

Essays

TRADITION AS PAST AND PRESENT IN SUBSTANTIVE DUE PROCESS ANALYSIS

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ABSTRACT

Tradition is often understood as an inheritance from the past that has no connection to the present. Justices of the U.S. Supreme Court on both ends of the ideological spectrum work from this understanding, particularly in analyzing cases under the substantive due process clause. Some conservative Justices say that substantive due process protects only rights that were firmly established when the Constitution was ratified. In contrast, some liberal Justices dismiss tradition as being too stagnant and oppressive to serve as a limit on substantive due process rights, relying instead on contemporary norms and reason. Both of these approaches share an oppositional view of past and present, and permit little opportunity for deeper, searching inquiry into what liberty interests are so deeply embedded in this Nation's identity that they should be protected by the U.S. Constitution. The Essay presents a richer, interactive understanding of tradition as a continuity between past and present. Tradition represents what elements of our evolving past we wish to own in the present. The Essay explores this alternative view of tradition using as exemplars some judicial opinions in the substantive due process area, largely from the Court's center. It argues that tradition does not deserve a place in substantive due process analysis simply because it represents a fixed truth from some distant past, nor should tradition be entirely rejected as a source of substantive due process rights simply because of its connection to the past. Understood as a source of our identity that is both inherited and changing, tradition can serve as a constructive focal point for determining substantive due process rights.

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INTRODUCTION

Some political candidates speak of restoring traditional values, as if going backwards were a meaningful direction and could erase today's undesirable social norms. Other candidates speak of completely changing the way we do business, as if the past could be swept aside and the present constructed upon a foundation disconnected from what has come before. These invocations have rhetorical power and provide a shorthand in political discourse. The trouble is that, in making a virtue out of distancing past from present, they also exaggerate divisions within current politics, discourage efforts to find common ground and shared commitments, and mask actual commitments behind rhetorical screening.

This dichotomous way of thinking about traditional values operates not only in politics, but in judicial decisionmaking relating to individual constitutional rights. For some members of the U.S. Supreme Court, tradition is the only legitimate source of substantive due process rights; in other words, no matter how well-accepted a liberty or identity interest has come to be in present society,

substantive due process protection is not available unless the right was already, at some specific chronological moment, “deeply rooted in this Nation’s history and tradition.”¹ Even with respect to equal protection rights, Justice Scalia believes that “the function of [the Supreme Court] is to preserve . . . society’s values . . . not to revise them.”² For some other Justices, in contrast, tradition is a source of oppression, and thus a cause for suspicion, not constitutional instantiation. The opinions of Justices Brennan and Blackmun, for example, contend that individual rights should be identified based on reasoned judgment and evolving, expanding contemporary norms, not tradition.³ On today’s Court, Justice Ginsburg views tradition as oppressive, not as a source of liberty, and, for this reason, she has generally preferred equal protection to substantive due process for securing individual rights.⁴

These contrary views share one point in common: that tradition is based only on the past and has no relation to the present. This Essay has a modest goal: to show that this view of tradition in opposition to the present is wrong, both descriptively and normatively. When courts and advocates reason from tradition, whatever they pretend to be doing, they are not in fact choosing between past and present, at least not to the extent, or in the way, claimed. Even if they could separate past and present as they claim, this Essay argues that to do so would eviscerate the richness of the historical dimension that substantive due process is intended to capture.

Traditions do not exist—and should not inform existing constitutional law and politics—simply by virtue of their existence in the past. As this Essay will explain, traditions are transmitted, and continue only if they are accepted and carried forward from one generation to the next, often in revised form.⁵ The need for acceptance in the present makes tradition a choice, not a discovery of some objective fact or truth. Tradition represents *ownership* of a

1. *Lawrence v. Texas*, 539 U.S. 558, 593 (2003) (Scalia, J., dissenting) (quoting *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997)) (internal quotation marks omitted).

2. *United States v. Virginia*, 518 U.S. 515, 568 (1996) (Scalia, J., dissenting) (emphasis omitted).

3. See *infra* notes 73, 76–97 and accompanying text.

4. See *infra* notes 74–75 and accompanying text.

5. See *infra* Part II.

continuity with the past—a *present* authority,⁶ as well as a past one. It is not the absence of change; “the very traditionality of law ensures that it *must* change.”⁷ Indeed, change often strengthens, rather than weakens, tradition.⁸

Conversely, today’s normative commitments do not spring fully clothed from the present. The present builds on what was transmitted, and received, from the past. Accordingly, change means revision, not creation, and is best secured on its foundations in the past—carefully rethought and reconsidered.⁹ In this important sense there is pastness in the present, and presence in the past.¹⁰

I proceed in this Essay first by exploring how tradition is understood in some representative substantive due process opinions at each end of the Court’s ideological spectrum. I then sketch an alternative, more integrated approach to tradition and demonstrate the application of this approach in judicial opinions that tend to be associated with the Court’s “center.” The positions I explore correspond roughly to the different theories of constitutional interpretation evident in the broader arena of constitutional interpretation—not surprisingly, because the interpretative theories themselves reflect the same contrasting views of history and change. *Originalists*, who believe the Constitution should be interpreted according to its original meaning,¹¹ also believe that only rights that existed at the time of the Framers or when the Fourteenth Amendment was ratified should be protected by substantive due process and that present norms and circumstances are irrelevant.

6. Martin Krygier, *Law as Tradition*, 5 LAW & PHIL. 237, 240 (1986); see also *id.* at 250 (“Traditions depend on real or imagined *continuities* between past and present.”).

7. *Id.* at 251.

8. See Joseph R. Gusfield, *Tradition and Modernity: Misplaced Polarities in the Study of Social Change*, 72 AM. J. SOC. 351, 357–58 (1967).

9. See Katharine T. Bartlett, *Tradition, Change, and the Idea of Progress in Feminist Legal Thought*, 1995 WIS. L. REV. 303, 305 (“[T]he primary impulse for social change seeks reconciliation between the familiar and an evolving sense of what is just and good, rather than a radical break from the past.”).

10. See Krygier, *supra* note 6, at 256 (“Important traditions are a combination of inheritance and (often creative) reception and transmission.”).

11. See, e.g., Robert H. Bork, *The Constitution, Original Intent, and Economic Rights*, 23 SAN DIEGO L. REV. 823, 823 (1986) (“[O]riginal intent is the only legitimate basis for constitutional decisionmaking.”); Lino A. Graglia, *Constitutional Interpretation*, 44 SYRACUSE L. REV. 631, 631 (1993) (“To interpret a document simply means to attempt to determine what its author or authors intended to convey.”); Lino A. Graglia, “*Interpreting the Constitution: Posner on Bork*,” 44 STAN. L. REV. 1019, 1020 (1992) (“Originalism is a virtual axiom of our legal-political system, necessary to distinguish the judicial from the legislative function.”).

Rationalists or *perfectionists*¹² are not constrained by the past, favoring instead the use of reasoned judgment in light of today's realities to extend substantive due process precedents.¹³ Although these approaches take opposite stances toward tradition, they share the view that answers lie either in the past or in the present, but not both. In contrast, *common-law constitutionalists*,¹⁴ *Burkean minimalists*,¹⁵ or *traditional rationalists*¹⁶ respect both history and reason. History is important—indeed, it is given a kind of presumptive weight. But it is not a single, unchangeable state of affairs at some single, original moment,¹⁷ nor is it the end of the analysis to which contemporary considerations and practices are irrelevant.¹⁸

Drawing from the same view of the role of history as common-law constitutionalists—and as a number of Justices from the Court's center—I argue in this Essay that an interactive view of tradition in which both past and present are relevant is superior to the dichotomous, either/or view. It is superior not because it inevitably reaches “better” results, but because it builds on a more realistic view

12. The terms are used in Cass R. Sunstein, *Burkean Minimalism*, 105 MICH. L. REV. 353, 356, 394 (2006). Professor Sunstein uses the term “perfectionists” to apply to both those on the right and those on the left who “want to read the Constitution in a way that fits with the most attractive political ideals.” *Id.* at 353.

13. For other “dynamic” theories of interpretation, see Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204 (1980), which argues that the Constitution's “text and original history” should be given “presumptive weight” but should not be treated as “authoritative or binding,” *id.* at 205; and Daniel A. Farber, *The Originalism Debate: A Guide for the Perplexed*, 49 OHIO ST. L.J. 1085 (1989), which argues for “pragmatic constitutionalism” that considers not only Constitutional text, but also judicial precedents, American traditions, and contemporary social values, *id.* at 1104–06.

14. See, e.g., Ernest Young, *Rediscovering Conservatism: Burkean Political Theory and Constitutional Interpretation*, 72 N.C. L. REV. 619, 688 (1994) (advocating for an evolutionary approach to constitutional interpretation based heavily on precedent).

15. See Sunstein, *supra* note 12, at 389 (advocating for “a conception of the Constitution as evolving in the same way as traditions and the common law—not through the idiosyncratic judgments of individual judges, but through a process in which social norms and practices play the key role”).

16. See David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877, 891 (1996) (“The central rational traditionalism idea is that one should be very careful about rejecting judgments made by people who were acting reflectively and in good faith, especially when those judgments have been reaffirmed or at least accepted over time.”).

17. See Larry Kramer, *Fidelity to History—And Through It*, 65 FORDHAM L. REV. 1627, 1640 (1997) (“To assume that values articulated at the Founding should apply unchanged is to overlook the ways in which those values . . . may themselves have changed.”).

18. *Lawrence v. Texas*, 539 U.S. 558, 572 (2003) (“[H]istory and tradition are the starting point but not in all cases the ending point of the substantive due process inquiry.” (quoting *Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 857 (1998) (Kennedy, J., concurring)) (alteration in original)) (internal quotation marks omitted)).

of tradition, encourages transparency, and focuses debate on the questions most relevant to substantive due process analysis.

I. TRADITION IN SUBSTANTIVE DUE PROCESS JURISPRUDENCE: TWO OPPOSING VIEWS

In this Part, I explore two jurisprudential viewpoints that, although diametrically opposed in terms of the values they adopt, share analytically a view of tradition as entailing the past disassociated from the present. I start with the view—articulated most forcefully by Justice Scalia—that substantive due process secures only those particular individual liberties that are “deeply rooted in this Nation’s history and tradition.”¹⁹ I then address the contrary view of tradition—reflected in different ways in the jurisprudence of Justices Brennan, Blackmun, and Ginsburg—as an undesirable deadweight that should not play a significant role in identifying fundamental liberty rights.

A. *Tradition as Positive, Fixed, and Limiting*

1. *The Model.* The view of tradition held by the most conservative members of the U.S. Supreme Court is that tradition is discernible, fixed, and the sole source of liberty rights under substantive due process. In recent decades, the Justices most associated with this view are Justices White, Scalia, Thomas, and Alito. To these Justices, substantive due process is a very limited doctrine, intended only to prevent legislatures from trampling on individual rights that are already deeply settled in our nation’s earliest traditions.²⁰ Tradition is, within this view, a limiting principle—an objective criterion that prevents courts from substituting their own subjective preferences for those of legislatures. Legislatures are free to depart from tradition,²¹ but courts are not. If a tradition was not

19. *E.g., id.* at 594 (Scalia, J., dissenting) (quoting *Bowers v. Hardwick*, 478 U.S. 186, 192 (1986), *overruled by Lawrence*, 539 U.S. 558) (internal quotation marks omitted).

20. *See, e.g., United States v. Virginia*, 518 U.S. 515, 568 (1996) (Scalia, J., dissenting) (stating that the Court’s function in terms of identifying suspect classes and fundamental rights is only to “prevent backsliding from the degree of restriction the Constitution imposed upon democratic government, not to prescribe, on [its] own authority, progressively higher degrees”).

21. *See McDonald v. City of Chicago*, 130 S. Ct. 3020, 3058 (2010) (Scalia, J., concurring) (stating that rights that are not recognized by the Court “are left to be democratically adopted or rejected by the people”); *Virginia*, 518 U.S. at 567 (Scalia, J., dissenting) (“The virtue of a democratic system with a First Amendment is that it readily enables people, over time, to be persuaded that what they took for granted is not so, and to change their laws accordingly.”);

firmly established at the time of the Framers or when the Fourteenth Amendment was adopted, or if a particular tradition supports a legislative act, the substantive due process challenge at issue fails.²² Indeed, Justice Thomas suggests that he would support overruling past precedents not grounded in enumerated constitutional provisions.²³

An exemplar of the view of tradition as ascertainable, fixed, and essential to the identification of rights under substantive due process is Justice White's majority opinion in *Bowers v. Hardwick*.²⁴ The opinion upheld the Georgia antisodomy statute at issue in that case on the ground that sodomy was a criminal offense under many laws in effect at the time of the ratification of both the Bill of Rights and the Fourteenth Amendment.²⁵ "Against this background," Justice White wrote, the claim that there is a right to engage in homosexual sodomy is "at best, facetious."²⁶ In his concurring opinion, Chief Justice Burger reinforced the reasoning of Justice White. "Decisions of individuals relating to homosexual conduct have been subject to state intervention throughout the history of Western civilization," he wrote.²⁷ "[P]roscriptions against sodomy have very 'ancient roots'" in Roman law, "Judeo-Christian moral and ethical standards," and the common law of England.²⁸ "To hold that the act of homosexual

Bowers, 478 U.S. at 190 (noting that states are free to repeal their laws criminalizing homosexual sodomy).

