wavering even in these states.[329]

Looking beyond our Nation's boundaries, the Court also cited European legislative and judicial action. It noted the British Parliament's 1967 repeal of laws punishing homosexual conduct.[330] It also cited and discussed the 1981 decision of the European Court of Human Rights in *Dudgeon v. United Kingdom*,[331] which invalidated Northern Ireland's prohibition on consensual homosexual conduct as a violation of the European Convention on Human Rights.[332] The Court noted that *Dudgeon* was authoritative in twenty-one European countries in 1981 and in forty-five by the time of *Lawrence*.[333] The Court later observed that "[o]ther nations, too, have taken action consistent with an affirmation of the protected right of homosexual adults to engage in intimate, consensual conduct."[334]

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323. *See id.* at 572.
324. *See id.* (citing MODEL PENAL CODE § 213.2 cmt. 2 (1980)).
325. *See id.*
326. *See id.* at 576.
327. *See id.* at 573.
328. *See id.*
329. *Cf.* Cass R. Sunstein, *What Did* Lawrence *Hold? Of Autonomy, Desuetude, Sexuality, and Marriage*, 2003 SUP. CT. REV. 27, 27–28 (suggesting that *Lawrence* can be read to reflect an American-style principle of desuetude, grounded in procedural due process and calling for the invalidation of laws when they impair constitutionally important interests "on the basis of moral judgments lacking public support, as exemplified by exceedingly rare enforcement activity"). *But cf.* Calabresi, *supra* note 181, at 1117 (arguing that desuetude does not support a general declaration of constitutional invalidity, but only a ruling that the law in question is unenforceable unless and until the state gives appropriate public notice of its intention to start enforcing the law again in the future).
330. *See Lawrence*, 539 U.S. at 572–73 (citing Sexual Offences Act, 1967, c. 60, § 1 (Eng.)).
331. 45 Eur. Ct. H.R. (ser. A) (1981).
332. *Id.* ¶ 61; *see Lawrence*, 539 U.S. at 573.
333. *See Lawrence*, 539 U.S. at 573.
334. *Id.* at 576.

To be sure, the Court's opinion in *Lawrence* did not announce a new theory of substantive due process, much less a theory explicitly based on evolving values. Indeed, the Court's opinion left open the precise significance of the recent developments that it discussed. On the one hand, the Court linked this discussion to its critique of the *Bowers* Court's historical account of sodomy regulation, noting that these recent developments, including those in Europe, undercut "the premise in *Bowers* that the claim put forward was insubstantial in our Western civilization."[335] On the other hand, the Court also used the judicial invalidations of sodomy prohibitions, by state courts and by the European Court of Human Rights, in part as evidence simply that these other courts had rejected—and thereby undermined—the reasoning and result in *Bowers*.[336] Although these courts were neither interpreting the Fourteenth Amendment's Due Process Clause nor identifying unenumerated rights appropriate for national recognition in the United States, the Supreme Court credited their opinions nonetheless, presumably as a matter of political-moral reasoning. Thus, commenting on judicial rulings as well as legislative actions abroad, the Court declared that "the protected right of homosexual adults to engage in intimate, consensual conduct . . . has been accepted as an integral part of human freedom in many other countries."[337] "There has been no showing," the Court continued, "that in this country the governmental interest in circumscribing personal choice is somehow more legitimate or urgent."[338]

The Court's discussion of recent developments might thus be linked to either or both of the two prevailing theories of substantive due process, that of historical tradition and that of reasoned judgment. But the Court's discussion is also suggestive of another possibility—that evolving values, as such, might provide a suitable guideline for substantive due process decisionmaking. This suggestion is nascent at best in *Lawrence*, but the Court's decision planted the seeds for a move in this direction.

V. TOWARD A THEORY OF EVOLVING NATIONAL VALUES

Unlike the theories of historical tradition and reasoned judgment, there is no developed theory of evolving national values in

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335. *Id.* at 573; *see id.* at 572–73; *see also id.* at 576 (suggesting that developments abroad are relevant "[t]o the extent *Bowers* relied on values we share with a wider civilization").

336. *See id.* at 576–77.

337. *Id.*

338. *Id.* at 577.

the Supreme Court's substantive due process decisions. There are only hints and suggestions, most notably those provided by *Lawrence.* As a result, this theory will require elaboration and refinement, drawing out these hints and suggestions with an eye to relevant constitutional policy and to the strengths and weaknesses of the Court's two existing theories. The theory of evolving national values, as articulated here, thus is my own creation far more than the Court's. But it is a theory that bears a family resemblance to the Court's existing approaches, that builds upon the Court's suggestive observations in *Lawrence*, and that calls for a decisionmaking model similar to one the Court has employed to resolve other issues of individual rights. Further, I will argue that as a matter of constitutional policy, this theory is superior to either of the Court's existing approaches and therefore ought to be explicitly adopted.

In addition to the Court's opinion in *Lawrence*, there were earlier judicial suggestions of an evolving values approach to substantive due process. As I have argued previously,[339] Justice Harlan's invocation of tradition in *Poe v. Ullman*[340] can be read to foreshadow the approach of historical tradition, but Harlan's opinion also suggested that the doctrine of substantive due process may be more dynamic. Declaring that due process reflects "the balance struck by this country," Harlan mentioned not only "the traditions from which it developed" but also "the traditions from which it broke," because "tradition is a living thing."[341] Exactly what Harlan meant is unclear, but this language suggests that substantive due process should protect not only historical rights but also rights that have emerged over time, gaining sufficient support in our contemporary law and culture that the Supreme Court can properly recognize their existence without engaging in "unguided speculation."[342] More recently, in his separate opinion in *Washington v. Glucksberg*,[343] Justice Souter claimed the support of Justice Harlan in advancing his own "evolving values" approach to substantive due process.[344] Justice Souter's argument is impressive, and it warrants separate attention and evaluation. As we will see, however, Souter's approach actually is a refinement of the theory of reasoned judgment. It should not be confused with the theory of evolving national values

339. *See supra* Part III.A.1.
340. 367 U.S. 497 (1961).
341. *Id.* at 542 (Harlan, J., dissenting).
342. *See id.*
343. 521 U.S. 702 (1997).
344. *See id.* at 765–73 (Souter, J., concurring in the judgment).

that I will be developing and defending in the remainder of this Article.

A. *Justice Souter's "Evolving Values" Refinement of the Theory of Reasoned Judgment*

Expanding upon Justice Harlan's discussion in *Poe*, Justice Souter argued in *Glucksberg* that the Court's task is to define and apply evolving standards of " 'ordered liberty' comprising a continuum of rights to be free from 'arbitrary impositions and purposeless restraints.' "[345] In so doing, the Court should weigh competing interests "within the history of our values as a people."[346] Unenumerated constitutional rights, on this view, are derived from values "exemplified by 'the traditions from which [the Nation] developed,' or revealed by contrast with 'the traditions from which it broke.' "[347] More specifically, the Court's analysis of traditional and evolving legal standards should address not only the issue at hand but also related questions. Like common law decisionmaking, this method looks for "an evolving boundary between the domains of old principles."[348] It "pay[s] respect . . . to detail, seeking to understand old principles afresh by new examples and new counterexamples."[349]

In *Glucksberg*, the particular issue before the Court was physician-assisted suicide, and Souter suggested—contrary to the majority—that he was prepared (if not quite ready) to recognize presumptive constitutional protection for terminally ill adults to make and effectuate this choice.[350] As support for this conclusion, Souter noted that although society generally has not decriminalized assisted suicide, it has eliminated earlier prohibitions and penalties on the related acts of suicide and attempted suicide.[351] He also stated that physician-assisted suicide implicates a liberty interest in bodily integrity that is similar in some respects to the well-accepted right to

