Incorporating the Supreme Court's Eighth Amendment Framework into Substantive Due Process Jurisprudence through the Introduction of a Contingent-Based and Legislatively-Driven Constitutional Theory

Adam Lamparello, Indiana Tech Law School
INCORPORATING THE SUPREME COURT'S EIGHTH AMENDMENT FRAMEWORK INTO SUBSTANTIVE DUE PROCESS JURISPRUDENCE THROUGH THE INTRODUCTION OF A CONTINGENT-BASED AND LEGISLATIVELY-DRIVEN CONSTITUTIONAL THEORY

Adam Lamparello [FN1]

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*693 Because the Constitution itself is ordained and established by the people of the United States, constitutional adjudication by this Court does not, in theory at any rate, frustrate the authority of the people to govern themselves through institutions of their own devising and in accordance with principles of their own will. But decisions that find in the Constitution principles that cannot fairly be read into the document usurp the people's authority, for such decisions represent choices that the people have never made and that they cannot disavow through corrective legislation. [FN1]

*694 I. INTRODUCTION

It is axiomatic that the Due Process Clause of the Fourteenth Amendment [FN2] “has been read by the majority of the [Supreme] Court to be broad enough to provide substantive protection against state infringement of a broad range of individual interests.” [FN3] Importantly, the recognition of a substantive element undergirding the Due Process Clause is predicated upon the recognition that there exists a right of personal privacy under the Constitution (even though it does not explicitly mention a right to privacy), [FN4] emanating from the “penumbras” in the Bill of Rights, [FN5] and specifically within the concept of liberty as guaranteed by the Fourteenth Amendment's text. [FN6] As Justice Douglas stated in Poe v. Ullman, “[l]iberty . . . ‘gains content from the emanations of . . . specific (constitutional guarantees)’ and ‘from experience with the requirements of a free society.’” [FN7] Based upon these principles, the Court has afforded constitutional protection (i.e., freedom from unwarranted government intrusion) in decisions relating to marriage, procreation, contraception, family relationships, child rearing, education, and a woman's right to terminate her pregnancy. [FN8]

Critically, however, the decision concerning whether to accord newly proffered liberties [FN9] protection under the Fourteenth Amendment has been difficult because “the Constitution is not a deed setting forth the precise metes and bounds of its subject matter . . . it is a document announcing fundamental principles in value-laden terms that leave ample scope for the exercise of normative judgment by those charged with interpreting and applying it.” [FN10] As a result, “[a]ttempts to articulate the constraints that must operate upon the Court when it employs the Due Process Clause to protect liberties not specifically enumerated in the text of the Constitution have produced varying definitions of “fundamental liberties.” [FN11]

*695 For example, one approach is to accord protection to only those rights that are “implicit in the concept of ordered liberty” such that “neither liberty nor justice would exist if [they] were sacrificed.” [FN12] Another approach describes the inquiry as “whether a right involved ‘is of such a character that it cannot be denied without violating those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions.’” [FN13] Yet
another framework, consistently employed by Justice Scalia, seeks to protect only those rights that are “deeply rooted in this Nation’s history and tradition.” [FN14]

In contrast to Justice Scalia’s approach, Justice Kennedy espouses the view that “history and tradition are [merely the] starting point but not in all cases the ending point of the substantive due process inquiry” [FN15] and Justice Kennedy endorses a contemporary “emerging awareness” [FN16] of concepts such as “freedom” and “liberty” that rely, in part, upon international law. Ultimately, while

[t]hese distillations of the possible approaches to the identification of un-enumerated fundamental rights are not . . . precise legal tests . . . [t]heir utility lies in their effort to identify some source of constitutional value that reflects not the philosophical predilections of individual judges, but basic choices made by the people themselves in constituting their system of government. [FN17]

More importantly, however, while it remains dubious whether these general frameworks prevent “‘judges from roaming at large in the constitutional field,’” [FN18] they do provide insight into the specific constitutional theories that the Justices employ when interpreting and applying the Constitution, particularly the Due Process Clause of the Fourteenth Amendment. Such theories are of paramount importance in substantive due process cases, because the Fourteenth Amendment sets forth “principles in value laden terms that leave ample scope for the exercise of normative judgment” [FN19] by the Court in deciding whether to recognize newly proffered rights as fundamental. In other words, the outcome of a particular case is often directly tied to the specific constitutional theory for which the deciding Justice (who commands a majority) has a particular predilection.

For example, in addition to the general approach discussed above, Justice Scalia also embraces an “originalist” theory of interpretation *696 that “rests upon the original meaning of the Constitution’s text,” [FN20] and which “is not a subjective for what [the] particular Framers had in mind, but an objective understanding of what the words themselves meant at the time.” [FN21] In other words, Justice Scalia “emphasizes original understanding [of the words in the text of the Constitution],” [FN22] that should be construed “reasonably and naturally for all that they contain,” [FN23] and which acts “to preserve the separation of powers by keeping courts from encroaching on the legislative role and democratic will.” [FN24]

To the contrary, Justice Breyer advocates a “consequentialist,” “forward-looking,” or “pragmatic” method of interpretation, which focuses upon “the likely outcomes of various rulings.” [FN25] This approach, which he has called “Active Liberty,” [FN26] advocates for the idea that “courts need to be practical and flexible enough to adapt their rulings to reality and necessity,” [FN27] so that courts can “apply general rules to particular cases in a manner that seems fair [and purpose-driven].” [FN28] Additionally, as discussed above, Justice Kennedy endorses a similar, forward-looking approach that considers not only history and tradition but also contemporary values that may provide greater insight into notions of liberty and justice. [FN29]

Furthermore, scholars and commentators have advanced numerous theories that advocate alternative methods for the Court when interpreting and applying the Constitution. [FN30] For example, as Part II sets forth in more detail, Cass Sunstein argues for a “minimalist” approach, which does “not subscribe to any particular theory of interpretation,” [FN31] and does not “want to do any more than decide one case at a time.” [FN32] In this way, Sunstein advocates that courts should “avoid *697 taking stands on the most contested questions of constitutional law,” [FN33] and strive to achieve “more modest outcomes” [FN34] that “leave fundamental questions undecided” and which “are forged around reasonable outcomes.” [FN35] Importantly, scholars have also endorsed a “pluralistic” [FN36] or “eclectic” method of interpretation, [FN37] which considers a multitude of sources when deciding cases, including, but not limited to, “[the Constitution’s] text, the Framers’ intent, constitutional theory, precedent, and value arguments.” [FN38] In addition, Pro-
fessor Akhil Amar has advanced the concept of “intratextualism,” which “fuses textualist and structuralist theory into a new interpretive technique in which the Constitution becomes a kind of self-referential dictionary.” [FN39] Under this approach, “[w]ords or phrases that recur in the text provide a controlling . . . gloss on their likely meanings in otherwise unrelated textual settings.” [FN40]

Significantly, despite the multitude of theories that the Court has employed—and commentators have created—each theory has been the subject of substantial criticism. For example, and as will be set forth in more detail below, Justice Scalia's originalism has been criticized in part because “many issues that are important to us today were not considered during the framing of the various provisions [of the Constitution],” thus making it very difficult to discern original intent. [FN41] In addition, there exists a legitimate concern “as to the reliability of what documented evidence we do have,” [FN42] and “original intent is often hard to ascertain” [FN43] due to the “divergent views of those involved in making crucial decisions, and the usual difficulties in interpreting any text.” [FN44] Finally, originalism suffers from a significant defect when used to interpret provisions in the Constitution that are phrased in general terms and thus not susceptible to precise meaning or objective understanding. [FN45]

*698 In addition, Justice Breyer’s “consequentialism” or “outcome oriented” paradigm has been criticized because “it seems incurably indeterminate” [FN46] such that courts are doing nothing other than abstractly looking for “reasonable solutions to difficult problems.” [FN47]

In essence, while Justice Breyer will admittedly consider the consequences of his decisions and consult various sources of law in confronting important constitutional questions, there exists no coherent methodology or purpose underlying his approach. With respect to Sunstein's minimalism, the primary criticism is that the Court cannot—and should not—avoid rendering landmark rulings that decide important constitutional questions. [FN48] In other words, while judicial restraint and modesty are laudable goals, they should not prevent the Court from acting in its institutional capacity to decide critical issues that involve fundamental rights. [FN49] Additionally, while minimalism argues for incremental decisions concerning important constitutional cases, it does not provide a framework regarding the substance of how such decisions should be rendered. [FN50]

Lastly, “pluralism” or “eclecticism” has been sharply criticized on the ground that, when considering a multitude of sources on significant constitutional questions, such sources may lead to conflicting outcomes, and there is no hierarchy concerning which of these should be dispositive. [FN51] Ultimately, therefore, the common thread that connects these theories is that “[t]heir utility lies in their effort to identify some source of constitutional value that reflects not the philosophical predilections of individual judges, but basic choices made by the people themselves in constituting their system of government.” [FN52] Unfortunately, however, in important constitutional cases, particularly those arising under the Fourteenth Amendment, the utilization of any of these theories has left the Court vulnerable to criticism that it is legislating from the bench and usurping the will of the people as expressed through the legislative process. Whether such criticism is valid has become almost inapposite, as even the appearance of a preference for a particular outcome has threatened the Court's institutional credibility and led to charges that it is exercising a legislative rather than judicial function.

*699 This Article attempts to rectify this difficulty by examining the specific methods of interpretation employed by the Court in substantive due process cases and then advocates for a new “contingent-based” and legislatively driven theory that does not advocate which theory of interpretation should gain primacy in these cases. Instead, this Article endeavors to demonstrate when it is most appropriate to utilize a specific theory; and this determination, as a normative matter, should be based upon how the state or federal legislatures have acted with respect to the particular issues that the Court is confronting.
In other words, when deciding fundamental rights cases pursuant to the Due Process Clause, the Court should adopt the paradigm that it uses when deciding whether a specific punishment qualifies as “cruel and unusual” under the Eighth Amendment. As set forth in Part III, when making such a determination, the Court examines the “evolving standards of decency that mark the progress of a maturing society.” [FN53] by focusing, in substantial part, upon the enactments of the state and federal legislatures across the country. Based in large part upon whether there exists a consensus among the States--supporting or rejecting--a practice challenged as “cruel and unusual,” the Court's analysis and outcome will, in most cases, be consonant with the will of the country's legislative bodies. Put differently, the Court's Eighth Amendment jurisprudence is the ideal example of courts respecting the will of the people as expressed through the democratic process. Thus, this Article argues that, in cases implicating important fundamental rights, particularly under the Fourteenth Amendment, the Court should first look to enactments by legislative bodies throughout the country, and the results of this analysis should influence the type of interpretive theory that the Court employs in a given case.

In other words, the specific actions of legislative bodies across the nation will provide the justification for the Court's collective and consensus-driven adoption of a particular theory (e.g., pragmatism) to guide its analysis of “rights-based” issues arising under the Due Process Clause. It must also be noted, as a threshold matter, that the adoption of a particular method of interpretation--based upon the specific actions of legislative bodies across the nation (i.e., whether there has been substantial legislative action resulting in consensus)--will reduce the criticisms aimed at that theory, and the decision itself, because its implementation will be appropriate for that particular case.

This method is predicated upon the underlying premise that the Court's decisions in substantive due process cases should, in many instances, be reflective of and consistent with the actions of legislative bodies and the democratic process. In other words, this theory serves to guard against “judicial activism” and overreaching by re-shaping the Court's institutional role into one of modesty and judicial restraint in the vast majority of cases. In addition, and perhaps most importantly, such a theory recognizes that it is not the Court's duty to “make law” or “legislate from the bench,” but to instead, as analogized by Chief Justice Roberts, act as baseball umpires calling balls and strikes and simply applying the rules of the game. [FN54] Simply stated, the legislature is constitutionally provided with lawmaking power, not the Courts, and even though many scholars, including this author, have a progressive vision of the Constitution as a “living document,” it is intellectually dishonest to ask the Court to remedy problems that are within the legislatures' lawmaking power.

As a corollary, therefore, and in connection with its institutional role, the Court should no longer strive to create positive law, namely, it should not decide cases in which it recognizes new fundamental rights. Rather, the Court's role in substantive due process cases should be to ensure that legislative enactments are not infringing upon either the Constitution's provisions or rights that the Court has already deemed fundamental. Thus, the Court will continue to have an active role in invalidating legislation that is constitutionally infirm, but it will refrain from making new law that substitutes its own judgment for the legislative process. If the Court adopts this analysis in substantive due process cases, it will appropriately rely upon the democratic process in deciding the important constitutional issues, which is of particular salience given that the Due Process Clause is subject to a wide degree of interpretation.

By using the democratic process as the justification for the method of interpretation employed, the Court's role will be re-shaped with the appropriate level of restraint to ensure its institutional credibility. Finally, while each theory of interpretation is subject to criticism, its implementation in particular instances, based upon the democratic process, will serve as a consensus builder for the Court. Part II discusses the primary theories utilized by the Court when interpreting and deciding important constitutional issues, particularly those arising under the Due Process Clause. Part III introduces and argues that the Court should both adopt its Eighth Amendment jurisprudence in cases implicating the Fourteenth Amendment, and adopt a particular interpretive theory based upon an examination of legislative activity throughout the
country.

II. THE PREVAILING THEORIES OF CONSTITUTIONAL INTERPRETATION: VARIOUS APPROACHES AND DIFFERENT PURPOSES

The primary methods of interpretation that have relevance to the Supreme Court’s constitutional adjudication—and those advocated by scholars—are: (1) textualism; (2) originalism; (3) “new” originalism; (4) “consequentialism” or “pragmatism”; (5) minimalism; (6) intratextualism; and (7) miscellaneous theories, including (a) intra-textualism; (b) perfectionism; and (c) majoritarianism. Each of these theories will be discussed in turn.

A. Textualism

Importantly, textualism is a method of interpretation advocated and implemented by Justice Scalia, who believes “[e]very issue of law resolved by a federal judge involves interpretation of text.” [FN55] In essence, “[a]ny decision which cannot be characterized in terms of the court having followed the text is ‘wrong,’ because ‘the text is the law, and it is the text that must be observed.’” [FN56] More specifically, for Justice Scalia, the purpose of textualism “is not to interpret the statute either ‘strictly’ or ‘leniently,’ but to interpret it ‘reasonably to contain all that it fairly means.’” [FN57] Moreover, with respect to statutory language that is ambiguous, Justice Scalia rejects the notion that “a judge should look to the statute's legislative history,” [FN58] because, in his view, “the objective indication of the words, rather than the intentions of the legislature, is what constitutes the law.” [FN59]

Critically, however, Justice Scalia’s “approach to constitutional interpretation . . . seems, at least at first glance, to vary in some important respects from his approach to statutes.” [FN60] Specifically, Justice Scalia believes that interpretive practices are different because “‘the usual principles are being applied to an unusual text.’” [FN61] Indeed, according to Justice Scalia, “the context of the Constitution tells us not to expect nit-picking detail, and to give the words and phrases an expansive rather than narrow interpretation though not an interpretation that the language will not bear.” [FN62] Therefore, Justice Scalia believes that “the actual words used by the drafters of the Constitution represent the only . . . clear and objective manifestation of the principles which the document was thought to represent.” [FN63] As a result, the text of the Constitution should be taken every bit as seriously as the source of its meaning just as one takes the texts of statutes. [FN64] Ultimately, the essence of textualism “is the respect for democratic government that is assured by examining only what the lawgiver--here, the Framers of the Constitution--promulgated, and the avoidance of open-ended hypothesizing about what the lawgiver meant.” [FN65]

Significantly, however, textualism is not immune from criticism, particularly when it is applied to constitutional interpretation. As Professor Havel notes, “Textualism as formalism might hold the promise of reliable and predictable analysis, until the conceptual instability and textual matter itself is understood.” [FN67] For example, textualism can lead to “the sort of precise and technical parsing” [FN68] that calls into question its appropriateness in constitutional interpretation. This criticism is particularly relevant, a fortiori, in the context of the Due Process Clause because, as Professor Akhil Amar acknowledges, “it speaks in terms more lofty, general and open-ended.” [FN69] As a result, “faithfulness to the text of the [Fourteenth] Amendment . . . ‘invites a higher level of interpretive generality and a different mode of legal analysis.’” [FN70]

To be sure, the criticism of textualism in constitutional analysis, particularly in cases arising under the Fourteenth Amendment, is that the text itself is sufficiently broad, open-ended and general such that the text does not provide defin-
itive answers. As a result, the Court must employ different methods that inherently require an analysis of context and the possibility of subjectivity. As Havel notes, Amar's interpretive hesitations (regarding the Constitution's more general provisions) “reveal something rather interesting about the enterprise of interpretation: it is deeply contextualized, and hence necessarily subjective, and the interpreter is likely to reach for whatever tools—textualist or meta-textualist—to unlock the context.” [FN71]

B. Originalism

Notably, originalism is an enduring paradigm of interpretation for which Justice Scalia has long been a supporter and advocate. To begin with, Justice Scalia's basic approach “is that courts can and should rely on the meaning of the constitutional text to decide the outcome in at least some constitutional cases.” [FN72] As a result, “Justice Scalia is not interested in the intentions of the Framers who wrote the provisions, just as he is not interested in the intentions of those who drafted statutes.” [FN73] To be sure, “Discerning the intent of groups is difficult if not incoherent, and even if discoverable, intentions should not trump the meaning of the actual language used.” [FN74] Simply stated, Justice Scalia is “interested primarily in the meaning of the text itself, as opposed to what those who drafted the text intended or hoped it would accomplish.” [FN75]

To ascertain the meaning of the Constitution's text, “[Justice] Scalia suggests that we look to the practices and interpretations of the Founding generation[s], implying that what counts most are the practices and understandings of those reasonably educated men who were around when the relevant provisions were adopted.” [FN76] Such practices and understandings, according to Justice Scalia, can provide evidence concerning the meaning of the Constitution's various provisions. [FN77]

One must be careful, however, to note that, while Justice Scalia will look to the “practices and interpretations of the Founding generation[s],” he does not seek to discern the Framers' specific intent. [FN78] Ultimately, therefore, “Justice Scalia's originalism rests upon the original meaning of the Constitution's text.” [FN79] Thus, this method of interpretation “is not a subjective quest,” and emphasizes “original understanding, not original intent,” that “reads texts reasonably and naturally for all that they fairly contain.” [FN80] For Justice Scalia, originalism is the only plausible method of interpretation because “[t]he constitutional text that was actually ratified is the only legitimate source of constitutional law” [FN81]; and thus, the only method by which to invalidate legislation is to “rely on the original meaning of that text.” [FN82] In other words, originalism “is the only legitimate way to justify judicial review.” [FN83]