22. See, e.g., *Michael H. v. Gerald D.*, 491 U.S. 110, 117, 124, 125 (1989) (plurality opinion) (reasoning that the California law imposing a conclusive presumption of paternity on the mother's husband is "more than a century old," that "[t]he presumption of legitimacy was a fundamental principle of the common law," and that "nothing in the older sources, nor in the older cases, addressed specifically the power of the natural father to assert parental rights over a child born into a woman's existing marriage with another man").

23. *Troxel v. Granville*, 530 U.S. 57, 80 (2000) (Thomas, J., concurring in the judgment) ("I write separately to note that neither party has argued 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."); cf. *id.* at 92 (Scalia, J., dissenting) (conceding that the Court's prior substantive due process cases relating to the family have some "small claim to *stare decisis*" but stating that they should not be further extended).

24. *Bowers v. Hardwick*, 478 U.S. 186 (1986), *overruled by* *Lawrence v. Texas*, 539 U.S. 558 (2003).

25. *Id.* at 192-94, 196.

26. *Id.* at 194.

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

28. *Id.* at 196-97 (quoting *id.* at 192 (majority opinion)).

sodomy is somehow protected as a fundamental right would be to cast aside millennia of moral teaching.”²⁹

In his dissenting opinion in *Lawrence v. Texas*,³⁰ which reversed *Bowers*, Justice Scalia built upon Justice White’s reasoning in *Bowers*, reinforcing the categorical nature of that reasoning. Rights either were established at the time of the Framers or the ratification of the Fourteenth Amendment, or they were not.³¹ According to Justice Scalia, the challenged Texas antisodomy statute was supported by a long history of sodomy regulation;³² the right to homosexual sodomy was not, and therefore could not be, a constitutionally protected right.³³ Present circumstances were irrelevant. For Justice Scalia, it did not matter that antisodomy statutes generally were not enforced, that private attitudes toward homosexuals and homosexual sex had evolved since the Fourteenth Amendment was ratified, or that any other circumstances had changed. All that mattered, in his view, was that antisodomy statutes had a sufficiently old pedigree or, alternatively, that legal protection of sodomy did not.

Because this view of tradition is designed explicitly to limit the ability of courts to expand individual rights,³⁴ it ordinarily carries with it a preference for defining claimed rights in narrow and specific terms. Thus, Justice White defined the right at issue in *Bowers* as the “fundamental right to engage in homosexual sodomy,”³⁵ rather than as the more general claim to privacy in the “private, consensual sexual activity” identified by Justice Blackmun in his dissenting opinion.³⁶ Similarly, in a challenge to a California statute that conclusively presumed that the husband of a married woman was her

29. *Id.* at 197.

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

31. See J.M. Balkin, *Tradition, Betrayal, and the Politics of Deconstruction*, 11 CARDOZO L. REV. 1613, 1616 (1990) (arguing that Justice Scalia treats traditions as coming in “discrete units with discrete boundaries”).

32. *Lawrence*, 539 U.S. at 596 (Scalia, J., dissenting) (“In 1868, when the Fourteenth Amendment was ratified, all but 5 of the 37 States in the Union had *criminal sodomy laws*.” (quoting *Bowers*, 478 U.S. at 192–93)).

33. *Id.* at 594.

34. See, e.g., *Bowers*, 478 U.S. at 195 (majority opinion) (“There should be . . . great resistance to expand the substantive reach of [the Due Process Clause], particularly if it requires redefining the category of rights deemed to be fundamental.”).

35. *Id.* at 191.

36. *Id.* at 199 (Blackmun, J., dissenting) (identifying the issue in the case as whether “individuals [have] the right to decide for themselves whether to engage in particular forms of private, consensual sexual activity”).

child's father, even against the claim of a man whose blood tests could establish that he was the child's biological father, Justice Scalia characterized the claim narrowly, as that of an "adulterous natural father"³⁷ who was asking the Court to disregard the "historic respect . . . traditionally accorded to the relationships that develop within the unitary family,"³⁸ rather than as that of a natural parent with a substantial parent-child relationship seeking to accept the responsibilities of parenthood.³⁹ Likewise, in Justice Scalia's concurring opinion in *Cruzan v. Director, Missouri Department of Health*,⁴⁰ a case concerning whether parents may terminate life-sustaining nutrition and hydration for their terminally ill adult child who was in a persistent vegetative state, Justice Scalia characterized the case as one about the right to assisted suicide,⁴¹ rather than the more general, and well accepted, right to be free from unwanted medical intervention.⁴²

Under the static view of tradition held by Justices White and Scalia, Court precedents that might support a claimed right are also read narrowly. Thus, prior decisions protecting rights to intimate conduct between consenting adults, to procreation, and to possess obscene material in the privacy of one's home, are limited in order to distinguish these established rights from the claim of consenting adults of a right to be free in their sexual relationships in the privacy of their own homes.⁴³ Similarly, prior decisions securing rights for an unmarried father who developed a relationship with his child are narrowed in *Michael H. v. Gerald D.*⁴⁴ to the context of the "unitary

37. *Michael H. v. Gerald D.*, 491 U.S. 110, 120 (1989) (plurality opinion).

38. *Id.* at 123.

39. *Id.* at 142–46 (Brennan, J., dissenting) (emphasizing the nature of the parent-child relationship without regard to marriage and objecting to the plurality's repeated references to the "adulterous natural father") (quoting the plurality opinion (emphasis added)).

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

41. *Id.* at 294–97 (Scalia, J., concurring) (finding the petitioner's case to be legally indistinguishable from "ordinary suicide").

42. *Id.* at 312 (Brennan, J., dissenting).

43. *See Bowers v. Hardwick*, 478 U.S. 186, 190–91, 195 (1986) ("[N]one of the rights announced in those cases bears any resemblance to the [right at issue]. No connection between family, marriage, or procreation on the one hand and homosexual activity on the other has been demonstrated . . ."), *overruled by Lawrence v. Texas*, 539 U.S. 558 (2003).

44. *Michael H. v. Gerald D.*, 491 U.S. 110 (1989).

family,”⁴⁵ and precedents relating to bodily integrity are limited in *Cruzan* by the state’s tradition of prohibiting assisted suicide.⁴⁶

In contrast to the narrowing of constitutional claims and the precedents that might support them, the traditions drawn upon to support the challenged legislative acts are defined broadly. In *Lawrence*, Justice Scalia drew upon an undifferentiated history of antisodomy laws to support broadly a state’s right to ban homosexual sodomy, even though some of those bans—like those on heterosexual sodomy—would be unconstitutional under the Court’s prior family-privacy precedents.⁴⁷ In *Michael H.*, Justice Scalia defined broadly the common-law presumption of the legitimacy of a child so as to support the application of the California statute, even though the fact presumed could be scientifically disproved by a blood test and notwithstanding prior Court precedents about the rights of a father who has formed a relationship with his child.⁴⁸ A history of statutes prohibiting suicide provides cover in *Cruzan* for state statutes that constrict the ability of individuals to make end-of-life decisions for family members, notwithstanding common-law traditions relating to medical decisionmaking and family autonomy.⁴⁹

An advantage claimed by the Justices who adhere to this particular tradition-based method for deciding substantive due process cases is that it avoids subjective value judgments by courts. When courts are limited to measuring a constitutional claim against the existence of a long-established tradition, their own personal views of the tradition do not enter into the calculation. “[B]eyond all serious dispute,” Justice Scalia wrote in *McDonald v. City of Chicago*,⁵⁰ the historical method he employs “is much less subjective, and intrudes much less upon the democratic process,” than the alternative “vague ethico-political First Principles whose combined conclusion can be found to point in any direction the judges favor.”⁵¹

45. *Id.* at 123.

46. *Cruzan*, 497 U.S. at 279–80.

47. *Lawrence*, 539 U.S. at 595–96 (Scalia, J., dissenting); cf. *Bowers*, 478 U.S. at 215–18 (Stevens, J., dissenting) (finding it “perfectly clear” that certain historical antisodomy statutes would be unconstitutional under the Court’s family-privacy precedents).

48. See *Michael H.*, 491 U.S. at 125–30 (plurality opinion) (interpreting the Court’s precedents to be inapplicable to a father’s assertion of “rights over a child born into a woman’s existing marriage with another man”).

49. See *Cruzan*, 497 U.S. at 294–95 (Scalia, J., concurring) (citing prohibitions on assisted suicide and concluding that the petitioner did not have a fundamental right to suicide).

50. *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010).

51. *Id.* at 3058 (Scalia, J., concurring).

He has strong words for those Justices ready to identify new rights based on such First Principles, accusing members of the Court supporting the result in *Lawrence*, for example, of “tak[ing] sides in the culture war,”⁵² “sign[ing] on to the so-called homosexual agenda,”⁵³ and risking “massive disruption of the current social order.”⁵⁴ This critique is possible only from the standpoint that tradition is objectively discernible and unchanging. Indeed, Justice Scalia believes that the historical method is so reliable that it should be the “primary determinant of what the Constitution means”—even, say, the Equal Protection Clause.⁵⁵

Another feature of this historical method is that, because tradition is frozen, Court rulings based on it are permanent. In *Cruzan*, for example, Justice Scalia made clear that there is no right, now, or at any time in the future, to challenge any state regulation regarding end-of-life matters. Regardless of the facts of the case, changed circumstances, or evolving attitudes since early common law, this line of rights is a permanent dead end in the courts. Tradition sets the course. “[F]ederal courts have no business in this field”⁵⁶ “[T]he Constitution has nothing to say about the subject.”⁵⁷ Period.

2. *The Critique.* Notwithstanding the appeal of a fixed, discernible view of tradition as a limiting principle for substantive due process, tradition does not provide an objective basis for deciding substantive due process claims. As will be examined more fully in Part II, tradition cannot serve that role because of its inherently fluid and evasive characteristics. Tradition is not fixed, nor can it be easily or reliably retrieved. It represents not fixed facts, but accumulated values that cannot be ascertained through some precise, scientific method. Perhaps most especially, tradition cannot be determined solely by looking at the past. It is, instead, an iterative phenomenon

52. *Lawrence*, 539 U.S. at 602 (Scalia, J., dissenting).

53. *Id.*

54. *Id.* at 591; see also *id.* at 586–92 (arguing that *Lawrence* was much more likely to cause disruption of social order than the overruling of *Roe v. Wade*, 410 U.S. 113 (1973), would have caused in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), even though avoiding such disorder was used as a justification for *Casey*’s refusal to overrule *Roe*, see *Casey*, 505 U.S. at 856 (plurality opinion)).

55. See *United States v. Virginia*, 518 U.S. 505, 570, 574–75 (1996) (Scalia, J., dissenting).

56. *Cruzan v. Dir., Mo. Dep’t of Health*, 497 U.S. 261, 293 (1990) (Scalia, J., concurring).

57. *Id.* at 300.

that accumulates over time, with repeated affirmations, revisions, and instantiations.

Justice Scalia's opinions, themselves, reflect the flexibility offered by the categories upon which he relies to create certainty. To take just one example, Justice Scalia opposed the biological father's claim to paternal rights in *Michael H.* because that claim was contrary to the interests of the unitary family—the mother, husband, and child.⁵⁸ Yet in the later case of *Troxel v. Granville*,⁵⁹ Justice Scalia voted to reject the right of parents in a unitary family to resist visitation by third-party grandparents under a Washington statute allowing such visitation if the court concludes that it is in the child's best interests.⁶⁰

One might conclude that Justice Scalia is consistent in that he simply rejects the identification of new constitutional rights when doing so would defeat the will of legislatures. This consistency is belied, however, by Justice Scalia's willingness in *McDonald* to sign on to the majority's identification of a right to possess handguns in one's own home on the basis of historical evidence no more or less mixed than the evidence in cases in which he rejected substantive due process claims. *McDonald* concerned a Chicago law restricting the possession of handguns. The question in *McDonald* was whether the Second Amendment right to bear arms is so sufficiently fundamental to our "scheme of ordered liberty" that it should be incorporated as a matter of substantive due process to invalidate the restrictions in question.⁶¹ In his opinion for the Court, Justice Alito purported to track Justice Scalia's approach in *Lawrence*, *Michael H.*, and *Cruzan*. "The relationship between the Bill of Rights' guarantees and the States must be governed by a single, neutral principle"—tradition.⁶² Yet here, instead of defining the claimed right and applicable precedent narrowly to defeat the claim, Justice Alito defined the claimed right—and the tradition upon which it is based—broadly, as the "right to keep and bear arms"⁶³ and the right to self-defense,⁶⁴ in

58. *Michael H. v. Gerald D.*, 491 U.S. 110, 123 (1989) (plurality opinion).

59. *Troxel v. Granville*, 530 U.S. 57 (2000).

60. *Id.* at 91–93 (Scalia, J., dissenting). Justice Thomas suggested that he would have gone further and overruled the Court's substantive due process decisions as exceeding the "original understanding of the Due Process Clause." *Id.* at 80 (Thomas, J., concurring in the judgment).