345. *See id.* at 765 (quoting *Poe*, 367 U.S. at 549, 543 (Harlan, J., dissenting)).
346. *See id.* at 764.
347. *Id.* at 767 (quoting *Poe*, 367 U.S. at 542 (Harlan, J., dissenting)).
348. *Id.* at 770.
349. *Id.*
350. *See id.* at 782 (noting that "the importance of the individual interest here, as within that class of 'certain interests' demanding careful scrutiny of the State's contrary claim, cannot be gainsaid" and suggesting that this interest "might in some circumstances, or at some time, be seen as 'fundamental' to the degree entitled to prevail," but observing further that this "is not . . . a conclusion that I need draw here" (quoting *Poe*, 367 U.S. at 543 (Harlan, J., dissenting))). Souter went on to determine that the claim of right was defeated, for the present, on the basis of the State's competing interests. *See id.* at 782–89.
351. *See id.* at 774–77, 781.

medical care and counsel, even with respect to a life-ending withdrawal of medical treatment,[352] and he argued that the protection of abortion rights is analogous as well.[353] Under this analysis, the Court properly could recognize presumptive constitutional protection for physician-assisted suicide on the basis of evolving American values, broadly understood—even though only one state, Oregon, has actually taken specific legal action consistent with this view, and even though others have consistently and recently reaffirmed their traditional prohibitions on the practice.[354]

Souter's understanding of substantive due process is creative and sophisticated. Despite his protestations to the contrary,[355] however, his approach is hardly one of judicial restraint. Although he links his approach to evolving American values, Souter would permit the Court to recognize rights that lack specific historical or contemporary support. As a result, the recognition of rights under this methodology ultimately rests on the Court's own philosophical reasoning and interpolations.[356] Souter's methodology therefore amounts to a type of reasoned judgment, and, indeed, he himself invokes this terminology in describing his approach.[357]

As a refinement of the theory of reasoned judgment, Souter's particular approach to substantive due process has strengths and weaknesses that are similar, but not identical, to those identified previously for this theory.[358] Thus, under Souter's approach, substantive due process serves not only a nationalizing function but

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352. *See id.* at 777–78, 779–80, 781.

353. *See id.* at 778–79, 781; *cf. id.* at 790–91 (Breyer, J., concurring in the judgment) (expressing sympathy for Souter's analysis and for the argument "that one can find a 'right to die with dignity' by examining the protection the law has provided for related, but not identical interests relating to personal dignity, medical treatment, and freedom from state-inflicted pain").

354. *See id.* at 716–19 (majority opinion).

355. *See, e.g., id.* at 768 (Souter, J., concurring in the judgment) (noting that "constitutional review, not judicial lawmaking, is a court's business here," and stating that a court should not recognize an unenumerated constitutional right unless the challenged statute's resolution of competing interests is unreasonable).

356. *See* McConnell, *supra* note 87, at 698–700 (contrasting Souter's expansive reasoning with "Harlan's deeply conservative opinion" in *Poe* and contending that Souter's opinion was a "misappropriation" of Harlan's approach to substantive due process).

357. *Glucksberg*, 521 U.S. at 769 (Souter, J., concurring in the judgment) (referring to "the process of substantive review by reasoned judgment"). Not surprisingly, Souter cites his own (joint) opinion in *Casey* for the Court's embrace of a reasoned judgment methodology, adding that the Court's particular judgments should be evaluated "according to the usual canons of critical discourse." *Id.* (citing Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 849 (1992)).

358. *See supra* Part III.B.2.

also a liberty-maximizing function, albeit perhaps not to the same degree as other, more abstract (and therefore potentially more expansive) versions of reasoned judgment. His approach also permits the Supreme Court to fashion a coherent set of unenumerated rights that the Court deems fitting for our contemporary society, taking into account the Court's best reading of relevant currents of America's political-moral development. As a result, Souter's approach arguably fares well under the criterion of functional justification—but only if the Supreme Court in fact is able to make sound political-moral judgments on this basis. Relatedly, the criterion of judicial objectivity and competence presents a mixed picture. On the one hand, Souter describes a reasoning process that approximates common law decisionmaking. As compared to more abstract forms of reasoned judgment, this methodology is one that judges might be relatively competent to employ.[359] On the other hand, this methodology is not objective in any strong sense, certainly not as compared to the approach of historical tradition, and it requires value judgments for which the Court has no special expertise. Souter's approach also founders under the criterion of majoritarian self-government. It is one thing for courts to make common law decisions, which are subject to legislative correction. It is quite another for them to create unenumerated constitutional rights, immune from legislative override, especially when these rights lack specific support in historical or contemporary legislative policymaking.[360]

Justice Souter presents and defends an attractive model of reasoned judgment, describing a role for the Supreme Court that the Court may be relatively competent to perform and that may serve important functions. But the functional utility of this approach ultimately depends on the Court's ability to make sound political-moral judgments. In addition, this model raises serious questions of judicial objectivity, and it undermines the principle of majoritarian self-government. Souter's approach warrants serious consideration,

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359. For arguments defending the common law method as a basis for constitutional interpretation, see FARBER & SHERRY, *supra* note 96, at 152–56; David A. Strauss, *Common Law, Common Ground, and Jefferson's Principle*, 112 YALE L.J. 1717 (2003); David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877 (1996); Young, *supra* note 191, at 686–715.

360. I do not mean to exaggerate the countermajoritarian nature of Souter's approach, which calls for a degree of judicial prudence and circumspection. Indeed, in *Glucksberg* itself, Souter declined to recognize presumptive constitutional protection for the time being, and he ultimately rejected the constitutional claim in question. *See supra* note 350 and accompanying text.

but, on balance, like the theory of reasoned judgment more generally, its weaknesses outweigh its strengths.

B. A Distinctive Theory of Evolving National Values

Although Souter's approach is actually a theory of reasoned judgment, Harlan's "living tradition" language in *Poe*, coupled with elements of the Court's analysis in *Lawrence*, can be read to suggest a distinctive theory of substantive due process, a theory of evolving national values. As I conceive this theory, it is considerably more constrained than any version of the reasoned judgment approach. Conversely, it is considerably more robust, and certainly more dynamic, than the theory of historical tradition.

In my conception, the theory of evolving national values calls for the Supreme Court, in Harlan's words, to identify "the balance struck by this country"[361] concerning particular issues of individual rights. As under the theory of historical tradition, as elaborated in *Glucksberg*,[362] the Court should in each case define the constitutional claim precisely and narrowly and then canvass American social and legal history, from the past to the present, as it relates to this particular claim. Unlike the theory of historical tradition, however, the theory of evolving national values does not limit special constitutional protection to claims that are "deeply rooted" in American history. Instead, the critical question is whether the asserted individual right has broad *contemporary* support in the national culture. This contemporary support might be a continuation of longstanding historical tradition. To this extent, the theory of evolving national values encompasses the theory of historical tradition. But the contemporary support might reflect a change from the past. What matters is the current, evolved state of our national culture, including especially our national legal culture, as it relates to the specific issue at hand.

Only if broad contemporary national support exists for an asserted individual right is the right eligible for special constitutional protection. In this respect, the theory of evolving national values, like that of historical tradition, depends upon an objectively determined, external source of values. Also like the theory of historical tradition, however, this theory demands an additional determination by the Supreme Court. The Court must decide, as a matter of independent normative judgment, whether the asserted right deserves national

361. Poe v. Ullman, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting).
362. *See supra* Part III.A.1.

constitutional protection, thereby protecting the right even in states that choose not to follow the general national pattern. In resolving this question, the Court inevitably must employ a methodology analogous to that required by the theory of reasoned judgment. It must determine, in essence, whether the claim of right supported by the national culture is a claim that warrants recognition as a matter of political-moral reasoning. But the Court does not reach this second question for claims of right that lack the requisite national support.

Although *Lawrence* did not expressly embrace the theory of evolving national values, this theory is fully adequate to justify the Court's decision, and it may help explain some of the Court's reasoning. As discussed previously, the Court, focusing narrowly on the precise constitutional claim before it, emphasized that American social and legal history revealed a strong liberalizing trend with respect to consensual sodomy.[363] As a result, by the time of the Court's decision, a substantial majority of the states had decriminalized this practice, and enforcement was rare even in the dwindling minority of states that continued to make it a crime.[364] Quite clearly, the asserted individual right, a right to engage in this practice free from criminal sanction, satisfied the first requirement of the theory of evolving national values. It had broad support in contemporary American culture, including our national legal culture—support that indicated societal and legal repudiation of the history that had gone before. The states were not unanimous on this score, but one could fairly describe the states' position as a general consensus.