Furthermore, Justice Scalia's adherence to originalism is based, inter alia, upon the fact that it promotes a limited judicial role in constitutional disputes and “also helps to preserve the separation of powers, by keepings courts from encroaching on the legislative role and democratic will.” [FN84] To be sure, while Justice Scalia acknowledges that flexibility in the law is important, “He emphasizes the need for legislative rather than judicial flexibility.” [FN85] In other words, “Judges who stray from originalism . . . tend to constrict the ambit of democratic government, whereas originalism usually preserves a larger role for elected legislatures.” [FN86] Ultimately, therefore, for Justice Scalia, “Originalism is required by democracy because it is the interpretive strategy most likely to uncover the will of the self-governing people who were responsible for the law . . . .” [FN87]

The only method by which to achieve this is through a “quite limited conception of the judicial role,” whereby “judges (especially those who, like federal judges, are unelected and life-tenured) must refrain from ‘willfulness,’ which is defined as ‘bend[ing] the law to their wishes.’” [FN88] As a normative matter, therefore, “legislatures—not judges—are primarily responsible for updating the law to fit changing times.” [FN89] In other words, “the ‘right of democratic choice and the responsibility of democratic governance is not promoted by judicial imperialism, even if justified as showing
some responsiveness to popular *706 sentiments or public virtues.”’” [FN90] Thus, “a judge who refuses or fails to stick closely to the text and its historical context will necessarily, even if not purposefully, end up interpreting the text to mean not what it ‘really’ means but what she wants it to mean.” [FN91] In so doing, “the judge will not have discovered the meaning of the [Constitution’s] text, rather she will have created its meaning.” [FN92]

In the final analysis, the anchor that Justice Scalia uses to support originalism--in addition to fashioning a limited judicial role in favor of democratic processes--is that it promotes the rule of law. [FN93] According to Justice Scalia, the adoption by courts of “clear, categorical rules” [FN94] advances “predictability and equal treatment, reduce[s] judicial arbitrariness, and foster[s] judicial courage to make unpopular decisions.” [FN95] In other words, “[b]y adopting general rules, judges *707 constrain their discretion and minimize the role of their own policy preferences.” [FN96]

Importantly, however, originalism has been vulnerable to substantial criticism by both judges and scholars who believe that it is both an unworkable and inequitable method to decide constitutional cases. As Professor Ryan describes, Justice Breyer begins by criticizing originalism on five grounds, namely that: (1) the Founders did not have a fixed view that courts should be originalist; (2) non-originalists are not necessarily subjective; (3) originalists have ample opportunity to be subjective and thus selective in their reliance on history, and they can use that history to obscure what really motivated their decision; (4) originalism does not necessarily produce clear, workable rules and even if it does, the advantages of such rules can be overstated; and (5) originalism can produce very harmful consequences. [FN97]

*708 In addition to these criticisms, Professor Cass Sunstein offers powerful objections to originalism. [FN98] Sunstein's first objection focuses upon the “overlapping lists of the consequences that would attend the Court's embrace of originalism/fundamentalism.” [FN99] For example, Sunstein identifies the following potential consequences:

[S]tates could ban the sale of contraceptives; one could bid farewell to portions of the Clean Air Act and other health and safety laws; states could establish official churches; even modest gun control laws would be invalid; the federal government could discriminate on the basis of race; state and federal governments could segregate on the basis of race; there would be no right of privacy; states could sterilize criminals; and speech in general might be less protected, while commercial speech would be protected to the same extent as political speech. [FN100]

However, Sunstein's criticism here is subject to vulnerability on two fronts. First, Sunstein is assuming that courts should evaluate and choose interpretive methods based primarily upon the consequences of a particular decision. Critically, such a practice would create the potential for arbitrary and subjective decisions that would engender claims that the Court is legislating from the bench. In addition, such decisions would not facilitate the creation of legal rules, but would promote decisions on a case-by-case basis, thus reducing stability and predictability in the law. Finally, the most devastating criticism to Sunstein's consequentialist argument is that it ignores the role and influence of stare decisis, namely, for any of the consequences enunciated above to happen, the Court would have to abandon years of firmly established precedent and issue rulings that were so grossly offensive that they could never be justified. In short, Sunstein's objection here is somewhat exaggerated.

A more powerful criticism against originalism, however, is that it “cannot properly use evidence from the past without considering the reality of historical change.” [FN101] As Professor Stephen Griffin explains, “By refusing to exit from the eighteenth century and privileging one *709 particular set of historical contexts, originalism is unable to cope with legitimate constitutional change outside the Article V amendment process and cannot provide a meaningful connection to our constitutional past.” [FN102] Put differently, “[O]riginalism . . . perpetuates a selective account of the context in which the Constitution was adopted and went into operation in the 1790s and renders us unable to cope with the legitimacy of informal constitutional changes that occurred later, especially in the twentieth century.” [FN103] In other words, originalists have the tendency to rely selectively on the historical record to reach certain decisions, which risks
precisely the type of subjectively and outcome-oriented approach that they strive to avoid.

Ultimately, what is perhaps the most effective criticism is that “[a]ny version of originalism that relies exclusively on the practices of the ratifiers or tries to imagine their answers to precise constitutional questions is difficult if not impossible to reconcile with the more open-ended provisions of the Constitution.” [FN104] As Ryan states:

These provisions, like the Equal Protection, Privileges or Immunities, Due Process, Cruel and Unusual Punishment, Free Speech, and Necessary and Proper Clauses, all seem to establish general principles that may indeed result in different applications over time. The tension in Scalia’s approach to originalism is that he wants to remain true to the constitutional text and he wants that text to be very specific. But it is not always easy to reconcile these twin desires, and to transform general provisions into a more or less fixed list of specific rules is to gloss the original meaning of the text. [FN105]

In fact, to even attempt such a task “runs contrary to the central point of the originalist project, which is to elucidate, not change, the meaning of the text.” [FN106] Thus, while originalism is vulnerable to criticism in certain areas, it can nonetheless have relevance and applicability in certain circumstances, as set forth in Part III.

C. “New” Originalism

In essence, new originalism was developed primarily in response to the criticisms that were directed at its predecessor (originalism). “One of the prominent features of the new originalism is the insistence on following original public meaning rather than original intent.” [FN107] Indeed, *710 in emphasizing public meaning, rather than private intent, new originalists have made the “objective theory of intent” a central feature of their approach. Simply stated, the primary--if not sole--issue when interpreting the Constitution “is the textual meaning of the document, not the . . . subjective intentions, motivations or expectations of its authors.” [FN108] Indeed in “focusing on the public meaning of the Constitution [new originalism arguably] addresses the chief flaws of originalism.” [FN109] Additionally, new originalists claim that “old originalism was ‘a reactive and critical posture.’” [FN110] Moreover, old originalism was “committed to judicial restraint, and ‘methods of constitutional interpretation [that] were understood as a means to that end.’” [FN111] Furthermore, as stated above, “old originalism . . . tended to rely on the subjective intentions or mental states of the founders as the most relevant evidence of the meaning of constitutional provisions.” [FN112]

In addition, while old originalism was concerned with “balancing judicial restraint with the implicit commitment to follow the intent of the framers no matter what the result;” [FN113] new originalism “‘is more concerned with providing the basis for positive constitutional doctrine than the basis for subverting doctrine.’” [FN114] In other words, new originalism “is not concerned primarily with criticizing Supreme Court decisions,” [FN115] and “the emphasis on judicial restraint has been dropped.” [FN116] Thus, new originalism is not a theory that focuses on judicial review, but instead emphasizes “the role judges should have in a democracy, and more a theory of legitimate interpretation that emphasizes the rule of law aspects of American constitutionalism.” [FN117] *711 In this role, courts are expected to uphold the Constitution, and “must stand ready to be ‘activist’--to strike down legislation inconsistent with the intent of the framers when necessary.” [FN118]

Moreover, as described by Professor Griffin, Professor Randy Barnett explicates the role of new originalism as emphasizing “the fundamentality of the Constitution as written law.” [FN119] Barnett asserts that the commitment to original meaning reflects a fidelity to the Constitution's written text. [FN120] In other words, “Constitutions are put in writing in order to restrict future law makers and thus lock in a particular legal order.” [FN121] In advocating for new originalism, Barnett analogizes constitutional principles with contract interpretation:
With a constitution, as with a contract, we look to the meaning established at the time of formation and for the same reason: If either a constitution or a contract is reduced to writing and executed, where it speaks it establishes or “locks in” a rule of law from that moment forward. Adopting any meaning contrary to the original meaning would be to contradict or change the meaning of the text and thereby to undermine the value of the writtenness itself. Writtenness ceases to perform its function if meaning can be changed in the absence of an equally written modification or amendment. [FN122]

Thus, for Barnett the original meaning and contract-based approach “is superior to the emphasis of the old originalism on subjective intent . . . [and] the change to public meaning answered the most devastating critiques launched against originalism in the 1980s.” [FN123] Another purported departure from old originalism, advocates assert, is that new *712 originalism is not a “purely results-driven theory” [FN124] and does not “specif[y] the consequences . . . for constitutional doctrine.” [FN125]

Not surprisingly, however, many of the modifications or revisions that new originalists claim address the criticisms of old originalism may, ultimately, be distinctions without a difference. First, the same criticisms that affect old originalism arguably apply with equal force to new originalism:

[C]ritics point to methodological problems associated with identifying the specific scope [of] beliefs of the founders, especially the so-called “summing problem” of identifying a “single coherent shared or representative intent from the “varying intentions of individual framers.” They also cite problems with the possible ambiguity of original intent and with identifying the appropriate level of generality at which constitutional problems are to be understood. Moreover, critics claim there are problems of circularity in the justification for originalism and the possibility that the “interpretive intentions” of the founders were non-originalist. [FN126]

Additionally, “critics of [new] originalism argue that there are ‘dead hand’ problems related to the authority of the long-dead Founders over present political actors and the potential undesirable outcomes of substantive originalist interpretations of the Constitution. [FN127]

Furthermore, new originalism, as with its predecessor, “start[s] with the assumption that originalism has been the sole method of constitutional interpretation followed by courts and commentators from the beginning of the republic.” [FN128] This, however, belies the “actual interpretive*713 practice of the Supreme Court.” [FN129] Indeed, while new originalism emphasizes the need to give effect to the Constitution's original meaning, “[t]here seems little doubt that many authorities thought the purpose of the interpretive process was to reveal the intent or meaning of the Constitution,” [FN130] and there exists “a variety of legitimate means to ascertain the Constitution's meaning.” [FN131]

In fact, this is precisely what the Supreme Court has done throughout its history. As one commentator explains, “the Justices drew upon a range of sources to justify their decisions: the text of the Constitution, the plain or ordinary meaning of words, common law definitions or principles, natural law, local practices and rules, principles of equity, and what they termed ‘general principles of republican government.’” [FN132] To be sure, the Supreme Court's history of deciding constitutional questions involved structural, textual and historical methods of interpretation. [FN133] In other words, “judicial review was a complex institutional practice” [FN134] that resulted from an intricate “interweaving of different methods of interpretation.” [FN135] As a corollary, “originalism was not the status quo--it was not the sole or even primary method of interpretation.” [FN136]

*714 Another problem with new originalism--as with old originalism--is that “[t]he meaning of a constitutional provision in the abstract is rarely at issue.” [FN137] Rather, the important question “is the meaning of a provision to a specific contemporary set of facts [and] [p]ractical experience shows that federal judges often find evidence of original meaning absent, inadequate and fragmented, or too cryptic and equivocal to use to decide the rights of the parties.”
Consequently, courts “have required other methods of interpretation and our constitutional tradition has provided the tools they need to resolve actual cases.” In turn, such practices have “created their own traditions,” indicating that “legitimate interpretation is typically more a matter of how a judge should respond to them rather than an attempt to time-jump . . . back to the eighteenth century.”

This raises the final vulnerability from which new originalism cannot escape, namely, “using evidence from the eighteenth century selectively to decide cases in the present without taking into consideration relevant changes in context.” In other words, a proper historical perspective “focuses on the contexts in which historical events took place and how those contexts were later changed.” In this way, historians emphasize “the identification of continuities and discontinuities between past and present” and seek to explain “how past ideas and institutions differed from those of the present.” This affects new originalism because “it perpetuates a selective account of the context in which the Constitution was adopted and went into operation in the 1790s and renders us unable to cope with the legitimacy of informal constitutional changes that occurred later, especially in the twentieth century.” As a result, new originalism “tends to downgrade . . . even formal amendments . . ., such as the Fourteenth Amendment” and “tends to cut us off from our constitutional tradition.”

Ultimately, new originalists would be in a better position to assert the efficacy of their interpretive method if they acknowledged that originalism is but a part of the many modes of interpretation that the Court uses when discerning the meaning of constitutional text. If this concession is made, it is more plausible to admit that original meaning is a factor in searching for a reasonable interpretation of the Constitution's provisions; but other methods, such as precedent, context, history and tradition also compliment originalism to provide a more comprehensive account of what the words and purposes of the text suggest.

D. Consequentialism or Pragmatism

Significantly, the consequentialist or pragmatic theory of interpretation differs starkly from originalism and strives to decide cases based upon the implications that such decisions will have as a matter of public policy. The approach is endorsed by Justice Breyer, who explains the contours of this paradigm and its applicability to constitutional adjudication. As a threshold matter, for Justice Breyer the goal of our Constitution is to “protect ‘negative liberty,’ meaning freedom from government constraint, and to protect ‘active liberty,’ meaning the ability to participate in governance.” Indeed, Breyer emphasizes the courts' need to further the goal of democratic governance, and “this overarching purpose, along with attention to practical consequences of government decisions, can help guide courts to the proper outcome in concrete cases.” Simply stated, Justice Breyer “disclaims that his approach is an actual theory of how to interpret the Constitution, calling it instead a ‘theme’ that ‘can affect’ interpretation as a matter of ‘perspective[ ] and emphasis.’” Justice Breyer does, however, contrast his approach to originalism, “which he defines as relying on ‘the Framers’ original expectations, narrowly conceived.’”

More specifically, Justice Breyer “thinks it proper to emphasize purposes and consequences, but he does not foreshow reliance on text, original understanding, or precedent.” As a result, Justice Breyer is “skeptical of general theories of interpretation because he does not believe any single theory will capture the true meaning of the Constitution or the intent of its Framers.” Indeed, for Justice Breyer, “the basic problem with interpreting the Constitution is that some of its provisions are open-ended and do not provide clear directions for rules of action, and one cannot easily ascertain a precisely defined purpose behind the provisions.” The ambiguous nature of certain provisions “presents judges with a dilemma: they must avoid being ‘willful’ and pouring into these clauses their individual views, but they must also avoid being ‘wooden’ and resting too much on interpretive formulas that ignore the nature of
the text and the complexity of actual cases.” [FN157] The solution to this problem, therefore, “is not a hard and fast theory of interpretation,” [FN158] but “an attitude that hesitates to rely upon any single theory or grand view of the law, of interpretation, or the Constitution.” [FN159] Instead, “[i]t champions the need *717 to search for purposes; it calls for restraint, asking judges to speak humbly as the voice of the law.” [FN160]

Consequently, Justice Breyer’s “own search for purposes has led him to ‘a certain view of the original Constitution's primary objective,’” [FN161] which he views as “furthering active liberty” [FN162] and as “creating a form of government in which all citizens share the government's authority, participating in the creation of public policy.” [FN163] In essence, Justice Breyer “believes that reference to this purpose, along with attention to the practical consequences of judicial decisions, can lead the Court to better results.” [FN164] Accordingly, he argues that the Court “should take greater account of the Constitution's democratic nature when they interpret constitutional and statutory texts.” [FN165] In so doing, the Court “will yield better law—law that helps a community of individuals democratically find practical solutions to important contemporary social problems.” [FN166] As a corollary, Justice Breyer's approach impliesly embraces the Constitution as a living document, which is interpreted in light of contemporary contexts and present-day conditions. [FN167]

Nonetheless, as Professor Ryan discusses, there are some conceptual weaknesses in Justice Breyer's approach to constitutional interpretation. First, with respect to his discussion of purpose, there is no clear indication regarding the source from which Justice Breyer derives such purpose; and it is similarly not clear how his concept of active liberty is to function in the constitutional calculus. [FN168] Perhaps most importantly, however is the fact that Justice Breyer's paradigm “seems incurably indeterminate.” [FN169] In other words, while we know Justice Breyer is searching for “reasonable solutions to difficult *718 problems” [FN170] and will consider “democratic purposes and consequences,” [FN171] we do not know whether Justice Breyer will consider “more specific purposes” [FN172] and what role “text, history, structure, and precedent” [FN173] will have in his analysis. In addition, while Justice Breyer certainly considers consequences important, he does not state with specificity what consequences he believes should be furthered through the interpretive process. [FN174]

Therefore, while Justice Breyer's attention to consequences and the ramifications of judicial decisions is laudable, his approach to constitutional interpretation raises some important questions, particularly how this method should apply in practice when confronting specific constitutional questions. As with each theory, Breyer's approach can be beneficial, provided its applicability is confined to a specific context of constitutional adjudication, as will be demonstrated in Part III.

E. Minimalism

Minimalism, an approach endorsed and advocated by Cass Sunstein, “does not subscribe to any particular theory of interpretation,” [FN175] and does not “want to do any more than to decide one case at a time.” [FN176] In essence, minimalists “want to ‘avoid taking stands on the biggest and most contested questions of constitutional law,’” [FN177] and instead “believe that more modest answers can be achieved through ‘incompletely theorized agreements.’” [FN178] To be sure, “[t]hese agreements leave fundamental questions undecided and consist of a consensus forged around reasonable outcomes that can ‘attract support from people holding many different theoretical positions.’” [FN179] In others words, “minimalists support reasonable public policies, and they favor the Court acting in as gingerly a fashion as possible to foster those policies.” [FN180]

In addition, minimalists do not “believe the Constitution is ‘frozen in the past,’ but they are also ‘nervous’ about judicial review and wary *719 of those who want to create new rights and liberties that lack a foundation in ‘our traditions
and practices.’” [FN181] Moreover, minimalists “may be conservative or liberal,” [FN182] as “minimalism itself ‘does not dictate particular results.’” [FN183] Ultimately, therefore, “minimalists believe in ‘narrow, incremental decisions,’ [FN184] that ‘resolve the problem at hand without also resolving a series of other problems that might have relevant differences.’” [FN185]

Minimalism, however, is not without its detractors, and as Professor Ryan explains, “suffers from two serious and related flaws.” [FN186] The first criticism--and one that minimalists do not address--is that “important [constitutional] questions cannot be eternally finessed and avoided.” [FN187] In other words, there will eventually arise disputes in which the Court will have to decide substantial constitutional questions, as evidenced in several landmark cases, e.g., Brown v. Board of Education. [FN188] Significantly, however, Sunstein fails to provide guidance regarding when the Court should ultimately abandon the minimalist approach in favor of deciding important constitutional issues.

