CoUNTING HEADS: DOES THE EXISTENCE OF A NATIONAL CONSENSUS GIVE RISE TO A SUBSTANTIVE-DUE-PROCESS RIGHT TO A PARTICULAR CRIMINAL PROCEDURE?

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Counting Heads: Does the Existence of a National Consensus Give Rise to a Substantive-Due-Process Right to a Particular Criminal Procedure?

by Carrie Leonetti*

I. INTRODUCTION

"The Constitution does not mean only what the judges say it means. On the contrary, the Constitution has often served as a catalyst for broad public deliberation about its general terms and aspirations."¹

Once again last term, the Supreme Court was asked to reconsider its decision in *Apodaca v. Oregon,*² this time on the basis of its decision last term in *McDonald v. City of Chicago.*³ The petitioner’s argument was that *McDonald’s* holding that “incorporated Bill of Rights protections ‘are all to be enforced against the States under the Fourteenth Amendment according to the same standards that protect those personal rights against federal encroachment’” undercut the central holding of the plurality opinion in *Apodaca* that a defendant’s Sixth-Amendment right to a unanimous verdict applied in federal court only.⁴ And once again last term, the Supreme Court denied the request to so hold.⁵

At the same time, the Supreme Court often relies on society’s standards, as expressed in legislative enactments and state practice, to determine the national consensus (the “head count”) regarding sentencing practices (imposition of the death penalty and, more recently, a sentence of life without the possibility of parole) in

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3 130 S. Ct. 3020 (2010).
determining whether such punishments are proportionate to the crimes of conviction under the Cruel and Unusual Punishment Clause of the Eighth Amendment.6

At first glance, these two areas of jurisprudence – one involving a question of the incorporation of all of the guarantees of the Sixth-Amendment right to trial by jury to the states and the other involving the extent to which the sentencing practices of a majority of states can dictate those of the minority – appear to have very little in common. But the Supreme Court’s “national consensus” methodology under the Eighth Amendment is based on an older due-process methodology, presenting the question: how far will and should the Court go in extending the idea that the substantive process7 due to a criminal

6 See Graham v. Florida, 130 S. Ct. 2011, 2022 (2010) (holding that imposing a sentence of life without the possibility of parole on a defendant who was a juvenile at the time of his offense categorically violated the proportionality requirement of the Cruel-and-Unusual-Punishment Clause of the Eighth Amendment); Kennedy v. Louisiana, 128 S. Ct. 2641, 2650 (2009) (holding that Louisiana’s death penalty for the rape of a child was categorically disproportionate to the crime, in violation of the Cruel-and-Unusual-Punishment Clause of the Eighth Amendment, because only a small number of states permitted such penalty and the few recent legislative enactments on the subject moved away from death penalties for nonhomicides); Roper v. Simmons, 543 U.S. 551, 563 (2005) (invalidating the death penalty for defendants who were juveniles at the time of their offenses in part because of the national (& international) consensus against executing juveniles for nonhomicides); Atkins v. Virginia, 536 U.S. 304, 312 (2002) (holding that executing a mentally retarded defendant was categorically disproportionate to the crime in violation of the Cruel-and-Unusual-Punishment Clause of the Eighth Amendment); Penry v. Lynaugh, 492 U.S. 302, 331 (1989) (overruled by Atkins) (“The clearest and most reliable objective of contemporary values is the legislation enacted by the country’s legislatures.”); Coker v. Georgia, 433 U.S. 584, 593 (1977) (holding that Georgia’s death penalty for the rape of an adult woman was categorically disproportionate to the crime, in violation of the Cruel-and-Unusual-Punishment Clause of the Eighth Amendment, in part because of the evolution of public attitudes against the death penalty in this circumstance, as evidenced by the small number of state legislatures that had enacted one since Furman v. Georgia (U.S. 1972) reinstated the death penalty and the rarity with which juries in Georgia had imposed it).

7 The Due-Process Clause of the Fifth Amendment provides, in relevant part, that “[n]o person shall be ... deprived of life, liberty, or property, without due process of law ....” U.S. CONST., Amd. V. The Due-Process Clause of the Fourteenth Amendment applies such restrictions to the states. U.S. CONST. Amd. XIV.

“The Due Process Clause of the United States Constitution provides that certain substantive rights such as life, liberty, and property, cannot be deprived except pursuant to constitutionally adequate procedures. The categories of substance and procedure are distinct.” Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532 (1985). For the purpose of this Article, “substantive due process” (as opposed to “procedural due process”) refers to the substantive limits that the Due-Process Clause places on the results of the policy choices that the government makes (e.g., whether a policy places an undue burden on individual), as opposed to the fairness limits that the Clause places on the processes by which those choices, whatever they may be substantively, are made (e.g., meaningful notice and a right to be heard). See County of Sacramento v. Lewis, 523 U.S. 833, 845-46 (1998) (explaining that the guarantee of substantive due process protects against governmental power arbitrarily and oppressively exercised); United States v.
defendant in a state with an anomalous criminal procedure is the process that would be provided to a similarly situated defendant in a mainstream jurisdiction? Pretty much everyone agrees that Oregon’s (and Louisiana’s) nonunanimous jury rules are anomalous.\(^8\) The interesting constitutional questions that this Article seeks to answer are both a descriptive and a normative\(^9\) one: (1) whether anomalousness, standing alone, is sufficient (although certainly not necessary) to constitute a violation of due process and (2) how far the Court should go in extending the idea that the substantive process due to a criminal defendant in a state with an anomalous criminal procedure is the process that would be provided to a similarly situated defendant in a mainstream jurisdiction. In short, it posits the existence of a counter-counter-majoritarian difficulty in constitutional criminal procedure and proposes a new test for substantive due-process rights, at least in the context of criminal procedure, by positing that anomalousness, standing alone, should be sufficient to render a jurisdiction’s failure to afford a particular criminal procedure a violation of due process, even in the absence of an enumerated right to such procedure in the Bill of Rights.

Louis Seidman and Mark Tushnet have outlined what they describe as the problem of baselines: against what does one compare government action to determine if it imposes an unwarranted and unconstitutional burden on an individual’s protected interest?\(^{10}\) The answer is that the baseline, at least in the context of criminal procedure,

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\(^9\) Of course, the line between descriptive and normative legal analysis is not always bright. See RONALD DWORKIN, LAW’S EMPIRE (1986), at 224; Cass R. Sunstein, *On Legal Theory and Legal Practice*, in THEORY AND PRACTICE (Shapiro & DeCew, eds., 1995), at 274.

\(^10\) See SEIDMAN & TUSHNET, supra note xxx, at 38-41.
should be that which a majority of jurisdictions does. This does not mean that the fact
that a majority of jurisdictions fails to afford a particular beneficial procedure to a
criminal defendant means that such procedure is not guaranteed by due process. Nor is
the recognition of a right by a majority of jurisdictions dispositive of whether such right
is guaranteed by the Due-Process Clause of the Fifth Amendment. But the majority rule,
where it inures to the benefit of a criminal defendant, should be the yardstick against
which the burdens imposed by the minority jurisdictions are measured.

Section II (A) of this Article describes what it terms the Court’s “national-
consensus methodology” for determining the existence of a right deriving from
substantive due process. It argues that the Court has historically used the existence of a
national consensus as at least one tool to determine whether a substantive due-process
right exists. It suggests that the existence of a national consensus (a head count) could
itself convert certain claims of liberty or property into vested substantive due-process
rights – that a national consensus can, in essence, create a substantive due-process right
where none existed before. It posits that, at least under some circumstances, the federal
constitution must recognize at least the same amount of constitutional protection as a
consensus of states recognize, under their state constitutions, common law, and/or
statutes and that a consensus among states could give rise to a federal substantive due-
process right to a particular criminal procedure.

Section II (B) argues that this process of substantive-due-process right “creation”
is a one-way ratchet, analogous to the concepts of “vesting” and retroactivity already
recognized in the context of procedural due-process cases and the Ex-Post-Facto Clause:
that states may form a consensus about what new procedures are due to criminal
defendants but may not erode by consensus rights to existing procedures that have already been recognized. It argues that, when there has been a tradition of granting criminal defendants a particular beneficial procedure in the absence of formal recognition of such tradition as a legal right, the tradition alone can ultimately require such recognition, but that it does not necessarily follow that the lack of a uniform tradition defeats the recognition of a legal right.

Section II (C) identifies two additional examples (besides jury unanimity) of criminal procedures whose relative uniformity between/among jurisdictions may support a criminal defendant’s due-process right to those procedures in an anomalous jurisdiction: the right to a Grand Jury indictment and the right to be free from unnecessary physical restraints in the courtroom (outside of the presence of the jury).

Section III posits that the laboratories-of-democracy metaphor of federalism does not work in situations in which states do not learn from their mistakes, even after the best solution has become clear. It argues that, when a supermajority of states has acted, recognizing a particular right of criminal procedure, federal courts should use the line that the consensus of states has drawn as their starting point in determining the scope of substantive due process because, by acting in consensus, the states have already completed their policy experiment as the laboratories of democracy. It suggests that courts should bolster the “creation” of “new” rights when they are created by a consensus of state legislatures. It points out that this counter-counter-majoritarian test for substantive due process allows the Court simultaneously to signal to the majority jurisdictions (those within the consensus) that what they are doing is constitutionally permissible, while also signaling to the minority jurisdictions (the outliers) that they are
in the minority precisely because their rules of criminal procedure fall outside of constitutional bounds.

Section IV argues that John Hart Ely’s representation-reinforcement theory of judicial review supports this proposal because the democratic process is particularly dysfunctional in the context of criminal law and procedure and the rights of criminal defendants cannot be adequately addressed and protected through the political process. For this reason, minority jurisdictions cannot reasonably be expected to join their majority brethren solely on the basis of the functioning procedural rights granted in those jurisdictions and this national-consensus methodology must be a one-way ratchet, permitting a majority of jurisdictions to impose upon a minority of jurisdictions a procedural right, but not to erode the guarantee of a right not recognized by most or all jurisdictions. It makes the case that Oregon’s and Louisiana’s nonunanimous jury verdicts are a case study of why individual jurisdictions cannot be relied upon to “do the right thing” in the absence of a constitutional mandate.

Section V concludes that criminal defendants in Oregon and Louisiana should have a good argument that due process guarantees to them the same right to a unanimous jury verdict, as part of the fundamental fairness that forty-eight other states and the federal system have recognized that unanimity provides, simply by virtue of that overwhelming head count. It explains that this due-process test is consistent with federalist ideals, if one conceives of the federalist process as a two-step process, with the first step being an experimental one and the second step being a post-experimental phase.

II. THE INTERSECTION OF CRIMINAL PROCEDURE AND SUBSTANTIVE DUE PROCESS
A. THE NATIONAL-CONSENSUS METHODOLOGY

The Court’s head-counting methodology has not traditionally been cabined solely within its Eighth-Amendment proportionality analyses – a fact that the Court has readily acknowledged in those cases.11 In Washington v. Glucksberg,12 for example, the Court found that Glucksberg’s asserted right to assisted suicide was not a fundamental liberty interest protected by substantive due process in large part because there was no national consensus recognizing it.13 While most commentators, in analyzing Glucksberg, have emphasized the Court’s focus on the country’s “history and traditions,”14 the Court’s

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11 See Simmons, 543 U.S. at 560 (acknowledging that the Court was interpreting the Cruel-and-Unusual-Punishment Clause “like other expansive language in the Constitution, . . . according to its text, by considering history, tradition, and precedent, and with due regard for its purpose in the constitutional design”) (emphasis added).