61. *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3036 (2010) (citing *Duncan v. Louisiana*, 391 U.S. 145, 149 (1986)).

62. *Id.* at 3048 (plurality opinion).

63. *Id.* at 3042 (majority opinion).

order to uphold the claim. These are rights, Justice Alito wrote, that “the Framers and ratifiers of the Fourteenth Amendment counted . . . among those fundamental rights necessary to our system of ordered liberty.”⁶⁵ And whereas judicial interest balancing is ordinarily inappropriate and deference to legislative interests to determine the will of the people is paramount,⁶⁶ in *McDonald*—which involved gun rights—these interests must bow to the Court’s understanding of the meaning of the broad rights of self-defense that it identifies.

Justice Alito, like Justice Scalia, writes with a certitude in substantive due process cases that is not unrelated to the particular view of tradition upon which this certitude is based. If tradition is discernible and unchangeable, it can be reliably and objectively identified. It is difficult to escape, though, the amount of discretion these conservative Justices exercise when deciding whether or not a right is, or is not, deeply rooted in this Nation’s history and tradition. In *Michael H. and Bowers*, Justices White and Scalia defined *narrowly* the claim and the relevant tradition so that they did not match, as discussed above,⁶⁷ notwithstanding other ways that both the claim and the tradition might have been characterized. In *McDonald*, Justice Alito defined the claimed right *broadly*—as a “right of self-defense” and the “right to keep and bear arms.” So defined, this right matched perfectly the broad statements he had retrieved from constitutional ratification debates and various secondary sources about these same rights,⁶⁸ and made the long and more detailed history of restrictions on gun ownership described in Justice Breyer’s dissenting opinion seem irrelevant.⁶⁹ It is this kind of slipperiness that leaves this method vulnerable to the frequent criticism that it creates

64. *Id.* at 3036.

65. *Id.* at 3042; *see also id.* at 3050 (Scalia, J., concurring) (characterizing the incorporation of the Second Amendment right to bear arms as a “straightforward application of settled doctrine”).

66. *See id.* at 3047 (plurality opinion) (explaining that “judicial interest balancing” was expressly rejected by the Court in *District of Columbia v. Heller*, 554 U.S. 570, 634–35 (2008)).

67. *See supra* notes 35–42 and accompanying text.

68. *McDonald*, 130 S. Ct. at 3036–42 (majority opinion).

69. *Compare id.* at 3036–44 (relying on general statements in favor of the historical right to keep and bear arms), *with id.* at 3120–38 (Breyer, J., dissenting) (providing an extensive list of specific gun regulations).

plenty of openings for judges to “smuggle[]” their personal preferences into substantive due process analysis.⁷⁰

The failure to engage alternative histories and traditions gives weight to the general observation some have made that originalism is less a coherent or compelling jurisprudence than a “political practice” that seeks “to forge a vibrant connection between the Constitution and contemporary conservative values.”⁷¹ The point is neither that the values identified by conservatives are wrong, nor that some other method would be more objective. It is, rather, that Originalists make false claims about the nature of tradition. To be supported by tradition, properly understood,⁷² values must not only be rooted in the past but must also resonate today. That resonance needs to be justified, not preemptively accepted as yesterday’s truth.

For the same reason, contemporary standards alone do not offer a more objective or more satisfying basis for substantive due process decisions. Section B explores a jurisprudence that leans too heavily on the present, to the exclusion of the past.

70. See *id.* at 3118 (Stevens, J., dissenting) (“[A] limitless number of subjective judgments may be smuggled into [Justice Scalia’s] historical analysis.”); *id.* at 3116–17 (challenging the neutrality of Justice Scalia’s historical method and noting the inherently subjective process of framing an issue and selecting and synthesizing historical sources). This criticism parallels similar objections by Justices in other cases. See, e.g., *Michael H. v. Gerald D.*, 491 U.S. 110, 137 (1989) (Brennan, J., dissenting) (“The pretense is seductive; it would be comforting to believe that a search for ‘tradition’ involves nothing more idiosyncratic or complicated than poring through dusty volumes on American history.”). Even Justices who, too, have applied a narrow “historical” version of substantive due process dispute its objectivity when they disagree about a result. See, e.g., *Moore v. City of East Cleveland*, 431 U.S. 494, 549 (1977) (White, J., dissenting) (“What the deeply rooted traditions of the country are is arguable, which of them deserve the protection of the Due Process Clause is even more debatable.”); see also Bartlett, *supra* note 9, at 318–19 (arguing that the tradition is not an objective standard, but instead has been used to advance a particular substantive agenda); Rebecca L. Brown, *Tradition and Insight*, 103 *YALE L.J.* 177, 221 (1993) (“Tradition is no longer, if it ever was, the powerful iconic beacon of societal truth, but is more accurately an apologia invoked to defend some predetermined (and unacknowledged) choice.”); cf. Robert Post & Reva Siegel, *Originalism as Political Practice: The Right’s Living Constitution*, 75 *FORDHAM L. REV.* 545, 569 (2006) (arguing that originalism is a political practice rather than a compelling jurisprudence); Laurence H. Tribe & Michael C. Dorf, *Levels of Generality in the Definition of Rights*, 57 *U. CHI. L. REV.* 1057, 1066 (1990) (arguing that the level of generality of claimed rights in substantive due process analysis is often based on conclusions judges seek to reach).

71. See Post & Siegel, *supra* note 70, at 569.

72. See *infra* Part II.

B. Tradition as “Steeped in Prejudice and Superstition”

1. *The Model.* If some conservative Justices believe in a fixed, unmediated past suited as a sole guide for individual-liberty rights, some liberal Justices have been overly dismissive of the past, while at the same time sharing with the conservative Justices a view of tradition as distinct from and contrary to present norms and circumstances. Justice Brennan exemplifies this dichotomous, antitradition view. Although this theory of tradition is less developed than that of Justice Scalia, to Justice Brennan, a Constitution whose interpretation is tied to tradition is “a stagnant, archaic, hidebound document steeped in the prejudices and superstitions of a time long past.”⁷³ Justice Ginsburg believes, as well, that tradition represents this nation’s “long and unfortunate history of sex discrimination”⁷⁴ and outdated, “fixed notions concerning the roles and abilities of males and females.”⁷⁵

Because these liberal views tend to associate tradition with injustice rather than with fundamental freedoms, those who hold these views do not believe that the Court should be bound by tradition in giving meaning to substantive due process.⁷⁶ Tradition is not the anchor for constitutional liberty interests, but, in many cases, its antithesis. Thus, although in his opinions Justice Brennan is sometimes able to identify a tradition supporting a substantive due process claim,⁷⁷ the ultimate question for him is not whether a specific right has always been protected but whether, guided “by our prior cases and by common sense,” a particular claim is “close enough to the interests that we already have protected to be deemed an aspect of ‘liberty’ as well.”⁷⁸ Justice Blackmun, similarly, insists in his opinions that substantive due process is not about “blind imitation of

73. *Michael H.*, 491 U.S. at 141 (Brennan, J., dissenting).

74. *United States v. Virginia*, 518 U.S. 515, 531 (1996) (quoting *Frontiero v. Richardson*, 411 U.S. 677, 684 (1973)).

75. *Id.* at 541–42 (quoting *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 724–25 (1982)) (internal quotation marks omitted).

76. This thought is often attributed to Justice Holmes. See Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897) (“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.”).

77. See, e.g., *Cruzan v. Dir., Mo. Dep’t of Health*, 497 U.S. 261, 305 (1990) (Brennan, J., dissenting) (citing common-law tort principles of trespass and battery as evidence that the right to be free from unwanted medical attention is deeply rooted).

78. *Michael H.*, 491 U.S. at 142 (Brennan, J., dissenting).

the past”⁷⁹ but rather about determining the values that underlie the Court’s prior precedents.⁸⁰

In determining whether a liberty interest should be extended, the Court’s most liberal members tend to characterize claims broadly, to facilitate connections with relevant precedents and thereby support expanded individual rights. For example, whereas Justices White and Scalia viewed the claims at issue in *Bowers* and *Lawrence* as the “right to engage in homosexual sodomy,” Justice Blackmun saw it more broadly as the right of individuals “‘to be let alone’ . . . to decide for themselves whether to engage in particular forms of private, consensual sexual activity.”⁸¹ Similarly, whereas Justice Scalia treated the issue in *Cruzan* specifically as the lawfulness of the state “interfer[ing] with bodily integrity to prevent a felony,”⁸² including suicide, Justice Brennan addressed the “right to be free from medical attention without consent.”⁸³

The Justices who refuse to be governed by a stationary view of tradition also tend to construe traditions and prior precedents more broadly. Thus, whereas Justices White and Scalia in *Bowers* and *Lawrence* looked only to the existence of antisodomy laws at the time of the Framers and the ratification of the Fourteenth Amendment, Justice Blackmun in *Bowers* rejected early law as a basis to deny freedom in the present,⁸⁴ and generously interpreted prior Court precedents to protect such things as “a way of life,” “harmony in living,” “the ability independently to define one’s identity,” “development of the human personality,” “giving individuals freedom to choose how to conduct their lives,” and “special protection for the individual in his home.”⁸⁵ In *Michael H.*, whereas Justice Scalia cited

79. *Bowers v. Hardwick*, 478 U.S. 186, 199 (1986) (Blackmun, J., dissenting) (quoting Holmes, *supra* note 76, at 469) (internal quotation marks omitted), *overruled by* *Lawrence v. Texas*, 539 U.S. 558 (2003).

80. *Id.*; *see also id.* at 210 (“[N]either the length of time a majority has held its convictions [n]or the passions with which it defends them can withdraw legislation from this Court’s scrutiny.”).

81. *Id.* at 199 (quoting *Olmstead v. United States*, 277 U.S. 438, 478 (1928)).

82. *Cruzan*, 497 U.S. at 298 (Scalia, J., concurring).

83. *Id.* at 305 (Brennan, J., dissenting); *see also* *Washington v. Glucksberg*, 521 U.S. 702, 790 (1997) (Breyer, J., concurring in the judgments) (stating that the issue raised by Washington’s ban on physician-assisted suicide is the “right to die with dignity” (internal quotation marks omitted)).

84. *Bowers*, 478 U.S. at 199, 210 (Blackmun, J., dissenting).

85. *Id.* at 205–07; *see also id.* at 217 (Stevens, J., dissenting) (looking broadly to the “American heritage of freedom,” which consists of “the abiding interest in individual liberty

early common law relating the presumption of legitimacy and narrowly construed Supreme Court precedents to apply to the “unitary family,”⁸⁶ Justice Brennan interpreted those precedents to support the rights of parents and families, broadly defined.⁸⁷ These precedents, for Justice Brennan, demonstrate that our society is not a homogeneous one that recognizes only one legitimate family form, but rather a facilitative and pluralistic one.⁸⁸ In the end, for Justice Brennan, the general tradition in support of parenthood⁸⁹ is the more important tradition to emphasize in determining “the kind of society” we are, and wish to be.⁹⁰

Whereas the historical method favored by Justice Scalia and other conservative Justices makes changed circumstances irrelevant to substantive due process, the more liberal Justices believe that the Court should take changed circumstances into account in deciding what values and rights are fundamental to our way of life. In the context of the conclusive presumption at issue in *Michael H.*, for example, Justice Brennan pointed out that blood tests now exist that can determine paternity virtually beyond a shadow of a doubt, making it unnecessary to achieve the necessary certainty through a legal fiction.⁹¹ Likewise, in considering the right to physician-assisted suicide, Justice Brennan found relevant the vastly increased availability of life-prolonging medical technologies, current medical practices relating to use of heroic measures, and the growing use of living wills and health-care powers of attorney—all of which change the context in which expectations relating to patient control of end-of-life decisions are evolving.⁹²

Because tradition requires interpretation, not simple retrieval, reason and judgment are an important part of the liberal methodology. Justice Brennan reasoned in *Cruzan*, for example, that although the state has a legitimate interest in preserving life, it can have “no legitimate general interest in someone’s life, completely

that makes certain state intrusions on the citizen’s right to decide how he will live his own life intolerable” (citations omitted)).

86. *Michael H. v. Gerald D.*, 491 U.S. 110, 123–25 (1989) (plurality opinion).

87. *Id.* at 137–47 (Brennan, J., dissenting).

88. *Id.* at 141.

89. *Id.* at 139.

90. *Id.* at 141.

91. *Id.* at 140.

92. *Cruzan v. Dir., Mo. Dep’t of Health*, 497 U.S. 261, 314, 320–25 (1990) (Brennan, J., dissenting).

abstracted from the interest of the person living that life.”⁹³ Justice Brennan explained why a person would not want to continue on life support (pride, abhorrence of an “ignoble end,” humiliation, desire for dignity),⁹⁴ why Missouri’s rule was counterproductive (it will make doctors and families more reluctant to initiate life-sustaining measures that they then will not be allowed to terminate, even at the family’s request);⁹⁵ why, although a living will may be the only way to satisfy Missouri’s requirements, most people do not make living wills (a wish to avoid dwelling on their own “deterioration and mortality,” a lack of awareness of how to create a living will);⁹⁶ and why Missouri’s failure to recognize testimony from family and friends about what a patient would have wanted makes factfinding less, rather than more, reliable (usually no one knows the patient better).⁹⁷ In contrast to Justice Scalia’s reliance on tradition divorced of its underlying rationale or any countervailing, contemporary norms and values, what counted for Justice Brennan’s opinion were general propositions that found support in precedent, reason, and present circumstances.

