SMU | Dedman School of Law

SMU Law Review

Volume 61 | Issue 4 Article 6

January 2008

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ABSTRACT

Liberty analysis under the Due Process Clause of the Fourteenth Amendment has been enormously inconsistent throughout the history of constitutional jurisprudence. In construing the meaning of "liberty," the Supreme Court has utilized a variety of interpretive methods but has never settled on any one in particular. Liberty jurisprudence is thus unpredictable, because the Court chooses among its various methods on a case-by-case basis. This is not desirable, because it encourages biased and personal value-based decision-making. There is a better solution. The Court's various interpretive methods over the past century reveal certain recurring objective analytical elements, although these elements are not always used, and have never been articulated together in a unified liberty test. These elements should be synthesized into one multi-dimensional interpretive test to further neutral and enduring liberty jurisprudence.

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I. INTRODUCTION

THE Supreme Court's liberty jurisprudence over the past century may fairly be called chaotic. The single word "liberty" in the Fourteenth Amendment's Due Process Clause has been defined and interpreted quite differently in various contexts. The reasons for the inconsistency can be traced to fundamentally opposing views about federalism and separation of powers that predate the Court's self-appointed power of ultimate constitutional interpretation.[1] The only constant in this area of constitutional adjudication seems to be a heated debate about the legitimacy of judicial review[2] and appropriate interpretive

1. "It is emphatically the province and duty of the judicial department to say what the law is." Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803). Justice Chase declared in 1798 that the Court should actively review legislation and strike down any legislative act that "cannot be considered a rightful exercise of legislative authority." Calder v. Bull, 3 U.S. (3 Dall.) 386, 401 (1798) (Chase, J.). Justice Iredell expressed the judicial restraint model that continues to animate the Court today: "[T]he authority [of the Court] to declare [legislation] void is of a delicate and awful nature, [and] the Court will never resort to that authority, but in a clear and urgent case." *Id.* at 399 (Iredell, J.)

2. For example, Alexander Bickel's characterization of the Court as a "deviant" institution rests on a conception of democracy dedicated to majority "will," a product of the legislative and executive branches acting in concert. ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH 18 (2d ed. 1986). Similarly, "popular constitutionalism" sharply constricts judicial interpretation of the Constitution in favor of constitutional interpretation by "the people themselves," i.e., elected officials. *See* Scott D. Gerber, *The Courts, the Constitution, and the History of Ideas*, 61 VAND. L. REV. 1067, 1068 (2008). *See also* Erwin Chemerinsky, *A Grand Theory of Constitutional Law?*, 100 MICH. L. REV. 1249, 1257 (2002) ("[T]he Constitution is an inherently anti-majoritarian document. . . . Judicial review enforcing an anti-majoritarian document always will be anti-majoritarian . . . . [J]udicial review enforcing it is consistent, and not at odds, with democracy.") *See also, e.g.*, W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 638 (1943) (The Bill of Rights were intended to withdraw certain rights from the "vicissitudes of political controversy," to put them beyond the reach of majority rule by protecting them by the courts.); JESSE H.

methods.[3]

The Constitution's "spacious"[4] terms such as "liberty" and "due process" necessitate interpretation.[5] A variety of interpretive methods propose to qualify or limit judicial discretion in constitutional litigation,[6] and constitutional scholars continue to seek out "neutral principles" of constitutional adjudication to prevent the Court from functioning as a "naked power organ."[7] Concerns about the Court's "naked" power are valid. The absence of a consistent interpretive method in liberty jurisprudence allows the Court to make decisions "willy nilly"[8] in accordance with its Members' personal biases, predilections, or political agendas. Indeed, concerns about "judicial activism"[9] and a loss of judicial "legitimacy" and

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CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS 64 (1980) (noting that the Court's "overriding virtue" is to protect individuals from government); HENRY STEELE COMMAGER, LIVING IDEAS IN AMERICA 204 (1964) (the judicial branch must reconcile "majority rule and minority right").

3. The debate over the Court's proper role in checking legislative action continues to animate contemporary disputes about the established "presumption of constitutionality," *see, e.g.*, Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 15 (1976) and Williamson v. Lee Optical of Okla., 348 U.S. 483 (1955), versus what Randy Barnett has termed the "Presumption of Liberty." *See* RANDY BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY 1-5 (2004) (arguing that the "judicially redacted" constitution has created "islands of liberty rights in a sea of governmental power," and that the presumption of constitutionality should be flipped in favor of a "Presumption of Liberty").

4. Duncan v. Louisiana, 391 U.S. 145, 148 (1968).

5. The Constitution was intended to "endure for ages to come, to be adapted to the various crises of human affairs," McCulloch v. Maryland, 17 U.S. (4 Wheat.) 415, 427 (1819), necessitating interpretation of its "spacious" terms. *Duncan*, 391 U.S. at 147-48. Terms such as "due process" were cast, in the words of Judge Learned Hand, "in such sweeping terms that their history does not elucidate their contents." LEARNED HAND, THE BILL OF RIGHTS 30 (1958).

6. These include literalism, originalism, conceptualism, cultural values, process-based modernism, and open-ended modernism. *See, e.g.*, Erwin Chemerinsky, *The Price of Asking the Wrong Question: An Essay on Constitutional Scholarship and Judicial Review*, 62 TEX. L. REV. 1207, 1234-48 (1984). *See also* William E. Nelson, *History and Neutrality in Constitutional Adjudication*, 72 VA. L. REV. 1237 (1986). Some scholars have suggested fundamental limits to the scope of judicial review based on democratic theory, such as John Hart Ely's famous process-based theory of judicial review. JOHN HART ELY, DEMOCRACY AND DISTRUST 92 (12th ed. 1998). *But see, e.g.*, Whitney v. California, 274 U.S. 357, 373 (1927) (Brandeis, J., concurring) ("Despite arguments to the contrary which had seemed to me persuasive, it is settled that the due process clause of the Fourteenth Amendment applies to matters of substantive law as well as to matters of procedures.").

7. *See* Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 12 (1959).

8. Richard A. Fallon, *Judicially Manageable Standards and Constitutional Meaning*, 119 HARV. L. REV. 1274, 1278 (2006) (referring to Justice Scalia's use of the term in Vieth v. Jubelirer, 541 U.S. 267, 295 (2004)). *See also id.* at 1285.