12 521 U.S. 702 (1997) (relying on the law’s historical rejection of suicide as a basis for refusing to recognize Glucksberg’s liberty interest in ending his life under the Due-Process Clause of the Fourteenth Amendment). The Court held that, because the right to assist with suicide did not rise to the level of a fundamental liberty interest protected by the Due Process Clause, Washington’s statute prohibiting it needed only to be "rationally related to legitimate government interests." Id. at 728. Washington State's goals of preserving human life and upholding the integrity and ethics of the medical profession were sufficient to meet the lenient rational-relationship test to overcome Glucksberg’s Fourteenth-Amendment challenge. See id. at 735.

13 See id. at 720-21.

discussion of that history and traditions in turn relied on the fact that no states had historically recognized a due-process right to assisted suicide. In determining that Glucksberg’s asserted right did not have a place “in our Nation’s traditions,” the Court emphasized the “consistent and almost universal tradition that ha[d] long rejected the asserted right” and “reflecting “the considered policy choice of almost every State.”

The Court also based its decision on its earlier one in *Cruzan v. Missouri Dept. of Health*, noting: “In *Cruzan* itself, we recognized that most States outlawed assisted suicide – and even more do today . . . .”

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15 *Glucksberg*, 521 U.S. at 723 (citing Jackman v. Rosenbaum Co., 260 U.S. 22 31 (1922) (“If a thing has been practiced for two hundred years by common consent, it will need a strong case for the Fourteenth Amendment to affect it”); Reno v. Flores, 507 U.S. 292, 303 (1993) (“The mere novelty of such a claim is reason enough to doubt that ‘substantive due process’ sustains it.”)).

16 497 U.S. 261 (1990) (holding that competent individuals have, under the Due-Process Clause of the Fourteenth Amendment, "a constitutionally protected liberty interest in refusing unwanted medical treatment" but affirming the decision of the Missouri Supreme Court that Cruzan's right to refuse medical treatment did not outweigh the state's policy favoring preservation of life because states possessed the power to safeguard against potential abuses by requiring clear and convincing evidence of an incompetent person's desire to have life-sustaining treatment withdrawn).

While *Glucksberg* was the product of a fractured court and included no less than five concurring opinions, a majority of the justices individually relied on the fact that the states’ experiments with assisted suicide were still ongoing — *i.e.*, that no consensus had yet been reached. In the majority opinion, Chief Justice Rehnquist noted: “The States are currently engaged in serious, thoughtful examinations of physician-assisted suicide and other similar issues . . . . Throughout the Nation, Americans are engaged in an earnest and profound debate about the morality, legality, and practicality of physician-assisted suicide. Our holding permits this debate to continue, as it should in a democratic society.” Justice O’Connor noted: “States are presently undertaking extensive and serious evaluation of physician-assisted suicide and other related issues . . . . In such circumstances, "the . . . challenging task of crafting appropriate procedures for safeguarding ... liberty interests is entrusted to the "laboratory' of the States . . . in the first instance." Justice Souter characterized assisted suicide as an “emerging issue.”

(prohibiting felony assisted suicide); OKLA. STAT. ANN. tit. 21, § 813 (West 1993) (prohibiting felony assisted suicide); 18 PA. CONS. STAT. § 2505 (1993) (criminalizing assisted suicide); S.C. CODE ANN. § 16-3-1090 (1999) (prohibiting misdemeanor assisted suicide); S.D. CODIFIED LAWS § 22-16-37 (1993) (prohibiting felony assisted suicide); TENN. CODE ANN. § 39-13-216 (1995) (prohibiting felony assisted suicide); TEX. PENAL CODE ANN. § 22.08 (Vernon 1994) (prohibiting assisted suicide); WASH. REV. CODE ANN. § 9A.36.060 (West 1988) (prohibiting felony assisted suicide); WIS. STAT. ANN. § 940.12 (West 1982) (prohibiting felony assisted suicide). Since *Glucksberg*, four additional states have criminalized physician-assisted suicide. See IOWA CODE ANN. §§707A.2, 707A.3 (West 1997) (creating the felony of assisted suicide); KY. REV. STAT. ANN. § 216.302 (West 1994) (making providing the means of suicide a felony); Mich. COMP. LAWS ANN. § 752.1027 (West 1992) (“A person who has knowledge that another person intends to commit or attempt to commit suicide and who intentionally does either of the following is guilty of criminal assistance to suicide, a felony . . . : (a) Provides the physical means by which the other person attempts or commits suicide. (b) Participates in a physical act by which the other person attempts or commits suicide.”); R.I. GEN. LAWS § 11-60-3 (1997) (“An individual or licensed health care practitioner who with the purpose of assisting another person to commit suicide knowingly: (1) Provides the physical means by which another person commits or attempts to commit suicide; or (2) Participates in a physical act by which another person commits or attempts to commit suicide is guilty of a felony . . . .”); see also VA. CODE ANN. § 8.01-662.1 (D) (1999) (“A licensed health care provider who assists or attempts to assist a suicide shall be considered to have engaged in unprofessional conduct for which his certificate or license to provide health care services in the Commonwealth shall be suspended or revoked by the licensing authority.”).

18 *Glucksberg*, 521 U.S. at 719, 735.
19 *Id.* at 737 (O’Connor, J., concurring) (citations omitted).
Justice Stevens concurred in the Court’s judgment in order to permit the “continuation of the vigorous debate about the ‘morality, legality, and practicality of physician-assisted suicide.’”\(^\text{21}\) In other words, if the *Glucksberg* Court had decided that assisted suicide was a protected right, then the debate would have been resolved prematurely.\(^\text{22}\)

In *In Re: Winship*,\(^\text{23}\) on the other hand, the Supreme Court held that the Due-Process Clause protected both an accused in a criminal prosecution and a juvenile during the adjudicatory stage of a delinquency proceeding against conviction except upon proof beyond a reasonable doubt in part because of the “virtually unanimous adherence to the reasonable-doubt standard in common-law jurisdictions.”\(^\text{24}\) And in *Honda Motor Co. v. Oberg*,\(^\text{25}\) the Supreme Court held that an amendment to the Oregon Constitution largely prohibiting judicial review of the amount of punitive damages awarded by a jury was inconsistent with substantive due process in part because, in modern practice in the federal courts and every State, except for Oregon, judges reviewed the size of such awards and Oregon’s “lonely eminence” and “deviation from established common-law

\(^{20}\) Id. at 789 (Souter, J., concurring) (“The Court should accordingly stay its hand to allow reasonable legislative consideration. While I do not decide for all time that respondents' [due-process] claim should not be recognized, I acknowledge the legislative institutional competence as the better one to deal with that claim at this time.”) (emphasis added).

\(^{21}\) Id. at 738 (Stevens, J., concurring).

\(^{22}\) In a subsequent case on assisted suicide, the United States Court of Appeals for the Ninth Circuit was explicit in "taking no position on the merits or morality" of the issue of physician-assisted suicide, *Oregon v. Ashcroft*, 368 F.3d 1118, 1123 (9th Cir. 2004) (holding that United States Attorney General Ashcroft’s interpretive rule declaring physicians in violation of the Controlled Substances Act (“CSA”), 21 U.S.C. §§ 801-904 (2006), for prescribing lethal doses of controlled substances to assist with patient suicides was unlawful and unenforceable because it violated the plain language of the CSA, contravened Congress's express legislative intent, and overstepped the bounds of the Attorney General’s statutory authority), *aff’d sub nom.* *Gonzales v. Oregon*, 546 U.S. 243 (2006) (holding that the Attorney General did not have the administrative power to prohibit doctors from prescribing regulated drugs for use in physician-assisted suicide under Oregon's Death with Dignity Act, *OR. REV. STAT.* § 127.885 (2007)).


\(^{24}\) Id. at 361.

procedures” had “constitutional implications” and “raised a presumption that its procedures violate[d] the Due Process Clause.”

The Court most recently applied its head-counting approach to due process in *Graham v. Florida.* 27 *Graham* was an Eighth-Amendment case, but it was also a due-process case in the sense that it dealt with a proportionality challenge to a state criminal law (the State of Florida’s life-without-parole sentencing scheme for juvenile offenders) under the Eighth Amendment, as incorporated to the states via the Due-Process Clause of the Fourteenth Amendment. In *Graham,* the Court held that Graham’s sentence of life imprisonment without the possibility of parole for nonhomicide crimes (armed burglary, assault, and attempted robbery) violated the Eighth Amendment’s prohibition against cruel and unusual punishment because he was a juvenile at the time that he committed it. 28 The Court based its decision, in part, on its finding that the practice of sentencing juvenile offenders who had not committed homicide to life imprisonment without the possibility of parole was exceedingly rare and a national community consensus had developed against it. 29 *Graham’s* head-counting methodology, in turn, was based on that of *Kennedy,* 30 *Simmons,* 31 and *Atkins.* 32

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26 Id. at 418, 421-29.
28 The Eighth Amendment states, in pertinent part: “[C]ruel and unusual punishments [shall not be] inflicted.” A punishment is “excessive,” and therefore prohibited by the Eighth Amendment, if it is not graduated and proportioned to the offense. See, e.g., *Weems v. United States,* 217 U.S. 349 (1910).
29 The Court also engages in a second prong of analysis in determining whether a sentence is disproportionate to a crime: its own independent judgment about whether there is a rational connection between the offense/offender and the punishment. See *Atkins,* 536 U.S. 304; *Coker v. Georgia,* 433 U.S. 584, 597 (1977). In *Graham,* in exercising this judgment, the Court also found that none of the recognized goals of penal sanctions (retribution, deterrence, incapacitation, and rehabilitation) provided an adequate justification for the sentence, that it could not be conclusively determined at the time of sentencing that a juvenile defendant would be a danger to society for the rest of his life, and that a sentence of life without parole improperly denied a juvenile offender a chance to demonstrate growth, maturity, and rehabilitation.
30 In *Kennedy,* the Court held that Louisiana’s statute authorizing capital punishment for the crime of child rape imposed disproportionate punishment, in violation of the Eighth Amendment, in situations in which the crime did not result, and was not intended to result, in the death of the victim. The Court based its
The problem with this history – that of substantive due-process cases being used as authority for a methodology employed in incorporation due-process cases, which are in turn cited in substantive due-process cases – is this: it is hard to tell when the head-counting methodology is appropriate. The Court often uses the terms “substantive due process” and “unenumerated rights” interchangeably, as if the concepts are coextensive.\(^\text{33}\) Is the heading-counting methodology a tool to determine whether an enumerated or penumbral right in the Bill of Rights should apply to the states via the Due-Process Clause of the Fourteenth Amendment (\textit{i.e.} a selective-incorporation tool) or is it a tool to determine whether a substantive due-process right exists at all under the Due-Process Clause of the Fifth Amendment?\(^\text{34}\) Because, if it is the former, the inquiry has probably

\(^{31}\) Simmons was convicted after he turned eighteen of a first-degree murder that he committed when he was seventeen and sentenced to death therefore. \textit{See Simmons}, 543 U.S. 551. The Supreme Court held that his execution, given that he was under eighteen at the time that he committed his capital crime, would violate the Eighth and Fourteenth Amendments. \textit{See id.} at 563. In reaching the decision that Simmons execution would be so disproportionate as to be cruel and unusual within the meaning of the Eighth Amendment, the Court referred to the “evolving standards” of society’s decency. The Court determined society’s standards by looking to “objective indicia of consensus, expressed in particular by the enactments of [state] legislatures that h[a]d addressed the question.” The Court concluded that Missouri’s juvenile death penalty was disproportionate based, at least in part, on the evidence of a consensus against the juvenile death penalty: a majority of states rejected its imposition (including the twelve states that had no death penalty at all), even in the twenty states that had no formal prohibition against executing juveniles, the practice was infrequent, and the "direction of change," which was toward abolition.