Justice Ginsburg shares Justice Brennan’s skeptical view toward tradition, but the two Justices differ in their treatment of substantive due process. Whereas Justice Brennan attempted to use substantive due process largely set free from tradition in favor of the expansion of individual liberty rights, Justice Ginsburg has never fully embraced substantive due process as an independent source of individual rights.⁹⁸ In cases decided in favor of substantive due process claims, Justice Ginsburg has mostly signed on to opinions written by others rather than authored her own.⁹⁹ When she has written for the majority, her approach to substantive due process has been to extend

93. *Id.* at 313; *see also id.* (reasoning that there are no third parties whose situation will be improved, or for whom harm will be averted, as a result of the state’s denial of Nancy Cruzan’s parents’ request).

94. *Id.* at 310–12.

95. *Id.* at 314.

96. *Id.* at 323–25.

97. *Id.* at 325.

98. For a similar observation, see Pamela S. Karlan, *Some Thoughts on Autonomy and Equality in Relation to Ruth Bader Ginsburg*, 70 OHIO ST. L.J. 1085, 1086 (2009) (“Justice Ginsburg has continued to resist the temptation to use substantive due process . . .”).

99. *See, e.g.*, *Troxel v. Granville*, 530 U.S. 57, 59 (2000) (joining Justice O’Connor’s plurality opinion); *Washington v. Glucksberg*, 521 U.S. 702, 789 (1997) (Ginsburg, J., concurring in the judgments) (concurring for essentially the same reasons as Justice O’Connor).

past decisions based on logic and evolving norms.¹⁰⁰ Given the choice, however, Justice Ginsburg has long favored equal protection over substantive due process analysis.¹⁰¹ The right to abortion, she states, would have been more secure on a foundation that incorporated the importance of the abortion decision to women's equality.¹⁰² To Justice Ginsburg, autonomy and equality concerns are "intimately related," with equality concerns the dominant ones.¹⁰³ Accordingly, in resisting

100. See *M.L.B. v. S.L.J.*, 519 U.S. 102, 116–17 (1996) (finding unconstitutional on due process grounds the state's denial of a mother's right to appeal the termination of her parental rights when she could not pay the \$2,400 record-preparation fee).

101. The conventional analysis is that substantive due process looks backward to protect established individual liberties against what Professor Sunstein calls "short-run departures" or "shortsighted deviations" from tradition, while equal protection looks forward, to invalidate practices, "however deeply engrained and longstanding," that are determined to discriminate against disadvantaged groups. 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, 1163, 1171 (1988). By Sunstein's view, substantive due process constitutes a limit on "dramatic and insufficiently reasoned change," *id.* at 1171, while equal protection operates as a "criticism of existing practice"—a "protect[ion] against tradition[]" that is "self-consciously designed to eliminate practices that existed at the time of ratification . . . that were expected to endure." *Id.* at 1174. Professor Laurence Tribe has made a similar contrast between the "properly conservative and suitably backward-looking" substantive due process doctrine and the "more aspirational domain of equal protection." Laurence H. Tribe, *Lawrence v. Texas: The "Fundamental Right" That Dare Not Speak Its Name*, 117 HARV. L. REV. 1893, 1897 (2004). This distinction, while it may seem to help distinguish many cases, imposes a false dichotomy between past and present. In fact, a number of scholars in recent years, including Professor Tribe himself, have challenged this dichotomous view of substantive due process and equal protection, arguing that the two doctrines actually protect a convergent set of rights relating to dignity and self-government. See *id.*, at 1897 ("Trying to make sense of the conclusions judges have reached by attending carefully to the rulings they have actually rendered in the name of substantive due process reveals a very different narrative. It is a narrative in which due process and equal protection . . . are profoundly interlocked in a legal double helix. It is a single, unfolding tale of equal liberty and increasingly universal dignity. This tale centers on a quest for genuine self-government of groups small and large, from the most intimate to the most impersonal."); Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747, 749 (2011) ("The introduction of a third overarching term like 'dignity' that acknowledges the links between liberty and equality is overdue. Too much emphasis has been placed on the formal distinction between the equality claims made under the equal protection guarantees and the liberty claims made under the due process or other guarantees."). This convergent view is wholly consistent with an interactive view of past and present that evaluates past norms and practices in light of current commitments, including commitments to equality, and that evaluates present norms and practice in light of the traditions that give them shape and meaning.

102. See Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade*, 63 N.C. L. REV. 375, 382–86 (1985).

103. *Id.* at 375 (arguing that "the shape of the law on gender-based classification and reproductive autonomy indicates and influences the opportunity women will have to participate as men's full partners in the nation's social, political, and economic life"). This view was included as part of the reasoning in *Casey*, although Justice Ginsburg was not a member of the Court when that decision was rendered. See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S.

the Court's retrenchment in the area of women's reproductive rights, Justice Ginsburg has veered away from the reasoning of an evolving substantive due process analysis. In her dissent in *Gonzales v. Carhart*,¹⁰⁴ she cited the Court's prior substantive due process cases as precedent, but invoked none of the reasoning supporting these precedents.¹⁰⁵ Indeed, she denied that the case was about "some generalized notion of privacy," instead shifting the right at stake to the "woman's autonomy to determine her life's course, and thus to enjoy equal citizenship stature."¹⁰⁶

Justice Ginsburg uses her view of the past as oppressive in an affirmative way in her equal protection jurisprudence. In *United States v. Virginia*,¹⁰⁷ for example, Justice Ginsburg used the history of public education in Virginia to refute Virginia's defense of its exclusion of women from the Virginia Military Institute (VMI). Virginia's claim was that the availability of the male-only VMI enhanced educational diversity in Virginia. In response, Justice Ginsburg pointed to Virginia's tradition of excluding women from its institutions of higher learning to show that preserving VMI as an all-male institution was part of a historical pattern of discrimination rather than a commitment to the benefits of educational diversity.¹⁰⁸ Virginia also claimed that the admission of women would undermine the strengths of the adversative training offered at VMI, because the same techniques could not be used in mixed company and would not work for women. Justice Ginsburg again recited historical facts to refute the claim: the U.S. military academies in response to the same skepticism successfully integrated women in the 1970s; if they could do so without compromising their rigor, so could VMI.¹⁰⁹

833, 852 (1992) (plurality opinion) ("The destiny of the woman must be shaped . . . on her own conception of her spiritual imperatives and her place in society.").

104. *Gonzales v. Carhart*, 550 U.S. 124 (2007).

105. *Id.* at 191 (Ginsburg, J., dissenting). Even in the course of citing the Court's precedents, Justice Ginsburg emphasizes that her preferred rationale focuses on women's equality interests, not the substantive due process rights on which those precedents are based. *See id.* (stating that the Partial-Birth Abortion Ban Act of 2003, 18 U.S.C. § 1531 (2006), "cannot be understood as anything other than an effort to chip away at a right declared again and again by this Court—and with increasing comprehension of its centrality to women's lives").

106. *Id.* at 172.

107. *United States v. Virginia*, 518 U.S. 515 (1996).

108. *Id.* at 536–40; *see also id.* at 538 ("[T]he historical record indicates [that the exclusion of women from the VMI was] more deliberate than anomalous.").

109. *Id.* at 540–45, 551 (citing concerns of those who defended the exclusion of women from military academies and from the practice of law, and noting that these concerns have not come to pass); *see also id.* at 555 n.20 (stating that Virginia's concern about the adversative training

2. *The Critique.* Although Justices Brennan, Blackmun, and Ginsburg undertake a wholly different kind of substantive due process analysis than Justices White, Scalia, and Alito, their approach reflects a similar misunderstanding of tradition. Justice Brennan concedes that tradition is not “irrelevant” in substantive due process cases,¹¹⁰ yet his method of focusing on present realities and his consistently broad characterization of rights and precedents leaves little room for consideration of the role of the past in determining what rights are fundamental to our identity, or in securing those rights through connections to the past. According to Justice Brennan, tradition is a “theme” in prior cases, but it is the precedents themselves, as new facts present themselves, that provide the authority to move forward.¹¹¹ Justice Ginsburg, too, sees tradition in a discontinuous way—fixed and unrelated to the present. Tradition is more a source of injustice than liberty. Like Justices Scalia and Alito, these Justices, too, fail to recognize the common process through which tradition is preserved and change occurs—namely, through an ongoing, inevitable process of selective transmissions from the past that are accepted and integrated into present norms under changing circumstances. They see past and present as competitive rather than interactive and potentially complementary.

The dichotomous view of past and present not only is inaccurate, but it also prevents meaningful debate about basic questions of constitutional values. It is, in short, a conversation stopper. By rejecting the factors that mean the most to the other, the approaches of both ends of the Court are conversation stoppers. They reach conclusions about the most basic issues relating to personal identity, freedom, and liberty on their own, exclusive terms—terms that allow no meaningful mutual exchange between the two sides. In focusing on only the past or the present, these approaches not only fail to speak to

method destroying a sense of decency between the sexes “is an ancient and familiar fear”). For a fuller analysis of Justice Ginsburg’s use of history, see Deborah A. Widiss, Note, *Re-Viewing History: The Use of the Past as Negative Precedent in United States v. Virginia*, 108 YALE L.J. 237, 245–59 (1998).

110. See *Michael H. v. Gerald D.*, 491 U.S. 110, 139 (1989) (Brennan, J., dissenting) (“It is not that tradition has been irrelevant to our prior decisions.”).

111. *Id.* at 139 (“Throughout our decisionmaking in this important area runs the theme that certain interests and practices . . . form the core of our definition of ‘liberty.’ . . . In deciding cases arising under the Due Process Clause, . . . we have considered whether the concrete limitation under consideration impermissibly impinges upon one of these more generalized interests.”).

each other but also to the Court's center, which tends to be more interested in the links between past and present.

II. BEYOND THE PAST/PRESENT DICHOTOMY

The two views of tradition described in Part I are nearly diametrically opposed and mutually exclusive, reaching different conclusions through different starting points and methodologies. As such, they provide little common ground for discussion about what fundamental rights deserve constitutional protection under substantive due process. They are ships passing in the night. The problem is not simply that the Justices disagree about starting points—conservatives preferring past tradition and liberals preferring contemporary norms and reasoned judgment. It is that both sides view these different starting points as polar opposites, each unrelated to the other. These understandings create disputed territory between the Justices that is impassable. Conservatives believe that only deeply rooted traditions are relevant *and* that these traditions have no relation to current norms and values. Liberals, on the other hand, believe that reasoned judgment is what matters most *and* that tradition adds little—except perhaps window dressing—to this judgment. What one side finds dispositive is entirely irrelevant to the other. These are not the makings of a meaningful constitutional discourse.¹¹²

A. *An Integrative View of Past and Present: The Model*

There is a way to think about tradition that better captures the dynamics of tradition and thereby provides a more satisfactory guide to substantive due process analysis. This alternative view sees past and present as in motion and as part of a negotiation about who we are and what freedoms and liberties matter to us enough to have constitutional status.¹¹³ Tradition is a connection or link between past and present,¹¹⁴ rather than a choice between them. The past is what

112. Cf. Olympia J. Snowe, Opinion, *How the Public Can Save the Senate*, WASH. POST, Mar. 4, 2012 at A23 (describing Senator Olympia Snowe's reasons for leaving the U.S. Senate, including the failure of leaders to find common ground and to live up to the Founding Fathers' intentions for establishing the "greatest deliberative body in history").

113. Bartlett, *supra* note 9, at 330; see also SHEILA ROWBOTHAM, *THE PAST IS BEFORE US: FEMINISM IN ACTION SINCE THE 1960S*, at 301 (1989) (arguing that "the future is behind us and . . . the past really is before us").

114. For a discussion of common law and custom as the "extension of a pre-existing series," in which "the agent who extends the series has, in theory, a range of options about the extension

the present redeems from its history; the present is what the present claims as its own.

This richer view of tradition understands that traditions are multiple and varied, and do not speak with just one voice.¹¹⁵ Often traditions are “indeterminate, self-contradictory, incalculable, inexplicable, and generally elusive.”¹¹⁶ They are also found in multiple places, such as social practices, norms, and expectations—not simply in older versions of the very same legal rules and proscriptions that a lawsuit challenges.¹¹⁷

A value or practice from the past earns recognition as a tradition when society chooses to bring it forward from the past into the present. In this sense, tradition is an inheritance, upon which a kind of evolutionary pressure is continually exerted,¹¹⁸ causing past commitments to be amended and reworked, in potentially creative ways.¹¹⁹ Deciding what constitutional rights should be protected by substantive due process is a matter of determining consciously, transparently, and respectfully what part of its past traditions the present should own for itself, and what it should not. This is not the kind of exercise that can be performed by a single, straightforward reading of historical evidence.¹²⁰

If tradition requires choices, it also requires constraints—both methodological and temperamental. Methodologically, the concept of tradition assumes that a people’s sense of identity changes not in sudden bursts but in incremental and iterative stages. Accordingly, judicial decisionmaking that builds on tradition is gradualist and minimalist. This means that decisions should be limited to the facts

of that series,” see Frederick Schauer, *Pitfalls in the Interpretation of Customary Law*, in *THE NATURE OF CUSTOMARY LAW* 13, 23–24 (Amanda Perreau-Saussine & James Bernard Murphy eds., 2007). A similar concept, discussed by Professor Schauer, is Professor Ronald Dworkin’s metaphor for interpretation of the “chain novel.” See RONALD DWORKIN, *LAW’S EMPIRE* 228–38 (1986).