9. The term "judicial activism" is not well-defined, but is a term carrying "perjorative connotation" with several meanings: 1) invalidation of the arguably constitutional actions of other branches; 2) failure to adhere to precedent; 3) judicial "legislation"; 4) departures from accepted interpretive methodology; and 5) results-oriented judging. *See* Keenan D. Kmiec, *The Origin and Current Meanings Of "Judicial Activism,"* 92 CAL. L. REV. 1441, 1444 (2004). *See also* Richard H. Fallon, Jr., *Some Confusions About Due Process, Judicial Review, and Constitutional Remedies*, 93 COLUM. L. REV. 309, 314 (1993).

"credibility"[10] have become mainstream[11] and are ubiquitous in the academic literature and the Court's decisions.[12]

The Court has struggled to determine the mandates of due process to protect individual liberty, and has often engaged in self-critical analysis relative to its duty to interpret the Constitution. The justices have frequently expressed concern about the need for more objective and consistent liberty interpretation[13] to avoid judicial "roaming at will."[14] Repeatedly, the Court has attempted to "rein in the subjective elements"[15] to prevent liberty interpretation from becoming the "idiosyncrasies of a merely personal judgment,"[16] and to further a "disinterested inquiry pursued in the spirit of science."[17] To this end, the Court has constructed various interpretive methods, which are then engaged irregu-

10. For decades, scholars and judges have argued that the Court must choose a theory of judicial interpretation to avoid a loss of judicial "legitimacy" or "credibility" that results when the Court appears to have no boundaries to its interpretive powers. *See* Chemerinsky, *supra* note 2, at 1253-55.

11. The public at large was drawn into the previously academic debate with the Court's nadir opinion in *Bush v. Gore,* 531 U.S. 98, 128-29 (2000) (Stevens, J., dissenting). "Although we may never know with complete certainty the identity of the winner of this year's Presidential election, the identity of the loser is perfectly clear. It is the Nation's confidence in the judge as an impartial guardian of the rule of law." Supreme Court justices have attained celebrity status as the public has become fascinated about their lives, to obtain clues as to what they may do next, in recognition of the awesome power that they exercise, and may abuse, relative to Americans' rights and lifestyles. *See generally, e.g.,* JEFFREY TOOBIN, THE NINE: INSIDE THE SECRET WORLD OF THE SUPREME COURT (2007). Toobin's book spent more than four months on the New York Times best-seller list, and was named one of the ten best books of the year by the *New York Times Book Review, Time, Newsweek, Fortune, Entertainment Weekly,* and the *Economist.*

12. *See, e.g.,* Kmiec, *supra* note 9 (quantifying use of the term "judicial activism").

13. *See, e.g.,* Washington v. Glucksberg, 521 U.S. 702, 756 (1997); Adamson v. California, 332 U.S. 46, 65 (1947) (Frankfurter, J., concurring) ("If the basis of selection is merely that those provisions of the first eight Amendments are incorporated which commend themselves to the individual justices as indispensable to the dignity and happiness of a free man, we are thrown back to a merely subjective test."). "[T]his practice [of recognizing unenumerated, substantive rights under the Due Process Clause] has neither rested on a single textual basis nor expressed a consistent theory." *Glucksberg,* 521 U.S. at 756.

14. Duncan v. Louisiana, 391 U.S. 145, 168-69, 171 (Black, J., concurring). *See also, e.g.,* Malloy v. Hogan, 378 U.S. 1, 33 (1964) (Harlan, J., dissenting) (The Court's interpretive methods are "simply an excuse for the Court to substitute its own superficial assessment of the facts and state law for the careful and better informed conclusions of the state court."). *See also* Benton v. Maryland, 395 U.S. 784, 808-09 (1969) (Harlan, J., dissenting) (expressing concern that the Court's methodology would erode many of the basics of the federal system).

15. *Glucksberg,* 521 U.S. at 722. The *Casey* Court expressed concern about the "popular misconception" that a change in the Court's membership will result in a fundamental change to the law, and the "lasting injury" that could result, both in relation to the legitimacy of the Court and the entire legal system. Planned Parenthood of Se. Pa. v. Casey, 505 U.S 833, 864 (1992).

16. *Adamson,* 332 U.S. at 68 (Frankfurter, J., concurring). *See also* Poe v. Ullman, 367 U.S. 497, 544 (1961) (Harlan, J., dissenting) ("The vague contours of the Due Process Clause do not leave judges at large. We may not draw on our merely personal and private notions and disregard the limits that bind judges in their judicial function." (quoting Rochin v. California, 342 U.S. 165, 170-71 (1952))).

17. *Rochin,* 342 U.S. at 172 ("'[D]ue process of law' requires an evaluation based on a disinterested inquiry pursued in the spirit of science, on a balanced order of facts exactly and fairly stated, on the detached consideration of conflicting claims . . . [to] reconcil[e] the needs both of community and of change in a progressive society.").

larly or simply discarded.[18]

The lack of consistency in liberty cases is not desirable because similar claims of liberty may be treated quite differently based on a single change in the Court's membership[19] or the Court's arguably results-oriented choice of interpretive methods on a case-by-case basis. Inconsistent decisions can lead to injustice and oppressive uncertainty about liberty rights.[20] Any interpretive method requires judicial value judgment, and subjective, results-oriented opinions cannot be eradicated entirely.[21] However, a more objective method that is superior to the current state of liberty jurisprudence is possible. The key is to create an interpretive test that mandates judicial review of several objective analytical elements to neutralize judicial bias and to create more balanced judicial review in all liberty cases.

This Article is devoted to creating a more objective, judicially manageable[22] multi-factor interpretive test to stabilize liberty jurisprudence. The Court's liberty decisions over the past century reveal that the Court has in fact reviewed certain objective elements repeatedly in analyzing liberty, despite never imposing a duty on itself to consider these elements in every case or identifying them together in any articulated, unified interpretive method. The proposed test unifies and distills the Court's various interpretive methods in liberty cases by "unearthing" common logical and sociological analytical elements.[23] That is, the elements are identified by synthesizing existing inconsistent Supreme Court "outputs" for analyzing

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18. For example, the penumbral approach to privacy was discarded less than a decade after it was announced, and the fundamental rights dual standard of review has been engaged inconsistently, with the Court engaging balancing tests or other alternate tests on an ad hoc basis, sometimes without announcing any standard. *See infra* Section II.D.

19. *See, e.g.*, Erwin Chemerinsky, *The Vanishing Constitution*, 103 HARV. L. REV. 43, 44-45 (1989) (When Justice Powell was replaced by Justice Kennedy in 1988, Justice Kennedy supplied the fifth vote to create a conservative majority, and the Court's 1988-1989 term "demonstrated a consistent, conservative working majority on the Court.").

20. "Liberty finds no refuse in a jurisprudence of doubt. Yet 19 years after our decision holding that the Constitution protects a woman's right to terminate her pregnancy . . ., that definition of liberty is still questioned." *Casey*, 505 U.S. at 844 (internal citation omitted). *See also infra* Sections II, IV.