\(^{32}\) \textit{Atkins} involved a claim that executions of mentally retarded criminals were cruel and unusual punishments, prohibited by the Eighth Amendment. \textit{See Atkins}, 563 U.S. 304. The Court assessed Atkins’s claim that his death sentence was unconstitutionally excessive based on what it called “currently prevailing standards of decency . . . in light of evolving community standards.” \textit{Id.} at 312. The Court found that the clearest and most reliable factor that it could look it in making this determination was the consensus of legislation that had been enacted by state legislatures around the country. The Court based its conclusion that there was a national consensus against executing the mentally retarded on the following: the large number of states prohibiting the practice, the complete absence of legislation reinstating such executions, the overwhelming vote of legislatures addressing the issue prohibiting the practice, and the rarity of the practice in even in states that ostensibly permitted it.

\(^{33}\) \textit{See, e.g., Glucksberg}, 521 U.S. at 755-56 (Souter, J. concurring) (“we are dealing with a claim to one of those rights sometimes described as rights of substantive due process and sometimes as unenumerated rights”).

\(^{34}\) In interpreting the Due-Process Clause of the Fourteenth Amendment, the Court often finds that the clause protects against violations of “fundamental rights” deriving from “the traditions and conscience of
been rendered moot by the Court’s latest (total-?) incorporation pronouncement in *McDonald*. But, if it is the latter, then it suggests that the existence of a national consensus (a head count) could convert certain claims of liberty or property into vested substantive due-process rights. And if the latter claim is true (that a national consensus can, in essence, create a substantive due-process right where none existed before), then the obituaries for substantive due process in the age of the Rehnquist and Roberts courts are premature.

*Griswold v. Connecticut* is a good example of the confusion that can sometimes be created in the Court’s due-process jurisprudence between when the Court is talking about a right in substantive due process and when it is talking about some other right that is simply applied to the states by way of the Due-Process Clause of the Fourteenth Amendment. The majority of five in *Griswold* held that a Connecticut statute

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35 See, e.g., Easterbrook, *The Constitution of Business*, 11 GEO. MASON U. L. REV. 53 (1989) (“Substantive due process is dead. We buried it in 1937.”); Reinhardt, *The Anatomy of an Execution: Fairness vs. Process*, 74 N.Y.U.L. REV. 313, 316 (“The Rehnquist Court has drawn the line regarding substantive due process, refusing to recognize any new, unenumerated rights.”). In fact, the right to due process has never been a very effective champion of liberty. While history has subsequently judged these decisions to be mistakes, in the past, over due-process challenges, the Supreme Court has allowed the internment of hundreds of thousands Japanese-American citizens, see *Korematsu v. United States*, 323 U.S. 214 (1944), the commitment of thousands of Americans who had been deemed insane, even though they posed neither a threat to themselves nor anyone else, see *O’Conner v. Donaldson*, 422 U.S. 563 (1975), and the incarceration of people who could not post peace bonds after having been acquitted of crimes, see Commonwealth v. Franklin, 172 Pa. Super. 152, 92 A.2d 272, 273 (1952) (citing data indicating that, during the previous ten years, 478 men, after acquittal on criminal charges, had been compelled to serve an aggregate of more than six-hundred years in prison for defaulting on bonds totalling $613,200).

36 381 U.S. 479 (1965) (holding that a Connecticut law forbidding the use of contraceptives and the dissemination of information about them was unconstitutional).

37 Of course, the Court could have cleared up this confusion by accepting the Petitioner’s (and amici’s) arguments in *McDonald* for incorporation via the Privileges-and-Immunities Clause, but it declined to do so. See *McDonald*, 130 S. Ct. at 3028-31.
criminalizing the use of contraceptives violated the right of privacy of married couples.\textsuperscript{38} A plurality of the majority wrote separately to clarify that the Due-Process Clause of the Fourteenth Amendment incorporated not just the enumerated rights of the Bill of Rights, but also those unenumerated personal rights that were fundamental.\textsuperscript{39} The dissenting judges dissented on the ground that there was no such thing as a right of privacy because such right was not enumerated in the Bill of Rights.\textsuperscript{40} It is this debate between the judges in the majority and in the dissent, about whether a constitutional right of privacy exists even though such right is not expressly enumerated in the Bill of Rights (but exists rather in the “penumbra” of those enumerated rights), that is the focus of most academic commentary on \textit{Griswold} and its progeny.\textsuperscript{41} For the purpose of this Article, however, it is the concurring opinion of Justice Harlan, who did not join in the plurality opinion but rather concurred in judgment only, that is the most interesting. Justice Harlan took issue with both the approaches of the plurality and the dissent on the ground that (what this

\begin{itemize}
  \item See \textit{Griswold}, 381 U.S. 479.
  \item See \textit{id}.
  \item See \textit{id}. (Black, J., dissenting).
  \item See \textit{In re Quinlan}, 355 A.2d 647, 663 (N.J. 1976) (“Although the Constitution does not explicitly mention a right of privacy, Supreme Court decisions have recognized that a right of personal privacy exists and that certain areas of privacy are guaranteed under the Constitution. The Court has interdicted judicial intrusion into many aspects of personal decision, sometimes basing this restraint upon the conception of a limitation of judicial interest and responsibility, such as with regard to contraception and its relationship to family life and decision. The Court in \textit{Griswold} found the unwritten constitutional right of privacy to exist in the penumbra of specific guarantees of the Bill of Rights “formed by emanations from those guarantees that help give them life and substance.”); see e.g., DeMoss & Coblenz, \textit{An Unenumerated Right: Two Views on the Right of Privacy}, 40 TEX. TECH L. REV. 249 (2008); Helscher, \textit{Griswold v. Connecticut and the Unenumerated Right of Privacy}, 15 N. ILL. U. L. REV. 33 (1994); Sanford Levinson, \textit{Constitutional Rhetoric and the Ninth Amendment}, 64 CHI.-KENT L. REV. 131, 141-43 (1988) (“Those who emphasize text and history . . . can no longer claim that adherents of the constitutional right to privacy are unwilling to apply textual or historical modes of argument . . .’’); Calvin R. Massey, \textit{Federalism and Fundamental Rights: The Ninth Amendment}, 38 HASTINGS L.J. 305, 329-43 (1987) (arguing that the Ninth Amendment ought to be understood to protect individual natural rights, including an unenumerated right to privacy); Lawrence E. Mitchell, \textit{The Ninth Amendment and the “Jurisprudence of Original Intention,”} 74 GEO. L.J. 1719, 1719-29 (1986) (“Examination of the . . . ninth amendment demonstrates the fallacy of attempting to discern the Framers’ original intentions . . . [and] that adaptability, at least in protecting individual rights, is intrinsic in the Constitution.”); Choon Yoo, \textit{Our Declaratory Ninth Amendment}, 42 EMORY L. J. 967 (1993).
\end{itemize}
Article terms “substantive”) due process is both more and less than merely a guarantee of rights against state encroachment coextensive with those against federal encroachment:

Judicial self-restraint will not . . . be brought about in the “due process” area by the historically unfounded formula long advanced by [Justice Black, in dissent], and now in part espoused by [Justice Stewart, in dissent]. It will be achieved in this area, as in other constitutional areas, only by continual insistence upon respect for the teachings of history, solid recognition of the basic values that underlie our society, and wise appreciation of the great roles that the doctrines of federalism and separation of power have played in establishing and preserving American freedoms. Adherence to these principles will not . . . obviate all constitutional differences of opinion among judges, nor should it. Their continued recognition will, however, go farther toward keeping most judges from roaming at large in the constitutional field than will the interpolation into the Constitution of an artificial and largely illusory restriction on the content of the Due Process Clause.*

* Indeed, [the dissenting opinion] is forced to lay aside a host of cases in which the Court has recognized fundamental rights in the Fourteenth Amendment without specific reliance upon the Bill of Rights.42

In Griswold, Justice Harlan appears to have been positing something similar to the thesis of this Article – that the married couples had a due-process right not to have their use of contraceptives criminalized because laws criminalizing contraception were contrary to “history” and the “basic values that underlie our society.” In other words, Connecticut’s contraception ban violated due process not because it violated a federal constitutional right of privacy that was incorporated to Connecticut via due process but

42 Id. at 501-02 (Harlan, J., concurring) (citations omitted). Harlan espoused the idea that the nation's living, evolving legal tradition gave the Due Process Clause its meaning in other contexts. See, e.g., Poe v. Ullman, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting) (“A decision of this Court which radically departs from [that living tradition] could not long survive, while a decision which builds on what has survived is likely to be sound.”).
because it infringed on the Griswold’s liberty in a way that was anomalous and contrary to the national consensus at the time.\textsuperscript{43}

A “head count,” therefore, of the five justices in the majority of \textit{Griswold} indicates that three of the five believed that due process protected the right of married couples to use contraceptives only \textit{procedurally}, to the extent that it incorporated a different, \textit{substantive} right of privacy, while the other two justices indicated the opposite – that substantive due process itself protected the right of married couples to use contraceptives. For Justice White, this substantive protection was inherent in the liberty interest that the Due-Process Clause protects, but for Justice Harlan this substantive protection was the result of history and consensus.

\textbf{B. THE VESTING OF SUBSTANTIVE DUE-PROCESS RIGHTS}

It is axiomatic that state courts, in interpreting their state constitutions, may only provide more (or the same), but not fewer constitutional protections than those afforded by the federal constitution.\textsuperscript{44} What this Article posits is the mirror image of that claim: that, at least under some circumstances, the federal constitution must recognize at least the same amount of constitutional protection as a consensus of states recognize, under their state constitutions, common law, and/or statutes. In other words, consensus can be a process by which legal norms become legal (constitutional) rules.

\textsuperscript{43} Justice White adopted a similar and more explicit “substantive” due-process approach in his concurring opinion, arguing that the “liberty” interest protected by the Due-Process Clause included that of married couples seeking to use contraception. Justice Harlan and Justice Black reiterated their due-process incorporation debate in \textit{Winship}. See \textit{Winship}, 397 U.S. at 372 n.5 (Harlan, J., concurring), 382 n.11 (Black, J. dissenting).