The second and related weakness for minimalism is that it simply fails to provide any guidance regarding the types of decisions that would be minimalist in nature. As Professor Ryan states, “minimalism doesn't tell you how those [constitutional] questions--or any others, really--should be answered as a matter of constitutional law.” [FN189] Put differently, while minimalism “tells you how judges should write opinions, suggesting that they should try to reach some agreement on some narrow grounds,” [FN190] it is “quite silent as to the substance of that agreement.” [FN191]

*720 Apparently in anticipation of this criticism, Sunstein advocates that courts “should take ‘exceedingly small steps in this controversial domain’ [(constitutional law)]” [FN192] and should strike down “only ‘the most indefensible laws.’” [FN193] Indeed, for minimalists, critical constitutional questions “should be left for ‘democratic arenas,’” [FN194] with courts acting, at most, as ‘catalysts.’” [FN195] Again, however, under the minimalist paradigm, “[i]t is not clear whether courts in this role need bother with the Constitution per se; it seems instead that they should act as juries assigned the task of assessing whether legislation is reasonable and striking down legislative provisions that are clearly unjust, oppressive, or just plain loopy.” [FN196] The problem is that it is not clear how the courts should operate in this function, namely, how they should specifically interpret and apply the Constitution's provisions, particularly those that are open-ended. Furthermore, minimalism provides no account of what role tradition, precedent, history, and original understanding should play in the minimalist model, and whether—or when—minimalism should give way to different approaches as a matter of equity. Simply stated, minimalism as a *721 method of interpretation may have practical problems in its applicability to certain contexts.

F. Pluralism or Eclecticism

Pluralistic methods of interpretation are inherently self-defining, as they “hold that there are multiple methods of interpreting the Constitution.” [FN197] Indeed, because the Constitution “is a complex document consisting of many clauses, each of varying degrees of generality and ambiguity.” [FN198] it seems logical to employ “a variety of principles or interpretive methods . . . when interpreting a complex document such as the Constitution.” [FN199] Importantly, those advocating a pluralist theory of interpretation assert that “close scrutiny of the text of the Constitution, determination of the intent of the Framers, application of precedent, examination of the structure of the Constitution, and appeals to a national ethos or tradition,” [FN200] are all relevant considerations.

Critically, however, pluralists generally maintain that “these types of constitutional arguments cannot be prioritized ex ante; they do not occupy hierarchal relationships but [instead] different forms of these arguments may be more suitable for different problems or functions.” [FN201] Furthermore, the Court itself “has never established a priority or ranking of these different methods of interpretation, nor has the Court ever suggested that the different methods are reducible to one master method.” [FN202] In other words, “[t]he absence of a hierarchy of methods or of a single master method
Further suggests that the Court is using multiple methods of interpretation.” [FN203]

In fact, this illustrates perhaps the most significant advantage that pluralists advance, namely, that it is, indeed, the practice that the Court utilizes when deciding constitutional questions. In describing how the “first Justices of the Supreme Court approached the task” of constitutional interpretation,” [FN204] Professor Griffin explains that the Court “did not attempt to develop a method of interpretation that squarely confronted the unique status of the Constitution.” [FN205] Instead, the Court “enforced their understanding of the Constitution as law by enforcing methods of interpretation appropriate to the various sources of American law as they understood them,” [FN206] which resulted, due to “the presence of multiple sources of law in the United States,” [FN207] in a “pluralistic theory of constitutional interpretation.” [FN208] The sources that the Court used pursuant to this method included “the Constitution, common law, the law of nations, civil law, and more specialized sources such as equity.” [FN209]

Indeed, such “sources of law formed the background against which the Justices developed a number of different methods of constitutional interpretation-- looking to the ‘text of the Constitution, the plain or ordinary meaning of words, common law definitions or principles, natural law, local practices and rules, principles of equity, and . . . general principles of republican government.’” [FN210] In fact, “[t]he task of constitutional interpretation was thought of in common-law terms, and the common law took on a broad meaning, ‘signifying the use of a discretionary mythology in which judges found, declared, and applied legal principles, employing a variety of sources.’” [FN211] Thus, “[t]he pluralism of methods in contemporary constitutional interpretation . . . originates in the pluralistic sources of American law.” [FN212]

An additional advantage cited by pluralists is that it operates to “constrain judges by imposing the discipline of having to consider a legal problem from multiple perspectives.” [FN213] Put differently, pluralism “requires judicial self-discipline, located within a particular community’s*723 interpretive traditions, and based on an appreciation for the limited but important role of judges in a democracy, and it depends, in the long run, on sustaining space for the idea of reasonable constitutional disagreement.” [FN214] As Professor Jackson explains:

[Pluralism] is demanding of its judges and other practitioners, asking them to consider multiple perspectives in reaching interpretive decisions (assuming that judicial review continues to be performed by the courts). Multi-valenced constitutionalism as an interpretive theory [also] has possible benefits in maintaining a sense of judicial humility, enhancing the perspectives that judges bring to bear on a legal problem, and encouraging incremental development of the law, while sustaining a sense of connection with the past, and, at the same time, maintaining space for the idea of reasonable disagreement . . . . Its willingness to engage with multiple sources is an intellectual hallmark of its epistemological humility.[FN215]

Furthermore, as Jackson states, “[i]n its embrace of multiple forms of justification,” pluralism “arguably fits with changes in legal consciousness that accompany the rise in democracy and of legal realism.” [FN216]

Accordingly, because pluralism promotes judicial restraint and encourages incremental decision-making, it also “makes it more likely that a wide array of claimants will be able to join in constitutional interpretation.” [FN217] In other words, “[l]osers in one battle will not feel entirely closed out of constitutional discourse but will have reason to remain engaged.” [FN218] Indeed, “[t]he plurality of views in our society finds some mirroring in the plurality of sources that make up the common law of adjudication,” and “[c]ommon law constitutionalism may . . . have more of a capacity to keep a wide range of contestants engaged in the constitutional conversation.” [FN219] This proposition is supported by the fact that common law constitutionalism “holds out the prospect for both short term settlement and long term change (or ‘unsettlement”).” [FN220]

Moreover, the various methods that pluralists employ when interpreting the Constitution “allow ‘different groups in
America to claim *724 the Constitution as their own in the face of reasoned but adverse interpretations,’ and permit departures from [the] present without ‘repudiation’ of the Constitution.” [FN221] Stated simply, “the process of constitutional argument and adjudication keeps . . . losers engaged . . . not only through multiple modalities but also through the prospects of legitimate disagreement and legitimate change in interpretation over time, and through reasoned argument within constitutional traditions.” [FN222] Ultimately, the benefit of pluralism is its “common law understanding of constitutional adjudication,” which maintains “space for reasonable disagreement--even on hotly contested issues.” [FN223] In this way, “[b]y recognizing the legitimacy of multiple modes of argument, the eclectic [pluralist] approach provides room for disagreement with decisions without disputing their legitimacy.” [FN224]

Pluralism, however, does have its drawbacks and has been subject to several criticisms. A particular objection is that reliance upon multiple sources can and often does lead to conflicting results or outcomes. [FN225] Thus, because pluralism does not embrace a hierarchal method among the multiple sources that it considers in the deliberative process, it cannot provide sufficient guidance when it is presented with conflicts between history and tradition, for example. Pluralists do not provide a direct response; instead, they suggest that “such critiques do not address other arguments in favor of common law constitutional decision-making, including its ability to perform settlement or coordination functions, its capacity to allow more stakeholders in the constitutional conversation, or its potential for providing an organic sense of connection with a particular history.” [FN226] Ultimately, perhaps the best response to this critique might be to establish some hierarchy among the different sources that are considered, or to support the notion that, when various sources conflict, the most equitable solution should prevail.

An additional criticism is that the pluralist approach of constitutional interpretation “appears to rest on no independent account of constitutional justice.” [FN227] Put another way, it is “as open to use by purposivists, whose foundational measure of justice is the protection of all forms of liberty, as those whose ground norm is equality.” [FN228] In *725 other words, “[pluralism] provides little basis for saying . . . that particular decisions were illegitimate rather than simply wrong, so long as they were grounded in plausible arguments within the interpretive traditions, and the argument that decisions are wrong must generally rest on misapplication of sources of decision acknowledged to be appropriate.” [FN229] However, this criticism can be objected to on the ground that pluralism does rest “on an account of the role of constitutional law in sustaining the conditions of reasonable discourse in a plural society, for values of tolerance, and peaceful means of resolving disputes, as elements of a just constitutional society.” [FN230]

Opponents of pluralism are likely to argue, as the final criticism, that this method is inconsistent with the rule of law. [FN231] Indeed, many scholars “believe that interpretive theories . . . must be reasonably constraining in defining which results are correct, in order to serve rule of law functions-- which consist both in restraining judges and assuring the predictability and clarity of the law.” [FN232] In response to this argument, pluralists explain that, even with single interpretive theories (e.g., originalism) their efficacy is “to a significant extent dependent on the good faith of those who work it, which is in turn dependent on the existence of widely shared assumptions that permit an understanding of the difference between good and bad faith in working a theory.” [FN233] As Professor Jackson explains, “no interpretive theory . . . can assure this,” and “much depends on the character of judges” and upon the “maintenance of a professional legal community that sustains the ‘law’ part of the law and politics of constitutional judgment.” [FN234]

*726 Finally, Jackson suggests that pluralism may be more constraining than other interpretive theories because, while it may be “less determinate than some other approaches,” [FN235] it indicates that “decisions made only in reliance on past decisions (whether reflected in judicial precedent or original intent) may not be a sufficient answer to claims of constitutional justice or purpose, or to changed constitutional understandings reflected in political and social processes.” [FN236] Furthermore, although “judges may rely on past decisions, the [pluralist] method emphasizes the legitimacy of other forms of argument and suggests the need for responses to these arguments from present understandings.”
For example, to those who would look only at original understandings, the method legitimates arguments about constitutional justice and purpose, not as trumps but as important arguments that merit consideration; likewise, to those who would rely on present understandings of justice and purpose, it legitimates resort to past understandings and decisions as legitimate calls on the interpreter's judgment. [FN238]

Therefore, “having to consider multiple sources is a kind of restraint that may reinforce, and is at least not inconsistent with, a more general recognition of constraints on the judicial role.” [FN239]

Having said that, pluralism does offer a method of interpretation that supports the use of multiple sources that the Court, in practice, has relied upon in deciding important constitutional issues. The difficulty in assaying pluralism's benefit is that it is unknown whether the Court often relies, or consults, all of these sources when rendering constitutional decisions, or whether it accords priority to certain sources based upon their own interpretive predilections. Another concern is whether the Court believes that it could, or should, consult these sources as a normative matter, particularly when considering contemporary constitutional issues. Finally, it may, as a practical matter, prove quite difficult for a particular judge to accept this method if she has already adopted a single interpretive theory as her guide to constitutional adjudication. Thus, while pluralism is plausible as a theory, its applicability in practice may prove difficult.

G. Miscellaneous Theories

This section provides a brief overview of several theories that scholars have advocated but which are not of significant influence on constitutional interpretation at the current time. They consist of: (1) intratextualism; (2) perfectionism; and (3) majoritarianism.

1. Intratextualism

Professor Akhil Amar has created a theory called intratextualism, which “fuses textualist and structuralist theory into a new interpretive technique in which the Constitution becomes a kind of self-referential dictionary.” [FN240] Essentially, “[w]ords or phrases that recur in the text provide a controlling ‘intratextualist’ gloss on their likely meanings in otherwise unrelated textual settings.” [FN241] In this way, intratextualism strives “to be holistic, manipulating more than one isolated word or phrase or clause at the same time in a directed quest for more profound meaning.” [FN242] Consequently, it “gives primacy to implicitness,” and Amar's theory suggests that “intratextualism is structuralism, a subset of Blackian theory that creates implicit relations among apparently related textual occurrences.” [FN243] Indeed, Amar indicates that “intratextual word links could act as a ‘surface sign of a much deeper thematic connection, a sympathetic vibration evidencing a rich harmony at work.’” [FN244] Ultimately, Amar does not promote intratextualism as “the New Kingdom for interpretation,” [FN245] but instead asserts that he is “providing only ‘another set of clues’ in the search for constitutional meaning” [FN246] and “another ‘standard tool in the kitbag of the capable constitutional lawyer.’” [FN247]

2. Perfectionism

Professor Cass Sunstein accurately describes perfectionists as those that “follow the text of the Constitution but try to put the text in its best light, which means they interpret the text ‘in a way that reflects their own deepest beliefs.’” [FN248] Sunstein refers to “Warren Court decisions as the best examples of perfectionism, with [Justices] Brennan and Marshall as some prominent practitioners.” [FN249]
3. Majoritarianism

Finally, majoritarians “are committed primarily to restraint and will not overturn legislation unless it plainly violates
the Constitution.” [*FN250] Sunstein cites Justices Thayer and Holmes as majoritarians. [*FN251] Ultimately,
“[a]lthough perfectionists and majoritarians have been on the Court in the past,” Sunstein argues that at the moment no
Justice is either a perfectionist or majoritarian.” [*FN252]

H. The Applicability of The Foregoing Theories To Constitutional Adjudication, Particularly Substantive Due Process
Jurisprudence

Based upon the foregoing discussion of the various theories apposite to the Court's adjudication of constitutional
cases, particularly in the substantive due process context, many scholars would assert the immediate objection that, given
all of the criticisms that can be raised about each method of interpretation, the only conclusion that can be reached is that
none of these theories should be utilized by the Court.

Critically, however, the primary objective in focusing attention upon both the benefits and disadvantages of the
above interpretive methods is to demonstrate that, as a normative matter, the Court should not use a single overarching
theory of interpretation when deciding constitutional issues, particularly under the Due Process Clause. Now, the apparent
implication from this reasoning is that the Court should consult multiple sources of law--precedent, history, and text-
-when interpreting the Constitution. This would lead to the ineluctable conclusion that pluralism is the best theory by
which the Constitution should be interpreted and applied. However, as illustrated below in section II.F, pluralism itself
is vulnerable to several criticisms, and its application can lead to unworkable results in certain cases. Furthermore, en-
dorsement of a pluralistic theory of interpretation would result in the adoption of a single interpretive theory itself,
which, as stated above, is not the most efficacious or equitable method to decide constitutional questions under the vast
majority of circumstances.

Instead, this Article advocates that the discussion involving the competing theories of interpretation should not focus
upon which theory of interpretation is most appropriate when interpreting the Constitution, but rather when and under
what circumstances the adoption of a particular theory or theories would be most effective. In other words, the Court's
application should not focus upon a single overarching theory, because, as a practical matter, each Justice often uses their
own interpretive method, and this results in the application of conflicting theories in the same cases. Rather, the Court's
adoption and application of a particular theory (or theories)--for purposes of judicial review--should be contingent upon
certain preliminary factors [*FN252] that influence the Court's application of a specific theory to a particular case.

As argued below, by using this approach the Court can begin to form a consensus with respect to its interpretive
method, and decide constitutional issues--particularly fundamental rights issues--in the most fair, equitable, and just
manner possible. Two related points are central to this argument. First, by using conflicting interpretive methods in the
same case (e.g. Justice Scalia's originalism versus Justice Breyer's pragmatism) the Court's decisions are not truly based
upon a collective vision of the Constitution's meaning, but rather upon what a majority of the Court says it means at a
particular time. The results of such a method are that it risks the Court's rulings being viewed as political, rather than ju-
dicial in nature. Second, only through the contingent-based interpretive paradigm advocated below can the adoption of a
single interpretive theory, and only in limited instances, be justified.

Importantly, the idea of a contingent-based paradigm in constitutional cases begs the question of the contingency's
substance and function. The adoption of a particular theory or theories in a particular case should depend precisely upon
how legislative bodies across this country, through statutes or otherwise, have expressed their democratic will concerning
a particular issue. In other words, the Court's adoption of an interpretive theory should depend upon, and respond to, the will of the people as expressed through democratic means; and the method by which to do this is to first survey the actions of legislative bodies across the country. The Court should then apply a particular theory based upon its examination of legislative enactments (i.e., whether there exists a consensus in favor of recognizing or rejecting a particular right at issue). Based upon this assessment, the Court's level of scrutiny should vary--ranging from deferential to exacting--to ensure that its decision is respectful to and reflective of the democratic process and the legislature's institutional lawmaking function. In other words, the Court should strive to act in a manner that simultaneously emphasizes judicial restraint and fidelity to the Constitution.

If the Court's rulings are seen as such, its decisions will be viewed as more legitimate, thus increasing its institutional credibility and insulating it from attacks of judicial activism, accusing it of being the arbiter of political, rather than judicial, decisions. Moreover, if the Court begins acting through a consensus-driven interpretive method that responds to democratic processes and the laws which are produced therefrom, a much needed rebalancing will occur that places lawmaking power with the legislature and constrains judicial review.

Notably, however, the Court will still have a very active role and obligation to uphold the Constitution--as well as its values and purposes--and to invalidate any legislation that infringes upon core constitutional and fundamental rights. In other words, the Court will be responsible for enforcing negative rights. Significantly, however, the Court should generally not be making positive law, except in certain instances as delineated below in Part III. Put differently, the Court should act less like lawmakers and more like “umpires,” ensuring that laws achieved through democratic means do not violate the Constitution's core principles. However, in certain very limited instances, the Court may have the power to make or advance law, but it should only be in rare circumstances.

The question then becomes the method by which to determine accurately how legislative bodies have acted concerning a particular issue. This Article argues that, for substantive due process cases, and for all cases involving fundamental rights, the Court should adopt a portion of its Eighth Amendment jurisprudence into due process adjudication. As discussed below, when determining whether punishment is cruel and unusual under the Eighth Amendment, the Court looks to “evolving standards of decency” in contemporary society; and a significant part of this determination is predicated upon how legislative bodies across the country have acted with respect to a particular method of punishment. Notably, however, the Court will still have a very active role and obligation to uphold the Constitution--as well as its values and purposes--and to invalidate any legislation that infringes upon core constitutional and fundamental rights. In other words, the Court will be responsible for enforcing negative rights. Significantly, however, the Court should generally not be making positive law, except in certain instances as delineated below in Part III. Put differently, the Court should act less like lawmakers and more like “umpires,” ensuring that laws achieved through democratic means do not violate the Constitution's core principles. However, in certain very limited instances, the Court may have the power to make or advance law, but it should only be in rare circumstances.