Likewise evident in the Court's opinion was its conclusion that the asserted right also satisfied the second requirement of this theory. Thus, the Court determined for itself, as a matter of political-moral reasoning, that this right demanded and deserved national constitutional protection. In support of this conclusion, the Court provided its own explication of personal liberty, individual autonomy, and self-definition;[365] found that sodomy prohibitions impaired liberty interests going well beyond the sexual practice directly at issue;[366] and concluded that the competing interest in traditional sexual morality was inadequate to justify these intrusive criminal laws.[367] As explained earlier, this reasoning, taken by itself, is consistent with the

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363. *See supra* Part IV.B.

364. *See* Lawrence v. Texas, 539 U.S. 558, 570–73 (2003).

365. *See id.* at 558, 562, 573–74, 578–79.

366. *See id.* at 567, 575–76.

367. *See id.* at 571, 577–78.

theory of reasoned judgment.[368] Read in conjunction with the Court's discussion of the states' contemporary treatment of this matter, however, it also can be seen to reflect the second prong of the evolving national values inquiry. Viewed in this light, the Court's own political-moral reasoning confirmed the normative validity of the general consensus that was present in American social and legal culture.

There is precedent outside the area of substantive due process for a comparable two-part analysis in the identification of contemporary constitutional rights. In interpreting the Eighth Amendment's ban on "cruel and unusual punishments,"[369] the Supreme Court "refer[s] to 'the evolving standards of decency that mark the progress of a maturing society' to determine which punishments are so disproportionate as to be cruel and unusual."[370] Thus, as with substantive due process, the particular meaning of the Eighth Amendment's prohibition may change over time. In capital cases, the Court conducts a two-part inquiry.[371] The Court first asks whether "objective indicia of society's standards, as expressed in legislative enactments and state practice,"[372] demonstrate a contemporary "national consensus"[373]—not unanimity, but a general consensus—against capital punishment in the context at hand.[374] Such a consensus supports a finding of unconstitutionality, but it does not by itself require that result. Rather, if the Court concludes that there is a consensus, it goes on "to bring its independent judgment to bear."[375] If both the national consensus and the Supreme Court's

368. *See supra* Part IV.A.

369. U.S. CONST. amend. VIII.

370. Roper v. Simmons, 543 U.S. 551, 561 (2005) (quoting Trop v. Dulles, 356 U.S. 86, 100–01 (1958) (plurality opinion)).

371. In noncapital cases, the Court's approach is rather different and tends to be quite deferential. *See, e.g.*, Ewing v. California, 538 U.S. 11 (2003) (rejecting an Eighth Amendment challenge to a sentence of twenty-five years to life in prison under California's "Three Strikes and You're Out" law). As the Court wrote in *Rummel v. Estelle*, 445 U.S. 263 (1980), "[o]utside the context of capital punishment, successful challenges to the proportionality of particular sentences have been exceedingly rare." *Id.* at 272.

372. *Roper*, 543 U.S. at 563.

373. *Id.* at 564.

374. *See id.* at 564–67.

375. *See id.* at 574; *see also id.* at 564 (noting that the "objective indicia of consensus" give the Court "essential instruction," after which "[w]e then must determine, in the exercise of our own independent judgment," whether the punishment is disproportionate). As the Court has explained, "in cases involving a consensus, our own judgment is 'brought to bear' by asking whether there is reason to disagree with the judgment reached by the citizenry and its legislators." Atkins v. Virginia, 536 U.S. 304, 313 (2002) (citation omitted).

independent judgment indicate that the punishment of death is disproportionate, it is deemed unconstitutional.[376]

The Court utilized this analysis in two recent death penalty cases. In its 2002 decision in *Atkins v. Virginia*,[377] the Court invalidated capital punishment for mentally retarded offenders. Three years later, in *Roper v. Simmons*,[378] the Court followed suit with a comparable ruling for juvenile offenders. *Roper* exemplifies the Court's reasoning process,[379] which was substantially similar in *Atkins*.

As the first step in its analysis in *Roper*, the Court examined objective "evidence of national consensus against the death penalty for juveniles."[380] The Court noted that a solid majority of the states—thirty, including twelve that banned capital punishment altogether[381]—currently prohibited capital punishment for juvenile offenders, and that actual executions were infrequent even in the twenty states whose laws continued to authorize this practice.[382] Departing from its 1989 decision in *Stanford v. Kentucky*,[383] which had upheld the juvenile death penalty,[384] the Court concluded that developments since *Stanford*, including a consistent trend favoring abolition, revealed a national consensus that had not been present when *Stanford* was decided.[385]

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376. As I understand the Court's contemporary Eighth Amendment jurisprudence, both elements are required before the death penalty can properly be declared unconstitutional. Justice O'Connor has a somewhat different view. She agrees that the Court must "weigh both the objective evidence of societal values and our own judgment." *Roper*, 543 U.S. at 605 (O'Connor, J., dissenting). But she has suggested that the Court's own judgment, if sufficiently well supported, can justify a ruling of unconstitutionality even in the absence of a genuine national consensus. *See id.* at 605–07. In fact, however, it appears that the Court has never held the death penalty unconstitutionally disproportionate without finding a national consensus in support of its decision. *See id.* at 615–16 (Scalia, J., dissenting).

377. 536 U.S. 304 (2002).

378. 543 U.S. 551 (2005).

379. To the extent that *Lawrence* and *Roper* can be seen to follow a similar methodology, it is notable that Justice Kennedy authored the majority opinion in each case.

380. *See Roper*, 543 U.S. at 564.

381. "[A] State's decision to bar the death penalty altogether," the Court explained, "of necessity demonstrates a judgment that the death penalty is inappropriate for all offenders, including juveniles." *Id.* at 574. *But see id.* at 611 (Scalia, J., dissenting) (arguing that states banning all executions are irrelevant to the existence of a "consensus that offenders under 18 deserve special immunity from such a penalty").

382. *See id.* at 564–65 (majority opinion).

383. 492 U.S. 361 (1989).

384. More precisely, the Court in *Stanford* had upheld the death penalty for juveniles who were older than fifteen but younger than eighteen at the time of their offense. *See id.*

385. *See Roper*, 543 U.S. at 564–67.

As the second step in its analysis, the Court forthrightly examined for itself the political morality of the death penalty in this context.[386] Citing the immaturity of juveniles, their susceptibility to negative outside influences, and their transient personalities, the Court declared that " 'their irresponsible conduct is not as morally reprehensible as that of an adult' "[387] and that "[f]rom a moral standpoint it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor's character deficiencies will be reformed."[388] Turning to the State's competing interests, the Court determined that the two social purposes served by the death penalty, retribution and deterrence, apply with lesser force to juveniles than to adults, because "culpability or blameworthiness is diminished" and because juveniles are "less susceptible to deterrence."[389] The Court found "confirmation" of its judgment in the practices of other countries and in international agreements, noting "the stark reality that the United States is the only country in the world that continues to give official sanction to the juvenile death penalty."[390]

The Eighth Amendment ban on disproportionate punishments serves different purposes than substantive due process,[391] but the Court's Eighth Amendment jurisprudence is relevant by analogy. Like substantive due process, it is based on "expansive language in the Constitution,"[392] and it generates constitutional meaning that may change over time on the basis of evolving standards of political morality. More specifically, the Court's Eighth Amendment analysis in capital cases suggests the practicability, and perhaps the wisdom, of a two-part inquiry in deciding the contemporary scope of constitutional rights whose content is not tied to the original meaning of the constitutional text. This analysis suggests that the Court's discretion to recognize newly emerging constitutional rights—that is, new restrictions on majoritarian government—should be limited by

386. *See id.* at 568–75.

387. *Id.* at 570 (quoting Thompson v. Oklahoma, 487 U.S. 815, 835 (1988) (plurality opinion)).

388. *Id.*

389. *Id.* at 571.

390. *Id.* at 575; *see id.* at 575–78.

391. In fact, when criminal punishment is at stake, the Eighth Amendment and substantive due process might sometimes serve related purposes. *Cf.* Bowers v. Hardwick, 478 U.S. 186, 197–98 (1986) (Powell, J., concurring) (rejecting substantive due process protection for consensual sodomy, but suggesting that a prison sentence for such conduct might violate the Eighth Amendment).