21. "Constitutional decisionmaking is all about value choices . . . . [C]onstitutional theory cannot avoid the need for courts to make value choices . . . ." Chemerinsky, *supra* note 6 at 1263.

22. *See* Fallon, *supra* note 8 at 1281-83 (noting that the age requirement for presidency is itself a clear, judicially manageable standard, whereas vague constitutional clauses such as "equal protection" require interpretation and therefore need interpretive limits).

23. *See* Laurence H. Tribe, *Reflections on Unenumerated Rights*, 9 U. PA. J. CONST. L. 483, 489, 492 (2007). Tribe refers to jurisprudential superstructures capable of enveloping and sheltering individuals and their relationships as "geodesic domes." *Id.* at 489. This is a fair description of liberty jurisprudence as a whole, provided that the domes have cracks and holes, such that certain unusual individuals, such as Michael H., get soaked while the majority stays dry. The proposed method is more like Tribe's "geological" model because it involves "digging beneath a recognized enumerated right or set of rights so as to unearth the logical or sociological presuppositions of those rights, the postulates they should be understood to reflect, or the underlying (typically more substantive) rights without which the rights enumerated (often more procedural or quasi-procedural in cast) would be rendered incoherent or largely purposeless." *Id.* at 496.

vague constitutional norms.[24] The proposed six element interpretive test is thus the product of an objective review of the "history and tradition" of Supreme Court liberty jurisprudence itself.

The largely objective elements of liberty proposed herein provide a desirable "check" on the Court's otherwise unfettered reliance on its potentially agenda-driven rendition of "history and tradition" as the sole criterion for interpreting liberty.[25] The proposed elements are: 1) history and tradition; 2) the nature of the right (personal autonomy, intellectual freedom, and intimacy); 3) bodily integrity (physical invasion, pain, or restraint); 4) state laws; 5) legislative facts; and 6) foreign/international law. The proposed test mandates consideration of each element to encourage impartial and balanced liberty analysis and to minimize the risk of liberty interpretation that is inconsistent with Americans' privacy expectations, scientific data, and global concepts of freedom. If adopted, this multi-factor interpretive test should lead to more enduring liberty jurisprudence, because requiring consideration of objective elements – such as medical and social facts, where relevant – limit the impact of the justices' personal or moral convictions.

Section II demonstrates the Court's history of inconsistent liberty analysis. Section III identifies six analytical elements that the Court has articulated and relied on repeatedly in liberty jurisprudence. The danger of inconsistent methods in liberty cases is demonstrated in Section IV by comparing Supreme Court precedent reaching opposite conclusions in similar cases within a short time frame. In Section V, the method proposed in this Article is illustrated by analyzing a substantive due process challenge to proposed legislation to mandate human papillomavirus (HPV) vaccine for eleven and twelve-year-old girls. This Article concludes that the Court, having conferred upon itself ultimate constitutional interpretive power, is the appropriate body to place a check on this power by adopting the proposed test to enhance objective, principled liberty interpretation.

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24. *See* Fallon, *supra* note 8, at 1283. A judicially manageable standard is an "output" when a court successfully devises a test that can thereafter be used to implement constitutional rights that are not themselves judicially manageable standards, such as the right of equal protection. The standard proposed herein synthesizes nearly a century of due process "outputs" to create an output-based "input" for liberty analysis that itself would become an "output" if adopted by a court.

25. *See infra* Section II. The Court has looked to "history and tradition" exclusively or as part of a broader analysis in liberty cases to determine whether a claimed right is "fundamental." *See, e.g.*, Washington v. Glucksberg, 521 U.S. 702, 720-21 (1997) ("Our established method of substantive-due-process analysis . . . [begins with identifying] those fundamental rights and liberties which are, *objectively*, 'deeply rooted in this Nation's history and tradition' . . . ." (emphasis added; citations omitted)). However, the justices' rendition of "history" has been quite subjective at times, vulnerable to the justices' results-oriented characterization of the relevant history, rendering "history and tradition" per se an inadequate interpretive method. *See, e.g.*, Lawrence v. Texas, 539 U.S. 558, 568-73 (2003) (criticizing the inaccurate rendition of history in Bowers v. Hardwick, 478 U.S. 186 (1986)). *See also infra* Section III.

II. INCONSISTENT DEFINITIONS OF "LIBERTY"

The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. . . . They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the government, the right to be let alone – the most comprehensive of rights and the right most valued by civilized men.[26]

In a Constitution for free people, there can be no doubt that the meaning of "liberty" must be broad indeed.[27]

The conceptual breadth of "liberty" necessitates interpretation. This Section will demonstrate the Court's inconsistent liberty analysis by reference to the incorporation cases, procedural due process cases, criminal procedure cases involving bodily integrity, and substantive due process cases. The following sub-sections exemplify, but by no means exhaust, the Court's inconsistent liberty analysis.[28]

A. INCORPORATION CASES

After the Fourteenth Amendment was passed, the Court was called upon to define "liberty" set forth therein and to determine the "due process" limits to state action. Whether and to what extent the Bill of Rights would be incorporated into the Due Process Clause of the Fourteenth Amendment was the subject of the incorporation debate.[29]

Early definitions of liberty include whether the claimed right "is of such a character that it cannot be denied without violating those 'fundamental principles of liberty and justice which lie at the base of all our civil and political institutions,'"[30] is such that "neither liberty nor justice would exist if [it] were sacrificed,"[31] or is "so rooted in the tradition and

26. Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

27. Roth v. Board of Regents, 408 U.S. 564, 572 (1972).

28. For example, the Court has employed very different tests for substantive due process deprivations of liberty depending on whether the deprivation results from executive or legislative action. The "shocks the conscience" standard applies to executive action, whereas liberty claims based on legislative action are governed by *Washington v. Glucksberg*, 521 U.S. 702 (1997), and other state law-based substantive due process cases. *See* County of Sacramento v. Lewis, 523 U.S. 833, 847 (1998); *see also infra* Section II.D. Due process cases based on property deprivation have produced a variety of standards as well. *See generally, e.g.*, State Farm Mutual Auto. Ins. v. Campbell, 548 U.S. 408 (2003) (deprivation of property/excessive punitive damages awards authorized by state law); BMW of N. Am. v. Gore, 517 U.S. 559 (1996); TXO Prod. Corp. v. Alliances Res. Corp., 509 U.S. 443 (1993). *See also* David H. Armistead, *Substantive Due Process Limits on Public Officials' Power to Terminate State-Created Property Interests,*" 29 GA. L. REV. 769 (1995).