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III. IMPORTING A CONTINGENT-BASED AND LEGISLATIVELY-DRIVEN METHOD OF CONSTITUTIONAL INTERPRETATION THROUGH ADOPTION OF THE COURT'S EIGHTH AMENDMENT JURISPRUDENCE

The Court should utilize a contingent-based approach that responds to legislative action throughout the country by adopting its Eighth Amendment analysis in constitutional and rights-based adjudication--particularly those cases involving the Due Process Clause. Before turning to a descriptive analysis of the Court's Eighth Amendment decisions, it is important to highlight the four instances of legislative action discussed below and which form the basis for the applica-
tion of a particular theory (or theories) to a specific case. These instances are: (1) when legislative bodies across the country have acted with respect to a particular right or right-based issue, and there is a national consensus in favor of rejecting an alleged right; (2) when legislative bodies across the country have acted with respect to a particular right or right-based issue, and there is a consensus in favor of recognizing a specific right; (3) when legislative bodies across the country have acted with respect to a particular right or right-based issue, and significant division exists concerning recognition or repudiation of a specific right; and (4) when only a limited number of legislative bodies (or even a single legislative body) have acted with respect to a particular right or right-based issue. Before turning to each category, it is important to first discuss the Court's Eighth Amendment framework.

A. The Court's Eighth Amendment Jurisprudence

1. General Principles

The Eighth Amendment provides that “[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.” [FN256] Importantly, while “the authors of the Eighth Amendment drafted a categorical prohibition against the infliction of cruel and unusual punishments . . . they made no attempt to define the contours of that category.” [FN257] “At a minimum, the Eighth Amendment prohibits punishment considered cruel and unusual at the time the Bill of Rights was adopted.” [FN258] At that time, the Eighth Amendment prohibited “barbarous methods generally outlawed in the 18th century” [FN259] such as torture, “disemboweling while alive, drawing and quartering, public dissection, burning alive at the stake, crucifixion, and breaking at the wheel.” [FN260] Critically, however, “[t]he prohibition against cruel and unusual punishments also recognizes the ‘evolving standards of decency that mark the progress of a maturing society.’” [FN261] This is due to the fact that “[t]he standard of extreme cruelty is not merely descriptive, but necessarily embodies a moral judgment,” the applicability of which “must change as the basic mores of society change.” [FN262] In any event, “[i]n discerning those ‘evolving standards,’” the Court has “looked to objective evidence of how our society views a particular punishment today.” [FN263] to determine whether a crime is “graduated and proportioned to [the] offense.” [FN264] In so doing, the Court relies upon “objective factors to the maximum possible extent,” [FN265] and “[t]he clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures.” [FN266]

In fact, “legislative judgments adopted by the people's chosen representatives weigh heavily in ascertaining contemporary standards of decency.” [FN267] In other words, punishments are more likely to be held “cruel and unusual” under the Eighth Amendment when they are “inconsistent with contemporary standards of decency as manifested in modern legislation,” [FN268] a benchmark that proves critical in Eighth Amendment jurisprudence. The principle underlying the Court's reliance upon and deference to legislative judgment was expressed in Gregg v. Georgia: [FN269]

Courts are not representative bodies. They are not designed to be a good reflex of a democratic society. Their judgment is best informed, and therefore most dependable, within narrow limits. Their essential quality is detachment, founded on independence. History teaches that the independence of the judiciary is jeopardized when courts become embroiled in the passions of the day and assume primary responsibility in choosing between competing political, economic and social pressures. [FN270]

For example, the Court has relied substantially upon legislative enactment to prohibit the punishment of death “for the rape of an adult woman,” [FN271] or “for a defendant who neither took life, attempted to take life, nor intended to take life,” [FN272] and for defendants who were insane. [FN273]

Of course, while legislative judgment is “weighed very heavily” [FN274] in the Court's analysis, the “Constitution contemplates that in the end [the Court's] judgment will be brought to bear on the acceptability of the death penalty under

the Eighth Amendment.” [FN275] For example, “in cases involving a consensus” [FN276] among the country's legislatures with respect to a specific punishment for a particular crime, the Court will only ask “whether there is reason to disagree with the judgment reached by the citizenry and its legislators.” [FN277]

2. Decisions Under the Eighth Amendment

As stated above, the Court's Eighth Amendment jurisprudence has relied heavily upon the judgment of the country's state legislatures when determining the constitutionality of particular punishments for certain crimes. In fact, the existence of a consensus—or lack thereof—by state legislative bodies (and Congress) has often played a dispositive role in determining whether a punishment is cruel and unusual *734 under the Eighth Amendment. Whatever the result, the point remains that legislative judgment—not judicial subjectivity—was and continues to be the driving force undergirding Eighth Amendment analysis. Specific decisions illustrate the extent to which legislative enactments influence the Court's constitutional analysis.

a. Penry v. Lynaugh

The Supreme Court's decision in Penry v. Lynaugh [FN278] provides strong evidence concerning the power of legislative enactments to influence the Court's constitutional analysis under the Eighth Amendment. In Penry, the issue before the Court was whether the execution of mentally retarded individuals violated the Eighth Amendment's proscription on cruel and unusual punishment. [FN279] Importantly, after explaining that evolving standards of decency [FN280] would guide its analysis, the Court stated that the “most reliable objective evidence of contemporary values is the legislation enacted by our country's legislatures.” [FN281] Relying upon such evidence to determine if there was a national consensus against execution of the mentally retarded, the Court held as follows:

The federal Anti-Drug Abuse Act . . . prohibits execution of a person who is mentally retarded. Only one state, however, currently bans execution of retarded persons who have been found guilty of a capital offense . . . . Maryland has enacted a similar statute which will take effect on July 1, 1989 . . . . In contrast, in Ford v. Wainwright, which held that the Eighth Amendment prohibits execution of the insane, considerably more evidence of a national consensus was available. No state permitted execution of the insane, and 26 States had statutes explicitly requiring suspension of the execution of a capital defendant who became insane . . . . In our view, the two state statutes prohibiting execution of the mentally retarded, even when added to the 14 states that have rejected capital punishment completely, do not provide sufficient evidence at present of a national consensus. [FN282]

Thus, due in substantial part to the lack of a legislative consensus against the execution of mentally retarded individuals, the Court held that “we cannot conclude today that the Eighth Amendment precludes the execution of any mentally retarded person . . . simply by virtue of his or her mental retardation alone.” [FN283]

*735 b. Atkins v. Virginia

In Atkins v. Virginia, [FN284] the Court was confronted with the exact same issue discussed in Penry, namely, whether the execution of mentally retarded individuals violated the Eighth Amendment's prohibition on cruel and unusual punishment. [FN285] Critically, the Court reversed its holding in Penry based largely upon the fact that “a national consensus ha[d] developed against” capital punishment for the mentally retarded. [FN286] The Court's conclusion was based predominately on its review of legislation enacted throughout the country in the wake of the Court's decision in Penry and the execution of a mentally retarded individual in Georgia. [FN287] The Court reasoned:

In 1988, when Congress enacted legislation reinstating the federal death penalty, it expressly provided that a “sentence of death shall not be carried out upon a person who is mentally retarded.” In 1989, Maryland enacted a
similar prohibition. It was that year that we decided Penry, and concluded that those two state enactments, “even when added to the 14 states that have rejected capital punishment completely, do not provide sufficient evidence at present of a national consensus.” . . . Much has changed since then. Responding to the national attention . . . received by our decision in Penry, state legislatures began to address the issue. In 1990, Kentucky and Tennessee enacted statutes similar to those in Georgia and Maryland, as did New Mexico in 1991, and Arkansas, Colorado, Washington, Indiana and Kansas in 1993 and 1994. In 1995, when New York reinstated its death penalty, it emulated the Federal Government by expressly exempting the mentally retarded. Nebraska followed suit in 1998. There appear to have been no similar enactments during the next two years, but in 2000 and 2001, six more states-South Dakota, Arizona, Connecticut, Florida, Missouri, and North Carolina--joined the procession. The Texas Legislature unanimously adopted a similar bill, and bills have passed at least one house in other states, including Virginia and Nevada. It is not so much the number of these States that is significant, but the consistency of the direction of change. [FN288]

*736 Furthermore, the Court noted that “even in those states that allow the execution of mentally retarded offenders, the practice is uncommon.” [FN289] For example, “New Hampshire and New Jersey continue to authorize executions, but none have been carried out in decades.” [FN290] Additionally, “even among those States that regularly execute offenders that have no prohibition with regard to the mentally retarded, only five have executed offenders possessing a known IQ less than 70 since we decided Penry.” [FN291]

Upon this basis, the Court found that “the large number of states prohibiting the execution of mentally retarded persons . . . provides powerful evidence that today our society views mentally retarded offenders as categorically less culpable than the average criminal.” [FN292] The Court also stated that “[t]he evidence carries even greater force when it is noted that the legislatures that have addressed the issue have voted overwhelmingly in favor of the prohibition.” [FN293] Ultimately, the Court reversed Penry, holding that “[o]ur independent evaluation of the issue reveals no reason to disagree with the judgment of ‘the legislatures that have recently addressed the matter’ and concluded that death is not a suitable punishment for a mentally retarded criminal.” [FN294] Accordingly, the Court held that “our ‘evolving standards of decency’” as expressed through legislative enactments warranted the conclusion that the execution of mentally retarded individuals constituted cruel and unusual punishment in violation of the Eighth Amendment. [FN295]

*737 c. Coker v. Georgia

In Coker v. Georgia, [FN296] the Supreme Court was confronted with the question of whether, consistent with the Eighth Amendment, the statutory crime of raping an adult woman could be punishable by death. [FN297] In deciding this issue, the Court stated that “we seek guidance in history and from the objective evidence of the country’s present judgment concerning the acceptability of death as a penalty for rape of an adult woman.” [FN298] In so doing, the Court reviewed legislative enactments across the country, noting that “[a]t no time in the last 50 years have a majority of the States authorized death as a punishment for rape.” [FN299] Specifically, the Court found that “in 1925, 18 States, the District of Columbia, and the Federal Government authorized capital punishment for the rape of an adult female.” [FN300] Furthermore, the Court found that “[b]y 1971 . . . that number had declined, but not substantially, to 16 states plus the Federal Government.” [FN301]

Subsequently, in 1972, the Court's decision in Furman v. Georgia found the vast majority of state capital punishment statutes unconstitutional, due primarily to infirmities in design and imposition. [FN302] In response to Furman, a substantial number of states began re-drafting their death penalty statutes to ensure their constitutionality. [FN303] Tellingly, however, the majority of those states that re-enacted death penalty laws did not include the punishment of death for the rape of an adult woman. [FN304] In discussing this trend, the Court stated as follows:
[In response to Furman], thirty-five States immediately reinstituted the death penalty for at least limited kinds of crime . . . This public judgment as to the acceptability of capital punishment, evidenced by the immediate, post-Furman legislative reaction in a large majority of the States, heavily influenced the Court to sustain the death penalty for murder in Gregg v Georgia [FN305] . . . . But if the “most marked indication of society's endorsement of the death penalty for murder is the legislative response to Furman,” . . . it should also be a telling datum that the public judgment with respect to rape, as reflected in the statutes providing the punishment for that crime, has been dramatically different. In reviving death penalty laws to satisfy Furman's *738 mandate, none of the States that had previously authorized death for rape chose to include rape among capital felonies. Of the 16 States in which rape had been a capital offense, only three provided the death penalty for rape of an adult woman in their revised statutes--Georgia, North Carolina, and Louisiana. In the latter two States, the death penalty was mandatory for those found guilty, and those laws were invalidated by [subsequent Supreme Court decisions.] When Louisiana and North Carolina, responding to those decisions, again revived their capital punishment laws, they reenacted the death penalty for murder but not for rape . . . . It should be noted that Florida, Mississippi and Tennessee also authorized the death penalty in some rape cases, but only where the victim was a child and the rapist an adult. [FN306]

Based upon this evidence, the Court found that “Georgia is the sole jurisdiction in the United States at the present time that authorizes a sentence of death when the rape victim is an adult woman, and only two other jurisdictions provide capital punishment when the victim is a child.” [FN307]

As a result, the Court held that “[t]he current judgment with respect to the death penalty for rape,” [FN308] while “not wholly unanimous among state legislatures,” [FN309] weighed “very heavily on the side of rejecting capital punishment as a suitable penalty for raping an adult woman.” [FN310] Consequently, while the Court was careful to explain that “in the end our own judgment will be brought to bear on the acceptability of the death penalty [for the rape of an adult woman],” the Court nonetheless held that “the legislative rejection of capital punishment for rape strongly confirms our own judgment, which is that death is indeed a disproportionate penalty for the crime of raping an adult woman.” [FN311] Accordingly, the Court found that the penalty of death for raping an adult woman constituted cruel and unusual punishment under the Eighth Amendment.

d. Kennedy v. Louisiana

Finally, in Kennedy v. Louisiana, [FN312] the Supreme Court was confronted with the issue of whether the Eighth Amendment prohibits the imposition of the death penalty for the crime of raping a child where death did not result. [FN313] The Court began its analysis by stating that it would be “guided by ‘objective indicia of society's standards, as expressed in legislative enactments and state practice with respect to executions.’” [FN314] As a result, the Court relied heavily upon the actions *739 of legislatures across the country in holding that the Eighth Amendment did in fact prohibit the imposition of death for the crime of child rape. [FN315] In so holding, the Court stated as follows:

In 1972, Furman invalidated most of the state statutes authorizing the death penalty for the crime of rape; and in Furman's aftermath only six States reenacted their capital rape provisions. Three States--Georgia, North Carolina, and Louisiana--did so with respect to all rape offenses. Three States--Florida Mississippi, and Tennessee--did so with respect only to child rape . . . . All six statutes were later invalidated under state or federal law . . . . By contrast, 44 States have not made child rape a capital offense. As for federal law, Congress in the Federal Death Penalty Act of 1994 expanded the number of federal crimes for which the death penalty is a permissible sentence . . . but it did not do the same for child rape or abuse . . . . When Atkins was decided in 2002, 30 States, including 12 noncapital jurisdictions, prohibited the death penalty for mentally retarded offenders [which was found to be cruel and unusual under the Eighth Amendment] . . . . When Roper was decided in 2005 . . . 30 States prohibited
the death penalty for juveniles, 18 of which permitted the death penalty for other offenders; and 20 States authorized it . . . . Both in Atkins and Roper, we noted that the practice of executing mentally retarded and juvenile offenders was infrequent. Only five states had executed an offender known to have an IQ below 79 between 1989 and 2002 . . . . and only three States had executed a juvenile offender between 1995 and 2005 . . . . The evidence of a national consensus with respect to the death penalty for child rapists, as with respect to juveniles, [and] mentally retarded offenders . . . shows divided opinions but, on balance, an opinion against it. Thirty-seven jurisdictions--36 States plus the Federal Government--have the death penalty . . . . [O]nly six of these jurisdictions authorize the death penalty for rape of a child . . . . Though our review of national consensus is not confined to tallying the number of States with applicable death penalty legislation, it is of significance that, in 45 jurisdictions, petitioner could not be executed for child rape of any kind. That number surpasses the 30 states in Atkins and Roper . . . that prohibited the death penalty under the circumstances those cases considered. [FN316]

Consequently, based in large part on the legislative response to the crime of child rape, the Court held that, “[b]ased both on consensus and our own independent judgment, our holding is that a death sentence for one who raped but did not kill a child, and who did not intend to assist another in killing the child, is unconstitutional under the Eighth and Fourteenth Amendments.” [FN317] Indeed, the Court's use of legislative enactments across the country is a hallmark under its Eighth Amendment jurisprudence and weighs heavily in assessing the constitutionality of determining whether particular punishments are cruel and unusual for certain crimes. [FN318]

*740 B. Proposed Interpretive Framework

Critically, the point of this discussion is to illustrate that, in determining whether a punishment is cruel and unusual under the Eighth Amendment, the Court has substantially relied upon and deferred to the predilections of federal and state legislative bodies. What is equally illustrative is what the Court has not done; namely, it has not used a single theory or theories of interpretation upon which to decide Eighth Amendment issues. Indeed, the Court's rejection of a theory-based approach is not only prudential but also predicated upon common sense. If, for example, the Court approached constitutional questions under the Eighth Amendment from an originalist perspective, nearly all forms of punishment today would be considered constitutional, because the Amendment, at the time of adoption, was intended to prohibit only the most heinous punishment. However, recognizing that societal values evolve and conceptions of civility change, the Court has “interpreted [the Eighth Amendment] . . . in a flexible and dynamic manner . . .” to reflect the evolving standards of decency in contemporary society. [FN319]

In so doing, the Court's Eighth Amendment decisions demonstrate respect for the democratic process, the legislature's primary role as lawmaker, and the Court's obligation to uphold the rule of law rather than actively create positive law. In other words, the Court has appropriately assumed a modest role and exercised a fair degree of judicial restraint in Eighth Amendment jurisprudence; and, while its “own judgment will be brought to bear” [FN320] on Eighth Amendment issues, its decisions are heavily influenced by and often consistent with the actions of state and federal law. This is not to say that the Court should not exercise its own independent judgment and discretion when deciding the constitutionality of issues arising under the Eighth Amendment, but the critical point is that the Court's analysis is based upon and guided by sources that are the product of democratic processes and legislative will. The upshot is that the Court's holdings in this area, regardless of the outcomes, appear less like political decisions and more like decisions based upon the rule of law and respect for the boundary between the legislative and judicial function. This not only renders the Court's decisions more reflective of their constitutional function, but it enhances their institutional credibility.

However, the Court need not always act in such a restrained and modest manner so as to merely serve as a rubber stamp for legislative enactments. Rather, the Court should have an active role in ensuring *741 that legislation is con-
sistent with the Constitution's provisions and prior decisions. In so doing, it is not inappropriate to use interpretive methods in rendering such decisions. Critically, the Court's decisions should consist more of negative law, namely, invalidating legislation that infringes upon a fundamental right or offends the Constitution in a given case. The Court's decisions should not, in most cases, consist of positive law—the making of new law in a particular area—because that will essentially prohibit legislatures across the country from addressing these issues with their constituents. In other words, the Court will be taking these issues out of the public debate and removing them from the democratic process. It is precisely this perception that threatens the Court's credibility and leads to the belief that its decisions are the product of political, rather than legal, considerations.