392. *See Roper*, 543 U.S. at 560.

an external source of values, the pattern of contemporary laws and practices in the various states. The Court's Eighth Amendment reasoning also confirms the necessity of the Court's additional and independent judgment, as a matter of political-moral reasoning. More broadly, it suggests that only if a general societal consensus and the Supreme Court's independent judgment are in agreement should the Court recognize a national constitutional limitation, thereby making the general consensus a matter of national uniformity.

C. Evaluating the Theory of Evolving National Values

Unlike the competing substantive due process theories of historical tradition and reasoned judgment, the theory of evolving national values has not been expressly embraced by the Court. As I have explained, however, this theory is consistent with some of the Supreme Court's opinion in *Lawrence*, and it is supported by analogous reasoning in the Court's recent Eighth Amendment cases, including *Roper*. Moreover, under the three criteria of evaluation I identified previously,[393] this theory appears to be superior, as a matter of constitutional policy, to either of the Court's established approaches.

Under my first two criteria—majoritarian self-government and judicial objectivity and competence—the theory of evolving national values, as I conceive it, is comparable to the theory of historical tradition. As discussed earlier, that theory fares well under these criteria.[394] So, too, does the theory of evolving national values.

Like the theory of historical tradition, the theory of evolving national values, properly understood, permits substantive due process to operate in relative harmony with the principle of majoritarian self-government. Thus, the Court's recognition of special liberties must reflect "balance[s] struck by this country,"[395] as indicated by broadly supported national social patterns and legal policies. These patterns and policies might or might not be "deeply rooted" historically, but they must be widely supported in the contemporary United States, and they must address the specific constitutional claim in question. Only if the asserted individual right is supported by a general consensus nationally will it be eligible for special constitutional protection, special protection that may result in the invalidation of legal policies falling outside the general consensus.

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393. *See supra* Part II.
394. *See supra* Part III.A.2.
395. Poe v. Ullman, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting).

To more fully evaluate this theory under the criterion of majoritarian self-government, it is important to clarify precisely how the Supreme Court is to determine the existence of the required national consensus. The most important indicium of the necessary contemporary support is enacted legislation in the various states, which is, of course, a product of majoritarian decisionmaking. As the Court has noted in the analogous Eighth Amendment context, "the 'clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures,' "[396] in part because " '[i]n a democratic society legislatures ... are constituted to respond to the will and consequently the moral values of the people.' "[397] Also relevant are clear trends in recent legislation, as noted in *Lawrence* and *Roper*, because they may help demonstrate or confirm an emerging majoritarian consensus.[398] Identifiable patterns

396. Atkins v. Virginia, 536 U.S. 304, 312 (2002) (quoting Penry v. Lynaugh, 492 U.S. 302, 331 (1989)).

397. Gregg v. Georgia, 428 U.S. 153, 175–76 (1976) (joint opinion of Stewart, Powell, and Stevens, JJ.) (quoting Furman v. Georgia, 408 U.S. 238, 383 (1972) (Burger, C.J., dissenting)); *see Atkins*, 536 U.S. at 322–23 (Rehnquist, C.J., dissenting).

398. Congressional action, if it exists, is relevant as well. *See, e.g.*, Roper v. Simmons, 543 U.S. 551, 567 (2005) (noting that despite a preexisting treaty reservation permitting the United States to avoid a provision barring capital punishment for juveniles, Congress in fact excluded juvenile offenders when it enacted the Federal Death Penalty Act of 1994). Indeed, if Congress has addressed the issue, one could argue that the congressional action, in and of itself, should be sufficient to establish a national consensus. *See* CHARLES L. BLACK, JR., DECISION ACCORDING TO LAW 41 (1981) ("As to issues of *national* consensus, the presumption has to be that Congress is the empowered voice."). But giving conclusive weight to congressional policymaking for the federal sphere (in the absence of a congressional decision to preempt or displace state policymaking on the issue) would be insufficiently attentive to the values of federalism in this context. At least for political-moral questions of the sort addressed by substantive due process, multiple decentralized decisions might well be more probative of a genuine national consensus than a single act of the national legislature. *Cf.* McConnell, *supra* note 87, at 682 (arguing, in the context of a tradition-based approach to substantive due process, that the decisions of decentralized institutions are critical and that "[n]o single vote, no single electoral victory, no single jurisdiction suffices").

Within the limits of congressional power, of course, Congress could pass federal legislation preempting or displacing state law to the contrary. Such legislation could create a federal statutory right, eliminating the need for a constitutional claim, or it could have the opposite effect, putting an end to state law experimentation that otherwise, over time, might lead to a national consensus favoring the recognition of a constitutional right. In the context of physician-assisted suicide, for example, the Supreme Court recently ruled that the Federal Controlled Substances Act cannot be construed to displace state law protection of the right to physician-assisted suicide, but the Court also suggested that Congress, if it so desired, would have the constitutional power to preclude (or, presumably, to permit) physician-assisted suicide nationwide. *See* Gonzales v. Oregon, 126 S. Ct. 904, 923–24 (2006). *See generally* Lawrence G. Sager, *Cool Federalism and the Life-Cycle of Moral Progress*, 46 WM. & MARY L. REV. 1385 (2005) (suggesting that the structure of American federalism can facilitate moral progress on matters of individual

of actual enforcement or nonenforcement of the law—also mentioned in *Lawrence* and *Roper*—are relevant as well, because these patterns reflect the decisions of electorally accountable prosecutors and of citizens themselves, acting as jurors.[399] Far less significant is more general evidence of an American societal consensus, including prevailing social practices, the announced positions of professional and social organizations, and the results of public opinion surveys.[400] But such evidence might be useful to some extent, for example, to confirm a conclusion that is supported by the more reliable indicators as well.

Other potential data, although mentioned by the Court in *Lawrence* and *Roper*, is irrelevant to the issue of a majoritarian American consensus. In particular, rulings of state courts applying state constitutional law should not count for this purpose, because they are not majoritarian.[401] Foreign and international legal policies and judicial rulings are likewise irrelevant to the existence of a majoritarian consensus in the United States.[402] As the late Chief Justice Rehnquist observed, "if it is evidence of a *national* consensus for which we are looking, then the viewpoints of other countries simply are not relevant."[403]

In determining whether a national consensus exists, the Court should focus on sources of evidence that are relevant and reliable and that reflect majoritarian judgments. More precisely, it should focus

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right—from state experimentation to wider acceptance and eventual nationwide recognition—but only in the absence of premature federal intervention).

399. Although not pertinent in *Lawrence* or *Roper*, in appropriate cases the Court may also consult prevailing common law doctrine, which, being subject to legislative control, reflects majoritarian acquiescence even if not explicit majoritarian support.

400. In the Eighth Amendment context, compare *Atkins*, 536 U.S. at 316 n.21 (citing polling data and the views of religious and professional organizations, among other data, as evidence "lend[ing] further support" to the Court's conclusion about a national consensus), with *id.* at 321–28 (Rehnquist, C.J., dissenting) (arguing that this sort of data should not be considered at all and that the Court should confine its inquiry to legislative enactments and jury decisions).

401. Unlike common law rulings, state constitutional rulings are not subject to majoritarian control or correction through the ordinary legislative process. And even if the state court judges are elected or electorally accountable, they are judicial actors deciding judicial questions. They are not political decisionmakers setting majoritarian policy.

402. When I speak here of international legal policies, I mean international legal policies that the U.S. government has not itself adopted or accepted.

403. *Atkins*, 536 U.S. at 325 (Rehnquist, C.J., dissenting). One could argue to the contrary, contending that majoritarian decisionmakers in the United States might tend to follow foreign or international trends. But an inference of this sort would be highly speculative, to put it mildly. As a result, foreign and international data should not contribute to the Court's resolution of this question.

primarily on legislative enactments and on patterns of enforcement or nonenforcement. If the Court properly confines its consensus analysis in this fashion, the theory of evolving national values satisfies my first criterion, at least to a substantial degree, because it limits the recognition of unenumerated rights to rights that are broadly supported by the American people and their elected representatives.