29. For a discussion of the incorporation debate, see Duncan v. Louisiana, 391 U.S. 145, 150 n.14 (1968).

30. Powell v. Alabama, 287 U.S. 45, 67 (1932). The Court relied upon the historical practice in America of providing counsel for criminal defendants, particularly in capital murder cases involving ignorant and illiterate youthful defendants, to find that the right of counsel in such cases is "fundamental [in] nature," such that failing to provide counsel could result in "judicial murder." *Id.* at 73.

31. Palko v. Connecticut, 302 U.S. 319, 326 (1937).

conscience of our people as to be ranked as fundamental,"[32] and therefore "implicit in the concept of ordered liberty."[33] These vague definitions left the Court to decide on a case-by-case basis whether state action that would violate the Bill of Rights if perpetrated by the federal government also violates the Fourteenth Amendment's guarantee of liberty.[34]

The Court often looked to the Bill of Rights and historical English and American practices to determine which liberties were "fundamental," and therefore deserving of protection from state infringement.[35] In some cases, the Court sought factual "objective criteria,"[36] or "matters of recorded history"[37] to construct a "test . . . to determine whether due process of law has been accorded in given instances."[38] The "objective" criteria have included American historical practices, including the existing laws in the various states,[39] foreign law,[40] and the Framers' intent.[41] In other cases, the Court simply declared that particular provisions contained in the Bill of Rights were "in" or "out" of the Fourteenth Amendment's Liberty Clause[42] based on an analysis of whether a "fair and enlightened system of justice would be impossible without them,"[43] or whether failing to apply the federal right to the states would subject citizens to "a hardship so acute and shocking that our policy will not endure it."[44]

At times, the Court held that certain provisions of the Bill of Rights create a liberty interest under the Fourteenth Amendment, but in a different, looser, "watered down, subjective version,"[45] so that a state actor may constitutionally deny a liberty interest by means that would not sat-

32. *Palko,* 302 U.S. at 325 (quoting Snyder v. Massachusetts, 291 U.S. 97, 105 (1934)).

33. *See id.* at 326 (citations omitted). *See also Duncan,* 391 U.S. at 148-49 (listing a variety of tests for deciding whether a provision of the Bill of Rights is also protected against state action by the Fourteenth Amendment).

34. *See, e.g.,* Adamson v. California, 322 U.S. 46, 50-51 (1947).

35. *See Duncan,* 391 U.S. at 148-49. In this case, the Court traced the history of jury trials from the Magna Carta, to English practice, to the "objective criteria" comprised of the existing laws and practices in America, noting that Louisiana was the only state that subjected suspects to bench trials where the punishment exceeds one year in jail. *Id.* at 161.

36. *Id.* at 161 (referring to precedent as "objective criteria").

37. Powell v. Alabama, 287 U.S. 45, 64 (1932).

38. *Id.* at 65.

39. *See Duncan,* 391 U.S. at 148-49.

40. The *Palko* Court relied in part on the fact that the countries in Continental Europe do not confer the right against double jeopardy on their citizens, noting that double jeopardy and compulsory self-incrimination are allowed by Roman law and French law. Palko v. Connecticut, 302 U.S. 319, 326 (1937).

41. The *Powell* Court stated: "One test which has been applied to determine whether due process of law has been accorded in given instances is to ascertain what were the settled usages and modes of proceeding under the common and statute law of England before the Declaration of Independence. . . ." *Powell,* 287 U.S. at 65.

42. *See Duncan,* 391 U.S. at 181 (Harlan, J., dissenting).

43. *Palko,* 302 U.S. at 325 (holding that double jeopardy is not unconstitutional if perpetrated by a state).

44. *Id.* at 328.

45. Malloy v. Hogan, 378 U.S. 1, 10-11 (1964) (quoting Ohio *ex rel* Eaton v. Price, 364 U.S. 263, 275 (1960) (dissenting opinion)). *See also* Benton v. Maryland, 395 U.S. 784, 796 (1969) (The Court must review double jeopardy claims by Fifth Amendment standards, not by the "watered-down standard enunciated in Palko.").

isfy due process under the relevant Bill of Rights provision if perpetrated by a federal actor. More frequently, the Court has required the same due process under state and federal law, testing state law "jot-for-jot" in accordance with the federal right,[46] because it would be "incongruous to have different standards determine the validity of a claim of privilege based on the same feared prosecution, depending on whether the claim was asserted in a state or federal court."[47]

As a result of the Court's vague and inconsistent methods of defining liberty, decisions in incorporation cases have been inconsistent. For example, the Court in *Palko v. Connecticut*[48] found that liberty's protection did not encompass preventing a state from subjecting a criminal defendant to double jeopardy even though the same conduct would violate the Fifth Amendment if perpetrated by the federal government.[49] The Court rejected a general rule of incorporation on grounds of federalism,[50] and found that Connecticut's procedural choice was not "so acute and shocking" to violate the Fourteenth Amendment.[51] Similarly, in *Adamson v. California*,[52] liberty was interpreted not to include the right to prevent a prosecutor from commenting on an accused's failure to testify, even though that right was secured by the Bill of Rights as against the federal government and had already been adopted by most states.[53] The *Adamson* Court relied in part on federalism,[54] holding that a state may devise methods to help juries determine truth in accordance with its own ideas of efficient criminal justice administration.[55]

Similarly, in *Williams v. Florida*,[56] the Court decided that the Sixth Amendment's mandate of a unanimous verdict by a twelve-member jury was not incorporated to the states, so that in state trials, the jury may be comprised of fewer jurors, and the verdict need not be unanimous.[57] In deciding whether due process under state law requires a unanimous twelve-member jury, the Court traced the history of the twelve-member jury, and found that it may have been grounded in biblical numbers[58] but was retained throughout the centuries in Europe by "historical acci-

46. *See Duncan*, 391 U.S. at 181 (Harlan, J., dissenting).
47. *Malloy*, 378 U.S. at 10-11.
48. 302 U.S. 319 (1937), *overruled by* Benton v. Maryland, 395 U.S. 784 (1969).
49. *See Palko*, 302 U.S. at 322-23.
50. *Id.* at 323.
51. *Id.* at 328.
52. 332 U.S. 46 (1947), *overruled by* Malloy v. Hogan, 378 U.S. 1 (1964).
53. *Adamson*, 332 U.S. at 55.
54. The Court stated that states are "free to abridge, within the limits of the due process clause, the privileges and immunities flowing from state citizenship. This reading [is] . . . a natural and logical interpretation. It accords with the constitutional doctrine of federalism . . . [to preserve] the balance between national and state power." *Id.* at 52-53.
55. *Id.* at 53-57.
56. 339 U.S. 78 (1970).
57. *Williams*, 399 U.S. at 102. *See also* Apodaca v. Oregon, 406 U.S. 404 (1972); Johnson v. Louisiana, 406 U.S. 356 (1972).
58. *Williams*, 399 U.S. at 86-90 (citing Coke's explanation that the number twelve is utilized in holy writ, such as twelve apostles).