It is for this reason that the Court's Eighth Amendment jurisprudence provides the ideal paradigm for the Court to adopt in rights-based cases—specifically those involving substantive due process under the Fourteenth Amendment. The Court should no longer be creating new rights under the Due Process Clause; instead it should be actively ensuring that extant legislation is not in violation of those rights already deemed fundamental in its jurisprudence. Indeed, if the Court, and courts around the country, continue to interpret the Fourteenth Amendment expansively and recognize new rights, their decisions will, as stated above, be viewed as the product of subjectivity, arbitrariness, and activism. The judiciary will be seen as a political institution that is acting as a law-making institution and usurping the legislative process. Nothing could be more anathema to the constitutional system of governing. Importing the Eighth Amendment into the Court's substantive due process jurisprudence will substantially solve this problem and reshape the democratic landscape by reinforcing the separation of powers in the federal government. Thus, Eighth Amendment jurisprudence can have an important structural benefit to the Court as well as a positive impact upon its decisional law.

However, after surveying legislative enactments across the country, the Court will still be faced with the challenge of what method of interpretation to use when its “own judgment will be brought to bear” [FN321] on substantive due process issues. Thus, as stated above, the second part of the model advocated in this Article is that the specific theory or theories adopted by the Court should be contingent upon how legislative bodies have acted with respect to the specific issue(s) that the Court is considering in the substantive due process context. In other words, the Court should conduct its analysis by: (1) examining the actions of legislative bodies concerning the asserted right at issue (i.e., discerning whether there is a consensus for or against recognizing a particular right); and (2) implement a particular interpretive theory or theories depending upon the results of that examination. Subsections III.E.1-4 advocate the specific theory or theories that should be adopted based upon the various scenarios that the Court is likely to confront after consulting legislative enactments. Each scenario will be discussed in turn.

Importantly, there is a difference between the method by which the Court interprets the Constitution and the actual contours of its decision. In other words, the next subsections not only discuss the theory of interpretation that the Court should use when examining the enactments of legislative bodies across the country, but also address the nature of the decision that the Court should render based upon the interpretative method used (e.g., an expansive or minimalist decision). But it is crucial to understand that a significant objective of this method is to ensure, as much as possible, that the Court's decisions are consistent with the decisions of legislative bodies across the country, provided that such laws do not violate either the Constitution or the Court's prior decisions. The paradigm described below attempts to meet this objective while simultaneously ensuring that the Court retains its role of upholding the Constitution and rule of law as set forth through its cases.

1. When Legislative Bodies Have Acted With Respect To A Particular Issue, and There is A Consensus in Favor of Rejecting an Alleged Right

The first category that the Court may be confronted with in rights-based cases is where an examination of legislative
enactments across the country reveals a consensus in favor of rejecting a particular right. For example, consider a case involving the constitutionality of partial birth abortion. The Court's first step, as described above, should be to consider “evolving standards of decency” as evidenced by legislative enactments across the country. Hypothetically, in conducting such analysis, the Court may discover that forty states categorically prohibit partial birth abortions under any circumstances, including when an abortion is necessary to protect the health of the mother. Additionally, the Court may discover that five states allow partial birth abortions when a mother’s life is at risk (based upon a doctor’s assessment), and that five states have not enacted any legislation on this issue. Based upon these facts, and the Court’s own Eighth Amendment jurisprudence, it is likely that the Court will find the existence of a national consensus in favor of rejecting a woman's right to have a partial birth abortion under any circumstances.

*743 This does not, however, end the inquiry, as the Court’s “own judgment will be brought to bear” [FN322] on the constitutionality of these enactments pursuant to the Due Process Clause (but using the Eighth Amendment model as its guide). In other words, the Court possesses the discretion, within limits, to determine the constitutionality of barring a woman from terminating her pregnancy when medical diagnoses render such procedure arguably necessary.

Significantly, based on the evidence of a national consensus against allowing partial birth abortions, the issue becomes, under these circumstances, what method of interpretation would be most appropriate to render a decision that reflects judicial restraint, the Court's institutional role, and the legislature's lawmaking power. Based upon the emergence of a national consensus in favor of rejecting the right to a late-term abortion, the Court should employ an originalist approach to interpreting the Due Process Clause, while simultaneously consulting its recent precedent with respect to substantive due process and a woman's right to terminate her pregnancy. The Court should take a deferential approach to evaluating the constitutionality of partial birth abortion, precisely because there exists a national consensus that resulted from the democratic process. Accordingly, provided that such enactments are not inconsistent with or contrary to substantive due process principles arising under the Due Process Clause, or the Court's relevant precedent, they should be upheld.

When implementing this approach, which promotes separation of powers, there is no question that the Court should uphold the legislative predilection to outlaw partial birth abortion. First, the text of the Due Process Clause, in relevant part, states that no citizen “shall be deprived of life, liberty or property without due process of law.” [FN323] The Due Process Clause, however, is open-ended and ambiguous; thus the originalist approach would not-- and could not--provide any basis to invalidate these legislative enactments. As Professor Ryan states:

These provisions, like the Equal Protection, Privileges or Immunities, Due Process, Cruel and Unusual Punishment, Free Speech, and Necessary and Proper Clauses, all seem to establish general principles that may indeed result in different applications over time. The tension in Scalia's approach to originalism is that he wants to remain true to the constitutional text and he wants that text to be very specific. But it is not always easy to reconcile these twin desires, and to transform general provisions into a more or less fixed list of specific rules is to gloss the original meaning of the text. [FN324]

In essence “[a]ny version of originalism that relies exclusively on the practices of the ratifiers or tries to imagine their answers to precise constitutional questions is difficult if not impossible to reconcile with *744 the more open-ended provisions of the Constitution.” [FN325] Consequently, the Court's use of originalism to resolve the question of partial birth abortion, at best, would lead the Court to reach two conclusions: (1) there is insufficient evidence to discern whether partial-birth abortion would be inconsistent with the Constitution's text and/or original understanding regarding its public meaning; and (2) a situation such as this was not contemplated by the Framers at the time that the Constitution was drafted. As a result, this matter should be left to the States to determine in conjunction with the legislative process.
In other words, the originalist approach serves a very important function here because it does not allow judges to search for higher purposes or penumbras emanating from the Due Process Clause, which would invite subjectivity and arbitrariness. Consider, under identical facts, if the Court employed Justice Breyer's pragmatic or consequentialist approach to this issue. The application of such theory would invite—if not encourage—the Justices to interpret the Due Process Clause in a manner consistent with their own individual predilections. In other words, the application of pragmatism would allow for unfettered judicial discretion because—given that the Due Process Clause is phrased generally and subject to interpretation—there would be no constraints upon the manner of interpretation or the contours of the Court's ultimate decision. Under this paradigm, the Court could conceivably invalidate the ban on partial birth abortion and justify such ban based upon its own broad interpretation of the Due Process Clause or on its contemporary notion of fundamental rights. This approach would not only risk that the Court's decision would be subject to claims of subjectivity and arbitrariness, but also would infringe upon the legislature's lawmaking power by legislating from the bench. That is precisely why originalism is the ideal theory to use when there exists a national consensus in favor of rejecting a particular right.

Next, with respect to the use of precedent, the Court will have greater discretion to invalidate statutes that are contrary to decisions interpreting and establishing fundamental rights. Importantly, the Court should interpret its precedent in a narrow and reasonable manner and not read rights into such decisions that cannot be fairly construed. Here, an examination of substantive due process jurisprudence reveals that the Court has found a right to personal privacy under the Constitution, and pursuant to this right, the Court has recognized a woman's right to terminate her pregnancy. [FN326] This should end the Court's inquiry. It is fairly obvious that this is an easy example, precisely because there is case law directly on point stating that a ban on partial-birth abortion is constitutional. However, even in the absence of this precedent, the Court should still uphold the ban because there is nothing either in the text of the Constitution or in the Court's independent judgment that can provide a basis for overturning the legislatures' judgment. This conclusion is based upon the fact that, when an examination of the Constitution's text or the Framers' original understanding of its meaning cannot be ascertained, it can be fairly stated that the asserted right is, at the very least, not inconsistent with originalist interpretations. Ultimately, therefore, the outcome of this hypothetical is directly traceable to the interpretive method employed, which serves a constraining function that ensures judicial restraint and deference to legislative enactments. This is precisely the role the Court should take in most cases when there is a national consensus in favor of rejecting a particular right.

A harder example might be where legislative bodies have acted and there exists a national consensus expressing that marriage shall only be between a man and a woman. Again, the Court's analysis should begin with examining evolving standards of decency as evidenced by legislative enactments across the country. Using this approach, assume that forty-seven states have statutes specifically stating that marriage shall only be between a man and a woman, two states allow for “civil unions,” and one state provides that individuals of the same sex have a fundamental right, under the Due Process Clause, to marry. Based upon this initial survey, there is no question that there exists a national consensus in favor of rejecting the right to gay marriage. Here, as with the partial-birth abortion example, the Court should again employ a modified “originalist” approach, which should take into account not only the text of the Due Process Clause and the original understandings of the Framers, but also the history and traditions of this country relating to marriage. The Court
should also consult its own precedent relating to the fundamental right to privacy and to marriage.

Using these approaches, and based upon the national consensus, the Court should rule that the states’ rejection of gay marriage is constitutionally valid. First, when applying the originalist approach and examining the text of the Due Process Clause, the Court would simply be unable to divine whether gay marriage was a right contemplated by the Founders and/or enshrined in the Fourteenth Amendment. As stated above, any attempt to reach a conclusion from such information and to rely “on the practices of the ratifiers,” [FN331] or to “imagine their answers to precise constitutional questions is difficult if not impossible to reconcile with the more open-ended provisions of the Constitution,” [FN332] such as the Due Process Clause.

The Court should then examine whether the right to gay marriage has any basis in the history and tradition of this country. An examination under this paradigm reveals that it arguably does not, unless the Court engages in an overly broad and fairly unjustified interpretation of the Due Process Clause. The best evidence of this conclusion does not come from any prior decisions of the Court relating to gay marriage, because none exist. Indeed, the closest indication that supporters of gay marriage could possibly reach regarding history and tradition relating to homosexual rights is Justice Kennedy’s statement in Lawrence v. Texas that “there is no longstanding history in this country of laws directed at homosexual conduct as a distinct matter.” [FN333] However, Lawrence was the most recent, and most relevant, case relating to the rights of homosexuals. [FN334] In that matter, the Court overruled a Texas statute criminalizing sodomy between individuals of the same sex. [FN335] These decisions did not, explicitly or implicitly, discuss gay marriage.

Importantly, in Lawrence Justice Scalia described the evolution of the Court’s jurisprudence relating to fundamental rights, a jurisprudence which remains intact today. [FN336] In Lawrence, Scalia stated:

We have held repeatedly, in cases the Court today does not overrule that only fundamental rights qualify for this so-called “heightened scrutiny protection-- that is, rights which are ‘deeply rooted in this Nation’s history and tradition . . .’” Bowers held, first, that criminal prohibitions of homosexual sodomy are not subject to heightened scrutiny because they do not implicate a “fundamental right” under the Due Process Clause . . . . [Also] that “[p]roscriptions against that conduct have ancient roots,” . . . “[and] that ‘[s]odomy was a criminal*747 offense at common law and was forbidden by the laws of the original 13 States when they ratified the Bill of Rights. [FN337] Accordingly, and based upon prior cases, Justice Scalia concluded that the Court has never “describe[d] homosexual sodomy as a ‘fundamental right’ or a ‘fundamental liberty interest.’” [FN338] In fact, the Court, to date, has not addressed the question regarding whether homosexuals have a fundamental right to marry. Some may argue, however, that this right may be found in the more general and open-ended terms (e.g., the liberty interest found in the Due Process Clause, and as expanded in the Court’s substantive due process jurisprudence). It may also be argued that the right to gay marriage falls under the general “right to privacy” as explicated in the Court’s prior jurisprudence. For example, in Griswold v. Connecticut, the Court invalidated a ban on the use of contraceptives by married couples [FN339] based on the notion that married couples have a constitutionally protected liberty interest in privacy that warrants protection from the state. [FN340] In so holding, the Court reasoned:

[S]pecific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance. . . . Various guarantees create zones of privacy. . . .

. . . .

We have had many controversies over these penumbral rights of “privacy and repose.” . . . The present case [a ban of contraceptive use by married couples] concerns a relationship lying within the zone of privacy created by several fundamental constitutional guarantees. . . . Such a law cannot stand in light of the fa-
miliar principle . . . that “a governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which . . . invade the area of protected freedoms.” . . .

We deal with a right of privacy older than the Bill of Rights . . . . Marriage is a coming together for better or for worse . . . and intimate to the degree of being sacred. It is an association . . . for as noble a purpose as any involved in our prior decisions. [FN341]

On this basis the Court recognized that the Due Process Clause did indeed contain a constitutionally protected right to privacy upon which the state could not intrude in matters pertaining to intimate associations such as marriage. [FN342]

Additionally, proponents of gay marriage may also rely upon language from Eisenstadt, where the Court held that:

It is true that in Griswold the right of privacy in question inhered in the marital relationship. . . . If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental *748 intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child. [FN343]

Thus, supporters of gay marriage are likely to argue that the substantive right to privacy as established in Griswold and Eisenstadt firmly support an individual's private decision regarding marriage, which is itself a recognized fundamental right.

Finally, proponents of gay marriage will likely rely on Lawrence where, although factually dissimilar, the Court stated in dicta that “our laws and tradition afford constitutional protection to personal decisions relating to marriage.” [FN344] Furthermore, the Court's justification for overturning a statute criminalizing sodomy between members of the same sex was predicated upon the privacy interest emanating from the Due Process Clause:

These matters [i.e., marriage], involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State. [FN345]

Based upon these principles, the Court did not simply look to history and tradition in rendering its decision, but instead focused upon the “emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex.” [FN346] As such, the Court held the Texas statute unconstitutional under the Due Process Clause. [FN347]

Thus, it can be argued that, although the originalist approach does not support gay marriage, the Court's prior precedent accords individuals this right based upon the rights of privacy and liberty. A closer look, however, finds this argument to be without merit. First, in this hypothetical, forty-seven states have already, through the democratic process and legislative enactments, expressed their will not to extend marriage to homosexuals. Second, there is simply no basis in the text of the Constitution, the Framers' understanding of the text's meaning, or their original understandings, that could possibly support this right. [FN348] It is safe to say that the Framers did not contemplate the issue of marriage between same gender couples. Third, the Court's prior case law has never addressed specifically the question of *749 whether homosexuals have a fundamental right to marry under the Due Process Clause. While the Court has, under its substantive due process jurisprudence, held that the right to marry is a fundamental right, all such decisions were based upon facts involving heterosexual couples. [FN349] Furthermore, the Court's decision in Lawrence, while based upon notions of privacy and liberty that emanate from the Due Process Clause, dealt with a criminal statute proscribing sodomy, and had nothing to do whatsoever with the right to marry.
Essentially, because there is no support in the text of the Constitution, the original understanding of the Framers, or the Court's own prior decisions, the only manner in which the Court could recognize such a right would be through a very expansive interpretation of the Due Process Clause. In other words, the Court would have to interpret the fundamental right to marry, as well as the privacy and liberty interests of the Due Process Clause, in a manner that has never been done in the Court's prior jurisprudence. In this way, the Court would be assuming an activist approach and, for all intents and purposes, making new law from the bench and usurping the legislatures' law-making power.

This is particularly troublesome because, in this hypothetical, forty-seven states have expressed their preference that marriage remain between heterosexual couples, and to hold otherwise the Court would be invalidating the laws of forty-seven states that resulted from the democratic process. This type of judging, while it arguably leads to an outcome that is fair and just to many (including this author), has the effect of usurping the role of democracy, majoritarian rule, and the separation of powers. In other words, the necessity and hope for positive change should result from the legislatures' deliberative processes, not through the Court substituting its own judgment for that of the people. Moreover, it is telling that the only way the Court could accomplish such an objective would be through a broad, expansive and fairly unprecedented interpretation of the Due Process Clause, which would not only invite claims of subjectivity, but would also risk the Court being viewed as a political, rather than judicial, institution.

Put differently, if the Court engages in a broad reading of the Due Process Clause and creates new rights when there is a national legislative consensus against recognizing that right, then there is no limit to the types and kinds of rights that can be recognized under the Fourteenth Amendment, and the only constraints will be the individual interpretive philosophies of the particular Justices. That is precisely why the interpretation of prior precedent should be fairly narrow, and why there should be a paradigm connecting the use of a particular interpretive theory to legislative activity and democratic processes.

Critically, however, it must be understood that, in certain circumstances, where there exists a substantial number of legislative enactments rejecting an alleged right, whether there is a consensus or not, the Court should be prepared to assume a more activist role if such legislation plainly violates any of the Constitution's provisions or is inconsistent with the Court's Fourteenth Amendment jurisprudence. In other words, as a normative matter, the Court should constrain legislatures from either infringing upon rights that have already been deemed fundamental or otherwise acting in a manner that deprives individuals of the equality and liberty encompassed within the Due Process Clause. In cases such as these, the Court would not be making new law or legislating from the bench, but in fact upholding the rule of law. In such circumstances, the Court can, and should, assume a more consequentialist or pragmatic approach that considers the ramifications of such enactments upon present-day notions of liberty and equality.

For example, consider state-sponsored segregation in public schools on the basis of race. In Brown v. Board of Education, [FN350] the Court declared that the concept of “separate but equal” was inherently unequal, with the consequence that many schools were ordered to integrate both African and White Americans. [FN351] In so holding, the Court first recognized (implicitly rejecting the originalist approach) that references to original understanding of the Fourteenth Amendment were insufficient to provide the Court with a basis to render its decision. [FN352] Regarding “the circumstances surrounding the adoption of the Fourteen Amendment,” [FN353] as well as “then existing practices in racial segregation,” [FN354] the Court found that such information was simply “inconclusive.” [FN355] As a result, the Court's approach mirrored the pragmatism that characterizes Justice Breyer's interpretive method:

In approaching [segregation], we cannot turn the clock back to 1868 when the Amendment was adopted, or even to 1896 when Plessy v. Ferguson was written. We must consider public education in the light of its full development and its present place in American life throughout the Nation. Only in this way can it be determined if
segregation in public schools deprives these plaintiffs of the equal protection of the laws. [FN356]

*751 Based upon this approach, the Court focused upon “the importance of education to our democratic society,” [FN357] and its role as “a principal instrument in awakening the child to cultural values . . . professional training [and] in helping him to adjust normally to his environment.” [FN358] The Court further stated in dicta that “it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education . . . . [W]here the state has undertaken to provide it, [it] is a right which must be made available to all on equal terms.” [FN359] Thus, the Court’s assessment of contemporary values and practical consequences led it to conclude that “in the field of public education the doctrine of ‘separate but equal’ has no place. . . . [Thus] by reason of the segregation complained of, [the plaintiffs have been] deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment.” [FN360]

Hence, the Brown Court appropriately assumed a more activist role—not to create new law or legislate from the bench—but to ensure that the value of equality was realized, and it did so effectively by using a consequentialist or pragmatic method of interpretation. In so doing, the Court ensured that the states’ conduct was consonant with the Constitution and consistent with contemporary notions of fairness and equality.