The theory of evolving national values, so understood, also fulfills my second criterion, that of judicial objectivity and competence. To be sure, one component of the Supreme Court's decisionmaking under this theory is largely unconstrained and open-ended. Thus, under the second part of its two-part inquiry, the Court cannot recognize an unenumerated right unless it concludes, on the basis of its own political-moral judgment, that the right warrants constitutional protection. But as we have seen, such an independent normative judgment is inevitably a part of every theory of substantive due process, including even the restrictive theory of historical tradition.[404] What matters is that under the theory of evolving national values, the Court's own political-moral judgment is not sufficient to justify the recognition of an unenumerated right, because the Court does not exercise its own judgment unless it first determines, objectively, that there is a contemporary national consensus favoring the particular constitutional claim before it. To this extent, at least, the Court's task is that "of a translator, the reading of signs and symbols given from without."[405]

Satisfaction of the requirement of a national consensus is objectively determined, but this requirement is not clear cut. In the first place, the Court must define the claim of right. As I have explained in discussing the approach of historical tradition, the Court must define the claim narrowly enough to reflect its salient political-moral components, and this determination requires a measure of judicial discernment.[406] The Court then must decide whether there exists a sufficient national consensus—and therefore a majoritarian sanction—for this particular claim.

The basic standard is that of a general consensus, not unanimity or even near-unanimity. At the same time, the Supreme Court's analysis in *Lawrence* and in its recent Eighth Amendment decisions suggests that this standard ordinarily requires, at a minimum,

404. *See supra* text accompanying notes 181–85.
405. *See* CARDOZO, *supra* note 98, at 174.
406. *See supra* notes 179–80 and accompanying text.

supportive legislative enactments in a solid majority of the states.[407] How substantial the majority must be in any given case may depend on the existence of other evidence of a national consensus, including legislative trends and patterns of enforcement or nonenforcement. If these trends and patterns are mixed or unclear, the Court should hesitate to recognize a national consensus, because it should be convinced that such a consensus will be enduring.[408] Given these ambiguities, the determination of a national consensus is likely to divide the Justices in close cases. In *Roper*, for instance, five Justices found a sufficient national consensus against the juvenile death penalty, but four did not.[409] Indeed, the Justices may not even agree on the nature or significance of particular legislative judgments. *Roper* once again provides an example. The Court's five-Justice majority found that thirty states, a substantial majority, had adopted legislative enactments against the juvenile death penalty, but this number included twelve states that had abolished capital punishment altogether.[410] Three of the four dissenting Justices would not have counted these twelve states, claiming that legislative decisions to

407. One could argue that there should be a higher and more specific threshold of legislative support. For example, one might attempt to approximate the formal requirement for a constitutional amendment, as set forth in Article V of the Constitution, by demanding supportive enactments in three-fourths of the states. *Cf.* McConnell, *supra* note 87, at 682 (defending a tradition-based approach to substantive due process, in part on the ground that longstanding traditions, like formally adopted constitutional provisions, can be seen to reflect the decisions of "a supermajority of the people, expressed through decentralized institutions"). *See generally* U.S. CONST. art. V (requiring that proposed constitutional amendments be ratified by three-fourths of the states). Such an alternative formulation would more fully honor my first two criteria of evaluation—majoritarian self-government and judicial objectivity and competence. But it would substantially limit the functional utility of substantive due process, thereby undermining the strength of this theory under my third and final criterion. *See infra* text accompanying notes 416–31.

408. One could imagine a more constrained version of the theory of evolving national values, one that would move the theory closer to that of historical tradition. According to this variation, the Court could not properly find a sufficient contemporary consensus unless the consensus had already endured—that is, been in place and become stable—for some period of years (even if not for the duration required for a "deeply rooted" historical tradition). *Cf.* McConnell, *supra* note 87, at 690 (arguing that the Court should not constitutionalize a right under substantive due process unless "a stable national consensus has emerged and persisted"). Under my criteria of evaluation, the effect of this variation would be comparable to the effect of requiring a higher and more specific threshold of legislative support. *See supra* note 407.

409. *Compare* Roper v. Simmons, 543 U.S. 551, 564–67 (2005) (majority opinion) (finding a national consensus), *with id.* at 594–98 (O'Connor, J., dissenting) (arguing that the evidence of a national consensus was weak), *and id.* at 608–15 (Scalia, J., joined by Rehnquist, C.J., and Thomas, J., dissenting) (rejecting the existence of a national consensus).

410. *See id.* at 564, 574 (majority opinion); *see also supra* note 381 and accompanying text.

completely abolish the death penalty do not bear on the more specific question of whether juveniles should be exempted from any such punishment.[411] This analysis contributed to their conclusion that there was no national consensus on this point.[412]

Although it does not provide a bright-line test, the requirement of a contemporary national consensus does provide an objective standard that limits the Supreme Court's discretion in a meaningful way. The Court's analysis of the consensus question is directed to the specific issue at hand, and it depends mainly upon the Court's examination of legislative enactments, legislative trends, and patterns of actual enforcement or nonenforcement. The Court's inquiry is narrowly focused and would appear to fall well within the judicial ken. Despite ambiguities at the margin, the consensus requirement is capable of principled and consistent application—at least to the same degree as countless other legal standards. The theory of evolving national values certainly does not leave the Justices "free to roam where unguided speculation might take them."[413] Rather, it includes an objective standard, "given from without,"[414] complete with " 'guideposts for responsible decisionmaking' that direct and restrain [the Court's] exposition of the Due Process Clause."[415]

Turning to my third criterion of evaluation, the question is whether the theory of evolving national values provides a contemporary, functional justification for the Supreme Court's substantive due process decisionmaking. Under the theory of historical tradition, as we have seen, substantive due process serves a nationalizing function, a conserving function, and a Burkean function.[416] Under the theory of reasoned judgment, by contrast, the nationalizing function of substantive due process is combined with a liberty-maximizing function.[417] If my earlier analysis is correct, the functional justification for substantive due process is relatively weak under the theory of historical tradition, because that theory severely restricts the role of substantive due process in contemporary governance. Under the theory of reasoned judgment, by contrast, the functional justification argument is potentially quite strong, due to the

411. *See Roper*, 543 U.S. at 610–11 (Scalia, J., joined by Rehnquist, C.J., and Thomas, J., dissenting).

412. *See id.* at 608–11.

413. Poe v. Ullman, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting).

414. CARDOZO, *supra* note 98, at 174.

415. Washington v. Glucksberg, 521 U.S. 702, 721 (1997) (quoting Collins v. Harker Heights, 503 U.S. 115, 125 (1992)).

416. *See supra* Part III.A.2.

417. *See supra* Part III.B.2.

liberty-maximizing function that it posits. But this argument depends upon the Supreme Court's independent ability to resolve hotly contested questions of political morality, which in turn reveals the more obvious weaknesses of this theory under my other two criteria—majoritarian self-government and judicial objectivity and competence. My argument here is that the theory of evolving national values steers between the extremes of the other theories, providing a strong functional justification for substantive due process even as it satisfies my other criteria as well. As I will explain, this theory's functional justification for substantive due process rests on three distinct but interrelated functions.

First, like the other theories, the theory of evolving national values allows substantive due process to serve a *nationalizing function*. Moreover, given the requirements of this theory, the propriety of the nationalizing function is not defeated or undermined by the competing argument in favor of state-by-state policymaking. The competing argument depends on the claim that state-by-state policymaking can honor divergent majoritarian preferences and therefore potentially can achieve a more stable, albeit diverse, resolution of the issue in question. As discussed previously, that argument is strong in the context of the reasoned judgment approach,[418] but under the theory of evolving national values, the Court's recognition of national constitutional rights is restricted to rights that are already supported by a national consensus among the states. Although the Court must exercise its independent judgment as well, it is not creating national norms in the face of widespread disagreement. Instead, the Court's recognition of a substantive due process right has the effect of consolidating what is already the dominant approach. In the absence of unanimity, federalism still is impaired to a degree. Under this theory of substantive due process, however, the Court's recognition of a constitutional right is likely not only to honor the majoritarian preferences of most Americans but also to effect a stable and enduring resolution of the issue at hand.