dent,"[59] as opposed to being integral to a fair trial. The Court relied on social science experiments demonstrating that there was "no discernible difference between the results reached by two different-sized juries,"[60] dispelling the concept that a state defendant was disadvantaged by having less jurors.[61] The Court also relied on state law precedent, noting that the states have consistently required a twelve-member jury in death penalty cases only, reflecting an "implicit recognition of the value of the larger body as a means of legitimizing society's decision to impose the death penalty."[62]

Later, during an era in which civil liberties were greatly expanded,[63] the Court overruled some of these decisions to conform the Fourteenth Amendment analysis to the Bill of Rights analysis.[64] In overruling *Palko v. Connecticut*, the Court in *Benton v. Maryland*[65] relied on legal precedent and the "origins" of the claimed liberties, by tracing the right against double jeopardy to "Greek and Roman times, . . . established in the common law of England long before the Nation's independence," and also relied on the fact that every state prohibited double jeopardy in some form.[66] Similarly, the Court overruled *Adamson v. California* in *Malloy v. Hogan*,[67] relying on the Framers' intent[68] in enacting the Fourteenth Amendment and the "shift" in Supreme Court jurisprudence to interpret Fourteenth Amendment due process rights consistent with cases interpreting the Bill of Rights.[69]

Applying provisions of the Bill of Rights to the states identically as they are applied to the federal government enhances consistency between federal and state due process requirements, but has been criticized as resulting from the subjective viewpoints of the justices and as an assault on federalism.[70] However, other than the requirements of a twelve-member

59. *Id.* at 89, 102.

60. *Id.* at 101-02.

61. The argument was that the greater the number of jurors, the greater the chances that one will vote to acquit, preventing conviction. *Id.* at 101-02.

62. *Id.* at 103.

63. During the Vinson Court (June 24, 1946 to September 8, 1953) and Warren Court (October 5, 1953 to June 23, 1969), civil liberties were defined liberally and expanded, which included incorporating many provisions of the Bill of Rights to the states via the Fourteenth Amendment's Due Process Clause. *See* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 482-83 (2d ed. 2002).

64. *See* Benton v. Maryland, 395 U.S. 784, 794-96 (1969).

65. 395 U.S. 784 (1969).

66. *Id.* at 794-95.

67. 328 U.S. 1 (1964).

68. *Id.* at 5.

69. *Id.* at 11. *See also* Mapp v. Ohio, 367 U.S. 643 (1961) (adopting exclusionary rule for federal prosecutions that applied to state prosecutions). The provisions requiring identical enforcement include First Amendment guarantees, the Fourth Amendment's prohibition of unreasonable searches and seizures, and the Sixth Amendment's right to counsel. *Malloy*, 378 U.S. at 11. *See also, e.g.,* Wallace v. Jaffree, 472 U.S. 38, 48-49 (1985).

70. *See, e.g., Malloy*, 378 U.S. at 16-17 (Harlan, J., dissenting) (The ultimate result of the Court's decision to incorporate the Bill of Rights to the Fourteenth Amendment in identical form is to create "compelled uniformity, which is inconsistent with the purpose of our federal system and which is achieved either by encroachment on the States' sovereign powers or by dilution in federal law enforcement of the specific protections found in the

jury and unanimous verdicts, it is now settled that liberty for state law purposes is defined by reference to the Bill of Rights and opinions interpreting its limits to federal power.

B. Procedural Due Process Cases

Before determining what procedures are constitutionally required by the Due Process Clause, courts must decide whether a deprivation of life, liberty, or property has occurred. The Court has defined liberty for procedural due process purposes in two general ways. In some cases, the Court has defined liberty based on the importance of the individual interest at stake. For example, in *Roth v. Board of Regents*, the Court defined liberty as "those privileges long recognized . . . as essential to the orderly pursuit of happiness by free men."[71] In other cases, the Court looked to expectations created by state law to determine whether the state law created a liberty interest.

The inconsistent liberty analysis in procedural due process cases may be exemplified best by the prisoners' rights cases, where the Court has defined liberty by reference to one or both of the above-referenced methods over the past forty years. In the early 1970s, the Court analyzed prisoners' liberty rights by reference to the Due Process Clause based on the "nature" of the alleged deprivation and the importance of the claimed right to the prisoner. For example, in *Morrissey v. Brewer*, the Court determined that revocation of parole implicates a liberty interest because of its impact the parolee's life, including the ability to be employed and to associate with friends and family.[72]

In 1974, the Court in *Wolff v. McDonnell*[73] decided that liberty interests may be created by state laws creating expectations, the deprivation of which requires compliance with procedural due process. The *Wolff* Court determined that a liberty interest in "good time" credits was "a statutory creation of the state," not based on the Due Process Clause.[74] Since the loss of good time credits meant longer incarceration, and the bases for revoking good time credits were clearly spelled out by state law, the state law created a liberty interest requiring due process before good time

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Bill of Rights."). *See also* Duncan v. Louisiana, 391 U.S. 145, 171 (1968) (Fortas, J., concurring) (noting that our Constitution sets up a federal union, not a monolith).

71. 408 U.S. 564, 572 (1972) (quoting Meyer v. Nebraska, 262 U.S. 390, 399 (1923).

72. 408 U.S. 471, 482 (1972). The Court stated that parole "includes many of the core values of unqualified liberty [such that] its termination inflicts a 'grievous loss' on the parolee and often on others." *Id.* at 482, alluding to the "grievous loss" language of *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring). *See also* Gagnon v. Scarpelli, 411 U.S. 778 (1973) (concluding that a revocation of probation similarly implicates a liberty interest).

73. *See* Wolff v. McDonnell, 418 U.S. 539 (1974).