2. When Legislative Bodies Have Acted With Respect To A Particular Issue, and There Is A Consensus in Favor of Recognizing a Specific Right

The Court is also likely to confront scenarios where, after surveying legislative enactments across the country, there exists a consensus in favor of recognizing a particular right. In such an instance, the Court’s response should be deferential, while simultaneously ensuring that this newly recognized right does not conflict with the Constitution’s provisions, the values upon which it is based, or previous case law of the Court. Accordingly, in these circumstances, the Court should adopt a modified originalist or negative originalist [FN361] approach, and consider prior precedent. However, the Court should be willing to interpret its prior precedent in a somewhat expansive manner, not only because the Due Process Clause is a general and open-ended provision, but because its level of review should, as stated above, be deferential to the legislative consensus.

Of course, an objection is likely to arise that, in the previous section, it was advocated that the Court should interpret its precedent in a narrow manner, whereas here it is being argued that a more expansive*752 and/or broader interpretation is permissible. There is a critical difference under these circumstances: legislative bodies across the country have overwhelmingly expressed a predilection in favor of recognizing a particular right, and the Court should use interpretive methods that, within the bounds of legitimate legal reasoning and constitutional law, can uphold such enactments. In other words, the Court should remain deferential to the democratic process provided there is a constitutional basis to support its decision.

For example, again consider, hypothetically, that there exists a national consensus in favor of extending the right of marriage to homosexual couples. Assume that thirty-nine states favor the recognition of same-gender marriage, while eight states confine marriage to heterosexual couples, and three have not spoken on the matter. If the Court was confronted with the task of assessing the constitutionality of such statutes, the originalist or negative originalist approach (in a more limited manner), coupled with Justice Breyer’s pragmatism, would yield a correct decision that respects the judicial role and legislative process. First, utilizing the originalist method of interpretation, the Court should first look to the text of the Fourteenth Amendment. Next, the Court should examine “the practices and interpretations of the Founding generation[s],” focusing upon “the practices and understandings of those reasonably educated men who were around when the relevant provisions were adopted.” [FN362] In addition, as Justice Scalia stated in Lawrence, [FN363] the Court can examine whether such right is “deeply rooted in this Nation’s history and tradition.” [FN364]

Using the originalist method, however, is not likely to yield conclusive results, due not only to the Fourteenth
Amendment’s open ended language, but also to the relative ambiguity concerning the Framers’ original understand-

ings. In other words, there is nothing in the historical record that specifically supports the right of same gender couples to marry. Importantly, however, it can be deduced from this information that there is no express evidence indicating that marriage between homosexual couples was specifically prohibited. The obvious--and fairly compelling--response is that this simply was not within the contemplation of the Framers at the time the Constitution was adopted. While this is a valid criticism, it can be countered by the fact that, if homosexual marriage was not contemplated by the Framers or in-
cluded in the Constitution, then it is a matter best left to the states’ legislative process.

Notwithstanding, the Court could take a somewhat broader approach to interpreting the Constitution and use a nega-
tive originalist framework, where the Court would seek to discern whether recognition⁷⁵³ of gay marriage as a funda-
mental right would conflict with the values underlying the Constitution. Specifically, negative originalism is properly
defined as follows:

[T]he theory of negative originalism would require a court not to divine the precise meaning of broadly
worded constitutional phrases or of long-standing historical practice. . . . In some cases . . . the historical record
will be invariably unclear and susceptible to varying interpretations, thus proving inadequate for constitutional de-
cision-making processes . . . . Negative originalism would require a court to ascertain whether protection of a
newly-asserted right would be contrary to, inconsistent with or discountenanced by the salutary values that our do-
mestic tradition embraces. Negative originalism would therefore require a court to discern the general or overrid-
ing principles that underlie a particular constitutional provision such as the Due Process Clause . . . and examine
whether the newly-asserted right would contravene the general intent that has manifested itself through the evolu-
tion of domestic law. [FN365]

Again, however, even a broader approach to interpreting the Constitution--namely, striving to define the more gen-
eral principles undergirding the Due Process Clause--is not likely to result in a definitive, satisfactory, and conclusive an-
swer. To be sure, the Court has indirectly utilized this approach when finding that there exist constitutionally protected
privacy and liberty interests under the Due Process Clause. [FN366] The potential problem with using negative original-
ism, however, is that the Court would essentially have to countenance recognition of gay marriage based upon constitu-
tional principles that are simply too vague to warrant the expansion of fundamental rights under the Due Process Clause.
As noted above, any attempt by the Court to rely “exclusively on the practices of the ratifiers . . . to imagine their an-
wers to precise constitutional questions is difficult if not impossible to reconcile with the more open-ended provisions of
the Constitution.” [FN367]

Therefore, the Court will be left with two options: prior decisional law and pragmatism. When using prior case law,
the Court can certainly rely upon dicta in Griswold and Eisenstadt, which discussed the importance of privacy and per-
sonal autonomy. The Court can also cite to its decision in Lawrence, where the majority emphasized that the Due Pro-
cess Clause is designed to “define the liberty” [FN368] of all and the concept of liberty is not simply predicated upon
“history and tradition” [FN369] but also upon “an emerging awareness that liberty gives substantial protection to adult
persons in deciding how to conduct their private lives in matters pertaining to sex.” [FN370] Accordingly, in assessing
⁷⁵⁴ liberty-based interests under the Due Process Clause, “history and tradition are the starting point but not in all cases
the ending point of the substantive due process inquiry.” [FN371]

The problem, however, with relying upon these cases is that they can equally support the proposition that gay mar-
riage is not a fundamental right, primarily because they involved dissimilar facts and general notions of liberty that argu-
ably did not contemplate a fundamental right of marriage for homosexuals. In other words, critics would argue that the
Court is simply engaging in the selective use of certain aspects of precedent to justify a particular result. For example,
the same case law can be used to reject the idea of gay marriage or to accept it, depending on whether a legislative con-
sensus has been reached to recognize such unions. The implication of this criticism is that the Court is engaging in subjective and arbitrary decision-making. This objection is a valid one and, based upon the facts, renders the use of decisional law in this area unhelpful as a matter of intellectual honesty.

This leaves the final interpretive method that is appropriate under the facts of this hypothetical—Justice Breyer's pragmatism. This method implicates two considerations that lead to the conclusion that the Court should uphold the legislatures' decision to recognize gay marriage. First, thirty-nine states have, through the democratic process, expressed that the right to marry should include members of the same gender. Thus, a contrary ruling by the Court would usurp the legislative will of thirty-nine states without any meaningful justification—there is nothing in the Constitution's text, its principles or the Court's precedent that demands such a ruling. If anything, the converse can be argued with more legitimacy: that the principles of liberty, privacy and autonomy are critical values in a democratic society, particularly where they find protection through the legislative process. Should the Court overrule the will of thirty-nine states, the consequences will be deleterious to the Court as an institution: it will be viewed as substituting its judgment arbitrarily for the will of the people and engaging in policy-based decision-making. There can be nothing more anathema to the Court's credibility.

Second, expanding the fundamental right of marriage to homosexual couples is arguably an equitable, fair, and just outcome in a free society, provided it is the result of democratic processes. Each state has the right, within constitutional constraints and the rule of law, to enact policies that it deems most consistent with its values and ideals. To the extent that a state believes that notions of equality, liberty, and privacy warrant the recognition of marriage between members of the *755 same sex, it has the right to make such a decision. Moreover, when there exists nothing in the Constitution or the Court's precedent prohibiting a state from making this choice, the Court should leave this decision to the states as a matter of policy and separation of powers. Should the Court do anything differently, it would be overstepping its authority, and the consequence would be to compromise the lawmaking power that is rightfully reserved to the states. Thus, in the final analysis, the originalist approach (to a more limited extent), coupled with the consequentialist or pragmatic approach, should guide the Court to uphold the states' decision to extend the right to marry to members of the same gender.

3. When Legislative Bodies Have Acted With Respect To A Particular Issue, and a Significant Division Exists Regarding Recognition or Repudiation of a Specific Right

The Court is also likely to face a scenario where, in examining the constitutionality of a particular rights-based issue, there exists a significant division among those legislative bodies that have acted with respect to rejecting or recognizing a particular right. For example, again consider the example of marriage between members of the same gender. In conducting its evolving standards of decency analysis, the Court may find, hypothetically, that fourteen states have statutes granting homosexuals the right to marry, fifteen states have laws prohibiting such practice, and seven states have laws providing for civil unions, but not marriage. The remaining fourteen state legislatures have simply not enacted statutes with respect to this issue. In such an instance, the Court's analysis should be conducted in two distinct parts.

Importantly, the Court's approach should mirror its analysis in Atkins, where it looked to the trend in legislative enactments—how state legislatures were currently acting with respect to a particular issue. The Court's analysis in Atkins is instructive. There, the Court considered whether the Eighth Amendment prohibited the execution of mentally retarded defendants. [FN372] Prior to Atkins, the Court previously considered this issue in Penry, [FN373] where it held that the execution of such defendants was not prohibited by the Eighth Amendment. [FN374] The Court's holding was based in substantial part upon the fact that the mere existence of “two state enactments [prohibiting execution of the mentally retarded] . . . even when added to the 14 States that have *756 rejected capital punishment completely, do not provide sufficient evidence of a national consensus.” [FN375]
However, in Atkins, the Court overturned Penry, not due to the existence of a consensus, but because the national trend was against executing those determined to be mentally retarded. [FN376] On this basis, the Court concluded that “the large number of States prohibiting the execution of mentally retarded persons . . . provides powerful evidence that today our society views mentally retarded offenders as categorically less culpable than the average criminal.” [FN377] Furthermore, after conducting its own independent analysis, the Court concluded that there was “no reason to disagree with the judgment of the legislatures that have recently addressed the matter.” [FN378]

Consequently, given that the Court should look to the trend in legislative enactments, it should not, where there is a substantial division among legislative bodies, adopt any particular interpretive method. Instead, where there is a substantial division among state legislative bodies, the Court should focus not on its interpretive method but upon the scope of its holding. In other words, the Court should be very mindful of the implications that its holding will have upon the democratic process, the ability of state legislatures to enact corrective legislation, and the need to ensure that “losers” in a particular dispute still remain engaged in the debate.

The method by which to achieve these objectives is to adopt Professor Sunstein's minimalist approach to constitutional decision-making. Put differently, the Court should render a holding that is as narrow or incremental as possible, such that there is room for legislative bodies across the country to continue the debate over a particular issue and act in accordance with their policy predilections. For example, assume that there existed a significant division among state legislatures regarding whether to recognize marriage between same-gender couples. In light of such statistics, the Court should be reticent to announce that same-gender couples have a fundamental right to marry. Such a decision would remove this issue entirely from the democratic process and prevent the type of legislative debate that the Constitution envisions.

Instead, the Court's holding should be modest and restrained. For example, should the Court decide that same-gender couples do have a fundamental right relating to marriage, its holding against those legislatures that have enacted prohibitions should be akin to something such as “the relevant statutes defining marriage between a man and a woman, while not unconstitutional per se, cannot satisfy constitutional *757 scrutiny unless same-gender couples are provided substantially similar rights that inhere in the institution of marriage itself.” This holding would still allow legislatures the right to define marriage in accordance with their policy preferences, but it would also ensure that same-gender couples are provided with rights that are nearly identical to married couples. In other words, it would allow legislatures to establish civil unions or extend marriage to same-gender couples. In addition same-gender couples would likely challenge the constitutionality of civil unions, thus remaining engaged in the constitutional debate.

Furthermore, subsequent to the Court's decision, same-gender couples can, and certainly would, continue to lobby across the country for legislation extending marriage to same-sex couples. However, they would be doing it through the legislative process—which is exactly the way democracy is designed to function. It is not for the courts to mandate their own moral codes upon the states; rather, it is the people that serve as agents of change and who will influence the legislature's lawmaking power. When change occurs in this manner, the Constitution is vindicated because the structure of government that it envisions has operated as it was intended.

4. When Only a Limited Number of Legislative Bodies (or Even a Single Legislative Body) Have Acted With Respect To A Particular Issue

Finally, the Court is likely to face many instances where only a limited number of legislative bodies (or even a single legislative body) have acted with respect to a particular issue. In this instance, the Court's analysis will differ in part because, when conducting its evolving standards of decency analysis, there will be no other states to examine. The Court
should adopt a modified pluralistic approach in deciding a particular issue, while also rendering a minimalist decision that again leaves room for corrective legislation. The sources that the Court should rely upon are history and tradition, precedent, pragmatism, and, to a limited extent, international law.

For example, consider Lawrence, where the issue was the constitutionality of a statute prohibiting sodomy between same gender couples. [FN379] The Court consulted a variety of sources in holding the Texas statute unconstitutional. Precedent, history, tradition, broad principles of liberty and privacy, and international law were all relevant in declaring the statute infirm under the Due Process Clause. [FN380] Specifically, the Court relied upon its past decisions in Griswold and *758 Eisenstadt, [FN381] the lack of a “longstanding history in this country of laws directed at homosexual conduct,” [FN382] the “emerging awareness” [FN383] that “liberty gives substantial protection to adult persons in deciding how to conduct their private lives,” [FN384] and a decision from the European Court of Human Rights. [FN385]

These sources formed the basis for the Court's decision that the Texas statute impermissibly infringed upon the liberty interest of same-gender couples under the Due Process Clause. The Court, however, did not declare that homosexuals have a “fundamental right to engage in . . . sodomy.” [FN386] but instead held that Texas had no legitimate interest that could override the exercise of their liberty under the Fourteenth Amendment. [FN387]

Some could argue that the Court's decision was too broad and should have been more minimalist in character. In other words, the Court had an alternative way of invalidating the Texas statute while still allowing the issue of sodomy to remain within the public debate for the State of Texas. Specifically, the Court could have ruled that the statute was unconstitutional based upon Equal Protection grounds because it applied only to homosexual and not heterosexuals couples. [FN388] A narrower holding would have returned the issue to the Texas legislature, where it would have had the opportunity to: (1) revise its statute to prohibit sodomy between all couples, whether homosexual or heterosexual; or (2) repeal the statute. In fact, Justice Thomas echoed this sentiment in his dissent, where he stated:

I write separately to note that the law before this Court “is . . . uncommonly silly.” If I were a member of the Texas legislature, I would vote to repeal it. Punishing someone for expressing his sexual preference through non-commercial consensual conduct with another adult does not appear to be a worthy way to expend valuable law enforcement resources. Notwithstanding this, I recognize that as a Member of this Court I am not empowered to help petitioners and others similarly situated. [FN389]

Thus, the point of Justice Thomas' dissent is that, while Texas's law bordered on the absurd, its fate should be determined through the legislative process.

This argument does have theoretical force in this case, but perhaps its application is significantly less attractive considering the facts. Laws criminalizing private, consensual conduct have no place in a society that values freedom, privacy, and independence. Texas' law was *759 not only silly, it was offensive. However, if this matter was returned to the legislative process, it is certainly possible that the statute would have been repealed and that would end the matter. It would be precisely the same result that the Court reached in Lawrence, but by different means—through the institution responsible for law-making. This is not a distinction without a difference; it is an important principle that our government institutions operate in the manner that the Constitution envisions, even if the results are sometimes unfavorable or unpopular, because it is through the democratic process that evolving standards of decency should develop.

IV. CONCLUSION

The desire to interpret the Constitution and “invoke its principles in [our] own search for greater freedom,” [FN390] is vital to a progressive democracy that seeks, through a rising national consensus, to extend liberty, privacy and
autonomy to all of its citizens. However, it must be done through the proper process, namely, that which is designed by the very Constitution from which we derive our progressive liberty interests. That process vests with the legislatures across this nation the power, through public debate and policy preference, to make choices about values, liberty, freedom, and justice. The legislative law-making power is not unfettered; the Court stands as an active guardian of the Constitution's text, purposes and principles, but it does not provide the Court with the authority to usurp the legislature's constitutional role.

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[FNa1]. Associate Professor of Law/Westerfield Fellow, Loyola College of Law, New Orleans, Louisiana. B.A., magna cum laude, University of Southern California; J.D., with honors, Ohio State University; LL.M, New York University. I would like to thank my research assistant, Cosima Clements, for her hard work and dedication throughout the drafting of this Article. In particular, Cosima provided invaluable assistance both in the research and writing phases, and her meaningful feedback contributed substantially to the Article's development. I would also like to extend a personal thank you to my mother, Dolores, father, Leonard, and brothers, Marc and Chris, for supporting me during a very important time in my life. This Article is dedicated to all of you.


[FN2]. The relevant portion of the Fourteenth Amendment is that which forbids the deprivation of “life, liberty or property without due process of law.” U.S. Const. amend. XIV, § 1.

[FN3]. Thornburgh, 476 U.S. at 789.


[FN5]. Id.; see also Griswold v. Connecticut, 381 U.S. 479, 484-85 (1965) (describing the right to privacy as emanating from various places in the Bill of Rights).


[FN8]. Planned Parenthood, 505 U.S. at 851.

[FN9]. The term “newly proffered liberties” refers to rights that are not specifically enumerated under the Constitution.


[FN11]. Id. at 790.


[FN16]. Id. at 572.


[FN18]. Id. (quoting Griswold, 381 U.S. at 502).

[FN19]. Id. at 789.


[FN21]. Bibas, supra note 20, at 186.

[FN22]. Id.

[FN23]. Id.

[FN24]. Id.

[FN25]. Id. at 187.

[FN26]. Bibas, supra note 20, at 188.

[FN27]. Id.

[FN28]. Id.


[FN32]. Id.

[FN33]. Id.

[FN34]. Id.

[FN35]. Id.


[FN38]. Griffen, supra note 36, at 1763.

[FN39]. Havel, supra note 37, at 1257.

[FN40]. Id.

[FN41]. Nancy S. McCahan, Comment, Justice Scalia's Constitutional Trinity: Originalism, Traditionalism and the Rule of Law as Reflected In His Dissent In O'Hare and UmBehr, 41 St. Louis U. L.J. 1435, 1464-65 (1997).

[FN42]. Id. at 1465.

[FN43]. Id.

[FN44]. Id.


[FN46]. Ryan, supra note 31, at 1645.

[FN47]. Id.

[FN48]. Id. at 1650.

[FN49]. Id.

[FN50]. Id.


[FN55]. Saphire, supra note 20, at 281.