Second, substantive due process under this theory serves a *progressive function*. According to this theory, the political-moral wisdom of the Supreme Court's recognition of an unenumerated constitutional right is supported not only by the Court's own judgment, but also by the contemporary national consensus. Thus, unlike the backward-looking philosophy that undergirds the theory of historical tradition, this theory posits a more forward-looking,

418. *See supra* note 281 and accompanying text.

progressive evolution of political morality, which seems more appropriate and fitting for the United States. Indeed, the idea of progress, including political-moral progress, is a core element—perhaps a constitutive element—of American society and political culture. As Professor Michael J. Perry has written, America's self-understanding includes a longstanding commitment "to the notion of moral evolution," according to which we seek "to bring our collective (political) practice into ever closer harmony with our evolving, deepening moral understanding."[419] In addressing questions of political morality, we learn from the past, sometimes reaffirming "deeply rooted" historical teachings[420] but sometimes moving in new directions.[421] These new directions may reflect, as the Court found in *Lawrence*, an "emerging awareness" of the proper scope of individual liberty.[422] When societal thinking changes to the point of creating a national consensus, no less than when a national consensus is longstanding, there is reason to believe that the liberty embraced by that consensus is worthy of recognition as a matter of political morality—perhaps not universally, but at least in the contemporary United States.[423]

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419. MICHAEL J. PERRY, THE CONSTITUTION, THE COURTS, AND HUMAN RIGHTS: AN INQUIRY INTO THE LEGITIMACY OF CONSTITUTIONAL POLICYMAKING BY THE JUDICIARY 99 (1982). *See generally* ALEXANDER M. BICKEL, THE SUPREME COURT AND THE IDEA OF PROGRESS (1970) (discussing the idea of progress and offering a critical account of its role in the Warren Court's constitutional decisionmaking).

420. To the extent that a contemporary consensus is longstanding—that is, sufficiently "deeply rooted" to justify recognition of a constitutional right even under the theory of historical tradition—the progressive function of substantive due process can be seen to include a Burkean component. But the function here is nonetheless "progressive" in the sense that the presumptive political morality of the national consensus is grounded not in its historical pedigree, but rather in the support it finds in contemporary society.

421. *See* Rebecca L. Brown, *Tradition and Insight*, 103 YALE L.J. 177, 204 (1993) ("Our heritage is as much about breaking with tradition as it is about following tradition.").

422. *See* Lawrence v. Texas, 539 U.S. 558, 572 (2003).

423. This argument presupposes an aspirational understanding of the Constitution, according to which constitutional interpretation is "responsive to our people's actual and evolving aspirations." *See* Richard B. Saphire, *Originalism and the Importance of Constitutional Aspirations*, 24 HASTINGS CONST. L.Q. 599, 663 (1997). According to the theory of evolving national values, however, it is not for the Supreme Court alone to determine the meaning and significance of our constitutional aspirations, at least not in the context of unenumerated rights. Instead, the Court must search initially for a contemporary national consensus. *See id.* at 662 (arguing that the Constitution should be read to include "the values and aspirations that . . . we present-day Americans 'as a people hold to be fundamental' " (quoting Terrance Sandalow, *Constitutional Interpretation*, 79 MICH. L. REV. 1033, 1042 (1981))).

One might go further than my argument would permit, contending that even if a national consensus has yet to emerge, the Supreme Court should be permitted to advance our constitutional aspirations by acting in furtherance of a developing pattern of evolving

Finally, the theory of evolving national values permits substantive due process to serve a *liberty-enhancing function*. Under the theory of reasoned judgment, substantive due process works more aggressively to *maximize* liberty. The theory of evolving national values, by contrast, does not permit the Supreme Court to maximize liberty to the same extent, because the Court is constrained by the requirement of a contemporary national consensus. Even so, substantive due process under this theory does work to *enhance* liberty, certainly as compared to the theory of historical tradition. Moreover, the theory of evolving national values allows and encourages the Court to consult and elaborate a libertarian philosophy of individual rights, albeit only to the extent that this perspective is supported by the requisite national consensus.

Under the theory of evolving national values, the Supreme Court's philosophical inquiry occurs at the second stage of its substantive due process analysis, when it is determining for itself whether an asserted individual right warrants protection as a matter of political morality. At this stage, the Court is free to enunciate, as it did in *Lawrence*, its own understanding of personal liberty. The Court could take a restrictive view of liberty and a broad view of governmental power, but it should not. Instead, the Court should employ—as it did in *Lawrence*—libertarian reasoning of essentially the same sort that it would utilize under the theory of reasoned judgment.

Recall my earlier discussion of the theory of reasoned judgment.[424] There, I argued that the functional justification for that approach rests on a libertarian philosophy that is plausible and attractive as a general constitutional philosophy of individual rights. According to this philosophy, the Supreme Court begins with a presumptive "right to be let alone," at least with respect to personal decisions that implicate important dimensions of individual autonomy and self-definition. In conducting its political-moral evaluation, the Court also considers additional, more specific individual interests, and it addresses competing governmental interests as well. The presumption favoring liberty, however, leads the Court to disfavor governmental paternalism, especially if the government is attempting merely to advance an interest in personal morality. More tangible

political morality—at least if the Court's decision is later vindicated, post hoc, by the development of an appropriate consensus. *Cf.* BICKEL, *supra* note 95, at 239 ("[T]he Court should declare as law only such principles as will—in time, but in a rather immediate foreseeable future—gain general assent.").

424. *See supra* Part III.B.2.

governmental interests may warrant accommodation, but only if they outweigh the presumptively protected individual interest.

I ultimately concluded that this libertarian philosophy, however plausible and attractive, was inadequate to justify substantive due process in accordance with the reasoned judgment model—in part because this philosophy is not beyond challenge and in part because the theory of reasoned judgment falters under my other criteria of evaluation. Under the theory of evolving national values, by contrast, the same type of libertarian philosophy moves from the plausible to the persuasive. More precisely, it is sufficiently persuasive to justify its use by the Supreme Court at the second stage of its substantive due process analysis.

A libertarian philosophy is appropriate here precisely because this theory of substantive due process includes its initial requirement of a contemporary national consensus. That requirement permits the theory of evolving national values to satisfy my other criteria of evaluation, eliminating competing arguments for rejecting a libertarian approach that is otherwise attractive. In addition, the required consensus provides more specific support for the Court's use of a libertarian approach, including a presumption favoring liberty, in deciding the particular case before it. After all, the Court does not employ its own judgment unless there is a contemporary national consensus—a majoritarian consensus—favoring the protection of liberty in the situation at hand. As the Court has written in the analogous Eighth Amendment context, the question at this stage is "whether there is reason to disagree with the judgment reached by the citizenry and its legislators."[425] Accordingly, there are two reasons for the Court to begin its independent analysis with a presumption favoring liberty: a general libertarian philosophy that can be justified under the theory of evolving national values, and a national consensus favoring liberty in the specific context at hand.

In elaborating and explaining its own independent judgment, the Supreme Court thus is free to invoke a libertarian philosophy, and it is well advised to do so. Moreover, the Court is free at this stage to consult whatever authorities it finds persuasive. More specifically, it may consult state constitutional rulings as well as foreign and international policies and judicial decisions—not to support the existence of a national majoritarian consensus, but instead to confirm the Court's independent judgment that this consensus is sound as a matter of political morality. Viewed in this light, the Court's reliance

425. Atkins v. Virginia, 536 U.S. 304, 313 (2002).

on these sorts of decisions and policies in *Lawrence*[426] was not only unobjectionable but also salutary, and the same can be said for the Court's use of foreign materials in the Eighth Amendment context, as in *Roper*.[427]

The requirement of a national consensus restricts the Supreme Court's freedom to fashion a coherent pattern of unenumerated rights, because some rights that might logically follow from others undoubtedly will lack the requisite consensus. Even so, the Court's political-moral reasoning, within the limits of the consensus requirement, can provide a reasoned elaboration of liberty. The Court's elaboration, in turn, may have a broader effect on the American polity by influencing—without dictating—the majoritarian resolution of separate but related questions. In *Lawrence*, for example, the Court carefully reserved the issue of same-sex marriage,[428] but its analysis of the liberty of homosexual couples

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426. *See Lawrence*, 539 U.S. at 572–73, 576–77.