74. *Id.* at 557-58. *See also* Greenholz v. Inmates of Neb. Penal and Corr. Complex, 442 U.S. 1 (1979) (clarifying that state law must be sufficiently clear to create entitlements to parole, not mere hope of parole). *See also* Ky. Dept. of Corr. v. Thompson, 490 U.S. 454 (1989).

credits could be revoked.[75] Similarly, the Court found a liberty interest in discretionary parole in *Greenholtz v. Inmates of Nebraska Penal and Correctional Complex*,[76] because state law created parole opportunities and provided only four bases requiring specific findings to deny parole. The Court departed from its prior Due Process Clause-based liberty analysis in other cases as well, yet occasionally reverted to a Due Process Clause analysis.[77]

In 1995, the Court in *Sandin v. Conner*[78] decided that in defining liberty, its shift from the nature of the deprivation to expectations created by state law had spurred excessive liberty claims.[79] The relatively conservative *Sandin* Court[80] restricted the definition of liberty under both existing methods: to establish a liberty interest, a prisoner must show either that the state action increased the adverse consequences to the inmate in such an unexpected manner as to give rise to protection by the Due Process Clause of its own force, or that state law created a liberty interest in freedom from restraint that, if deprived, "imposes atypical and significant hardship in relation to the ordinary incidents of prison life."[81]

The Court's decisions regarding liberty rights of public school students provide another example of inconsistency in procedural due process cases. In *Goss v. Lopez*, the Court found that students have a liberty interest in "good name, reputation, honor, or integrity,"[82] and that charges of misconduct resulting in suspension or expulsion "could seriously damage the students' standing with their fellow pupils and their teachers as well as interfere with later opportunities for higher education and employment."[83] Just two years later, the Court in *Ingraham v. Wright*

75. *Wolff*, 418 U.S. at 556-58. The Court also stated that a person's liberty is equally protected whether it arises from the Due Process Clause or state law. *Id.* at 558.

76. 442 U.S. 1, 11-12 (1979).

77. For example, the Court found that the loss of freedom involved in transferring a prisoner from a minimum to maximum security facility was insufficient for a finding of liberty deprivation under the Due Process Clause *per se*, such that any liberty interest in not being transferred must be derived from state or federal statutory language creating such a liberty interest. Meachum v. Fano, 427 U.S. 215 (1976). Yet, the Court found a Due Process Clause-based liberty interest in avoiding transfer from a prison to a mental institution because of the likelihood of mandatory drug treatment and potential for social stigma. Vitek v. Jones, 445 U.S. 480 (1980). The *Vitek* Court also found a liberty interest based on statutory language. *Id. See also* Washington v. Harper, 494 U.S. 210 (1990) (finding a Due Process Clause-based liberty right to avoid involuntary administration of antipsychotic drugs).

78. 515 U.S. 472, 481 (1995).

79. Among other things, "[b]y shifting the focus of the liberty interest inquiry to one based on the language of a particular regulation, and not the nature of the deprivation, the Court encouraged prisoners to comb regulations in search of mandatory language on which to base entitlements to various state-conferred privileges." *Id.* at 481. This also led to increased federal court involvement with day to day prison operations. *Id.* at 483.

80. *See supra* note 20.

81. *Sandin*, 515 U.S. at 483-84 (finding that discipline in the form of segregated confinement for 30 days did not implicate a liberty interest requiring due process prior to its imposition).

82. 419 U.S. 565, 575 (1975). *But see* Paul v. Davis, 424 U.S. 693 (1976) (holding that harm to reputation in and of itself is not a liberty deprivation).

83. *Id.* at 574.

found a liberty interest in avoiding school corporal punishment, described as "licks with a paddle while being held over a table in the principal's office."[84] The *Ingraham* Court found a liberty interest based on the physical restraint involved and the "infliction of appreciable pain."[85] In addition, the *Goss v. Lopez* Court found that a student's liberty right is violated in the absence of notice and a hearing prior to suspension or expulsion,[86] whereas the *Ingraham* Court held that no process is due prior to administering corporal punishment because state tort remedies are available *post facto*.[87]

C. Criminal Procedure Cases Involving Bodily Integrity

The Court has been quite inconsistent in defining the liberty interest at stake when a state actor invades a suspect's privacy by physically penetrating his body without his consent to procure evidence of criminal activity. In *Rochin v. California*,[88] the Court defined liberty in terms of whether the government action "offend[s] those canons of decency and fairness which express the notions of justice of English-speaking peoples[,]. . .those personal immunities which . . . are so rooted in the traditions and conscience of our people as to be ranked as fundamental,"[89] to avoid offending the "community's sense of fair play and decency"[90] or "shocking the conscience" of the Court.[91] The Court looked to "considerations deeply rooted in reason" such as "the maxims, rules, and principles" of traditional decisions, to avoid subjectivity.[92] The *Rochin* Court found that force-pumping a suspect's stomach to obtain evidence of morphine possession implicated a liberty interest in bodily integrity akin to the liberty interest in avoiding coerced confessions,[93] because it was "too close to the rack and the screw to permit of constitutional differentiation."[94]

Fourteen years later, the Court changed its method for defining liberty in *Schmerber v. California*,[95] where the state obtained evidence of drunk driving by extracting blood from the suspect's body against his will. The

84. 430 U.S. 651, 657 (1977).
85. *Id.* at 674. The Court's departure from a reputation-based liberty interest may be due to the fact that *Paul v. Davis*, 424 U.S. 693 (1976), was decided in the session between *Goss* and *Ingraham*.
86. *Goss*, 419 U.S. at 575.
87. *Ingraham*, 430 U.S at 676.
88. 342 US. 165, 169 (1952).
89. *Id.* at 169 (internal quotations and citations omitted).
90. *Id.* at 173. Douglas balked at this definition based on a review of state laws showing that only four states would exclude evidence obtained in this manner, undermining the majority's position that forced stomach pumping to obtain evidence violates the "decencies of civilized conduct." *Id.* at 177-78 (Douglas, J., concurring).
91. *Id.* at 172.
92. *Id.* at 171.
93. *Id.* at 173-74.
94. *Id.* at 172. Today, *Rochin* would be analyzed as a Fourth Amendment case. *See* Albright v. Oliver, 510 U.S. 266, 173 (1994); Graham v. O'Connor, 490 U.S. 386, 393-95 (1989).
95. 384 U.S. 757 (1966).