\textsuperscript{44} \textit{See}, e.g., PruneYard Shopping Ctr. v. Robins, 447 U.S. 74, 81 (1980) (“Our reasoning . . . does not \textit{ex proprio vigore} limit the authority of the State to exercise its police power or its sovereign right to adopt in its own Constitution individual liberties more expansive than those conferred by the Federal Constitution”); Ofer Raban, \textit{A Ratchet That Can Get Stuck: on the Relationship Between the Federal and the States’ Constitutions}, in \textit{BETWEEN COMPLEXITY OF LAW AND LACK OF ORDER} (Bartosz Wojciechowski, Marek Zirk-Sadowski, \textit{et al.} eds. 2009), at 132, 134.
The idea that a consensus among states could give rise to a federal substantive due-process right to a particular criminal procedure may seem far-fetched at first, but consider the following hypothetical. It is ostensibly a matter of black-letter law that a criminal defendant has no federal constitutional right to appeal his/her conviction.\(^{45}\) In other words, states (and the federal system) grant defendants criminal appeals as an exercise of legislative discretion, but, if a jurisdiction chose to close its appellate courts to criminal defendants, its doing so would give rise to no viable constitutional challenge on behalf of those so denied. But is that (untested) proposition really true? If a state, in order to cut costs during a fiscal crisis, for example, closed its appellate courts, it is hard to believe that the United States Supreme Court would deny review of a criminal defendant’s challenge to that legislative decision. And, if the Court were to review a constitutional challenge to that policy, surely the federal claim on the basis of which it did so would be a due-process one – something along the lines that the defendant had a due-process right to judicial review of trial-court errors (and not because a criminal appeal was guaranteed by some specific provision in the federal constitution that due process required be incorporated to the states). The petitioner’s best argument would be that every other American jurisdiction granted a criminal defendant at least one appeal of right from a conviction,\(^ {46}\) thereby evidencing that criminal appeals are part of the history and values that underlie our society. This particular formulation of a due-process right would best be characterized as a substantive one (necessary to protect against the

\(^{45}\) See McKane v. Durston, 153 U.S. 684 (1894) (stating that “a review by an appellate court of the final judgment in a criminal case, however grave the offense of which the accused is convicted, was not at common law and is not now a necessary element of due process); see also Halbert v. Michigan, 545 U.S. 605 (2005) (“The Federal Constitution imposes on the States no obligation to provide appellate review of criminal convictions.”) (citing McKane); but see Jones v. Barnes, 463 U.S. 745 (1983) (Brennan, J., dissenting) (characterizing the McKane dictum as “arguably wrong”).

\(^{46}\) See Jones, 463 U.S. at 757 (1983) (Brennan, J., dissenting) (noting that “a right of appeal is now universal for all significant criminal convictions”).
conviction of the innocent and other manifest injustices) rather than simply a procedural right to be heard (which presumably would already have been fulfilled before the trial court).  

The Supreme Court has recognized that “traditional practice provides a touchstone for constitutional analysis.” In Mapp v. Ohio, for example, in announcing the constitutional underpinning of the exclusionary remedy for violations of the Fourth-Amendment prohibition against unreasonable searches and seizures, the Court based its decision, in part, on its recognition that “more than half of [the states] . . . have wholly or partly adopted or adhered to the exclusionary rule.” At the same time, the Court has also recognized the rarity of individual states abrogating traditional safeguards against the erroneous deprivation of liberty or property.

Courts have engaged in a similar analysis with regard to the Takings Clause of the Fifth Amendment. As the United States Court of Appeals for the Ninth Circuit explained recently in Ward: “Property interests are not constitutionally created; rather, 

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47 The argument would be analogous, in the criminal context of imprisonment, to the one on which Honda prevailed in _Oberg_, in the civil context of punitive damages awards: that the possibility of unjust or arbitrary punishment by biased jurors requires judicial review of whether there is at least a rational basis for the particular punishment imposed by the State in order to deter future wrongdoing (a primary rationale of criminal punishment). _See Oberg_, 512 U.S. at 429.
48 _Id._ at 430.
50 _Id._ at 651.
51 _See Oberg_, 512 U.S. at 429 (“Because the basic procedural protections of the common law have been regarded as so fundamental, very few cases have arisen in which a party has complained of their denial. In fact, most of our due process decisions involve arguments that traditional procedures provide too little protection and that additional safeguards are necessary to ensure compliance with the Constitution.”).
52 The relevant part of the Fifth Amendment provides:
“No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.”
protected property rights are ‘created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law.’”53

This history suggests that a consensus among a majority of states can “create” a due-process right, by giving rise to a protected liberty interest,54 at least under some circumstances. And of course, this question raises one with the opposite antecedent: if a majority of state legislatures decided to take away a right of criminal procedure that a defendant currently has, as recognized by way of the Due-Process Clause, would that mean that he or she no longer had that right? Glucksberg was denied recognition of a due-process right to die, at least in part, because no states recognized one. If thirty-five state legislatures simultaneously enacted juvenile death-penalty statutes next week, would or should the Supreme Court overturn Simmons on the ground that national consensus of state legislatures now favored executing children?

The answer seems to be no, that this is a one-way street; due process cannot and should not be such an easily manipulable tautology. As Shep Melnick put it: “If one or two states lowered the age of execution, would the Supreme Court recognize a different ‘direction of change’ and overrule Roper v. Simmons? Unlikely.”55 After all, if a majority of state legislatures could dictate what procedure was substantively due to a criminal defendant under the Due-Process Clause by colluding to deny any process at all, then a defendant’s right of due process would be reduced to nothing more than a right to

53 Ward v. Ryan, 623 F.3d 807, 810 (9th Cir. 2010) (quoting Board of Regents of State Colls. v. Roth, 408 U.S. 564, 577 (1972)).
54 See, e.g., Miller v. Oregon Board of Parole and Post-Prison Supervising (9th Cir. April 25, 2011), No. 07-36086 (holding that an Oregon statute that allows a prisoner to obtain an early parole hearing if (s)he can show that (s)he is “likely to be rehabilitated within a reasonable period of time” gave rise to a liberty interest in early parole eligibility that was protected by the Due-Process Clause because the language of the statute created an “expectancy” of release upon the satisfaction of certain conditions).
democratic process in the promulgation of criminal-procedure laws.\textsuperscript{56} Such an interpretation would be completely at odds with the text and intent of the Due-Process Clause.\textsuperscript{57} But if \textit{Kennedy} is based on the fact that the overwhelming majority of death-penalty jurisdictions do not execute for non-homicide crimes (and the trend at the time of the decision was away from doing so), then why would a majority of states adopting death penalties for child rape not require the Supreme Court to overturn its current decision?

The short answer is that, as a general rule, civil-rights provisions constitute the floor of constitutional protection; they mark the minimal guarantees, but do not preclude more expansive ones.\textsuperscript{58} The Court’s recent federalism jurisprudence supports this interpretation. In the Court’s most recent Tenth-Amendment case, \textit{United States v. Bond},\textsuperscript{59} Bond had been convicted of chemical warfare under a federal statute that bans knowing possession or use of any chemical that “can cause death, temporary incapacitation or permanent harm to humans or animals” for purposes that are not “peaceful”\textsuperscript{60} after placing caustic substances on the mailbox, car door handle, and front doorknob of her husband’s pregnant mistress. Bond claimed that the statute was invalid

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\item \textsuperscript{56} See, \textit{e.g.}, Quinn v. Syracuse Model Neighborhood Corp., 613 F.2d 438, 448 (2d Cir. 1980) (explaining, in the context of the Takings Clause, that, “although the primary source of property rights is state law, the state may not magically declare an interest to be ‘Non property’ after the fact for Fourteenth Amendment purposes if, for example, a longstanding pattern of practice has established an individual’s entitlement to a particular governmental benefit”); \textit{accord} Winkler v. County of DeKalb, 648 F.2d 411, 414 (5th Cir. 1981) (agreeing with that statement in \textit{Quinn}); \textit{cf. MICHAEL MANDELBAUM, DEMOCRACY’S GOOD NAME} (“While voting determines who governs, liberty determines what governments can and cannot do. Liberty encompasses all the rules and limits that govern politics, justice, economics, and religion.”).
\item \textsuperscript{57} The Due-Process Clause of the Fourteenth Amendment prohibits the States from “depriv[ing] any person of life, liberty, or property, without due process of law . . . .” U.S. CONST. Amd. XIV (emphasis added). It is hard to imagine how this legal rule could be read to limit the ability of the federal constitution to guarantee such liberty.
\item \textsuperscript{58} Raban, \textit{ supra} note xxx, at 131.
\item \textsuperscript{59} No. 09-1227, June 16, 2011 (holding that a criminal defendant has standing to challenge the constitutionality under the Tenth Amendment of a federal law pursuant to which he or she has been convicted because states are not the sole intended beneficiaries of federalism).
\item \textsuperscript{60} 18 U.S.C. § 229 (1998).
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under the Tenth Amendment and basic federalism principles. The Court agreed, noting that the system of federalism embodied by the Constitution and highlighted by the Tenth Amendment did more than simply protect the authority and sovereignty of the states against encroachment by the federal government, but also protected “the liberty of the individual from arbitrary power” wielded without authority. The Court explained: “Federalism has more than one dynamic.” While it “preserves the integrity, dignity, and residual sovereignty of the States,” it also “secures the freedom of the individual.”

The one-way nature of the substantive due-process ratchet (i.e., that states may form a consensus about what new procedures are due to criminal defendants but may not erode by consensus rights to existing procedures that have already been recognized) is analogous to the concepts of “vesting” and retroactivity already recognized in the context of procedural due-process cases and the Ex-Post-Facto Clause. Courts already recognize that it is a violation of due-process protections to give a statute retroactive application where doing so will deprive a person of a “vested legal interest.” If a change in a procedure affecting a right protected by the Due-Process Clause (property or, in the case of a criminal jury trial, liberty) results in the retroactive elimination of a party’s accrued claim, the change violates due process. In other words, when there has been a tradition of granting criminal defendants a particular beneficial procedure in the absence of formal recognition of such tradition as a legal right, the tradition alone can ultimately require such recognition; it does not necessarily follow, however, that the lack of a uniform tradition defeats the recognition of a legal right. Such rights are merely honored in their breach. The Court has recognized as much: “When [safeguards of common-law

61 In Re: Workers Compensation Refund Western National Mutual Insurance Company, 46 F.3d 813 (8th Cir. 1995).
procedure are absent and] would have provided protection against arbitrary and inaccurate adjudication, this court has not hesitated to find the proceedings violative of due process.”62 “There is . . a vast difference between arbitrary grants of freedom and arbitrary deprivations of liberty or property.”63

One reason why this is true, that tradition may lead to the recognition of new rights but not to the erosion of old ones, is the backward effect that rights, particularly those recognized in the first instance by appellate courts, have on the functioning of trial courts once they are in place. Take, for example, the contemporary-objection rule or the colloquy that is often required between defendants and the court before such rights can be waived. When an appellate court recognizes a new right, these procedural rules spring into effect to ensure the uniform application of such rights. There is no similar process of procedural dismantling that occurs when an old right is suddenly taken away.

C. OTHER APPLICATIONS

1. The Right to Grand-Jury Indictment

As any student of criminal procedure knows, there is at least one glaring exception to the general rule of total incorporation of the Bill of Rights: the Fifth-Amendment right to a grand-jury indictment.64 Arguments in favor of incorporation have traditionally embraced a functional analysis, focusing on the necessity (or lack thereof) of grand-jury review to the protection of the innocent.65 In light of the Supreme Court’s head-counting jurisprudence, however, the better argument may be that most states

62 Oberg, 512 U.S. at 430.
63 Id. at 434.
64 See Hurtado v. California, 110 U.S. 516 (1884); see generally Barron v. Mayor of Baltimore, 32 U.S. 243 (1833) (reflecting the Court’s traditional view, prior to the ratification of the Fourteenth Amendment, that the Bill of Rights was not “applicable to the States”).
65 See Hurtado, 110 U.S. at 538 (recognizing that the state practice of providing a criminal defendant with a preliminary examination in front of a neutral magistrate provided nearly the same protection as the federal-constitutional and common-law grand-jury procedure).
provide for grand-jury review anyway, in the absence of an explicit federal requirement that they do so.