427. *See* Roper v. Simmons, 543 U.S. 551, 575–78 (2005). For contrary views, see Roger P. Alford, Roper v. Simmons *and Our Constitution in International Equipoise*, 53 UCLA L. REV. 1, 16 (2005) (criticizing the Court's reliance on foreign practice as a "benchmark for the correctness of its conception of what human dignity requires"); Joan L. Larsen, *Importing Constitutional Norms from a "Wider Civilization":* Lawrence *and the Rehnquist Court's Use of Foreign and International Law in Domestic Constitutional Interpretation*, 65 OHIO ST. L.J. 1283, 1293–97, 1301–26 (2004) (arguing that the Supreme Court's substantive use of foreign and international law as a matter of "moral fact-finding" is without constitutional justification).

Although I do not share their particular conclusions, Professors Alford and Larsen each highlight an important point that is sometimes overlooked: whether the use of foreign and international law is appropriate in domestic constitutional interpretation depends upon the use to which it is put, along with the theory or method of constitutional interpretation to which it is linked. *See* Alford, *supra*; Larsen, *supra*. For additional commentary emphasizing this linkage, see Roger P. Alford, *In Search of a Theory for Constitutional Comparativism*, 52 UCLA L. REV. 639 (2005); Mark Tushnet, *The Possibilities of Comparative Constitutional Law*, 108 YALE L.J. 1225 (1999). For a revealing debate between Justices Scalia and Breyer, highlighting the influence of their divergent theories of constitutional interpretation, see *The Relevance of Foreign Legal Materials in U.S. Constitutional Cases: A Conversation Between Justice Antonin Scalia and Justice Stephen Breyer*, 3 INT'L J. CONST. L. 519 (2005).

Interestingly enough, one type of international law, the customary international law of human rights, itself evolves over time and calls for judicial decisionmaking that is comparable in some respects to that required under the substantive due process theory of evolving national values. *See generally* Sosa v. Alvarez-Machain, 542 U.S. 692, 731–38 (2004) (sanctioning private claims under the Alien Tort Statute based on customary international law, but holding that such a claim is permitted only when it is supported by an international consensus on the particular issue at hand, defined at an appropriate level of specificity).

428. *See Lawrence*, 539 U.S. at 578 ("The present case . . . does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter.").

certainly supports the argument that this liberty should be extended to include the right to marry.[429] At present, the Court could not properly declare a right to same-sex marriage, because there is no national consensus favoring such a right.[430] Influenced in part by the Court, however, policymakers might ultimately move in this direction, eventually creating a national consensus that would support the recognition of an additional unenumerated right.[431]

In summary, the theory of evolving national values satisfies each of my three criteria of evaluation. The requirement of a contemporary national consensus permits substantive due process to operate in relative harmony with the principle of majoritarian self-government, and it constrains the Court's discretion in a manner that

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429. *See* Carlos A. Ball, *The Positive in the Fundamental Right to Marry: Same-Sex Marriage in the Aftermath of* Lawrence v. Texas, 88 MINN. L. REV. 1184, 1208–21 (2004); Tribe, *supra* note 9, at 1945–51.

430. As of yet, there is nothing approaching a contemporary national consensus favoring a right to same-sex marriage, nor even a right to comparable legal benefits in the form of civil union. Much to the contrary, recent legislation and state constitutional amendments have created a pattern of state laws—the best evidence of a national consensus—that clearly rejects such claims in favor of the maintenance of traditional, heterosexual marriage. Just one state, Massachusetts, has recognized same-sex marriage, and it acted only under the mandate of a state court invoking state constitutional law. *See* Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941 (Mass. 2003). Vermont and Connecticut have recognized a right to same-sex civil union, but Vermont, like Massachusetts, acted under the compulsion of a state court decision relying on state constitutional law. *See* Baker v. State, 744 A.2d 864 (Vt. 1999). In New Jersey, the State supreme court, following the lead of Vermont, recently declared that state constitutional law does not require same-sex marriage but does require the New Jersey Legislature to recognize same-sex civil union. *See* Lewis v. Harris, No. A-68-05 (N.J. Oct. 25, 2006). A handful of other states have enacted legislation providing same-sex couples with some of the benefits of marriage. At present, however, states giving same-sex couples any form of legal recognition are in a distinct minority. By contrast, an overwhelming majority of the states restrict marriage and its legal benefits to heterosexual couples. The Human Rights Campaign helpfully documents, catalogs, and maps the laws of all fifty states on its web site. *See* Human Rights Campaign, Your Community Homepage, http://www.hrc.org (follow "Laws in Your State" hyperlink; then follow "Statewide Marriage Laws" and "Relationship Recognition in the U.S." hyperlinks) (last visited Nov. 29, 2006). Congress has expressed a view similar to most of the states, declaring that for federal law purposes marriage is confined to its traditional definition. *See* Defense of Marriage Act, Pub. L. No. 104-199, § 3(a), 110 Stat. 2419, 2419 (1996) (codified at 1 U.S.C. § 7 (2000)).

431. This is not to deny that in the aftermath of *Lawrence*, there was a broad political backlash against same-sex marriage. *See supra* note 430. The greater part of this backlash, however, arose not so much from *Lawrence* as from other developments, including especially the subsequent decision of the Supreme Judicial Court of Massachusetts in *Goodridge*, which directly mandated legal recognition of same-sex marriage on the basis of state constitutional law. *See* Michael J. Klarman, Brown *and* Lawrence *(and* Goodridge*)*, 104 MICH. L. REV. 431, 459–82 (2005). In any event, the long-term political prospects for same-sex marriage are considerably more favorable than the short-term political environment might suggest. *See id.* at 484–86.

honors the criterion of judicial objectivity and competence. This requirement prevents substantive due process from maximizing liberty, but it permits the enhancement of liberty, in part through the Supreme Court's elaboration of a libertarian philosophy in its independent evaluation of the asserted individual right. At the same time, substantive due process serves a progressive function that honors America's self-understanding, and it nationalizes rights that warrant constitutional recognition at that level.[432]

CONCLUSION

In this Article, I have described and analyzed three competing theories of substantive due process: historical tradition, reasoned judgment, and evolving national values. In evaluating each theory, I have utilized three criteria, reflecting relevant considerations of constitutional policy: majoritarian self-government, judicial objectivity and competence, and functional justification. As we have seen, each theory has support in the Supreme Court's contemporary doctrine, and each can be defended as a matter of constitutional policy. On the basis of my analysis, however, I have concluded that the most appealing theory, on balance, is the theory of evolving national values. Under this theory, the Supreme Court should recognize an unenumerated right if but only if the right—defined narrowly and with precision—is supported both by a contemporary national consensus and by the Court's independent political-moral judgment.

If my argument is sound,[433] the Supreme Court should adopt the theory of evolving national values as a general theory for resolving substantive due process claims, and it should reject the competing theories. In so doing, the Court would clarify and rationalize its

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432. For the reasons discussed in the text, the evolving national values approach is superior to that of reasoned judgment as a matter of constitutional policy. It may also be more consistent with practical limitations on the judiciary's ability to generate social change. *See* GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? 338 (1991) (concluding that the courts, including the Supreme Court, "can *almost never* be effective producers of significant social reform" and that "[a]t best, they can second the social reform acts of the other branches of government"); *cf. id.* ("A court's contribution . . . is akin to officially recognizing the evolving state of affairs, more like the cutting of the ribbon on a new project than its construction."). For helpful commentary, see Symposium, *The Role of Courts in Social Change*, 54 DRAKE L. REV. 791 (2006).