Court defined liberty by reference to cases interpreting specific provisions of the Bill of Rights that were implicated by the facts, i.e., the Fourth and Fifth Amendments in *Schmerber*. The *Schmerber* Court defined liberty under the Fourth Amendment as protecting "personal privacy and dignity against unwarranted intrusion by the State. . . against arbitrary intrusion by the police . . . basic to a free society."[96] Based on this definition, the Court found that compulsory blood tests constitute a "search" under the Fourth Amendment, implicating a liberty interest.[97] The Court then applied the Fourth Amendment balancing test to find that the state's need for evidence outweighed the suspect's liberty interest, relying on medical evidence concerning minimal health risks of blood extraction and the prompt loss of evidence due to the speed of alcohol metabolism.[98]

Regarding the Fifth Amendment, the Court stated that liberty has been defined by reference to "the respect the government – state or federal – must accord to the dignity and integrity of its citizens . . . to respect the inviolability of the human personality," but found that the privilege has been limited to the "cruel, simple expedient" of a forced confession.[99] Based on "[h]istory and a long line of authorities,"[100] the Court held that the Fifth Amendment protects against self-incrimination of a "testimonial or communicative nature,"[101] not withdrawal of blood, which constitutes "real or physical evidence."[102] Admitting the blood test results into evidence therefore did not implicate a liberty interest under the Fifth Amendment.[103]

The Court modified its method of interpreting liberty again in *Winston v. Lee*,[104] another physically invasive evidence-production case, where the Court focused on the suspect's "expectation of privacy," including the "right to be let alone – the most comprehensive of rights and the right most valued by civilized men."[105] Based on this broad definition, the Court found that surgically removing a bullet from a suspect's body against his will implicates a liberty interest, because "compelled surgical intrusion implicates expectations of privacy and security."[106] Applying the Fourth Amendment balancing test, the Court found that "extensive probing and retracting of muscle tissue," risks of infection, and other "uncertain" medical risks tipped the balance in favor of the suspect, particu-

96. *Id.* at 767.
97. *Id.*
98. *Id.* at 769-72.
99. *Id.* at 762-63.
100. *Id.* The Court also referred to this analytical basis as "history and precedent." *Id.* at 767. The Court distinguished non-communicative evidence such as lie detector test results since they are "directed to eliciting responses which are essentially testimonial." *Id.* at 764.
101. *Id.* at 761.
102. *Id.* at 764.
103. *Id.*
104. 470 U.S. 753, 758 (1985)
105. *Id.* at 758 (1985) (citations omitted).
106. *Id.* at 759.

larly since the state had eyewitness evidence of the suspect's guilt, rendering the physical evidence less critical to the state's case.[107]

D. Substantive Due Process Cases

The Supreme Court originally defined liberty for Fourteenth Amendment substantive due process purposes in *Meyer v. Nebraska:*[108]

> [L]iberty . . . denotes not merely freedom from bodily restraint but also the right of the individual to contract, engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.[109]

The *Meyer* Court struck down a state law prohibiting children who had not yet passed the eighth grade from learning a foreign language, voicing concern about the irreversible lost intellectual opportunity: "It is well known that proficiency in a foreign language seldom comes to one not instructed at an early age."[110] Two years later, the Court struck down a law prohibiting private schooling in *Pierce v. Society of the Sisters of the Holy Names of Jesus and Mary,*[111] holding that liberty includes the right of parents to control their children's educational upbringing, and that a parent's choice to send a child to private school was constitutionally protected, because private schooling is not inherently harmful.

In *Griswold v. Connecticut,*[112] the Court found that "penumbras" or "zones of privacy" formed by emanations of enumerated rights which "help give them life and substance"[113] preclude a state from criminalizing spouses' use of contraceptives. The Court defined liberty broadly to proscribe "government invasions of the sanctity of a man's home and the privacies of life,"[114] and interference with "personal rights that are funda-

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107. *Id.* at 761-63.
108. 262 U.S. 390 (1923).
109. *Id.* at 399.
110. *Id.* at 403.
111. 268 U.S. 510 (1925). In *Pierce v. Society of Sisters*, the Court struck down a state law that required all children to attend public schools between the ages of eight and sixteen, because it infringed on the parents' prerogatives regarding their children's education.
112. 381 U.S. 479 (1965). The "principle" of *Meyer* and *Pierce* was specifically reaffirmed. *Id.* at 483.
113. *Griswold,* 381 U.S. at 484 (citing Poe v. Ullman, 367 U.S. 497, 516-22 (1961) (Douglas, J., dissenting)). Douglas had been on the Court at the time *Rochin* was decided and had lived through the *Lochner* Era. He was apparently committed to avoiding substantive due process analysis as a way of avoiding *Lochner* Era philosophy. *See* Roe v. Wade, 410 U.S. 113, 167 (1973) (Stewart, J. concurring) ("In view of what had been so recently said in [Ferguson v. Skrupa, 372 U.S. 726 (1963), which sounded the death knell of substantive due process], the Court's opinion in Griswold understandably did its best to avoid reliance on the Due Process Clause of the Fourteenth Amendment as the ground for its decision."). Justice Douglas therefore relied on a right of privacy implicit in many of the provisions of the Bill of Rights, including the First, Third, Fourth, and Fifth Amendments. *Griswold,* 381 U.S. at 484-85.
114. *Id.* (internal quotations and citations omitted).

mental [and] so rooted in the conscience of our people to be ranked as fundamental,"[115] relying on language from the incorporation cases.[116]

Roe v. Wade developed liberty analysis enormously by providing some objective elements for defining "fundamental rights" grounded in "history and tradition," at least in the context of abortion and presumably other medical contexts. In defining a woman's right to abortion as "fundamental," the Court looked to "medical and medical-legal history,"[117] what "history reveals about man's attitude toward the abortion procedure over the centuries,"[118] and the "history of abortion"[119] with an open, objective mind "free of emotion and predilection."[120] The Court considered numerous legislative facts, including the physical and mental health impact of forced motherhood, and the psychological harm that can result from a "distressful life and future," including the "stigma of unwed motherhood."[121]

The Court declared that "history and tradition" is the cornerstone of substantive due process liberty analysis in *Moore v. City of East Cleveland.*[122] In this case, the Court defined liberty to include living with extended family members because the "sanctity of the family" is "deeply rooted in this Nation's history and tradition," and "[i]t is through the family that we inculcate and pass down many of our most cherished values, moral and cultural."[123] The Court struck down a zoning ordinance that defined family in reliance on a Caucasian social construct of "family," which prevented extended family members from living together for popu-

115. *Id.* at 486 (Goldberg, J., concurring) (internal quotations and citations omitted). The Court relied on the incorporation cases, as well as *Meyer* and *Pierce, inter alia.*

116. *Id.* at 487, 493 (citations omitted). Justice Harlan concurred, but on substantive due process grounds. *Id.* at 500 (Harlan, J., concurring; citations omitted). Justice Goldberg, joined by Chief Justice Warren and Justice Brennan, relied on the Ninth Amendment as textual authority to protect non-textual rights such as privacy. *Id.* at 486. Justice Black, joined by Justice Stewart, dissented, finding that no constitutional provision authorized the Court to make "natural law," generalized findings of arbitrariness to strike down state laws, and that such an interpretation was an improper "transfer" of power from the legislature to the judiciary. *See id* at 508-513, 525-526 (Black, J., dissenting). *See also id* at 527-531 (Stewart, J., dissenting).