[FN56]. Id. (quoting Antonin Scalia, A Matter of Interpretation: Federal Courts and the Law 22 (1997)). Indeed, when interpreting text, Saphire explains that Scalia, unlike other judges, does not countenance the use of legislative history:

Justice Scalia's version of textualism in statutory interpretation has led him, famously, to reject the notion widely embraced by many scholars and judges that, at least with respect to language that is ambiguous, a judge should look to the statute's legislative history in determining its meaning. His reason for generally rejecting resort to legislative history is that the “objective indication of the words, rather than the intention of the legislature is what constitutes the law.” In addition he claims that rejection of legislative history entails certain practical advantages .... “Judges, lawyers and clients will be saved an enormous amount of time and expense.”
Id. at 281-82 (quoting Scalia, supra note 56, at 29).

[FN57]. Id. at 281 (quoting Scalia, supra note 56, at 23).

[FN58]. Id. at 281 (quoting Scalia, supra note 56, at 29).

[FN59]. Id. at 282. In justifying his “textualist” method of interpretation, Justice Scalia specifically contrasts his approach with the common law method of judging, which he deems anathema to constitutional decision-making:

In his typically colorful way, [Justice Scalia] refers to the thrill that he supposes first-year law students sometimes experience when they realize common-law judging “consists of playing king devising, out of the brilliance of one's own mind, those laws that ought to govern mankind. How exciting!” ... common law adjudication allows judges to keep the law “in tune with the times,” to prevent the law from “atrophying.” ... and to account for the notion ... that the law embodies social aspirations in whose working out the judge can play an important role. But it is just these invigorating and dynamic features of common law adjudication which (Justice Scalia believes) threaten to undermine democracy. The common law process is a creative one; it is a process in which judges do not just take the law as they find it, but in which they necessarily make law. The question “whether life-tenured judges are free to revise statutes and constitutions adopted by the people and their representatives is not merely ... a question of some ‘importance,’ but a question utterly central to the existence of democratic government.” It is a question that Justice Scalia answers decidedly in the negative.

Id. at 284-85 (quoting Scalia, supra note 56, at 7, 133, 138).

[FN60]. Id. at 282.

[FN61]. Id. (quoting Scalia, supra note 56, at 36). This is most evident in that, when interpreting the Constitution, Justice Scalia is willing to consider the legislative history underlying the Constitution's various provisions.

[FN62]. Id. at 281 (quoting Scalia, supra note 56, at 36).

[FN63]. Id. at 283. Scalia does offer several reasons for justifying the adoption of his textualist philosophy and, as discussed below, originalist theory of interpreting the Constitution:

Justice Scalia ... chooses textualism-originalism because he believes it best furthers a set of political values and objectives that should govern the way judges act. The first value is democracy; the second, derivable from the first, is the legitimacy of the judicial role. For Justice Scalia, textualism-originalism is required by democracy because it is the interpretive strategy most likely to uncover the will of the self-governing people who were responsible for the law ... in question.

Id.

[FN64]. Id.

[FN65]. Havel, supra note 37, at 1252.

[FN66]. Id.

[FN67]. Id. at 1253.

[FN68]. Id. (quoting Akhil Reed Amar, A Neo-Federalist View of Article III: Separating the Tiers of Federal Jurisdiction, 65 B.U. L. Rev. 248 n.169 (1985)).

[FN69]. Amar, supra note 68, at 248 n.169.
[FN70]. Havel, supra note 37, at 1253 (quoting Amar, supra note 68, at 258 n.169).

[FN71]. Id.

[FN72]. Ryan, supra note 31, at 1628. As Ryan explains, originalists believe that courts “should ... determine how the [Constitution's] provisions were understood at the time they were ratified, and that understanding should guide decisions.” Id. at 1624.

[FN73]. Id.

[FN74]. Id. at 1628. For originalists, this method is the only manner by which to properly interpret the Constitution in accordance with the Court's institutional role:

The claim that originalism is the only “lawful” way to interpret and apply the Constitution ... readily translates into the ubiquitous accusation from the right that nonoriginalists tend to be unprincipled and activists, happy to enshrine their personal views into the Constitution. This charge is repeated in various forms in the political arena by those who claim that only conservative judges can be trusted to follow the law and refrain from legislating from the bench.

Id. at 1624.

[FN75]. Id. at 1628.

[FN76]. Id. at 1628-29.

[FN77]. Id. at 1630.

[FN78]. Id. at 1628-29.

[FN79]. Bibas, supra note 20, at 186.

[FN80]. Id. Ryan explains as follows:

Scalia acknowledges--as he must--that there can be a difference between meaning and expectations. The Founding generations may have expected particular results to follow from constitutional language. But these expectations may or may not be consistent with the actual and proper meaning of the text. They might be the result of misinterpretations of language or time-bound prejudices and beliefs that obscure the proper application of the text. Moreover, the language used in many constitutional provisions establishes general principles that are enduring but nonetheless invite different applications in different contexts. The Founders themselves would have recognized, as we should, that their specific expectations did not settle the meaning of these general principles enshrined in the text.

Ryan, supra note 31, at 1629.

[FN81]. Id. at 1630; see also Samaha, supra note 30, at 613-14 (contrasting the views of Ronald Dworkin, celebrating judicial interpretation of “abstract moral principles,” with those of originalists, after landmark cases such as Roe v. Wade, 410 U.S. 113 (1973)).

[FN82]. Ryan, supra note 31, at 1630. As Ryan notes, for originalists, “[T]he only way judges can legitimately rely on the Constitution to negate legislation or executive acts is to rely on the original meaning of the text.” Id.

[FN83]. Id.

[FN84]. Bibas, supra note 20, at 186.
[FN85]. Id. at 188.

[FN86]. Id.

[FN87]. Saphire, supra note 20, at 284. As Professor Bibas explains, “[O]riginalism and formalism promise legitimate, neutral sources of law; clear, predictable and equal treatment; and checks and balances on judicial, legislative and executive arbitrariness.” Bibas, supra note 20, at 188.

[FN88]. Saphire, supra note 20, at 285 (quoting Scalia, supra note 56, at 140).

[FN89]. Saphire, supra note 20, at 284.

[FN90]. See McCahan, supra note 41, at 1468-69 (quoting Gregory C. Cisk, Questioning Dialogue by Judicial Decree: A Different Theory of Constitutional Review and Moral Discourse, 46 Rutgers L. Rev. 1691, 1720 (1994)); see also Saphire, supra note 20, at 285-86 (discussing Justice Scalia's view of judicial activism when Justices make decisions based upon preferences and values, and noting that Justice Scalia has employed this sort of activism). Saphire explains that one of Justice Scalia's reasons for embracing originalism is that it fosters judicial activity and insulates judges from claims of activism and subjectivity:

Before further considering Justice Scalia's defense [of originalism] ... perhaps a word or two should be addressed to the possibility that all the talk about interpretive methodology ... is really ... an ultimately transparent and unsuccessful attempt to camouflage a decision making “process” by which the Justice simply decides cases based upon whatever personally preferences or values he may hold.

....

[W]hen a Supreme Court Justice is charged with abusing power, the claim is seldom that the Justice in question is corrupt in the crudest and most venal sense. Instead, the critic's claim is that the Justice decides cases not on the basis of “the law,” but on the basis of considerations that are, in some important sense, external to the law.

Saphire, supra note 20, at 285-86.


[FN92]. Id. at 185.

[FN93]. Bibas, supra note 20, at 187.

[FN94]. Id.

Id. at 187-88 (quoting Antonin Scalia, The Rule of Laws as a Law of Rules, 56 U. Chi. L. Rev. 1175, 1180-81, 1184, 1182-83 (1989)).

[FN95]. Id.; see also Saphire, supra note 20, at 289 (discussing the potential role of Justice Scalia's political and personal preferences in his decisions). Saphire explains:

[D]espite (or perhaps because of) his leadership in “the-judge's-personal-values-have-no-legitimate-role-in-his-or-her-decision” club, Justice Scalia has not been exempt from—indeed, he has been a frequent target of this sort of inquiry....

Some have tried to connect Justice Scalia's judicial philosophy or the actual decisions he reaches in individual cases to other aspects of his personal background, or to his philosophy of human nature. For example, one recent commentator has suggested that Justice Scalia's ethnic background--his status as a “southern Italian American”--may help explain his commitment to a system of rules and to more traditional ... conceptions of family relationships. Others have considered
whether Justice Scalia's generally perceived conservative political philosophy animates his generally conservative record as a judge. Still others have suggested that a good deal of Justice Scalia's judicial performance can be traced to his substantive views about human nature and his particular conceptions of virtue and good character.

Saphire, supra note 20, at 289 (quoting Peter A. Lauricella, Chi Lascia La Via Vecchia Per La Nuova Sa Quel Che Perde E Non Sa Quel Che Trova: The Italian-American Experience and Its Influence on the Judicial Philosophies of Justice Antonin Scalia, Judge Joseph Bellacosa, and Judge Vito Titone, 60 Alb. L. Rev. 1701, 1708-12 (1997)).


[FN97] Ryan, supra note 31, at 1635-37. Ryan addresses each of these criticisms in turn, explaining as follows:

The first point is interesting and may be right, though it is neither new nor dispositive. The fact that the Founding generation may have not uniformly endorsed originalism is far from fatal to the theory. To see why, imagine that the Founders did endorse it. Would this be enough to establish originalism as the method contemporary courts should use? Of course not. To rely on original expectations or understandings about interpretation to justify using original understanding as a methodology would be hopelessly circular....

Justice Breyer's second and third points are important but essentially cancel each other out.... The most that Justice Breyer can honestly claim--and again, his book is admirably forthright--is that both nonoriginalists and originalists have means of restraining themselves and opportunities to do mischief.

Justice Breyer's fourth point is that originalism doesn't lead to clear rules and even if it does, clear rules aren't always so great. This point seems to cancel itself out, at least insofar as it does not offer a way to distinguish originalism from other interpretive methodologies....

This leaves the fifth point, namely, that originalism leads to “seriously harmful consequences.” ...

If this is indeed one of their arguments against originalism, it is ... overblown insofar as it ignores the role of stare decisis.

Id. at 1635-38.

[FN98] Id. at 1637-38.

[FN99] Id. at 1637.

[FN100] Id. Ryan explains:

Before assessing the relationship between this list and reality, it's important to try to understand why Sunstein and Breyer emphasize consequences so much. In Sunstein's view, any theory of interpretation has to be defended and justified based on its consequences. If a particular approach “would produce intolerable results,” he argues, “it is hard to defend.” Breyer seems to endorse the same position.

Id. (quoting Cass Sunstein, Radicals in Robes: Why Extreme Right-Wing Courts Are Wrong For America 73 (2005)).

[FN101] Griffin, supra note 45, at 1205. Griffin calls this “History without Historicism” and expicates his argument in the following way:

“Historicism” can be defined in a number of ways, but the definition I employ here is fairly standard. A historicist perspective focuses on the contexts in which historical events took place and how those contexts were later changed. According to William Nelson, “[t]he essence of history is the identification of continuities and discontinuities between past and present.”

Id. (quoting William E. Nelson, The Fourteenth Amendment: From Political Principle to Judicial Doctrine 11 (1988)).
[FN102]. Griffin, supra note 45, at 1205. As a result, Griffin states that “[originalism] thus lacks perspective on the constitutional system we already have.” Id.

[FN103]. Id. at 1208.

[FN104]. Ryan, supra note 31, at 1641.

[FN105]. Id. at 1641.

[FN106]. Id.

[FN107]. Griffin, supra note 36, at 1186. However, Griffin questions whether this claims effectively addresses the central criticisms against “old” originalism:

    New originalists claim that focusing on the public meaning of the Constitution addresses the chief flaws of originalism exposed in earlier debates. This claim is questionable. Many serious objections were lodged against earlier forms of originalism and the new originalism does not purport to deal with them all. It is apt to describe the new originalism as a “reboot” to the extent that its proponents wish for a fresh start, despite the reality that earlier storylines remain unresolved.

    Id.


[FN109]. Id. at 1186. Furthermore, “[t]he new originalism tends to have an austere and academic cast when compared with the concrete case concerns of the old originalism.” Id. at 1189-90.

[FN110]. Id. at 1188 (quoting Whittington, supra note 108, at 604).

[FN111]. Id. (quoting Whittington, supra note 108, at 602).

[FN112]. Id.

[FN113]. Id.

[FN114]. Id. (quoting Whittington, supra note 108, at 608). Indeed, Whittington is an avid defender of originalism and believes what is at stake is “the Constitution as a rule of law.” Id. at 1189.

[FN115]. Id. at 1188.

[FN116]. Id. at 1189.

[FN117]. Id.

[FN118]. Id.

[FN119]. Id. at 1190.

[FN120]. Id.

[FN121]. Id.
Professor Griffin does, on the other hand, raise legitimate issues that may affect the application of new originalism in practice:

First, Whittington and Barnett avoid specifying the consequences of the new originalism for constitutional doctrine. Although the aim of avoiding a purely results-driven theory is laudable, in practice this leads to a curious disconnect between theory and ground-level constitutional law. One could read Whittington’s entire book, for example, without gaining an understanding of how a lawyer is supposed to analyze a given constitutional case or a judge is supposed to render a decision. The practice of constitutional law is not addressed.

Another curious point is that it is not clear whether any federal judge, alive or dead, has ever followed as a matter of consistent judicial philosophy what new originalists recommend. We may assume there are some existing decisions consistent with originalism and some judges who have therefore acted rightly. But has any judge or justice been able to follow new originalist tenets consistently? Without knowing this, it becomes more difficult to judge the plausibility of the new originalism.

Id. at 1191.

[FN123] Id. at 1190.

[FN124] Id. at 1191. On another note, as Griffin states, “[n]ew originalists believe that the only alternative to originalism is an ill-defined theory called nonoriginalism.... Barnett asserts: ‘It takes a theory to beat a theory and, after a decade of trying, the opponents of originalism have never converged on an appealing and practical alternative.’” Id. at 1191-92 (quoting Barnett, supra note 122, at 92).

[FN125] Griffin, supra note 36, at 1190.

[FN126] Id. at 1196 (quoting Whittington, supra note 108, at 605-06).

[FN127] Id. (quoting Whittington, supra note 108, at 605-06).

[FN128] Id. at 1197. Griffin further examines this assumption by stating:

If originalism were the status quo, it would be recognized as the sole (or at least primary) method of constitutional interpretation by all courts in the United States. Plainly, originalism is not the status quo....

....

... Without rooting their theory firmly in an accurate description of past and present interpretive practice, however, originalists have no way to demonstrate that their assumption is correct. If the adoption of originalism as the sole or primary method of constitutional interpretation would therefore be a significant departure from the status quo, originalists must assume a heavy normative burden....

Originalists think they have a good reason to suppose originalism is the status quo. Any number of founding era authorities can be cited for the proposition that the duty of a court in interpreting the Constitution is to discover and give effect to its original meaning....

[However,] [t]here seems little doubt that many authorities thought the purpose of the interpretive process was to reveal the intent or meaning of the Constitution. There is also little doubt that there were a variety of legitimate means to ascertain the Constitution's meaning.

Id. at 1197-98.

[FN129] Id. at 1198.

[FN130] Id. at 1198.
[FN131]. Id.


[FN133]. Id.

[FN134]. Id.

[FN135]. Id.

[FN136]. Id. at 1200. To illustrate this point, Griffin discusses the history of the Marshall Court, explaining as follows:

    Many famous decisions of the Marshall Court, including Marbury v. Madison, McCulloch v. Maryland, and Barron v. Mayor of Baltimore, show Marshall employing a variety of methods in interpreting the Constitution, presumably all legitimate.

    In Barron, for example, Marshall made three distinct arguments, each leading to the conclusion that the Bill of Rights applied only to the federal government. He began by relying on the structure of the constitutional order. States had adopted their own constitutions, and the limitations stated in those constitutions were most naturally construed as applying only to those states. This implied that when the people of the United States adopted the Constitution, any limitations contained within it would apply only against the federal government. Next, Marshall made an argument which relied on the text of Article I, Section 9, specifying limitations on the power of the federal government. Limitations on the states were specified separately in Section 10. Marshall inferred that the framers intended a distinction between the limitations applicable to the federal government and the limitations applicable to the states and that without express language applying a given limitation to the States, it must be construed as applying to the federal government. Finally, Marshall referred to the history of the ratification of the Constitution, noticing that many amendments were introduced to limit the power of the new federal government, but none were to apply against the states. Marshall inferred that the amendments which became the Bill of Rights were thus intended to apply to the federal government.

    We can thus see Marshall using a variety of methods of interpretation that are still used today.

    Id. at 1198-99.

[FN137]. Id. at 1204.

[FN138]. Id.

[FN139]. Id.

[FN140]. Id. at 1204. Griffin underscores this point by discussing the Court's historical decision in Brown v. Board of Education:

    The relevance of Brown to the debate over originalism is not so much that the decision is likely inconsistent with the original meaning of the Equal Protection Clause. The relevant point for exclusive originalism is that one of the most celebrated Supreme Court decisions in U.S. history, a decision that helped underwrite the legitimacy of the contemporary constitutional order, especially for racial and ethnic minorities, was deliberately and unanimously not based on any version of original intent or meaning, despite the clear understanding of the justices that originalism was an option. By itself, then, Brown showed that originalism was not the status quo—it was not the sole or even primary method of interpretation that the Court must always follow.

    Id. at 1200.

[FN141]. Id. at 1205.
[FN142]. Id.

[FN143]. Id. (quoting Nelson, supra note 101, at 11).


[FN145]. Id. at 1208.

[FN146]. Id.

[FN147]. Id. Additionally, in critiquing and ultimately rejecting originalism as an interpretive theory, Griffin states: Perhaps originalists believe that over the last few decades, standard methods of interpretation have failed to produce persuasive rationales in important cases relative to the rationales available through historical argument. However, as the example of Brown demonstrates, this would justify only working to improve our understanding of those methods and traditions of which they are a part, rather than abandoning them. Or perhaps originalists think it is enough if their method became prima inter pares. But this would require an argument that confronts the well-grounded legitimacy of other methods of interpretation. Given the ambition of new originalists to promote originalism as the exclusive legitimate means of constitutional interpretation, I do not see how a sound argument can be made on this score. The new originalism should be rejected on this basis alone.

Id. at 1205.

[FN148]. Ryan, supra note 31, at 1625.

[FN149]. Id. at 1626; see also Stephen Breyer, Active Liberty: Interpreting Our Democratic Constitution 6 (2005) (describing the democratic objective of the Constitution as a “source of judicial authority and an interpretive aid to more effective protection of ancient and modern liberty alike”).