115. See Krygier, *supra* note 6, at 242 (“[E]ven in constantly vetted traditions such as law, the past speaks with many voices.”).

116. Brown, *supra* note 70 at 222.

117. Bartlett, *supra* note 9, at 314.

118. See F.A. HAYEK, *The Origins and Effects of Our Morals: A Problem for Science*, in *THE ESSENCE OF HAYEK* 318, 318 (Chiaki Nishiyama & Kurt R. Leube eds., 1984) (explaining his view that “cultural evolution operates chiefly through group selection”).

119. Krygier, *supra* note 6, at 256.

120. See Rebecca L. Brown, *History for the Non-Originalist*, 26 *HARV. J.L. & PUB POL’Y* 69, 71 (2003) (“The kinds of questions that tend to arise in constitutional interpretation, and on which historical evidence might be helpful, tend not to be the kinds of questions that can aspire to truth.”).

directly before the court and should not preclude future decisionmaking in contexts that may implicate different values and considerations.

Temperamentally, this view of tradition calls for prudence, caution, and humility. Judges determining whether a fundamental constitutional right has emerged are obliged to try in good faith to set aside their own subjective values, in favor of those evident in both our inherited past and our evolving present. This requires “judgment”¹²¹ from “judicial statesmen” with both practical and social wisdom and an ability to understand the competing considerations that underlie the potentially relevant values.¹²²

A number of constitutional-law scholars have developed theories of constitutional interpretation that take seriously the interaction between past and present in a way that is consistent with these methodological and temperamental limits. Dean Larry Kramer, for example, critiques the “originalist” view of constitutional interpretation on the grounds that it assumes that “[t]here are Founding moments and the present—then and now—and little else.”¹²³ In this critique, Dean Kramer argues that it is the job of interpreters of the Constitution to determine which competing interpretations of the Constitution make sense in light of what has happened since the Founding moments. “Subsequent history is essential to determine what our Constitution has become and to decide what it should continue becoming”—an inquiry that is both “grounded in the present” but also based on the “best sense” we can make of the “‘web of beliefs and practices’ we have inherited.”¹²⁴ In seeing the act of interpretation as a synthesis of past and present, Kramer eschews the notion that interpretation chooses between the two.

121. Professor Jeff Powell makes the case that historical research itself requires the “constant exercise of judgment.” H. Jefferson Powell, *Rules for Originalists*, 73 VA. L. REV. 659, 660 (1987); see also *id.* at 683 (arguing that “[h]istory yields interpretations, not uninterpreted facts”).

122. See Neil S. Siegel, *The Virtue of Judicial Statesmanship*, 86 TEX. L. REV. 959, 979 (2008) (“[S]tatesmanship charges judges with approaching cases so as to facilitate the ability of the legal order to legitimate itself over the long term by . . . expressing social values as social circumstances change and sustaining social solidarity amidst reasonable, irreconcilable disagreement.”).

123. Kramer, *supra* note 17, at 1628.

124. *Id.* at 1641 (quoting DON HERZOG, HAPPY SLAVES: A CRITIQUE OF CONSENT THEORY 22–23 (1980)).

Scholars as otherwise diverse as Professors Ernest Young,¹²⁵ Cass Sunstein,¹²⁶ and David Strauss¹²⁷ have linked this more synthetic notion of tradition in various ways with the thought of Edmund Burke. Professor Young advocates a “conservative” or “evolutionary” view of constitutional interpretation that he calls “common-law constitutionalism,” which approaches constitutional interpretation like other forms of common-law reasoning, starting with precedent as a “source of knowledge,” and responding to changing circumstances with “slow, incremental change” as opposed to “radical transformations.”¹²⁸ Within this framework, tradition is not a fixed source of authority; rather, it is “determined from case-by-case adjudication, from judgments of similarity and difference to what has gone before—in short, from the tradition of readings and rereadings of authoritative materials that constitute the practice of constitutional stare decisis.”¹²⁹

Professor Young argues that Burke rejects rigid adherence to some originalist understanding at some discrete point in time of the sort advocated by Justices Scalia and Thomas.¹³⁰ Burke also “downplays the efficacy of a priori rationalizations about law and justice,”¹³¹ “naked reason,”¹³² and “abstract notions of justice”¹³³ toward which opponents of tradition gravitate. Instead, Burke urges respecting the “lessons of history”¹³⁴ over time, using “precedent, legal reasoning, collective deliberation,” and “reasoned judgment.”¹³⁵

125. See Young, *supra* note 14 (arguing that modern judicial conservatism is anathema to the classically conservative political theory articulated in the writings of Edmund Burke).

126. See Sunstein, *supra* note 12, at 353 (arguing that Burkean judicial philosophies oppose originalism).

127. See Strauss, *supra* note 16, at 885 n.23 (advocating a theory, which he identifies as less conservative than Burke’s, in which interpretations of the Constitution are driven both by the text and by a continually developing body of constitutional common law).

128. Young, *supra* note 14, at 622, 624, 688–89. For a critique of common-law constitutionalism, see generally Adrian Vermeule, *Common Law Constitutionalism and the Limits of Reason*, 107 COLUM. L. REV. 1482 (2007), which argues that common-law constitutionalism is no more rational or efficient than statutes and other sources of law.

129. Young, *supra* note 14, at 700 (quoting Balkin, *supra* note 31, at 1624) (internal quotation marks omitted).

130. *Id.* at 627–42.

131. *Id.* at 624.

132. *Id.* at 648.

133. *Id.* at 704.

134. *Id.*

135. *Id.* at 694 (quoting *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 849 (1992) (plurality opinion)).

Professor Sunstein also praises Burkean minimalists, who unlike either originalists or perfectionists, “believe that constitutional principles must be built incrementally and by analogy, with close reference to long-standing practices.”¹³⁶ Professor Sunstein links this form of gradualist minimalism with the restraint that judges refrain from deciding cases broadly and deeply, instead deciding one case at a time based on the facts before the court.¹³⁷ Similarly, Professor Strauss applauds “rational traditionalism,” which “calls for recognizing the value of conclusions that have been arrived at, over time, by an evolutionary process.”¹³⁸ Rationalist traditionalism gives the “benefit of the doubt”¹³⁹ to past practice and text,¹⁴⁰ but it tempers that deference with moral judgments about fairness, good policy, and social utility, which “have always played a role in the common law, and have generally been recognized as a legitimate part of common law judging.”¹⁴¹

A highly influential statement of this view of tradition is Justice Harlan’s dissenting opinion in *Poe v. Ullman*,¹⁴² a substantive due process case in which the Court declined to invalidate a state’s ban on contraceptives.¹⁴³ In his dissent, Justice Harlan famously conceptualized a Burkean view of tradition that both respects the past

136. Sunstein, *supra* note 12, at 356. Professor Sunstein’s taxonomy distinguishes Burkean minimalists from originalists, who seek to recover the original meaning of the Constitution, from rationalist minimalists, who favor incremental steps but are often critical of tradition, and from perfectionists, who want to read the Constitution to accord with the highest political ideals (whether liberal or conservative). *Id.* Professor Daniel Conkle seems to suggest a similar theoretical breakdown in distinguishing between the “theory of historical tradition” upon which Justice White relies in *Bowers* and other decisions, the “theory of reasoned judgment” represented by the jurisprudence of Justice Blackmun in *Roe* and his dissent in *Bowers*, and the “theory of evolving national values” followed by Justice Kennedy in *Lawrence*, see Daniel O. Conkle, *Three Theories of Substantive Due Process*, 85 N.C. L. REV. 63 (2006). None of Professor Conkle’s formulations are Burkean, however, in the sense that none of them combine tradition and reasoned judgment; instead, they each accept one version or another of the tradition-change dichotomy.

137. See CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT 10–11 (1999) (“They decide the case at hand; they do not decide other cases too, except to the extent that one decision necessarily bears on other cases, and unless they are pretty much forced to do so.”).

138. Strauss, *supra* note 16, at 879.

139. *Id.* at 895.

140. *Id.* at 897.

141. *Id.* at 900.

142. *Poe v. Ullman*, 367 U.S. 497 (1961).

143. The case was abrogated four years later by *Griswold v. Connecticut*, 381 U.S. 479, 487 (1965).

and recognizes its inevitably dynamic and evolving nature. “[T]radition is a living thing,” he wrote, representing the balance that our nation has struck between the “postulates of respect for the liberty of the individual” and “the demands of organized society.”¹⁴⁴ This liberty is not fixed as “a series of isolated points pricked out” in various areas, but is rather “a rational continuum.”¹⁴⁵ Within this continuum, there are choices to be made between the traditions “from which [this nation] has developed” and “the traditions from which it broke.”¹⁴⁶ Some traditions are worth preserving while others should be discarded. The necessity of choice does not mean that judges are “free to roam where unguided speculation might take them,”¹⁴⁷ or to give rein to their “merely personal and private notions.”¹⁴⁸ The Court must respect tradition, for pragmatic as well as prudential reasons. Decisions that show such respect are “likely to be sound,” whereas those “which radically depart[] from it could not long survive.”¹⁴⁹ Judgment and restraint are critical components.¹⁵⁰ Each new claim should be “considered against a background of Constitutional purposes, as they have been rationally perceived and historically developed. . . . The new decision must take ‘its place in relation to what went before and further [cut] a channel for what is to come.’”¹⁵¹

This more dynamic, interactive view of tradition is both more open-ended and generative than conservatives allow, and more constrained than many liberals assume. The next Section demonstrates its application.

B. The Interactive View of Past and Present: Applications

Justice Harlan’s integrative view of tradition and liberty has formed the basis for a number of Supreme Court opinions in recent decades. The view of tradition reflected in these opinions is not outcome dispositive, in the sense that some of the opinions upheld state statutes against substantive due process attacks, while others

144. *Poe*, 367 U.S. at 542 (Harlan, J., dissenting).

145. *Id.* at 543.

146. *Id.* at 542.

147. *Id.*

148. *Id.* at 544 (citing *Rochin v. California*, 342 U.S. 165, 170 (1952)).

149. *Id.* at 542.

150. *Id.*

151. *Id.* at 544 (quoting *Irvine v. California*, 347 U.S. 128, 147 (1954) (Frankfurter, J., dissenting)) (last alteration in original).

invalidated such statutes. This Section analyzes opinions in three distinct subject-matter areas: (1) end-of-life decisionmaking, (2) private sexual behavior between individuals of the same sex, and (3) grandparent visitation. In each of these areas, I identify the features of the opinions that reflect an interactive view of past tradition and current norms, and suggest the benefits of this view.

1. *End-of-Life Decisionmaking.* Chief Justice Rehnquist's majority opinion in *Cruzan* held that a state may constitutionally prohibit withdrawal of life-sustaining medical treatment unless there is clear and convincing evidence that the incompetent person would have wanted such withdrawal.¹⁵² Two of the opinions in this case—already discussed¹⁵³—either gave dispositive weight to history (Justice Scalia) or virtually ignored history altogether (Justice Brennan). The other opinions, in different ways and in various degrees, took a more nuanced approach.

Justice Stevens, in his dissenting opinion in *Cruzan*, directly took on the historical methodology employed by Justice Scalia, and in so doing, provides the fullest expression of a more interactive view of past and present. Issues of the magnitude raised in the case, he wrote, cannot be settled by categorical principles. The questions of “whether, and how, the Constitution protects the liberty of seriously ill patients to be free from life-sustaining medical treatment” should not be resolved “in the abstract.”¹⁵⁴ Concrete details matter.¹⁵⁵ History also matters, but it does not always provide consistent or controlling signals. In this particular case, Justice Stevens pointed out that the “[d]ecisions about prolongation of life are of recent origin.”¹⁵⁶ History about life-sustaining medical treatment could hardly be dispositive when it is the case that “[f]or most of the world's history . . . such decisions would never arise because the technology would not be available.”¹⁵⁷ Medical advances have created a new problem, changing the circumstances under which any historical precedent might be dispositive, or even relevant.

152. *Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261, 286–87 (1990).

153. *See supra* notes 40–42, 46, 49, 56–57, 82–83, 92–97 and accompanying text.

154. *Cruzan*, 497 U.S. at 331 (Stevens, J., dissenting).

155. *See id.* (“Our responsibility as judges both enables and compels us to treat the problem as it is illuminated by the facts of the controversy before us.”).