433. Needless to say, I believe that my argument is sound, but I make no claim that it is irresistible. Reasonable observers, or reasonable Justices, might embrace any of the three theories that I have described, depending on how they weigh and apply my criteria of evaluation.

substantive due process doctrine. Although the theory would be new, it would not necessarily undermine the Court's existing body of precedents. As we have seen, *Lawrence v. Texas*[434] is easy to justify under this theory.[435] Moreover, many of the Court's prior holdings (as opposed to its reasoning) could also be explained in a manner consistent with this approach. In *Griswold v. Connecticut*,[436] for example, there clearly was a contemporary national consensus supporting the right of married couples to use contraceptives.[437] A similar consensus, supported by state laws and other relevant evidence, might also be found for other family-related and parental rights that the Court has recognized.[438] Likewise, the right to refuse medical treatment, as discussed in *Cruzan v. Director, Missouri Department of Health*,[439] was supported by a contemporary consensus as well as historical tradition, because the historical tradition had continued to the present.[440] Conversely, in *Washington v. Glucksberg*,[441] there was no contemporary national consensus favoring a right to physician-assisted suicide,[442] and the Court's rejection of that claim therefore was proper under this theory.

Other precedents would be difficult or impossible to explain under the theory of evolving national values, but they might be reaffirmed nonetheless on the basis of stare decisis. The Supreme Court's 1973 decision in *Roe v. Wade*,[443] for example, plainly was not supported by a national consensus.[444] Perhaps there was a national consensus favoring the more moderate approach that the Court adopted two decades later in *Planned Parenthood of Southeastern Pennsylvania v. Casey*,[445] or perhaps not. By prematurely constitutionalizing the right to abortion in *Roe*, the Court preempted

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434. 539 U.S. 558 (2003).

435. *See supra* Part V.B.

436. 381 U.S. 479 (1965).

437. *See* Sunstein, *supra* note 329, at 27 (noting that *Griswold*, like *Lawrence*, invalidated "a law that had become hopelessly out of touch with existing social convictions"). Indeed, as Justice Harlan explained in his opinion anticipating *Griswold*, the challenged Connecticut statute was uniquely intrusive on personal privacy and liberty, compared to other state and federal laws, in that Connecticut stood alone in making it a crime to *use*—rather than to distribute—contraceptives. *See* Poe v. Ullman, 367 U.S. 497, 554 (1961) (Harlan, J., dissenting).

438. *See supra* Part I.

439. 497 U.S. 261 (1990).

440. *See id.* at 269–70.

441. 521 U.S. 702 (1997).

442. *See id.* at 716–19.

443. 410 U.S. 113 (1973).

444. *See supra* notes 213–14 and accompanying text.

445. 505 U.S. 833 (1992).

state legislatures and thereby deprived itself of the best evidence of a national consensus, the pattern of freely adopted state legislation.[446] As a result, the case for a consensus favoring the *Casey* approach—either at the time of the *Casey* decision or today—would necessarily rest on much less reliable evidence, such as public opinion surveys.[447] Evidence of this type, standing alone, generally is not enough to support the finding of a national consensus. Yet one might argue that such evidence, however unreliable, could support the reaffirmation of *Casey* when combined with the force of stare decisis. Or perhaps stare decisis alone would justify this result. Concededly, the right to abortion would be something of an anomaly under the theory of evolving national values, but stare decisis has its own power.[448] Indeed, if one accepts the Court's analysis in *Casey*,[449] stare decisis has special force in this context.[450]

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446. *Cf.* Ruth Bader Ginsburg, *Speaking in a Judicial Voice*, 67 N.Y.U. L. REV. 1185, 1208 (1992) ("[T]he Court, through constitutional adjudication, can reinforce or signal a green light for a social change.... *Roe*, on the other hand, halted a political process that was moving in a reform direction and thereby, I believe, prolonged divisiveness and deferred stable settlement of the issue.").

447. *Cf.* James G. Wilson, *The Role of Public Opinion in Constitutional Interpretation*, 1993 BYU L. REV. 1037, 1137–38 (suggesting, shortly after the Court's decision, that *Casey* reflected a compromise that might prove acceptable to most Americans).

448. On the role of stare decisis as a source of constitutional legitimacy, see Fallon, *supra* note 83, at 1821–24.

449. *See Casey*, 505 U.S. at 854–69.

450. The Supreme Court may revisit the role of stare decisis in pending cases challenging the federal Partial-Birth Abortion Ban Act of 2003, Pub. L. No. 108-105, 117 Stat. 1201 (codified as amended at 18 U.S.C. § 1531 (Supp. IV 2004)). *See* Gonzales v. Carhart, 126 S. Ct. 1314 (2006) (mem.) (granting certiorari to review Carhart v. Gonzales, 413 F.3d 791 (8th Cir. 2005)); Gonzales v. Planned Parenthood Fed'n of Am., Inc., 126 S. Ct. 2901 (2006) (mem.) (granting certiorari to review Planned Parenthood Fed'n of Am., Inc., v. Gonzales, 435 F.3d 1163 (9th Cir. 2006)). The Act provides no exception for women facing non-life-threatening health risks, and, as the lower courts held, it therefore would seem unconstitutional under the precedent of *Stenberg v. Carhart*, 530 U.S. 914 (2000). But the pending challenges raise a number of issues, including the question of appropriate relief, leaving various resolutions open to the Court. *Cf.* Ayotte v. Planned Parenthood of N. New Eng., 126 S. Ct. 961 (2006) (remanding a challenge to a parental notification law that lacked an explicit exception for emergency abortions for minors facing health risks, with the Court suggesting that the constitutional defect might be cured by a more narrow remedy than invalidation of the law in its entirety); *id.* at 969 (noting that the Court had approved a complete invalidation of the "partial birth abortion" statute in *Stenberg*, but observing that "the parties in *Stenberg* did not ask for, and we did not contemplate, relief more finely drawn"); Nat'l Abortion Fed'n v. Gonzales, 437 F.3d 278 (2d Cir. 2006) (concluding that the federal Partial-Birth Abortion Ban Act is unconstitutional, but deferring the question of remedy, with the court noting the potential impact of *Ayotte* and inviting the submission of supplemental briefs).

Even if the Supreme Court does repudiate or limit *Stenberg* in the pending cases, its reasoning is likely to reflect the view that "partial birth abortion" is morally distinctive,

In any event, my argument looks mainly to the future. It is designed to inform the Supreme Court's consideration of claims urging the recognition of a new unenumerated right—perhaps a right to same-sex marriage, or a right to engage in reproductive cloning, or a right that we cannot as yet imagine.[451] In cases such as these, the theory of evolving national values would require the Court to find a contemporary national consensus favoring the asserted right before conducting its own political-moral evaluation. This theory would reject a narrow focus on historical tradition, but it also would reject the approach of reasoned judgment, which champions an unduly expansive role for the Court. The theory of evolving national values would countenance the notion of a living Constitution, one that protects unenumerated rights that emerge over time. The Constitution's evolving set of unenumerated rights, however, would be a product not merely of the Court's own judgment, but also of majoritarian actions that would provide the Court with an external standard of decision. This theory would permit the Court to enhance liberty and to advance a progressive understanding of the Constitution. At the same time, it would confine the Justices to an appropriate judicial role. After all, they are judges. They are not "knight[s]-errant, roaming at will in pursuit of [their] own ideal of beauty or of goodness."[452]

justifying a distinctive legal response. As a result, the Court's decisions are unlikely to threaten the general doctrinal approach of *Casey*.

451. Some or all such claims, of course, might be couched in terms of equal protection as well as substantive due process. My focus in this Article is substantive due process, not equal protection, but my argument might have implications for equal protection as well. *Cf.* City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 466 (1985) (Marshall, J., concurring in the judgment in part and dissenting in part) (contending that evolving societal values, as embodied and reflected in patterns of legislation, should inform the Court's equal protection decisionmaking). In any event, when it comes to the recognition of a newly emerging, nonoriginalist constitutional right, I seriously doubt that an equal protection claim should prevail when a substantive due process claim would not. *Cf.* Vacco v. Quill, 521 U.S. 793 (1997) (rejecting an equal protection argument for physician-assisted suicide, with the Court's decision resting heavily on its substantive due process ruling in *Washington v. Glucksberg*, 521 U.S. 702 (1997)). *But cf.* Cass R. Sunstein, *Sexual Orientation and the Constitution: A Note on the Relationship Between Due Process and Equal Protection*, 55 U. CHI. L. REV. 1161 (1988) (contending that equal protection is a more potent constitutional weapon than substantive due process, one that is designed to invalidate discriminatory practices even if they are supported by longstanding and continuing traditions).

452. CARDOZO, *supra* note 98, at 141.