[FN150]. Ryan, supra note 31, at 1626 (quoting Breyer, supra note 149, at 3-34). Ryan further explains that Breyer “proceeds in the second part of the book to illustrate his approach through discussion of numerous concrete cases involving a range of issues. He concludes by contrasting his approach to originalism ... and spends the final part of the book highlighting the relative weaknesses of ... originalism.” Id.

[FN151]. Id.

[FN152]. Id. (quoting Breyer, supra note 149, at 6-7).

[FN153]. Id. (quoting Breyer, supra note 149, at 116).

[FN154]. Id. at 1642.

[FN155]. Id.

[FN156]. Id.

[FN157]. Id. (quoting Breyer, supra note 149, at 18-19).

[FN158]. Id.
[FN159]. Id. (quoting Breyer, supra note 149, at 19).

[FN160]. Id. (quoting Breyer, supra note 149, at 19).

[FN161]. Id. (quoting Breyer, supra note 149, at 33).

[FN162]. Id. (quoting Breyer, supra note 149, at 33).

[FN163]. Id. (quoting Breyer, supra note 149, at 33).

[FN164]. Id.

[FN165]. Id. (quoting Breyer, supra note 149, at 5). Ryan further states that “Breyer's approach here, as elsewhere, is candid, in admitting the indeterminancy of traditional legal sources.” Id. at 1643.

[FN166]. Id. at 1642 (quoting Breyer, supra note 149, at 6).


[FN168]. Ryan, supra note 31, at 1643-44.

[FN169]. Id. at 1644-45. Ryan explains that

[i]t is one thing to suggest, as Breyer does, that some general reference to active liberty might help inform decisionmaking. It seems quite another to look for ways to explain every provision in the Constitution in those terms.... More generally, why resort to general, abstract purposes if it is possible to discern the purpose or principle embodied by the relevant provision.

Id.

[FN170]. Id. at 1645.

[FN171]. Id.

[FN172]. Id.

[FN173]. Id. For example, Ryan raises important questions: “Will democratic purposes and consequences ever override these other sources? Do they trump text or clear understanding? Precedent? Or do they just fill in gaps and nudge him in one direction or another?” Id.

[FN174]. Id.

[FN175]. Id. at 1647-48.

[FN176]. Id. at 1645.

[FN177]. Id. (quoting Sunstein, supra note 100, at 27).

[FN178]. Id. (quoting Sunstein, supra note 100, at 27-28).

[FN179]. Id. (quoting Sunstein, supra note 100, at 28).
Id. at 1653.

[FN181] Id. at 1648 (quoting Sunstein, supra note 100, at xiii).

[FN182] Id.

[FN183] Id. (quoting Sunstein, supra note 100, at 29).

[FN184] Id. (quoting Sunstein, supra note 100, at 29).

[FN185] Id. (quoting Sunstein, supra note 100, at 29). In describing his approach, Ryan states, “According to Sunstein, Justice Frankfurter was a minimalist, as are both Justices O'Connor and Ginsburg.” Id.

[FN186] Id. at 1650.

[FN187] Id.

[FN188] Id. at 1651.

[FN189] Id. at 1650.

[FN190] Id.

[FN191] Id. at 1650. Ryan elaborates on this point with the following example:

    In discussing abortion, Sunstein admits that “[m]inimalists are greatly embarrassed by Roe, and rightly so.” He acknowledges that the Court “badly overreached” and that the decision was not based in precedent or constitutional text. He argues that the Court instead should have proceeded slowly. Rather than create a full-blown right to abortion, this Court first should have established that women must be allowed to obtain an abortion in cases of rape or when childbirth would endanger their health. This makes some good sense, and Sunstein is probably correct that such rulings would have contributed to a dialogue about abortion rather than dictating a “solution.” ...

    But surely the question the Court actually decided in Roe—whether women have a right to choose an abortion at least in the first trimester—could not have been dodged forever, and Sunstein does not say how the Court should ultimately have ruled when confronted with that question. Indeed, other than relying on the inherent reasonableness of permitting abortions in cases of rape or medical necessity, he does not explain why absolute bans on abortion violate the Constitution rather than make for bad public policy. Nor does he explain why his one-sentence suggestion that bans on “partial birth” abortions might be constitutional. In short, when Sunstein says things like, now that we have Roe, “[m]inimalists are willing to agree that the Constitution permits reasonable restrictions on the right to choose abortion,” one is left to wonder: Why, exactly? On what basis can minimalists say much of anything about what “the Constitution” permits or prohibits?

    Id. at 1651 (quoting Sunstein, supra note 100, at 106-08).

[FN192] Id. at 1652 (quoting Sunstein, supra note 100, at 127).

[FN193] Id. (quoting Sunstein, supra note 100, at 127).

[FN194] Id. (quoting Sunstein, supra note 100, at 127-29).

[FN195] Id. Sunstein's approach is illustrative with respect to the issue, discussed infra Part III, of gay marriage: Sunstein argues that federal courts should not be in the business of recognizing a right to gay marriage, largely
for institutional and strategic reasons. Gay marriage is being debated in legislatures around the country, and it is a divisive social and moral issue. Sunstein believes that legislatures should have time to consider solutions, and he sees it as a benefit that there might be a diverse range of possible accommodations, from various forms of civil unions to ordinary marriage. Sunstein is also worried about the backlash that can attend court decisions that press for too much too quickly, as happened in response to the decision by the Massachusetts Supreme Court recognizing a right to gay marriage.

Id. at 1651-52.

[FN196] Id. at 1652.

[FN197] Griffin, supra note 36, at 1753.

[FN198] Id. at 1756.

[FN199] Id. Indeed, pluralism is arguably a sensible approach because:

As practiced by the founding generation, constitutionalism meant creating a written text to serve as a framework for government. Although the Constitution contains specific rules, its most famous and useful provisions are general in character. In fact, the most important provisions of the Constitution had to be general because the goal of writing a constitution was to establish a framework that would endure the test of time.

Id. at 1758.

[FN200] Id. at 1768. Griffin does acknowledge that “[a]dmittedly these methods can point in different directions in any given case, but resolving this problem is not an appropriate task for a general theory of constitutional interpretation.” Id.

[FN201] Jackson, supra note 51, at 616.


[FN203] Id.

[FN204] Id. at 1760.

[FN205] Id.

[FN206] Id.

[FN207] Id.

[FN208] Id. Griffin relates pluralism to the current debate regarding the varying theories of constitutional interpretation:

A pluralistic theory of interpretation helps in understanding both the debate over constitutional interpretation that has occurred during the past several decades and the resiliency, despite many effective criticisms, of the different positions in the debate. Each theory of constitutional interpretation is grounded in a recognized source of law, drawing strength from the authority of that source. Partisans of a particular theory can always take comfort in the fact that their theory is used somewhere in American law, whatever the doubts of critics. Such usage, from a partisan perspective, surely indicates that their theory of choice is correct. Consequently, the debate continues.

Id. at 1761.

[FN209] Id. at 1760.

[FN210] Id. (quoting White, supra note 132, at 114).
[FN211]. Griffin, supra note 36, at 1760 (quoting White, supra note 132, at 119).

[FN212]. Griffin, supra note 36, at 1760.

[FN213]. Jackson, supra note 51, at 640.

[FN214]. Id. at 637. Regarding the criticism that pluralism can lead to inappropriate levels of judicial discretion, Jackson argues as follows:

   In response to those who see multi-source interpretive approaches as inherently unconstrained and undisciplined, proponents of these approaches might argue that the multiplicity of sources does constrain judges by imposing the discipline of having to consider a legal problem from multiple perspectives. Rather than treating each source as a mathematical “factor,” multiplication of which yields many more possibilities for decision, multi-valenced (including common law) constitutionalists treat the modalities of argument as interactive ....

   Id. at 640.

[FN215]. Id. at 637-38.

[FN216]. Id. at 638.

[FN217]. Id. at 642.

[FN218]. Id.

[FN219]. Id. at 642-43.

[FN220]. Id. at 643.

[FN221]. Id. (quoting Philip Bobbit, Constitutional Interpretation 31, 158 (1991)).

[FN222]. Jackson, supra note 51, at 643.

[FN223]. Id.

[FN224]. Id. at 644.

[FN225]. See Richard H. Fallon, Jr., A Constructivist Coherence Theory of Constitutional Interpretation, 100 Harv. L. Rev. 1189, 1191-92 (1987) (describing the difficulty a pluralistic framework has dealing with hard cases and how different considerations within the framework can contradict).

[FN226]. Id. at 648.

[FN227]. Id. at 649.

[FN228]. Id.

[FN229]. Id. Importantly, Jackson acknowledges that pluralism “may also be objected to as insufficiently connected to the democratic basis for constitutionalism, [and] the consent of the ‘people’ to the limits established in the Constitution.”

   Id. Jackson responds to this criticism as follows:

   Yet the democratic pedigree of most of the Constitution is quite contestable, since it was made and ratified by a
very limited electorate, which then deeply entrenched its work against future (more inclusive) constituencies. And it is not clear how strong an element of active democratic consent (for example, formal ratification), is required to make constitutions legitimate, or how much is provided by continued consent and acquiescence to its contours over time (including the role of the Court). Moreover, the Constitution can be read to delegate to the courts the authority to interpret the text over time and, in that case, there is nothing especially ‘unconsented’ to about its exercise of this power—though that delegation, like other decisions made at a founding moment, may lose some justificatory force over time.

Id. at 650.

[FN230] Id. at 649-50.

[FN231] Id. at 650.

[FN232] Id. at 650.

[FN233] Id. at 651.

[FN234] Id.

[FN235] Id.

[FN236] Id. at 651-52.

[FN237] Id. at 652.

[FN238] Id.

[FN239] Id.

[FN240] Havel, supra note 37, at 1257.

[FN241] Id.

[FN242] Id. at 1257-58.

[FN243] Id. at 1258.

[FN244] Id. at 1259 (quoting Akhil Reed Amar, IntraTextualism, 112 Harv. L. Rev. 747, 793 (1999)).


[FN246] Id. at 1260 (quoting Amar, supra note 244, at 748).

[FN247] Id. (quoting Amar, supra note 244, at 788).

[FN248] Ryan, supra note 31, at 1647 (quoting Sunstein, supra note 100, at xii).

[FN249] Id.

[FN250] Id.
Death by hanging was the most common mode of execution both before and after enactment of the Eighth Amendment. In addition to hanging, which was intended to, and often did, result in a quick and painless death, “[o]fficials also wielded a set of tools capable of intensifying a death sentence,” that is, “ways of producing a punishment worse than death.” One such “tool” was burning at the stake. Because burning, unlike hanging, was always painful and destroyed the body, it was considered a “form of super-capital punishment, worse than death itself.” Other methods of intensifying a death sentence included “gibbeting,” or hanging the condemned in an iron cage so that his body would decompose in public view ... [b]ut none of these was the worst fate a criminal could meet.... “[t]he punishment of high treason,” ... involved “embowelling alive, beheading and quartering.” ... The principle object of the aggravated forms of capital punishment was to terrorize the criminal and thereby more effectively deter the crime.... [and] [t]heir defining characteristic was that they were purposely designed to inflict pain and suffering beyond that necessary to cause death.... Although the Eighth Amendment was not the subject of extensive discussion during the debates on the Bill of Rights, there is good reason to believe the Framers viewed such enhancements to the death penalty as falling within the prohibition of the Cruel and Unusual Punishments Clause.... Moreover, the evidence we do have from the debates on the Constitution confirms that the Eighth Amendment was intended to disable Congress from imposing torturous punishments.

respect to a particular issue, the Court does not only look to the actions of state legislatures. It also looks “to data concerning the actions of sentencing juries.” Id. at 334-35. For purposes of this Article, the portion of the Court's evolving standards of decency paradigm which is advocated is that which involves an assessment of legislative activity across the country.


[FN270]. Id. at 175 (quoting Dennis v. United States, 341 U.S. 494 (1951) (Frankfurter, J., concurring)).


[FN274]. Atkins, 536 U.S. at 312.

[FN275]. Id.

[FN276]. Id. at 313.

[FN277]. Id.


[FN279]. Penry, 492 U.S. at 313.

[FN280]. Id. at 330-31.

[FN281]. Id.

[FN282]. Id. at 334.

[FN283]. Id. at 340. Significantly, in reaching its conclusion, the Court also consulted the actions of juries as well as public opinion:

Penry does not offer any evidence of the general behavior of juries with respect to sentencing mentally retarded defendants, nor of decisions of prosecutors. He points instead to several public opinion surveys that indicate strong public opposition to execution of the retarded. For example, a poll taken in Texas found that 86% of those polled supported the death penalty, but 73% opposed its application to the mentally retarded... A Florida poll found 71% of those surveyed were opposed to the execution of mentally retarded capital defendants, while only 12% were in favor.... A Georgia poll found 66% of those polled opposed the death penalty for the retarded, 17% in favor, with 16% responding that it depends on how retarded the person is.... In addition, the AAMR, the country's oldest and largest organization of professionals working with the mentally retarded, opposes the execution of persons who are mentally retarded... The public sentiment expressed in these and other polls and resolutions may ultimately find expression in legislation, which is an objective indicator of contemporary values upon which we can rely. But at present, there is insufficient evidence of a na-
tional consensus against executing mentally retarded people convicted of capital offenses for us to conclude that it is categorically prohibited by the Eighth Amendment.

Id. at 334-35.


[FN285]. Id. at 307.

[FN286]. Id. at 316.

[FN287]. Id. at 313.


[FN289]. Id. at 316.

[FN290]. Id.

[FN291]. Id. Based largely upon these statistics, the Court held the “practice [of executing the mentally retarded], therefore, has become truly unusual, and it is fair to say that a national consensus has developed against it.” Id.

[FN292]. Id. at 315-16.

[FN293]. Id. at 316.

[FN294]. Id. at 321.

[FN295]. Id. Significantly, however, in his dissent, Justice Scalia argued that neither the history of the Eighth Amendment nor evolving standards of decency provided a basis to reverse Penry:

The Court makes no pretense that execution of the mildly mentally retarded would have been considered “cruel and unusual” in 1791. Only the severely or profoundly mentally retarded, commonly known as “idiots,” enjoyed any special status under the law at that time. They, like lunatics, suffered a “deficiency in will” rendering them unable to tell right from wrong.... Mentally retarded offenders with less severe impairments—those who were not “idiots”—suffered criminal prosecution and punishment, including capital punishment.... The Court ... miraculously extracts a “national consensus” forbidding execution of the mentally retarded ... from the fact that 18 States--less than half (47%) of the 38 States that permit capital punishment (for whom the issue exists)--have very recently enacted legislation barring execution of the mentally retarded.... If one is to say, as the Court does today, that all executions of the mentally retarded are so morally repugnant as to violate our “standards of decency,” surely the “consensus” it points to must be one that has set it righteous face against all such executions. Not 18 States, but 7-18% of death penalty jurisdictions have legislation of that scope.

Id. at 341-42 (Scalia, J., dissenting).


[FN297]. Id. at 592.

[FN298]. Id. at 593.
[FN299]. Id.

[FN300]. Id.

[FN301]. Id.


[FN303]. Coker, 433 U.S. at 593-94.

[FN304]. Id. at 594.


[FN306]. Coker, 433 U.S. at 593-95 (citations omitted).

[FN307]. Id. at 595-96.

[FN308]. Id.

[FN309]. Id.

[FN310]. Id.

[FN311]. Id. at 597.


[FN313]. Id. at 2646.

[FN314]. Id. at 2650 (quoting Roper v. Simmons, 543 U.S. 551, 563 (2005)).

[FN315]. Kennedy, 128 S. Ct. at 2650-52.

[FN316]. Id. at 2651-63.

[FN317]. Id. at 2650-51.

[FN318]. See, e.g., Roper, 543 U.S. 551 (2005) (holding that the execution of minors under the age of 18 is unconstitutional under the Eighth Amendment); see also Thompson v. Oklahoma, 487 U.S. 815 (1998) (holding that the Eighth Amendment prohibits the execution of a defendant for first-degree murder who was under the age of 15 at the time of the crime); Enmund v. Florida, 458 U.S. 782 (1982) (holding that the Eighth Amendment prohibits the execution of an individual who aids and abets a felony where murder results but who himself did not kill, attempt to kill, or intend to kill).


[FN321]. Id.

[FN322]. Id. at 312.

[FN324]. Ryan, supra note 31, at 1641.

[FN325]. Id.


[FN328]. Casey, 505 U.S. at 846.


[FN330]. Id. at 168.

[FN331]. Ryan, supra note 31, at 1641.

[FN332]. Id.


[FN334]. Id. at 564-65.

[FN335]. Id. at 578-79.

[FN336]. Id. at 588 (Scalia, J., dissenting).

[FN337]. Id. at 593 (Scalia, J., dissenting) (citations omitted).

[FN338]. Id. at 594 (Scalia, J., dissenting).


[FN340]. Id.

[FN341]. Id. at 484-86 (citations omitted).

[FN342]. Id. at 486.


[FN345]. Id. at 574 (quoting Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 851 (1992)).

[FN346]. Id. at 572.

[FN347]. Id. at 577-79.

(discussing the textual and originalist difficulties in finding gay rights in the Constitution).


[FN351] Id. at 495.

[FN352] Id. at 489.

[FN353] Id.

[FN354] Id.

[FN355] Id.

[FN356] Id. at 492.

[FN357] Id.

[FN358] Id.

[FN359] Id.

[FN360] Id. at 495.


[FN364] Id. (quoting Washington v. Glucksberg, 521 U.S. 702, 721 (1997)).

[FN365] Lamparello, supra note 167, at 411.

[FN366] See Lawrence, 539 U.S. at 574-75.


[FN368] Lawrence, 539 U.S. at 571 (quoting Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 850 (1992)).

[FN369] Id. at 588 (Scalia, J., dissenting).

[FN370] Id. at 572.

[FN371] Id. (quoting County of Sacramento v. Lewis, 523 U.S. 833, 857 (1999) (Kennedy, J., concurring)).


[FN374]. Id. at 340.


[FN376]. Id. at 314-15.

[FN377]. Id. at 315-16.

[FN378]. Id. at 321 (quoting Enmund v. Florida, 458 U.S. 782, 801 (1982)).


[FN380]. Id. at 565-78.

[FN381]. Id. at 564-65.

[FN382]. Id. at 568.

[FN383]. Id. at 572.

[FN384]. Id. at 572.

[FN385]. Id. at 573.


[FN387]. Lawrence, 539 U.S. at 578-79.

[FN388]. Id. at 581 (O’Connor, J., concurring).

[FN389]. Id. at 605 (Thomas, J., dissenting).

[FN390]. Id. at 579.

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