2. Freedom from In-Court Restraints

There is a different, newer test of this theory making its way up through some lower courts, and it involves the practice of shackling defendants (with waist, wrist, and ankle restraint chains) during court proceedings, other than trial, including arraignments, pleas, and sentencing proceedings. Several courts have found that this universal shackling policy violates due process in court proceedings that occur outside of the presence of the jury, although they have been less than consistent (or even articulate) in identifying their rationales for such decisions.66

66 The common-law rule forbidding the physical restraint of a defendant in the presence of the jury, recognized in Deck v. Missouri, 544 U.S. 622, does “not apply at ‘the time of arraignment,’ or like proceedings before the judge.” Id. at 626 (quoting 4 W. Blackstone, Commentaries on the Laws of England 317 (1769)). This is true because the core due-process concern that “[v]isible shackling undermines the presumption of innocence and the related fairness of the factfinding process” has no application to nonjury proceedings. Id. Several federal circuits have extended Deck’s requirement of a individualized showing of necessity for in-court restraints to the context of jury sentencing. See, e.g. Duckett v. Godinez, 67 F.3d 734, 748 (9th Cir. 1995); Elledge v. Dugger, 823 F.2d 1439, 1451-52 (11th Cir.), modified, 833 F.2d 250 (11th Cir. 1987).

67 The California Supreme Court addressed the issue of shackling as early as 1871 in People v. Harrington, 42 Cal. 165, explaining that the use of shackles during the course of a trial “inevitably tend[ed] to confuse and embarrass [the defendant’s] mental faculties, and thereby materially to abridge and prejudicially affect his constitutional rights of defense.” Id. at 168.

A century later, the California Supreme Court, in People v. Duran, 545 P.2d 1322, found that Duran’s status as a state prison inmate charged with a violent crime was insufficient to justify the use of restraints in his proceedings that occurred before the jury. In 1991, in People v. Fierro, 1 Cal.4th 173 (1991), the court extended the Duran principles to (non-jury) preliminary hearings. Id. at 219-20. Pursuant to Fierro, absent an individualized showing of necessity, defendants in California may not appear shackled at their preliminary hearings. Id. at 220. The court concluded that, although “the dangers of unwarranted shackling at the preliminary hearing are real, they are not as substantial as those presented during the trial. Therefore, a lesser showing than required at trial is appropriate.” Id. The court did not articulate what “lesser showing” would suffice to satisfy a defendant’s right to due process in an individual case because Fierro did not present that question.

One California appeals court divined two principles for determining when shackling can be done without a due-process violation. First, “the type of proceeding determines the amount of ‘need’ that the court must find to justify the use of restraints. If the proceeding is before a jury, ‘manifest necessity’ is clearly required. However, where the proceeding does not require a jury, a ‘lesser showing’ of need is apparently sufficient.” See Tiffany v. Superior Court, 59 Cal. Rptr. 3d 363, 372. Second, “irrespective of the type of proceeding, [every California court] has looked to the conduct of the individual defendant to determine the need for restraints.” Id. (citing People v. Cox, 809 P.2d 351 (reaffirming Duran’s holding and concluding that, while no formal hearing was required to demonstrate the need for shackles, the record
An incarceration regulation cannot withstand constitutional scrutiny if “the logical connection between the regulation and the asserted goal is so remote as to render the policy arbitrary or irrational” or if the regulation represents an “exaggerated response” to legitimate penological objectives.\(^{68}\) Assuming that a liberty interest in being free from shackles exists (and it would be difficult to argue otherwise),\(^ {69}\) the formal test for determining whether an abridgement of that right is justified by the security interests involved is assessed by focusing on four factors: the scope of the particular intrusion, the manner in which it is conducted, the justification for its initiation, and the place in which it occurs.\(^ {70}\)

The basic due-process argument against blanket shackling, particularly when it had to contain evidence beyond the general justifications for a court’s shackling policy substantiating a threat of violence on the part of the defendant who had been restrained). Inadequate facilities are insufficient to establish the required showing of necessity. See People v. Prado, 67 Cal.App.3d 267, 275.

\(^{68}\) Turner v. Safley, 482 U.S. 78, 98 (1987) (striking down a Missouri prison regulation prohibiting inmates from marrying without the permission of the prison superintendent as facially unconstitutional and rejecting Missouri’s proffered security and rehabilitation concerns as not reasonably related to the marriage restriction due to the lack of supporting evidence in the record). “[I]f a restriction or condition is not reasonably related to a legitimate goal - if arbitrary or purposeless - a court permissibly may infer that the purpose of the governmental action is punishment that may not constitutionally be inflicted upon detainees qua detainees.” Id. at 539. As the Court explained in Wolfish:

\[\text{Loading a detainee with chains and shackles and throwing him in a dungeon may ensure his presence at trial and preserve the security of the institution. But it would be difficult to conceive of a situation where conditions so harsh, employed to achieve objectives that could be accomplished in so many alternative and less harsh methods, would not support a conclusion that the purpose for which they were imposed was to punish.}\]


\(^{69}\) Freedom "from bodily restraint" lies "at the core of the liberty protected by the Due Process Clause." Foucha v. Louisiana, 504 U.S. 71. “The Supreme Court has recognized that an individual has a liberty interest in being free from incarceration absent a criminal conviction.” Oviatt ex rel. Waugh v. Pearce, 954 F.2d 1470, 1474 (9th Cir. 1992) (citing Baker v. McCollan, 443 U.S. 37, 144 (1979)). “[U]nder the Due Process Clause, a detainee may not be punished prior to an adjudication of guilt in accordance with due process of law.” Wolfish, 441 U.S. at 535.

\(^{70}\) See Wolfish, 441 U.S. 520. In Turner, the Supreme Court set forth four factors “relevant in determining the reasonableness” of restrictions on prisoners’ rights: (1) whether there exists a “valid, rational connection between the prison regulation and the legitimate governmental interest put forward to justify it;” (2) whether there are “alternative means of exercising the right that remain open to prison inmates;” (3) the “impact” that “accommodation of the asserted constitutional right” will have “on guards and other inmates, and on allocation or prison resources generally;” and (4) where there exist “ready alternatives” for furthering the governmental interest. See id. at 89-90.

Turner involved restrictions on the liberties of incarcerated (i.e. convicted) prison inmates. See A.J. by L.B. v. Kierst, 56 F.3d 849,854 (8th Cir. 1995) (explaining that pretrial detainees' conditions-of-confinement claims are analyzed under a due-process standard that is more protective than the standard
it involves detainees charged with nonindictable offenses (i.e., misdemeanors), therefore, is that it is too significant an intrusion in light of its purported justification, particularly when it occurs prior to trial (or even formal charge) inside a courtroom (as opposed to in a correctional facility or during transport). The question that courts have not yet addressed is whether the anomalousness (or commonness) of a particular jurisdiction’s shackling policy plays any role in the success or failure of that argument.

In United States v. Howard,71 the United States Court of Appeals for the Ninth Circuit held that a requirement that pretrial detainees making their first appearance before a magistrate judge in the United States District Court for the Central District of California (hereinafter “Central District”) wear leg shackles for the initial court appearance was reasonably related to a legitimate security purpose because the Central District shackling policy required only “leg restraints,” was “less restrictive than the previous policy requiring full restraints,” applied only “to arrested, in-custody defendants, as opposed to defendants appearing in court in response to a summons,” and left “in place the option for a defendant to move the court for removal of the shackles, and an individualized determination may be made at the time of the motion as to whether extenuating circumstances warrant removal of the shackles.” In United States v. Brandau,72 a different panel of the same court remanded a challenge to a mandatory full-body shackling policy applicable to all defendants at initial appearances that was implemented by the district judges of the Eastern District of California, on the ground that it violated

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71 463 F.3d 999, 1006-07 (9th Cir. 2006) (“Howard II”).
72 578 F.3d 1064 (9th Cir. 2009).
the substantive requirements of the Due-Process Clause because it was promulgated and is enforced without a sufficient individualized showing of its necessity, for an evidentiary hearing regarding the present shackling practice at initial appearances to determine whether the challenge had been rendered moot by a subsequent change in the written policy. In doing so, the court avoided deciding the substantive due-process issue on its merits, although it indicated, in *dicta*, that a defendant did have a due-process interest in being unshackled:

A criminal defendant's first and sometimes only exposure to a court of law occurs at his initial appearance. The conditions of that appearance establish for him the foundation for his future relationship with the court system, and inform him of the kind of treatment he may anticipate, as well as the level of dignity and fairness that he may expect. We have recognized that shackling defendants at such time “effectuates some diminution of the liberty of pretrial detainees and detracts to some extent from the dignity and the decorum of a critical stage of a criminal prosecution.” *United States v. Howard*, 480 F.3d 1005, 1008 (9th Cir. 2007). We have not, however, fully defined the parameters of a pretrial detainee's liberty interest in being free from shackles at his initial appearance, or the precise circumstances under which courts may legitimately infringe upon that interest in order to achieve other aims, such as courtroom safety.⁷³

The records in the *Howard* and *Brandau* cases were devoid of evidence as to how prevalent such a shackling practice is in courts across the country. Would the answer to that question have mattered? Should it have? If this type of universal shackling policy were common in federal and state courts, and/or the trend of courts nationwide is moving in this direction, Brandau should not have had a weaker argument: he still has a liberty

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⁷³ *Id.* The United States Court of Appeals for the Second Circuit, on the other hand, has held that the rules limiting the use of shackles in the courtroom did not apply in (non-jury) sentencing proceedings before a judge. *See United States v. Zuber*, 118 F.3d 101, 102-04 (2d. Cir. 1997). The court reasoned that judges, unlike juries, are traditionally deemed not to be prejudiced by impermissible considerations (like a defendant’s custodial status). *Id.* (*citing* LiButti v. United States, 107 F.3d 110, 124 (2d Cr. 1997)).
interest in being free from physical restraints that either are or are not excessive in relationship to whatever security interest they promote. But what if the evidence showed the opposite? If this type of universal shackling policy were unique to these two federal courts in California, Brandau should have had a stronger substantive due-process challenge. As a practical matter, the answer is probably yes anyway: if no one else does this and their courts are still safe from dangerous defendants on the loose, then it less likely that the policy is necessary (i.e., not excessive in relation to its purported purpose). But even as a doctrinal matter, if no other courts do this, Brandau’s liberty interest in being unshackled should be afforded more weight in comparison to the security purpose against which it is being weighed, as evidenced by the history and values of our country. In other words, this procedure should be more inherently constitutionally suspect by virtue of its anomalousness.

III. THE VALUE OF CONVERGENCE: FEDERALISM AND NORMATIVE UNITY

Alexis de Tocqueville’s Democracy in America, perhaps the most influential analysis of American politics ever published, identified federalism as the key to America’s successful experiment with democracy. At first glance, the proposal in this Article may seem to run afoul of the classic "values of federalism:” diversity, variety, and local autonomy.