156. *Id.* at 336 (quoting *Cruzan v. Harmon*, 760 S.W.2d 408, 428 (Mo. 1988) (Blackmar, J., dissenting), *aff'd sub nom. Cruzan*, 497 U.S. 261 (1990)).

157. *Id.* (quoting *Cruzan*, 760 S.W.2d at 428 (Blackmar, J., dissenting)).

The issue of constitutional rights in this arena was complicated for Justice Stevens by the difficulty of describing the “precise constitutional significance of death.”¹⁵⁸ According to Justice Stevens, the rights that attend end-of-life decisions are not “reducible to a protection against batteries undertaken in the name of treatment,”¹⁵⁹ as Justice Brennan suggested, nor do they necessitate a rejection of the value of or “desire for life,”¹⁶⁰ as Justice Scalia claimed. It is impossible to categorize death in a way that easily disposes of the issue in the case because “not much may be said with confidence about death.”¹⁶¹ Indeed, the sanctity of life, including when it begins and ends, “is often thought to derive from the impossibility” of reducing it to a single measure like a physiological condition or function.¹⁶² What can be said, as with other questions that may depend upon when life begins,¹⁶³ is as much a question of “faith” as anything else.¹⁶⁴ For Justice Stevens, this fact “alone is reason enough to protect the freedom to conform choices about death to individual conscience.”¹⁶⁵

While he reached a different result, Chief Justice Rehnquist, writing for the majority, used reasoning more consistent with that of Justice Stevens than Justice Scalia. After surveying the common law relating to a competent person’s liberty interest in terminating medical treatment, the Chief Justice was concerned about extending the “logic” of prior cases to the refusal of treatment by an adult’s patient parents, because of “the dramatic consequences involved.”¹⁶⁶ In considering these consequences, Chief Justice Rehnquist noted the “commitment to life” of “all civilized nations” evident in treating homicide as a serious crime and of the majority of states in

158. *Id.* at 343.

159. *Id.*

160. *Id.*

161. *Id.*

162. *Id.* at 345–46.

163. *See id.* at 343–50.

164. *Id.* at 343.

165. *Id.*; *see also id.* at 350 (“[T]here is no reasonable ground for believing that Nancy Beth Cruzan has any *personal* interest in the perpetuation of what the State has decided is her life. . . . [I]t would be possible to hypothesize such an interest on the basis of theological or philosophical conjecture. But even to posit such a basis for the State’s action is to condemn it. It is not within the province of secular government to circumscribe the liberties of the people by regulations designed wholly for the purpose of establishing a sectarian definition of life.”).

166. *Id.* at 279 (majority opinion).

criminalizing assisted suicide.¹⁶⁷ In view of this backdrop, the Chief Justice concluded that a state's desire to guard against potential abuses by requiring a determination regarding an incompetent's wishes, as well as its refusal "to make judgments about the 'quality' of life that a particular individual may enjoy," is not constitutionally unreasonable.¹⁶⁸ All along the way, Chief Justice Rehnquist acknowledged the variety of sources, past and present, from which substantive due process rights might emerge,¹⁶⁹ as well as the important values at stake on both sides of the issue.¹⁷⁰

In agreeing with the majority, Justice O'Connor, too, was not able to find the kind of consensus that would support the creation of a new substantive due process right. At the same time, however, she rejected the categorical approach that led Justice Scalia to the same result. In particular, Justice O'Connor expressed concern about the many legitimate issues relating to the termination of life-sustaining medical treatment that were not then before the Court.¹⁷¹ Recognizing that future cases may arise in different factual contexts, Justice O'Connor insisted that the Court's opinion did not foreclose "a future determination that the Constitution requires the States to implement the decisions of a patient's duly appointed surrogate" or that states may develop "other approaches for protecting an incompetent individual's liberty interest in refusing medical treatment."¹⁷² For Justice O'Connor, it was clear that these questions should not be resolved by categorical judgments about whether a right existed at some particular point in time or was compelled by some current well-accepted doctrine. Each issue warranted its own balance of considerations taking into account past practice, current circumstances, and future issues yet to be fully defined. "As is evident from the Court's survey of state court decisions," she wrote, "no

167. *Id.* at 280.

168. *Id.* at 281–82.

169. *See, e.g., id.* at 269–82 (tracing state and federal common-law roots in the individual's interest in refusing unwanted medical treatment and the state's interest in safeguarding that decision).

170. *See, e.g., id.* at 286 ("Close family members may have a strong feeling—a feeling not at all ignoble or unworthy, but not entirely disinterested, either—that they do not wish to witness the continuation of the life of a loved one which they regard as hopeless, meaningless, and even degrading. But there is no automatic assurance that the view of close family members will necessarily be the same as the patient's would have been had she been confronted with the prospect of her situation while competent.").

171. *Id.* at 289–92 (O'Connor, J., concurring).

172. *Id.* at 292.

national consensus has yet emerged on the best solution for this difficult and sensitive problem,” making them, for the moment, especially suited to be “entrusted to the ‘laboratory’ of the States.”¹⁷³

Cruzan was followed seven years later by *Washington v. Glucksberg*,¹⁷⁴ which tested the constitutionality of Washington’s ban on assisted suicide. This time, opinions by Chief Justice Rehnquist and Justices Stevens and Souter reflect in various ways the Burkean methodology evident in Justice Stevens’s and Chief Justice Rehnquist’s opinions in *Cruzan*.¹⁷⁵ First, all of the various opinions assumed that the kind of question raised by the case was not settled through absolute principles derived from some fixed past or from reasoned judgment in the present, but rather, in Justice Souter’s words, through a weighing of “clashing principles” “within the history of our values as a people.”¹⁷⁶ Each opinion also acknowledged the importance of the ongoing debate over end-of-life decisions and the difficult legal issues that these decisions raise.¹⁷⁷ None suggested that the case be decided by a single, trumping principle.

This respect for the past that does not forever settle the questions of what values are fundamental for the future is inherent in the common-law method. As stated by Justice Souter,

173. *Id.* (quoting *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting)); see also *Washington v. Glucksberg*, 521 U.S. 702, 737 (O’Connor, J., concurring) (same).

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

175. Justice Ginsburg wrote separately to state that she agreed “substantially” with Justice O’Connor’s concurring opinion. See *id.* at 789 (Ginsburg, J., concurring in the judgments).

176. See *id.* at 764 (Souter, J., concurring in the judgment); see also, e.g., *id.* at 727–28 (majority opinion) (“That many of the rights and liberties protected by the Due Process Clause sound in personal autonomy does not warrant the sweeping conclusion that any and all important, intimate, and personal decisions are so protected . . .” (citation omitted)); *id.* at 745–46 (Stevens, J., concurring in the judgments) (“The state interests supporting a general rule banning the practice of physician-assisted suicide do not have the same force in all cases.”); cf. *id.* at 736–38 (O’Connor, J., concurring) (noting that although the majority looked to “our Nation’s history, legal traditions, and practices,” there is no generalized right to commit suicide because of “[t]he difficulty in defining terminal illness and the risk that a dying patient’s request for assistance in ending his or her life might not be truly voluntary”).

177. *Id.* at 720 (majority opinion) (“[W]e ‘ha[ve]’ always been reluctant to expand the concept of substantive due process because guideposts for responsible decisionmaking in this uncharted area are scarce and open-ended.” (second alteration in original) (quoting *Collins v. Harker Heights*, 503 U.S. 115, 125 (1992))); *id.* at 738 (O’Connor, J., concurring) (“As the Court recognizes, States are presently undertaking extensive and serious evaluation of physician-assisted suicide and other related issues.”); *id.* at 752 (Stevens, J., concurring in the judgments) (“There remains room for vigorous debate about the outcome of particular cases that are not necessarily resolved by the opinions announced today.”); *id.* at 784 (Souter, J., concurring in the judgment) (“[T]he knowing and responsible mind is harder to assess.”).

[T]he value of common-law method . . . [is that it] is suspicious of the all-or-nothing analysis that tends to produce legal petrification instead of an evolving boundary between the domains of old principles. Common-law method tends to pay respect instead to detail, seeking to understand old principles afresh by new examples and new counterexamples.¹⁷⁸

Second, the view of tradition reflected in these three opinions is complex and interactive. Tradition is given meaning through present choices that are, themselves, shaped by changing circumstances. Chief Justice Rehnquist's opinion is the most explicit in this regard. It canvassed a broad swath of relevant traditions from the thirteenth-century common law to contemporary state laws,¹⁷⁹ acknowledging both that bans on assisted suicide are deeply rooted and that the "bans have in recent years been reexamined" ("and, generally, reaffirmed").¹⁸⁰ It also then described changing circumstances and evolving practices that may be relevant to current norms, including living wills, surrogate health care decisionmaking, and the withdrawal or refusal of life-sustaining medical treatment.¹⁸¹ It acknowledged that the liberty interests protected by the Fourteenth Amendment have never been "fully clarified" and "perhaps [are] not capable of being fully clarified," but instead have needed to be "carefully refined by concrete examples."¹⁸² Accordingly, the Court did not "find" tradition in some fixed past. Rather, it "inquire[d] whether th[e] asserted right has any place in our Nation's traditions."¹⁸³ This inquiry requires a choice, not a simple excavation—a choice that requires consideration of both past and present. As Justice Souter remarked in his concurrence, "[t]he new decision must take its place in relation to what went before and further [cut] a channel for what is to come."¹⁸⁴

Finally, the opinions in *Glucksberg* affirm that although the common-law method is gradual,¹⁸⁵ movements in any particular

178. *Id.* at 770 (Souter, J., concurring in the judgment).

179. *Id.* at 711–16 (majority opinion).

180. *Id.* at 716.

181. *Id.*

182. *Id.* at 722.

183. *Id.* at 723.

184. *Id.* at 770 (Souter, J., concurring in the judgment) (alteration in original) (quoting *Poe v. Ullman*, 367 U.S. 497, 544 (1961) (Harlan, J., dissenting)).

185. *See, e.g., id.* ("The [common law] 'tradition is a living thing,' albeit one that moves by moderate steps carefully taken." (citation omitted) (quoting *Poe*, 367 U.S. at 542 (Harlan, J., dissenting))).

direction are not inevitable. The possibility of a new constitutional right does not mean that one should be granted. Indeed, none of the concurring Justices urged the identification of a new fundamental right. After sympathetic analyses of the individual's interests in making end-of-life decisions without interference from the state,¹⁸⁶ the opinions examined the need for caution and the reasons why, in the case of this particular right, deference to state legislatures was best.¹⁸⁷ Small differences in context might warrant a different result. For example, the opinions suggested that the case would be a closer one, and may well have come out differently, if the state did not allow for sufficient dosages of pain-killing medication for terminally ill patients.¹⁸⁸ In the next case or in a different context, the right in question might be better viewed as a more general "right to die with dignity,"¹⁸⁹ rather than the more narrow formulation of the right to physician-assisted suicide.¹⁹⁰ In this manner, the *Glucksberg* opinions explore issues without forcing a premature resolution of them,¹⁹¹ explicitly continuing—rather than foreclosing—the ongoing debate on the nature of life-and-death decision making.¹⁹²

186. See, e.g., *id.* at 777–79 (discussing respondents' liberty interest in bodily integrity).

187. E.g., *id.* at 782–89; *id.* at 720 (majority opinion) (“[W]e have a tradition of carefully formulating the interest at stake in substantive-due-process cases.”); *id.* at 737 (O'Connor, J., concurring) (“[E]ven assuming that we would recognize such an interest, I agree that the State's interests . . . are sufficiently weighty to justify a prohibition against physician-assisted suicide.”).

188. See, e.g., *id.* at 736–38 (O'Connor, J., concurring) (“[I]n these States a patient who is suffering from a terminal illness and who is experiencing great pain has no legal barriers to obtaining medication, from qualified physicians, to alleviate that suffering, even to the point of causing unconsciousness and death [T]here is no need to address the question whether suffering patients have a constitutionally cognizable interest in obtaining relief from the suffering that they may experience in the last days of their lives.”); *id.* at 790–92 (Breyer, J., concurring in the judgments) (stating that because statutes at issue permit drugs for pain, this case makes it unnecessary to decide if there is a fundamental right to “die with dignity”).

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

190. See *id.* at 723 (majority opinion) (“[T]he question before us is whether the ‘liberty’ specifically protected by the Due Process Clause includes a right to commit suicide which itself includes a right to assistance in doing so.”).

191. See, e.g., *id.* at 736 (O'Connor, J., concurring) (noting that there is no reason to reach respondents' narrower question in the context of the facial challenges at issue).