The classical statement of American federalism is that it creates a marketplace in which local governments and state governments exist in competition with each other,

74 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 161 (J.P. Mayer ed., 1969) (“In large centralized nations the lawgiver is bound to give the laws a uniform character which does not fit the diversity of places and of mores . . . .”).
which drives them to deliver their public goods in the most efficient way. In particular, "core police powers" are traditionally left to the states, and "states lay claim by right of history and expertise" to experiments in criminal law and procedure. Federalism is highly desirable, the argument runs, because it entails a multitude of relatively equal and geographically limited governments, a structural condition that compels them to compete for citizens by structuring attractive "packages" of costs and benefits. That structure, in turn, enables individuals to satisfy their preferences more fully by freely selecting their homes from an extensive and highly varied menu of jurisdictions. Consequently, the argument concludes, it is essential to preserve many local governmental units, ensure that individuals retain the right to "exit" jurisdictions and move to others, and keep the powers of the central government limited so that it will not be able to suppress competition and enforce dysfunctional uniformities among the states. In this "laboratory of democracy," the "successful experiments of yesterday become the effective public policy of

tomorrow." In de Tocqueville's day, state and local governments were free to experiment with policy as laboratories of democracies because the United States had yet to become an over-centralized mass democracy. Ideally, as the results of the experiments became known, good policies would be adopted, and bad ones would be discarded. The competition among the states would then result in economically efficient policies.  

Even de Tocqueville had reservations about the desirability and durability of a federal system. One reason for withholding his categorical endorsement of federalism was the complexity of the system, which can lead to public confusion over accountability for decisions and a myriad of different rules, regulations and standards. If American federalism was complicated in the 1830s, then it is even more so now with fifty states and some 86,000 local governments.

Furthermore, disputes over federalism usually involve the difficulty of drawing a line between state and federal power in a situation in which the federal government has a different policy than one or more individual states, the federal and state policies come into conflict with one another, and a federal court has to resolve the conflict – by siding either with Congress (under the Supremacy Clause, for example) or with the state(s) (under the Tenth Amendment, for example). The standard federalist claim is that the

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80 See id. at 770; John Kincaid, *Federal Democracy and Liberty*, 32 POL. SCI. & POL. 211 (1999) (noting that de Tocqueville believed that decentralization was more advantageous than federalism).


83 See U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.").

84 See Purcell, *supra* note 78, at 669 n.138 (describing "the fundamental problem of federalism" as that of "drawing the line between national and state power"). Compare *Raich*, 545 U.S. at 70-71 (2005) (Thomas, J., dissenting) ("One searches the Court's opinion in vain for any hint of what aspect of American life is
reserved to the States. Yet this Court knows that "the Constitution created a Federal Government of limited powers." That is why today's decision will add no measure of stability to our Commerce Clause jurisprudence: This Court is willing neither to enforce limits on federal power, nor to declare the Tenth Amendment a dead letter."); Board of Trustees v. Garrett, 531 U.S. 356, 365 (2001) ("[I]t is the responsibility of this Court, not Congress, to define the substance of constitutional guarantees."); United States v. Morrison, 529 U.S. 598 (2000) (holding that the Commerce Clause did not grant Congress the power to legislate civil remedies for victims of gender-motivated violence); Florida Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627 (1999); Printz v. United States, 521 U.S. 898 (1997); City of Boerne v. Flores, 512 U.S. 507 (1997); Seminole Tribe v. Florida, 517 U.S. 44 (1996); United States Term Limits, Inc. v. Thornton, 514 U.S. 779, 838 (1995); United States v. Lopez, 514 U.S. 549 (1995); New York v. United States, 505 U.S. 144 (1992) (enforcing a constitutional limit on the federal government's power to compel states to take regulatory actions); Oregon v. Ashcroft, 368 F.3d 1118, 1125 (9th Cir. 2004) (noting that "the principle that state governments bear the primary responsibility for evaluating physician assisted suicide follows from our concept of federalism, which requires that state lawmakers, not the federal government, are the "primary regulators of professional [medical] conduct" ") (quoting Conant v. Walters, 309 F.3d 629, 629 (9th Cir. 2002)), aff'd sub nom. Gregory v Ashcroft, 501 U.S. 452, 458 (1991) (stating that a decentralized government "increases [the] opportunity for citizen involvement in democratic processes"); Younger v. Harris, 401 U.S. 37 (1971); A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 546 (1935) ("If the commerce clause were construed to reach all enterprises and transactions which could be said to have an indirect effect upon interstate commerce, the federal authority would embrace practically all the activities of the people and the authority of the State over its domestic concerns would exist only by sufferance of the federal government."); Hammer v. Dagenhart, 247 U.S. 251, 272-73 (1918), overruled in part by United States v. Darby, 312 U.S. 100 (1941) ("If it were otherwise, all manufacture intended for interstate shipment would be brought under federal control to the practical exclusion of the authority of the States, a result certainly not contemplated by the framers of the Constitution when they vested in Congress the authority to regulate commerce among the States."); (Dred) Scott v. Sanford, 60 U.S. 393 (1857) (declaring that Congress could not abolish slavery in the territories and that Scott remained a slave, even in a free state, and therefore could not become a citizen of the United States); Conant v. Walters, 309 F.3d 629, 647 (9th Cir. 2002) (Kozinski, J., concurring) (quoting Morrison, 529 U.S. at 616 n.7) (arguing that federal regulation in the area of medical marijuana use was inappropriate under basic principles of federalism); THOMAS M. KECK, THE MOST ACTIVIST SUPREME COURT IN HISTORY: THE ROAD TO MODERN JUDICIAL CONSERVATISM 40 (2004); WOODROW WILSON, CONGRESSIONAL GOVERNMENT: A STUDY IN AMERICAN POLITICS 33-34 (1885) ("The federal judges hold in their hands the fate of state powers, and theirs is the only authority that can draw effective rein on the career of Congress."); R. Shep Melnick, Deregulating the States: The Political Jurisprudence of the Rehnquist Court, in INSTITUTIONS AND PUBLIC LAW: COMPARATIVE APPROACHES 69 (Tom Ginsburg & Robert A. Kagan, eds., 2005); Barry Friedman, Valuing Federalism, 82 MINN. L. REV. 317, 363 n.203 (1997); Larry Kramer, Understanding Federalism, 47 VAND. L. REV. 1485, 1490-91, 1495 n.18 (1994) (arguing that there was consensus among the Framers that the powers of the national government would be limited); McGinnis & Somin, supra note xxx; Seth P. Waxman, Defending Congress, 79 N.C. L. REV. 1073 (2001) with Romer v. Evans, 517 U.S. 620, 623 (1996) (holding that the 1992 Colorado ballot initiative "Amendment 2," which invalidated anti-sexual-orientation-discrimination protections enacted by local governments, violated the Equal-Protection Clause of the Fourteenth Amendment); Cooper v. Aaron, 358 U.S. 1, 18 (1958) (announcing that the "basic principle" of American constitutional law was "that the federal judiciary is supreme in the exposition of the law of the constitution" and that its rulings constituted "the supreme law of the land"); Brown v. Board of Educ., 347 U.S. 483 (1954) (overruling Plessy v. Ferguson, 163 U.S. 537 (1896) (upholding legalized racial segregation on railroads) and ruling racial segregation in public schools unconstitutional under the Equal-Protection Clause); Darby, 312 U.S. 100 (1941) (affirming extensive congressional power and rejecting the argument that the Tenth Amendment constituted an independent and substantive limit on national powers); Palko v. Connecticut, 302 U.S. 319, 325 (1937) (suggesting that the protections in the Bill of Rights were properly binding on the states when they were essential to the nation's "scheme of ordered liberty"); United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936) (expanding federal executive power); Lochner v. New York, 198 U.S. 45 (1905) (striking down New York’s minimum-wage/maximum-hour legislation under the Contracts Clause); McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819) (upholding the doctrine of
constitutional power of the states was "designed to protect our fundamental liberties" by creating checks on the national government. The type of dispute that this Article addresses is a different one. It is one among the states (or among two groups of states, rather – a supermajority and a slim minority), in which the federal courts are called upon

implied congressional power and the constitutionality of the second Bank of the United States); Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304 (1816) (upholding the right of the Supreme Court to review decisions of state courts); Chisholm v. Georgia, 2 U.S. (2 Dall.) 419 (1793); League of United Latin American Citizens v. Wilson, 908 F. Supp. 755, 786-87 (C.D. Cal. 1995) (declaring California's Proposition 187, which attempted to cut services for illegal aliens, unconstitutional and preempted by federal law); JESSE H. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS: A FUNCTIONAL RECONSIDERATION OF THE ROLE OF THE SUPREME COURT 252-53 (1980) ("Even the most casual survey of the United States Reports reveals that in every area of constitutionally designated individual liberties -- whether it be speech, race, religion, the rights of the accused, or any other -- the record of the state and local governments has been far inferior to that of the nation."); BARRY CUSHMAN, RETHINKING THE NEW DEAL COURT: THE STRUCTURE OF A CONSTITUTIONAL REVOLUTION pt. IV (1998) (describing the drastic extension of Congressional and federal judicial power during the New Deal); ROBERT A. KATZMANN, INSTITUTIONAL DISABILITY: THE SAGA OF TRANSPORTATION POLICY FOR THE DISABLED (1986); R. SHEP MELNICK, REGULATION AND THE COURTS: THE CASE OF THE CLEAN AIR ACT 324-27 (1983); PAUL L. MURPHY, THE CONSTITUTION IN CRISIS TIMES 1918-1969 (1972) (describing the Court's expansion of the reach of the Equal-Protection and Due-Process Clauses and enforcement of the guarantees of the first eight Amendments against the states, as well as the federal government); PAUL E. PETERSON, THE PRICE OF FEDERALISM 9 (1995) ("Sovereignty must be concentrated in the hands of the national government. Quite apart from the dangers of civil war, the powers of state and local governments have been used too often by a tyrannical majority to trample the rights of religious, racial, and political minorities. The courts now seem a more reliable institutional shelter for the nation's liberties."); LUCAS A. PowE, JR., THE WARREN COURT AND AMERICAN POLITICS (2000) (describing the Warren Court's stretching of Congressional powers while asserting sweeping federal judicial authority to impose a wide range of new constitutional restrictions on the states); LAURENCE TRIBE, AMERICAN CONSTITUTIONAL LAW 255-267 (3d ed., 2000); Jonathan L. Entin, The New Federalism After United States v. Lopez, 46 CASE W. RES. L. REV. 635, 636 (1996) ("The Court struggled . . . for more than a century before the New Deal transformation ushered in a doctrinal structure suggesting that there were no judicially enforceable limits on the commerce power."); Richard A. Epstein, The Proper Scope of the Commerce Power, 73 VA. L. REV. 1387, 1451 (1987) (arguing that the New Deal Supreme Court "rejected the idea of limited federal government and decentralized power" in favor of a centralized government acting for the public welfare); Laurence H. Tribe, Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation, 108 HARV. L. REV. 1221, 1259 (1995) ("In addition, since the New Deal 'switch,' the Commerce Clause power in particular has been understood to be remarkably inclusive. Consequently, the universe of legitimate ends has expanded to such a degree that it now seems almost brazen to suggest that there is anything Congress may not do."); Herbert Wechsler, The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government," 54 COLUM. L. REV. 543 (1954) (reasoning that the Court's distinctive constitutional task was to protect those constitutional values that the "political safeguards" failed to guarantee: first, the supremacy of federal law and, second, the federal constitutional rights of individuals and minorities).

either to leave the conflict in place or to bring the minority of states in line with the majority. In this context, a federal court siding with the consensus of states in recognizing a particular right of criminal procedure is invoking jurisdiction over the minority states by virtue of the Fifth and Fourteenth Amendments, on behalf of an individual criminal defendant in one of the minority states upon whom such sought-after right (a unanimous jury verdict, for example) has not been bestowed, and the criminal defendant’s standing becomes a proxy for the states in the consensus (those recognizing the right). Because of this, this proposal does not run afoul of the criticism that some scholars have leveled at “federalist” opinions by the Supreme Court that preserve the rights of a small minority of states to run roughshod over the rights of particular parties because of parochial interests. The “legal check” that the Due Process Clauses put “into the hands of the (federal) judiciary” is nonetheless the same check as when an individual state (or many states) declines to recognize a right enumerated in the federal constitution.

86 Cf. John C. Calhoun, The Fort Hill Address, in UNION AND LIBERTY: THE POLITICAL PHILOSOPHY OF JOHN C. CALHOUN 367, 380 (Ross M. Lence ed., 1992) (1831) (charging that federal judges were merely "the judicial representatives" of a "united majority" and that granting them power to determine the constitutionality of laws "would be, in reality, to confide it to the majority, whose agents they are").
87 See, e.g., Michael S. Greve, Laboratories of Democracy: Anatomy of a Metaphor, 6 A.E.I. FEDERALIST OUTLOOK 5-6, http://www.federalismproject.org/outlook/5-2001.html (last visited August 27, 2011) (criticizing Erie Railroad Co. v. Tompkins, 304 U.S. 64 (1938) (abolishing the centralized national common law of Swift v. Tyson, 41 U.S. (16 Pet.) 1 (1842) and directing the federal judiciary to enforce the varied common-law rules of the separate states) on the ground that, although Erie seemed like "a profederalism decision," it was actually "the opposite" because it allowed "parochial state courts" to use their power to encourage the "systematic exploitation of out-of-state corporations in franchise disputes and, most egregiously, in products liability litigation").
In the "laboratories-of-democracy" metaphor of federalism, states are seen as scientists -- sometimes succeeding, sometimes failing, but always advancing. The normative value of allowing the states to "perform their role as laboratories for experimentation," therefore, is to provide them with an opportunity “to devise various solutions where the best solution is far from clear." The idea, as Justice Oliver Wendell Holmes, Jr. phrased it, was that states were "insulated chambers" that could conduct "social experiments that an important part of the community desires" and that, if successful, the experiments would redound to the benefit of the nation as a whole. Earl Maltz has pointed out that the metaphor of laboratory experimentation conceives of state legislation "as a vehicle for eventually developing a national consensus on 'correct' social and economic policies" that demands adoption nationwide. When Justice Brandeis spoke of the states as laboratories for resolving social problems, he also spoke of identifying "the ultimate right solution of the problem."

Sometimes, however, this laboratories-of-democracy metaphor is not sound, and states do not learn from their mistakes, even after the best solution has become clear. There is a serious question of whether state and local governments as they exist today are wells of public-spiritedness and republican virtue, needing only freedom from

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89 For Justice Brandeis's classic statement praising the states as laboratories of democracy, see New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (dissenting from the Court’s decision striking down Oklahoma's licensing requirement for sellers of ice and asserting that "it is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country").

90 United States v. Lopez, 514 U.S. 549, 568 (1995) (Kennedy, J., concurring in the Court’s judgment striking down the federal Gun-Free School Zones Act and describing the way that Congress's blunt decision to deal with school violence through a harsh criminal penalty intruded on the more creative policy experiments undertaken by state and local governments).


Washington to pour forth efficient criminal-justice policies for the good of the common wealth.\textsuperscript{94} Even the Federalists of 1787-89 "were much more troubled over the irresponsibility and small-mindedness of the state legislatures in the years immediately following the Revolution than they were over the deficiencies of the Articles of Confederation," particularly with their “tendency to beat down court reforms and similar undertakings intended for the larger public benefit."\textsuperscript{95} As Chief Justice William Howard Taft phrased it in \textit{Truax}, the "Constitution was intended -- its very purpose was -- to prevent experimentation with the fundamental rights of the individual."\textsuperscript{96} His conclusion was consistent with the thesis of this Article: that “experiments in government must be discarded when they prove to be failures."\textsuperscript{97} Or, as Frederick Schwarz put it: “[T]he laboratory of state experimentation is not a sealed room.”\textsuperscript{98}

One way to view federalist theory is as a form of deference to the states born out of a distrust of the institutional competence of federal courts in all but the most extreme circumstances to determine when the states have overstepped their constitutional bounds.\textsuperscript{99} When a supermajority of states has acted, drawing a line around the right that

\textsuperscript{94} For example, during the "Red Scare" period following World War I, numerous states passed criminal syndicalism statutes, imposing lengthy sentences on those convicted under them. \textit{See} GEOFFREY R. STONE, PERILOUS TIMES: FREE SPEECH IN WARTIME 224 (2004). Tennessee even imposed a death penalty for membership in the Communist Party. \textit{See id.} at 340-41, 422-23.

\textsuperscript{95} STANLEY ELKINS & ERIC MCKITRICK, THE AGE OF FEDERALISM 693, 702 (1993).

\textsuperscript{96} \textit{Truax}, 257 U.S. at 338.

\textsuperscript{97} \textit{Id.} Even Justice Brandeis rejected the "laboratory" metaphor when he joined the Court in its two earliest decisions expanding substantive-due-process analysis to protect noneconomic fundamental rights. \textit{See} Pierce v. Society of Sisters, 268 U.S. 510 (1925); Meyer v. Nebraska, 262 U.S. 390 (1923); \textit{see also} Pointer v. Texas, 380 U.S. 400, 410, 413 (1965) (Goldberg, J., concurring) ("I do not believe that this [laboratory idea] includes the power to experiment with the fundamental liberties of citizens safeguarded by the Bill of Rights.").

\textsuperscript{98} Frederick A.O. Schwarz, Jr., \textit{States and Cities as Laboratories of Democracy}, 54 THE RECORD 157, 163 (Mar./Apr. 1999).

\textsuperscript{99} \textit{See} Spencer Roane, \textit{Hampden}, Essay No. 4, \textit{in} JOHN MARSHALL’S DEFENSE OF MCCULLOCH V. MARYLAND 147, 148 (Gerald Gunther ed., 1969) (contending that "the ultimate redress against unconstitutional acts of the general government" lay with the "state legislatures" which would "sound the alarm to the people, and effect a change" and insisting that "the judiciary is not, in such cases, a competent tribunal").
they see fit to recognize, recognizing the location of that line is no longer a difficult
exercise for the federal courts. They can use the line that the consensus of states has
drawn as their starting point and, motivated by respect for the democratic processes that
took place within those states, shake off the usual pull of judicial restraint. By acting in
consensus, the states have already completed their policy experiment as the laboratories
of democracy. Now the question is not whether the countermajoritarian courts will
impose a substantive due-process right from above, but rather whether they will empower
the supermajority of states in the consensus to pull in line the small minority of states
outside of it. With less justification for judicial restraint, the courts should look at the area
within the states’ policy experiment and ask whether the results are in. The typical
federalist concern is with courts “creating” “new” constitutional rights instead of
deferring to the democratically elected branches of both the federal and state
governments.100 That concern is not invoked by the proposal in this Article: that courts
not only defer to, but bolster, the “creation” of “new” rights when they are created by a
consensus of those democratically elected state legislatures.

Constitutional theory is often portrayed as a choice between majority rule and
counter-majoritarian rights.101 But this dichotomy is too simple. As Charles Black has
explained, constitutional courts do more than simply tell a majority what it cannot do;
they also issue what he called the “legitimating function” of judicial review, the
important function of signaling to the majority that what they have done is

100 See, e.g., ALEXANDER M. BICKEL, THE MORALITY OF CONSENT (1975); ALEXANDER M.
BICKEL, THE SUPREME COURT AND THE IDEA OF PROGRESS (1970); see also Edward A. Purcell,
(1976).
constitutionally permissible. The counter-counter-majoritarian test for a substantive due process right to a particular criminal procedure that this Article proposes allows the Court to perform both functions simultaneously – to signal to the majority jurisdictions (those within the consensus) that what they are doing is constitutionally permissible and reassure their populations that they are being governed within the bounds of the constitution, while also signaling to the minority jurisdictions (the outliers) that they are in the minority precisely because their rules of criminal procedure fall outside of constitutional bounds.

IV. POLITICAL DYSFUNCTION: WHY (VARIATIONS IN) CRIMINAL PROCEDURE (ARE) IS DIFFERENT

"The importance of a fixed constitutional framework and stable institutional arrangements is necessarily lost once the framework that was designed to place a limit upon politics becomes the central subject of the politics it was designed to limit."103

Within state legislative processes, an executive, small groups of legislators, or sometimes a single legislator can halt the progress of laws at any one of several stages, and influential minority interests sometimes can manipulate the process to create gridlock on controversial issues.104 Other scholars have pointed out that states are not effective laboratories for experimentation because state legislators are risk averse, they do not want to commit resources to an experiment that may prove unpopular, and they have an

inherent incentive to support the status quo.\textsuperscript{105} The multi-stage structure of traditional legislation permits a few vested representatives to kill controversial bills, allowing other legislators to avoid taking a stand.\textsuperscript{106} K.K. Duvivier has documented the way in which outside forces served to prevent the federalism model of experimentation from working smoothly within the state legislative process in the context of physician-assisted suicide.\textsuperscript{107}

John Hart Ely’s representation-reinforcement theory of judicial review famously posits that courts appropriately step in when an underrepresented class of people does not have a fair chance of getting a legislature to respond to their concerns – when "the ins are choking off the channels of political change to ensure that they will stay in and the outs will stay out."\textsuperscript{108} Criminal defendants are in precisely such a class.

Decisions concerning criminal procedure tend to be particularly controversial politically. Crime-control policy tends to be politically constructed.\textsuperscript{109} In the process, criminological knowledge is marginalized, and punitive discourses tend to prevail.\textsuperscript{110}

Because of the political dysfunction surrounding the “war on crime” specifically and criminal-justice policy generally, the rights of criminal defendants cannot be adequately addressed and protected through the political process. For this reason, minority jurisdictions cannot reasonably be expected to join their majority brethren solely on the basis of the functioning procedural rights granted in those jurisdictions. For this

\textsuperscript{106} See David D. Schmidt, \textit{Citizen Lawmakers} 33-34 (1989); Duvivier, supra note xxx, at 917.
\textsuperscript{107} See Duvivier, supra note xxx, at 942.
\textsuperscript{108} John Hart Ely, \textit{Democracy and Distrust} 103 (1980); see, e.g., Jane S. Schacter, \textit{Ely and the Idea of Democracy}, 57 STAN. L. REV. 737, 755-59 (2004) (summarizing a variety of empirical findings questioning the extent to which government is, or can be, held "accountable" by "the people").
\textsuperscript{110} See id.
same reason, this national-consensus methodology must be a one-way ratchet, permitting a majority of jurisdictions to impose upon a minority of jurisdictions a procedural right, but not to erode the guarantee of a right not recognized by most or all jurisdictions.