192. See, e.g., *id.* at 735 (“Throughout the Nation, Americans are engaged in an earnest and profound debate about the morality, legality, and practicality of physician-assisted suicide. Our holding permits this debate to continue, as it should in a democratic society.”); *id.* at 738 (Stevens, J., concurring in the judgments) (“The Court ends its opinion with the important observation that our holding today is fully consistent with a continuation of the vigorous debate about the ‘morality, legality, and practicality of physician-assisted suicide’ in a democratic society. I write separately to make it clear that there is also room for further debate about the

2. *Private Sexual Conduct Between Individuals of the Same Sex.*

While a number of the opinions in *Bowers* and *Lawrence* work from a dichotomous view of past and present,¹⁹³ other opinions in these cases adopt a richer, more integrative view. Justice Stevens's dissenting opinion in *Bowers* is one such example. According to Justice Stevens, past rules and attitudes are relevant to substantive due process decisions,¹⁹⁴ but so are current attitudes and norms.¹⁹⁵ The point of tradition is not to congeal past practices, but to provide the context for choosing among multiple, evolving possibilities of who we are as a society. As Justice Stevens pointed out in *Bowers*, the "tradition of respect for the dignity of individual choice in matters of conscience" is itself "[g]uided by history."¹⁹⁶ The focus of tradition is what is to be carried forward from the past, rather than what the past, at some time frozen in the past, forever compels.

For pragmatic as well as doctrinal reasons, this view of tradition does not mean that courts are free to revise tradition continually to suit their own ideological agendas. Tradition operates as a real constraint. To repeat Justice Harlan's words, "[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."¹⁹⁷

Kennedy's majority opinion in *Lawrence* explicitly adopted Justice Stevens's approach to tradition,¹⁹⁸ extending it with the help of fuller briefing on the history of sodomy than the Court had in *Bowers*.¹⁹⁹ Justice Stevens had noted in *Bowers* that traditional antisodomy regulations were directed against both homosexual and heterosexual sodomy.²⁰⁰ Under *Griswold v. Connecticut*²⁰¹ and

limits that the Constitution places on the power of the States to punish the practice." (quoting *id.* at 735 (O'Connor, J., concurring)) (citation omitted)).

193. See *supra* notes 24–36, 43, 47, 52–54, 79–81, 84–85 and accompanying text.

194. See *Bowers v. Hardwick*, 478 U.S. 186, 217 (1986) (Stevens, J., dissenting) ("Society has every right to encourage its individual members to follow particular traditions [relating to] expressing affection for one another and in gratifying their personal desires."), *overruled by Lawrence v. Texas*, 539 U.S. 558 (2003).

195. See *id.* at 219–20 (reasoning that because Georgia's prohibition on private, consensual sodomy had not been enforced for decades, the state's interest could not be characterized as important).

196. *Id.* at 217 (quoting *Fitzgerald v. Porter Mem'l Hosp.*, 523 F.2d 716, 719–20 (1975)).

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

198. *Lawrence*, 539 U.S. at 577–78.

199. See *id.* at 567–71 (citing the aid of scholarly amicus briefs).

200. *Bowers*, 478 U.S. at 215 (Stevens, J., dissenting).

201. *Griswold v. Connecticut*, 381 U.S. 479 (1965).

Eisenstadt v. Baird,²⁰² any application of the statute to heterosexual couples would be unconstitutional.²⁰³ In *Lawrence*, Justice Kennedy noted further that “[i]t was not until the 1970s that any State singled out same-sex relations for criminal prosecution, and only nine States have done so.”²⁰⁴ Moreover, the tradition of sodomy prohibitions upon which *Bowers* was based had been eroded, both statutorily²⁰⁵ and in terms of the more recent decisions of *Planned Parenthood of Southeastern Pennsylvania v. Casey*²⁰⁶ and *Romer v. Evans*.²⁰⁷ With these developments, the deficiencies of *Bowers* became clearer,²⁰⁸ and the connections between *Casey* and *Romer* and antisodomy statutes became more evident.²⁰⁹

In the course of reversing *Bowers*, Justice Kennedy stated that *Bowers* was wrongly decided.²¹⁰ Such an admission of error might have been necessary if substantive due process was a static doctrine, tethered to a fixed, discretely bounded concept of tradition, as Justices Scalia and Alito maintain.²¹¹ But, although an explanation of the Court’s reversal of its seventeen-year-old decision in *Bowers* is essential to explaining the decision, the confession that the Court erred in *Bowers* is misplaced, and apology was unnecessary. If tradition is a commitment the Court chooses, not discovers, its choices need not—indeed, sometimes should not—remain stationary over time. Because tradition is an evolving concept, what might at one time have been insufficient as a tradition to support an important liberty interest might later become sufficient, and vice versa. It is, perhaps, unfortunate that although the majority opinion reflects an interactive view of tradition, the *Lawrence* Court did not seem to fully appreciate or own that view.

3. *Grandparent Visitation*. One of the more interesting examples of an organic view of tradition is *Troxel v. Granville*. *Troxel*

202. *Eisenstadt v. Baird*, 405 U.S. 438 (1972).

203. *Bowers*, 478 U.S. at 215–19 (Stevens, J., dissenting).

204. *Lawrence*, 539 U.S. at 570.

205. *See id.* 573 (pointing out that in 2003 only thirteen states prohibit sodomy, of which only four enforce their laws only against homosexual conduct).

206. *Id.* at 573–74, 576 (citing *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992)).

207. *Id.* at 574–76 (citing *Romer v. Evans*, 517 U.S. 620 (1996)).

208. *Id.* at 573.

209. *Id.* at 564–67.

210. *Id.* at 578 (“*Bowers* was not correct when it was decided, and it is not correct today.”).

211. *See supra* text accompanying notes 31–45, 50–57, 61–69.

concerned the constitutionality of a Washington state statute broadly authorizing courts to grant visitation to a child by “[a]ny person,” even over the objection of the child’s parents, upon a determination that visitation was in the child’s best interests.²¹² Unlike Justice Scalia’s and Justice Thomas’s analyses of the case, mentioned in Part I,²¹³ the other opinions in the case reflect an interactive role of tradition and change. Their method is deeply contextual, builds (at most) incrementally on past decisions, and refrains from bold holdings that decide more than is required (although there is disagreement about which questions need to be decided). As in the end-of-life decisions, the opinions differ on the way the case should be decided, and yet all exemplify a brand of common-law constitutionalism.

Writing for a plurality of the Court in *Troxel*, Justice O’Connor surveyed the seventy-five-year evolution of Supreme Court cases developing the liberty interest of parents, highlighting the links between those prior decisions and the history and culture of Western civilization of which they were a part.²¹⁴ She also examined the “changing realities of the American family”²¹⁵ and the traditional statutory means by which states generally protect parental decisions on behalf of their children.²¹⁶ She carefully dissected the lower court opinions to reveal that the trial court had simply disagreed with the mother, factually, about a matter that traditionally had been left to parents—what is in a child’s best interests.²¹⁷ Finally, her opinion carefully limited its own reach to the particular statute at issue, as interpreted by the state supreme court. That court had held that the statute was unconstitutional because it did not require that harm or potential harm to the child be established before visitation was

212. *Troxel v. Granville*, 530 U.S. 57, 67 (2000) (plurality opinion) (emphasis omitted) (quoting WASH. REV. CODE § 26.10.160(3) (1994)) (internal quotation marks omitted).

213. See *supra* note 60 and accompanying text.

214. *Troxel*, 530 U.S. at 65–66 (plurality opinion).

215. *Id.* at 64.

216. See, e.g., *id.* at 70 (citing state statutes requiring consideration of whether visitation rights would interfere with the parent-child relationship).

217. *Id.* at 72. Justice Souter in a concurring opinion extended the analysis of the lack of deference that the trial judge gave to the parent’s choice in this case, in light of the traditionally protected constitutional rights of parents. See *id.* at 79 (Souter, J., concurring) (“It would be anomalous . . . to subject a parent to any individual judge’s choice of a child’s associates from out of the general population merely because the judge might think himself more enlightened than the child’s parent.”).

ordered over the objection of the parent.²¹⁸ Justice O'Connor concluded that the best-interests standard gave too little deference to parents, but she reserved the question of what minimal additional limitations on the court's power to order visitation over parent objection should be.²¹⁹ At each step of the analysis, she clearly exposed what was at stake in the case, recognized that specific facts matter, and refused to recognize the past, or any other factor, as a trump.

While Justice Stevens and Justice Kennedy favored a different result in *Troxel* than Justice O'Connor,²²⁰ they shared her holistic approach to history, factual context, and reason. Justice O'Connor's analysis took into account the historical premise of parents' liberty interest in their children, which is that parents are presumed to act in the interests of their children.²²¹ Exploring some of the same constitutional record, Justice Stevens underlined the potential for divergent interests between parents and children and the need for constitutional sensitivity to the children's interests.²²² Justice Kennedy also looked at history, precedent, contemporary practice, and criticisms of the best-interests test—finding the record “inconclusive.”²²³ He raised some common fact patterns that challenge the premise that parents will act in their children's best interests, such as when the parents are not the child's primary caretaker, or when those seeking visitation have no legitimate and established relationship with the child. These nontraditional circumstances are not to be judged as good or bad, Justice Kennedy explained, but as facts that might make a difference in future cases.²²⁴

218. *Id.* at 63 (plurality opinion).

219. *See id.* at 73 (holding that the statute's unlimited rights for third-party visitation petitions were unconstitutional, but not reaching the question of whether harm must be a basis for third-party visitation statutes).

220. Justice Stevens would have overruled the lower court because he believed that the statute might still be interpreted in a constitutional way. *Id.* at 85 (Stevens, J., dissenting). Justice Kennedy would have overruled the lower court because he read the Washington Supreme Court opinion to say, wrongly, that the best-interests test is never appropriate in third-party visitation cases. *Id.* at 94 (Kennedy, J., dissenting).

221. *Id.* at 65–73 (plurality opinion).

222. *Id.* at 87–88 (Stevens, J., dissenting).

223. *Id.* at 96–100 (Kennedy, J., dissenting).

224. *See id.* at 98, 100–02 (“Cases are sure to arise . . . in which a third party, by acting in a caregiving role over a significant period of time, has developed a relationship with a child which is not necessarily subject to absolute parental veto.”). Justices O'Connor and Stevens also urged caution. *See id.* at 73–74 (O'Connor, J., plurality opinion) (“[T]he constitutional protections in this area are best ‘elaborated with care.’” (quoting *id.* at 101 (Kennedy, J., dissenting))); *id.* at 90

In sum, this set of opinions avoids absolute principles that deliver knockout punches. The opinions directly engage the values underlying the different sides of the case, showing how history, precedent, and contemporary realities help shape those values. The result is a transparent conversation that deepens rather than shuts down deliberation about what this society deems fundamental to its identity.

III. IMPLICATIONS OF AN INTEGRATIVE VIEW OF TRADITION

An integrative view of tradition recognizes that substantive due process claims cannot be decided either by relying entirely on the past, or by ignoring it. Tradition is not sufficient to establish or to defeat a claim because it cannot be simply fast-forwarded to the present. Traditions are either accepted or rejected, in part or in whole, from among alternatives. Not to choose is not an available option. If the past is to matter, the choice must be understood in terms of the complexity of present circumstances and commitments.²²⁵

If tradition does not define the content of substantive due process in any unmediated way, neither can tradition be rejected *simply because it is tradition*. Like tradition itself, an alternative to tradition also emerges from past practices and norms; no right can be deemed truly fundamental if it has not evolved from a past history and stood some test of time. As Professor Martin Krygier writes, “any particular ‘present’ is a slice through a continuously changing diachronic quarry of deposits made by generations of people with different, often inconsistent and competing values, beliefs, and views of the world.”²²⁶ This quarry forms a “stock” representing the “changing present of the tradition, to which each generation of participants contributes in turn.”²²⁷ The tensions and inconsistencies within this inventory called tradition make it necessary to choose, but the stock is not unlimited.

There are a number of ways in which this view of tradition may be viewed as dangerous, result-oriented, and lacking a limiting

(Stevens, J., dissenting) (noting that the variety of family forms militates against a freestanding constitutional rule).

225. See, e.g., *Lawrence v. Texas*, 539 U.S. 558, 567–72 (2003) (reviewing the history of sodomy regulations in light of the “emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex”).

226. Krygier, *supra* note 6, at 242.

227. *Id.*

principle. In this Part, I identify and respond to some of these potential criticisms. I then return to the point that primarily motivates this Essay—that despite the potential problems inherent in this view of tradition, the interactive model both reflects what tradition actually is and how it is most relevant to substantive due process analysis. Pretending tradition works, or should work, otherwise neither makes it that way, nor improves the quality of decision making.