The trend currently is toward the erosion of procedural protections of criminal law. Michael Tonry has described this trend as one of “malign neglect”: political indifference and/or obliviousness to the decimation of a generation through politically driven criminal-justice policies. Similarly, Robert Sampson and Dawn Bartusch have argued that current law-enforcement practices are part of a broader range of social policies that add to the disproportionate burdens borne by those who live in neighborhoods of concentrated disadvantage through escalating imprisonment rates, more intensive surveillance, and more aggressive police practices, all of which add to the ordeal of families and communities already most victimized by crime. Elliott Currie has called attention to the failure of political leaders to address these broader issues and, in so doing, to settle for, and contribute to, an impoverished political discourse on the subject of criminal justice:

Neither presidential candidate in 1996 spoke to the issues raised by the mushrooming of America’s prisons or offered an articulate response to the crisis of violence among American youth. Instead, the candidates reached for the most symbolic and least consequential issues: both Clinton and Dole, for example, supported the extension of the death penalty, along with a vague call for “victims’ rights,” boot camps, and school uniforms. . . . The political debate, such as it is, has become increasingly primitive and

112 See Michael Tonry & David S. Harrington, Strategic Approaches to Crime Prevention, in BUILDING A SAFER SOCIETY: STRATEGIC APPROACHES TO CRIME PREVENTION (Michael Tonry & David S. Harrington, eds. 1995).
detached from what we know about the roots of crime and the uses and limits of punishment.\textsuperscript{114}

In other words, policymakers tend to fixate on increasing punishment as their sole criminal-justice remedy and bombard citizens “with the myths, misconceptions, and half-truths that dominate public discussion, while the real story is often buried in a specialized technical literature.”\textsuperscript{115} A substantial body of data indicates that the politics of crime and punishment are a classic instance of what Murray Edelman refers to as “words that succeed and policies that fail.”\textsuperscript{116} Winning and holding public office, not crime control, are driving the policymaking process.\textsuperscript{117} And in politics, as Katherine Beckett has put it, “crime pays”\textsuperscript{118} – at least insofar as it becomes the occasion for a punitive political discourse and for punitive policy initiatives.\textsuperscript{119}

Oregon’s and Lousiana’s nonunanimous jury verdicts are a case study of why individual jurisdictions cannot be relied upon to “do the right thing” in the absence of a constitutional mandate. The Oregon voters’ pamphlet argument in favor of amending Oregon’s Constitution to authorize nonunanimous jury verdicts explicitly linked the unanimity requirement with its effect on juror deliberation and the stringent reasonable-doubt standard:

\begin{quote}
The laws of Oregon now . . . require that the evidence against the defendant must be so conclusive as to the culprit’s guilt that the jury must be convinced beyond any reasonable doubt or to a moral certainty of that guilt before it is privileged to find a verdict of guilty. Twelve jurors
\end{quote}

\textsuperscript{115} Id. at 6-7.
\textsuperscript{116} Murray Edelman, Political Language: Words That Succeed and Policies That Fail (1977); see Lyons & Scheingold, supra note xxx, at 116.
\textsuperscript{117} See Lyons & Scheingold, supra note xxx, at 116.
trying a criminal case must be unanimous in their decision before the defendant may be found guilty. The proposed constitutional amendment is to prevent one or two jurors from controlling the verdict or causing a disagreement.\textsuperscript{120}

The Oregon Supreme Court has explicitly found that “the amendment [to the state constitution permitting nonunanimous verdicts] was intended to make it easier to obtain convictions.”\textsuperscript{121} This was hardly a lofty policy goal.

Almost forty years ago, the fractured plurality of the Supreme Court held, in \textit{Apodaca},\textsuperscript{122} that the Fourteenth Amendment did not prohibit the states from securing felony convictions with less-than-unanimous verdicts.\textsuperscript{123} Today, \textit{Apodaca} is an anachronism. Subsequent legal developments, empirical data, and the ongoing national consensus in favor of unanimity call into question the validity of this decision. A plethora of empirical evidence is now available suggesting that permitting nonunanimous verdicts of guilt lowers the burden of proof below the constitutional requirement of proof beyond a reasonable doubt by negatively affecting the jury’s deliberation process and the accuracy of its findings. Nearly forty years of empirical research on jury decisionmaking since \textit{Apodaca} was decided demonstrates conclusively that unanimous juries are more careful, thorough, and accurate.\textsuperscript{124} These studies have documented that unanimity rules,

\begin{itemize}
\item \cite{Voters' Pamphlet, Special Election, May 18, 1934, p.7 (Ballot Measure 302-03)}
\item \cite{State ex rel. Smith v. Sawyer, 501 P.2d 792 (Or. 1963)}
\item \cite{406 U.S. 404}
\item \cite{See id. at 410.}
\item \cite{See John Guinther, \textit{The Jury In America} 81 (1988); Reid Hastie, \textit{et al.}, \textit{Inside the Jury} 108 (1983) (finding that mock juries that were required to reach a unanimous verdict deliberated more thoroughly and spent more time discussing the evidence); James H. Davis, \textit{et al., The Decision Processes of 6- and 12-Person Mock Juries Assigned Unanimous and Two-Thirds Majority Rules}, 32 J. PERSONALITY & SOC. PSYCHOL. 1 (1975) (finding that simulated juries deliberated longer when they were required to be unanimous than when they were permitted to reach a verdict with a two-thirds vote); Dennis J. Devine, \textit{et al.}, \textit{Jury Decision Making: 45 Years of Empirical Research on Deliberating Groups}, 7 PSYCHOL. & PUB. POL'Y & L. 622, 629 (2001) (providing a comprehensive review of the empirical research on jury decisionmaking published between 1955 and 1999 and concluding that permitting nonunanimous verdicts of guilt have a significant effect when the prosecution’s case is “not particularly weak or strong”); Diamond, \textit{et al., supra} note xxx (documenting that real juries that were told that they did not have to reach unanimity
standing alone, can shape the jury’s verdict.\textsuperscript{125} The ABA Standards, on which Justice Powell relied in his decisive concurring opinion in \textit{Apodaca}, have been amended since \textit{Apodaca} was decided to require unanimity in all criminal jury trials.\textsuperscript{126} Today, more than forty years since \textit{Apodaca} was decided, Oregon and Louisiana remain the only two states that permit felony conviction by less than a unanimous vote of the trial jury. The experiment has been run. The results are in. The political systems in Oregon and Louisiana are simply malfunctioning by ignoring them.

\begin{flushleft}
\textsuperscript{125} See, e.g., HASTIE, et al., supra note xxx, at 96-98 (documenting that, in almost one-third of the unanimous juries that they monitored, the verdict initially supported by a supermajority of the jurors was different than the verdict ultimately delivered after deliberations).

\textsuperscript{126} See ABA STANDARD RELATING TO TRIAL COURTS 2.10 (1976) (“The verdict of the jury [in criminal cases] should be unanimous.”) (abrogating ABA STANDARD FOR CRIMINAL JUSTICE, TRIAL BY JURY 1.1 (d) (1968) (approving of “less-than-unanimous verdicts, without regard to the consent of the parties”)); ABA PRINCIPLES FOR JURIES & JURY TRIALS 4 (B) (August 2005) (“A unanimous decision should be required in all criminal cases heard by a jury.”). The Commentary to Trial-Court Standard 2.10 concludes: “If the question of jury trial in criminal cases is considered from a long range viewpoint, placing the present exigencies of the trial courts in proper perspective, the[] qualifications [in Criminal Justice Standard 1.1 (d) for less-than-unanimous verdicts] appear to be both unnecessary and unwarranted by our legal traditions.” The Comment to Jury Principle 4 states:

\begin{quote}
At least as early as the fourteenth century it was agreed that jury verdicts should be unanimous. . . . The historical preference for unanimous juries reflects society’s strong desire for accurate verdicts based on thoughtful and thorough deliberations by a panel representative of the community. Implicit in this preference is the assumption that unanimous verdicts are likely to be more accurate and reliable because they require the most wide-ranging discussions – ones that address and persuade every juror.
\end{quote}

Commentary to ABA Jury Principle 4 (internal citations omitted).
\end{flushleft}
V. CONCLUSION

Due process requires that the procedures by which laws are applied be fair, so that individuals are not subjected to arbitrary government power. As a descriptive matter, arbitrariness can be demonstrated by anomalousness. Or, as Edmund Burke put it, reasonable citizens will effectively delegate decision-making authority to their own traditions.\textsuperscript{127}

So, where does this leave criminal defendants in Oregon and Louisiana who have been convicted of felonies on the decisions of less-than-unanimous juries? In light of \textit{McDonald}, they have a good argument that the Court should overturn the incorporation portion of its decision in \textit{Apodaca} and recognize that the Sixth-Amendment right to trial by unanimous jury required in federal courts is the same one required in state courts. But they should also have a good argument that due process guarantees to them the same right, as part of the fundamental fairness that forty-eight other states\textsuperscript{128} and the federal system have recognized that a unanimous jury provides, simply by virtue of that overwhelming head count. The "private interest that will be affected," a defendant’s loss of personal liberty through imprisonment, argues strongly for the right to a unanimous jury verdict. Accurate decisionmaking as to guilt or innocence must be assured because an incorrect decision can result in a wrongful incarceration. The Court has acknowledged as much in its other Sixth-Amendment jurisprudence:

\begin{itemize}
\item \textsuperscript{128} Of course, some of these states follow the federal rule recognizing the right to a unanimous jury as a matter of their own lockstep constitutional doctrine, rather than out of an independent policy decision as to the rights of criminal defendants.
\end{itemize}
It appears that of those States that utilize six-member juries in trials of non-petty offenses, only two, including Louisiana, also allow non-unanimous verdicts. We think that this near-uniform judgment of the Nation provides a useful guide in delimiting the line between those jury practices that are constitutionally permissible and those that are not.¹²⁹

While in some ways this proposal could be seen as antifederalist – by proposing a majority-rules system of constitutional norm-making under which minority jurisdictions are deprived of their right to experiment with alternative procedures – it is actually consistent with federalist ideals, if one conceives of the federalist process as a two-step process, akin in some ways to the scientific process. The first step of the process is an experimental one, in which the states, as laboratories of democracy, test various systems. The second step is the post-experimental phase, after the laboratory results are in, in which the tested and proven (to the consensus of states) procedure has been verified. This conception is consistent with the counting-heads methodology that the Court has recently employed in its Eighth-Amendment jurisprudence. This Article does not propose that states not be permitted to experiment with their own, unique criminal procedures, but rather that there should be a time limit on such experiments if their results, no matter how compelling, are not ultimately persuasive to a few holdout jurisdictions.

In law, disagreement can be a productive and creative force, revealing error, showing gaps, moving discussion and results in good directions.¹³⁰ Many constitutional orders place a high premium on “government by discussion.”¹³¹ On the other hand, if

¹²⁹ Burch v. Louisiana, 441 U.S. 130, 138 (1979) (determining the minimum number of jurors required by the Sixth-Amendment right trial by jury) (internal citations omitted).
¹³¹ Id.
everyone having a reasonable general view converges on a particular reasonable judgment, then nothing is amiss.¹³²

Cass Sunstein has pointed out that people often can agree that a rule makes sense without entirely agreeing on the foundations of their belief, and what ultimately accounts for the outcome is left unexplained.¹³³ Sometimes people can agree on individual judgments even if they disagree on general theory.¹³⁴ Perhaps their agreement is all the constitutional justification that should be necessary.

¹³² Id.
¹³³ Id. at 829.
¹³⁴ See id. at 830.