One potential criticism is that an integrative view of tradition commits to political progressiveness, in that it will inevitably lead to a one-way, legislature-disregarding expansion of individual rights. This prediction comports with the hope and expectation of the liberal wing of the Court, which subscribes to a linear view of history.²²⁸ Present-day politics as well as a host of Supreme Court decisions should remind us, however, that traditions do not necessarily evolve in a predictable fashion, or in a single “progressive” direction. I say this both as a corrective to conservatives and a warning to liberals. At one time substantive due process was seen to protect a contract freedom from work-hour and minimum-wage restrictions;²²⁹ later, that right was severely curtailed.²³⁰ Retrenchments in the areas of criminal

228. It is this view of history to which Justice Ginsburg subscribes when she asserts, citing historian Richard Morris, that “[a] prime part of the history of our Constitution . . . is the story of the extension of constitutional rights and protections to people once ignored or excluded.” See *United States v. Virginia*, 518 U.S. 515, 557 (1996) (citing RICHARD B. MORRIS, *THE FORGING OF THE UNION, 1781-1789*, at 193 (1987)). This perspective may be more compelling with respect to equal protection rights than with substantive due process rights, see Tribe, *supra* note 101, at 1897 (emphasizing the progressive purpose of equal protection doctrine, in contrast to the inherent conservatism of substantive due process), although the expansion of equal protection rights seems to have stopped, at least for the moment, see Yoshino, *supra* note 101, at 748 (noting the Court’s retrenchment against the trend of expanded equal protection). Professors Kenji Yoshino and Laurence Tribe argue that the two doctrines are converging. See Tribe, *supra* note 101, at 1898 (arguing that they are converging around the concept of self-government); Yoshino, *supra* note 101, at 749 (arguing that they are converging around the concept of dignity). Insofar as the difference between equal protection and substantive due process has long been thought to be based on the distinction between protecting minorities from traditional discrimination and protecting past traditions, see Cass R. Sunstein, *supra* note 101, at 1163, 1171 (observing that the Equal Protection Clause has been directed at historical discrimination, whereas the Due Process Clause “limit[s] dramatic and insufficiently reasoned change[] to protect tradition”), the convergence is consistent with a view of tradition that evaluates past norms and practices in light of current commitments, including commitments to equality, and evaluates present norms and practice in light of the traditions that give them shape and meaning.

229. *E.g.*, *Adkins v. Children’s Hosp.*, 261 U.S. 525, 560–62 (1923) (striking down a minimum-wage law), *overruled by West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937); *Lochner v. New York*, 198 U.S. 45, 64 (1905) (striking down a work-hour restriction).

230. *E.g.*, *West Coast Hotel*, 300 U.S. at 397.

procedure²³¹ and reproductive rights²³² also demonstrate that rights can shrink as well as expand. An interactive view of tradition means that rights will evolve both “backward” and “forward,”²³³ with *stare decisis* as a weight, but not an absolute brake in either direction. Today, for example, as national consensus builds toward acceptance of the liberty interests of gays and lesbians, it also builds toward greater protection for the fetus, and in favor of gun rights.²³⁴ Depending upon one’s politics, the direction an issue is moving may be bad or good; either way, that direction helps determine who we are as a society, a determination which is the fundamental inquiry of substantive due process.

Another potential criticism is that the integrative view of tradition introduces excessive indeterminacy in substantive due process cases. There is no denying that the doctrine offers more room to maneuver than most other provisions of the Constitution.²³⁵ But

231. See, e.g., *Berghuis v. Thompkins*, 130 S. Ct. 2250, 2267, 2269, 2275, 2278 (2010) (Sotomayor, J., dissenting) (“Today’s decision turns *Miranda* [*v. Arizona*, 384 U.S. 436 (1966),] upside down.”); Barry Friedman, *The Wages of Stealth Overruling (with Particular Attention to Miranda v. Arizona)*, 99 GEO. L.J. 1, 16–25 (2010) (reviewing Supreme Court precedents “gradually overruling” *Miranda*).

232. See, e.g., *Gonzales v. Carhart*, 550 U.S. 124, 132–33, 168 (2007) (cutting back on the abortion right in response to a facial challenge to a federal ban on partial-birth abortions).

233. It is not always clear, of course, which is which. Professors Reva Siegel and Jack Balkin have demonstrated how progressive law reform sometimes simply provides new frameworks within which old inequalities and injustices are maintained. For Professor Siegel’s theory of “preservation through transformation,” see Reva B. Siegel, *Discrimination in the Eyes of the Law: How “Color Blindness” Discourse Disrupts and Rationalizes Social Stratification*, 88 CALIF. L. REV. 77, 83 (2000); Reva B. Siegel, “*The Rule of Love*”: *Wife-Beating as Prerogative and Privacy*, 105 YALE L.J. 2117, 2175–88 (1996); and Reva B. Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111, 1113 (1997). Similarly, Professor Balkin notes that “in each era people will try to use the logics, rhetorics, and doctrines of equality to preserve power, conserve privilege, and establish greater inequality.” JACK M. BALKIN, *CONSTITUTIONAL REDEMPTION: POLITICAL FAITH IN AN UNJUST WORLD* 143 (2011).

234. Specifically on the argument why progressives who believe in a fundamental right to contraceptives and abortion should accept gun ownership as a fundamental right, Professor Akhil Amar writes that both are “simply facts of life, the residue of a virtually unchallenged pattern and practice on the ground in domains where citizens act freely and governments lie low.” Akhil Reed Amar, *Heller*, HLR, and *Holistic Legal Reasoning*, 122 HARV. L. REV. 145, 185 (2008); see also Cass R. Sunstein, *Second Amendment Minimalism: Heller as Griswold*, 122 HARV. L. REV. 246, 271 (2008) (“In many ways, *Heller* may be no less defensible than *Griswold* . . .”).

235. Substantive due process is not unique, of course, in its indeterminacy. The Eighth Amendment prohibition of cruel or unusual punishment, for example, is keyed to “evolving standards of decency.” See, e.g., *Roper v. Simmons*, 543 U.S. 551, 560–61 (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958)(plurality opinion) (2005); see also *Miller v. California*, 413 U.S.

this should not be surprising, insofar as the doctrine is designed to protect something inherently indeterminate—namely, values. A holistic, integrative view of tradition confronts and embraces the values aspect of substantive due process, not because indeterminacy is preferred to determinacy—it is not—but because the protection of our fundamental values is an essential feature of our constitutional scheme, as even Justice Scalia concedes, at least when he is prepared to recognize a particular claim.²³⁶ If we are to respect that feature, we need to tolerate some looseness in the joints. Shining a light on the nature of tradition to show that past and present both are relevant to determining those values improves substantive due process by making it more transparent.²³⁷ Values are not avoided by relying solely on a fixed view of tradition; they are simply masked. Nor are they avoided by rejecting tradition altogether in favor of general principles of liberty and freedom; some limiting principle is necessary to ensure that constitutional protection is extended to only the most fundamental and basic components of our liberty.

Additionally, it is important to note that an interactive view of tradition is not more indeterminate than the alternatives—except insofar as one might define tradition to predictably rule out, or accede to, most claims. Under an either/or view of tradition, Justices can easily defeat a claim by confining substantive due process analysis to the narrowest possible tradition and precedent, or by defining traditions and precedents broadly enough to support the identification of new rights. Both approaches are fully predictable from the method applied—but they are hardly free of judicial preferences. The plain truth of the matter is that defining values that

15, 30–32 (1973) (announcing the “contemporary community standards” test for evaluating obscene material under the First Amendment).

236. See *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3050 (2010) (Scalia, J., concurring) (agreeing with the majority opinion that the right to bear arms is a fundamental right). What Justice Scalia does not concede is that courts should have anything to do with determining those values. *Id.* at 3058. For a sampling of the voluminous scholarship demonstrating the complex interaction between legislation, public advocacy, and constitutional decisionmaking in setting constitutional values, see generally BARRY FRIEDMAN, *THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION* (2009); Robert Post & Reva Siegel, *Popular Constitutionalism, Departmentalism, and Judicial Supremacy*, 92 CALIF. L. REV. 1027 (2004); and Reva Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the De Facto ERA*, 94 CALIF. L. REV. 1323 (2006).

237. See *McDonald*, 130 S. Ct. at 3119 (Stevens, J., dissenting) (urging transparency in substantive due process cases).

are so important that they warrant a high level of constitutional protection is necessarily a difficult, value-laden enterprise.

A related critique is that an approach not anchored in a fixed, ascertainable past is too subjective. The question is, again—subjective as compared to what? The debates over history in the opinions in *McDonald* and *Lawrence* make clear that neither past values nor present-day ones are self-evident. Ironically, taking account of both past and present together may provide greater determinacy and objectivity than taking account of either alone. Each can help act as a potential limit on the other. The past puts limits on what present norms warrant constitutional protection and the present constrains what past values are carried forward. Traditions that matter are those *both* grounded in the past and owned in the present.

This more connected view of tradition will not necessarily result in fewer 5–4 votes. Besides the Justices’ opposing views on tradition, there are philosophical differences or “constitutional visions”²³⁸ that affect how Justices decide cases. Articulating those values in terms of the connection between past and present also will not reduce the vehemence with which these values are held. To the extent that values are deeply important, views toward them also will be deeply held. A fuller, engaged view of tradition will make clearer, however, that questions about fundamental liberties are not about accepting or rejecting tradition, but about ascertaining from our past and present who we are as a society. Being open about the value assumptions in such an analysis is a key ingredient of principled adjudication, and contributes to the transparency that is itself important to a constitutive societal dialogue about the meaning of liberty and freedom.

CONCLUSION

When judges are explicit and honest that questions of value cannot be decided on the basis of a single objective principle, they skip the charade that either tradition is a fixed measure of that principle, or that it is a useless anachronism to be rejected in substantive due process cases. The abortion debate is not about whether or not traditional “family values” should be preserved or rejected, nor can it be resolved either through the authority of a

238. See Neil S. Siegel, “*Equal Citizenship Stature*”: Justice Ginsburg’s *Constitutional Values*, 43 *NEW ENG. L. REV.* 799, 803–04 (2009).

single, fixed “tradition” unmediated by present norms or through reason alone. It is about what role for the state best expresses our collective fundamental values about life, personal autonomy, and women’s place in society, as they have been passed forward from the past and accepted and revised in the present. A similar point can be made about such issues as gay rights, health care, immigration, and capitalism. This Essay’s approach demands of conservatives greater attention to current realities, the abandonment of “objective traditions to which no one attends,” and “subjective attachment to nonexistent pasts.”²³⁹ Of liberals, it asks for more serious investigations of the past that should be rejected,²⁴⁰ and for respect for the parts of our past to which society remains attached.²⁴¹ The need to connect new claims to the familiar will make some claims more unlikely and others, perhaps, more appealing. In either case, it may make liberal advocates more pragmatic about the compromises that might be required for effective forward movement.²⁴²

239. The phrases are Professor Krygier’s. Krygier, *supra* note 6, at 256.

240. See *supra* notes 107–109 and accompanying text. Professor Reva Siegel has done critically important work along these lines. See generally Reva Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 STAN. L. REV. 261 (1992) (arguing that because abortion regulations were motivated by gender stereotypes, equal protection is the appropriate constitutional framework for examining abortion laws); see also Reva B. Siegel, *Home as Work: The First Woman’s Rights Claims Concerning Wives’ Household Labor, 1850-1880*, 103 YALE L.J. 1073 (1994) (arguing that women’s claims for a joint property regime are not new claims, but rather were first made in the nineteenth century, as part of protests about the undervaluation of household labor).

241. Professor Cary Franklin’s effort to rediscover the roots of a non-formalist definition of sex discrimination in the legislative history of Title VII of the Civil Rights Act of 1964, Pub. L. No. 88-352, tit. VII, 78 Stat. 253 (codified as amended at 42 U.S.C. §§ 2000e to 2000e-17 (2006 & Supp. IV 2011)), is an example of how the affirmative excavation of history and tradition can have more potential pay-off than rejecting the relevance of the past. See Cary Franklin, *Inventing the “Traditional Concept” of Sex Discrimination*, 125 HARV. L. REV. 1307 (2012).

242. Consideration of the residual values from the past may make us more pragmatic about other legal doctrines, including equal protection. For example, Professor Reva Siegel refutes the binary division of Justices between those who favor racial equality and those who do not, by explaining how “race moderates” sometimes allow civil rights initiatives and sometimes restrict them, depending upon the impact of those initiatives on social cohesion. Race moderates reject civil rights initiatives that offend whites and thereby set them against the rights of blacks, in part to avoid setting whites against blacks, or “balkanization.” Reva B. Siegel, *From Colorblindness to Antibalkanization: An Emerging Ground of Decision in Race Equality Cases*, 120 YALE L.J. 1278, 1297, 1300 (2011). The Court’s highly controversial opinion in *Ricci v. DeStefano*, 129 S. Ct. 2658 (2009), is one example of the antibalkanization principle, insofar as it represents the rejection of a city’s polarizing efforts to protect the rights of minority firefighters who had not done well on the city’s written promotion exams. Balkanization can be viewed as a consequence of a residual legacy of race discrimination to which race reformers should be sensitive—not just as a past to be defeated, but as the present synthesis of past and present that must be

Tradition deserves neither “undiscriminating praise [n]or blame.”²⁴³ It is a challenging concept that requires courts to wrestle with identifying the strongest and most valuable commitments of our past and present collective selves. That this is a contested undertaking fraught with value clashes does not mean that we should oversimplify tradition to avoid being overrun with substantive due process challenges, or that we should jettison the concept of tradition altogether. Tradition, properly understood, focuses us on the right question for substantive due process analysis; if we cannot always agree on where this leads us, we can at least be engaged in the same debate.

pragmatically taken into account. Along these lines, see Katharine T. Bartlett, *Making Good on Good Intentions: The Critical Role of Motivation in Reducing Implicit Workplace Discrimination*, 95 VA. L. REV. 1893 (2010). The sensitivity of “race moderates” to the impact of Court decisions on values that are carryovers from the past demonstrates the same kind of need for mediation of past and present as is present in the context of many substantive due process cases.

243. See Krygier, *supra* note 6, at 254–55.