117. *Roe,* 410 U.S. at 117.

118. *Id.* at 117.

119. *Id.* at 129. Contemporary history supported criminalizing abortion, so the Court traced history as far back as the Persian Empire and Roman Era to find support for a "right" of abortion. *Id.* at 130. Justice Blackman explained that abortion was available in colonial America from 1620 to the Civil War, and that criminalizing abortion was relatively new in legal history. Ironically, the Court later announced that recent history (the past half century) is the most relevant in analyzing liberty rights, demonstrating how subjective the relevant "history and tradition" can be. *See* Lawrence v. Texas, 539 U.S. 558, 571-72 (2003).

120. *Roe,* 410 U.S. at 116.

121. *Id.* at 153.

122. 431 U.S. 494, 503 (1977). The Court cited Justice Harlan's dissent in *Poe v. Ullman* and his concurrence in *Griswold v. Connecticut* in defining fundamental rights as those rooted in "history and tradition." *Id.* at 501.

123. The Court held that the tradition of uncles, aunts, cousins, and especially grandparents, sharing a household along with parents and children has roots equally venerable as the nuclear family. *Id.* at 504.

lation density control purposes.[124] The Court relied in part on census reports and other contemporary social data to support its broader definition of "family,"[125] and recognized the importance of progressive and pluralistic definitions of liberty based on improvements in social understanding, that "tradition is a living thing," and that American legal precedent supports *breaking* tradition where necessary to further social justice.[126]

By 1986, a number of fundamental rights had been constructed based on broad definitions of liberty.[127] In *Bowers v. Hardwick*,[128] a majority of the Court narrowed the definition of liberty relative to gay men's privacy rights by framing the issue presented as "whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy and hence invalidates the laws of the many States that still make such conduct illegal and have done so for a very long time."[129] The Court's narrow issue-framing choice foretold its conclusion, since a "right of sodomy" could not be characterized as "implicit in the concept of ordered liberty,"[130] or "deeply rooted in this Nation's history and tradition."[131]

In *Planned Parenthood of Southeastern Pennsylvania v. Casey*,[132] the Court returned to a more abstract definition of "liberty" in reaffirming the right of abortion, and articulated a number of elements relevant to liberty interpretation. The Court stated that our laws and tradition afford constitutional protection to "personal decisions" relating to marriage, procreation, contraception, family relationships, child rearing, and education, and that the state cannot enter the "private realm of family life" or interfere with the "most intimate and personal choices a person may

124. *Id.* at 504. The concurring opinion by Justice Brennan, joined by Justice Marshall, pointed out the disparate racial impact this ordinance would have on black families, who much more frequently lived in extended families. *Id.* at 510 n.9.

125. *Id.* at 505 n.14 (reviewing census data, *inter alia*). *See also id.* at 509-10 nn.6-9 (Brennan, J., concurring) (reviewing race data on families' composition, including the fact that 48% of households with an elderly black woman as head of household included children who were not her offspring, whereas only 10% of similar white households contained children not the offspring of the head of household).

126. Historical teachings include "traditions from which it developed as well as the traditions from which it broke . . ." *Id.* at 501 (quoting Poe v. Ullman, 367 U.S. 497, 542-543 (1961) (Harlan, J., dissenting)).

127. The fundamental rights recognized at this time were categorized as: the right to control one's children's upbringing and education; the right to family autonomy; the right to procreate; the right to marry; the right to obtain contraception; and the right to obtain an abortion. *See* Bowers v. Hardwick, 478 U.S. 186, 190 (1986).

128. In this 5-4 decision, the dissent vehemently disagreed with the majority's choice of framing the issue. *See id.* at 200 (Blackmun, J., dissenting) ("[T]he majority has distorted the question this case presents.").

129. *Id.* at 190.

130. *Id.* at 191-92 (quoting Moore v. City of East Cleveland, 431 U.S. 494, 503 (1977)).

131. *Id.* at 192 (quoting *Moore*, 431 U.S. at 503). The Court found that none of the fundamental rights recognized at that time (childrearing, education, procreation, marriage) bore any resemblance to the claimed fundamental right of sodomy. *Id.* at 190. The Court therefore applied rational basis review, finding that the law was rationally related to Georgia's "notions of morality." *Id.* at 196.

132. 505 U.S. 833 (1992).

make in a lifetime."[133] The Court focused on individuals' interest in personal autonomy, including choice of beliefs, reminiscent of the *Meyer* Court's protection of intellectual and educational autonomy.[134] Other elements the Court considered were: bodily integrity, including the physical and emotional pain involved with forced motherhood;[135] medical facts relevant to the liberty interest at stake;[136] expert witnesses' opinions about the real-life consequences of the challenged provisions;[137] individual or societal reliance on the established right of abortion;[138] and respect for *stare decisis* tempered by the need to reverse prior rulings when they "come to be seen so clearly as error."[139] The *Casey* Court engaged a multi-dimensional analysis to support its "principled"[140] decision in an apparent recognition of the need for more objective judicial review.

In *Washington v. Glucksberg*,[141] the Court returned to a narrow definition of liberty, framing the issue as whether there is a fundamental right to assisted suicide.[142] The Court relied on the fact that forty-four states and relevant European jurisdictions criminalize assisted suicide, noting that "[t]he primary and most reliable indication of [a national] consensus is . . . the pattern of enacted laws,"[143] and it is the "norm among western

133. *Id.* at 851.

134. *Id.* The Court stated: "At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State." Justice Stevens put it this way: "Our whole constitutional heritage rebels at the thought of giving government the power to control men's minds." *Id.* at 915 (Stevens, J., concurring in part and dissenting in part) (quoting Stanley v. Georgia, 394 U.S. 557, 565 (1969)).

135. *Id.* at 852-53.

136. *Id.* at 860 ("We have seen how time has overtaken some of *Roe's* factual assumptions: advances in maternal health care . . . and advances in neonatal care have advanced viability. . . ."). *See also* Stenberg v. Carhart, 530 U.S. 914, 923-29 (relying extensively on medical evidence to conclude that Nebraska's partial birth abortion law created an "undue burden" on the right of abortion).

137. *Id.* at 888-92 (citing studies conducted by the American Medical Association and other studies exposing facts about family violence).

138. *Id.* at 855-56.

139. *Id.* at 854. The Court referred to *West Coast Hotel* and *Brown v. Board of Education*, which overruled *Lochner v. New York* and *Plessy v. Ferguson*, respectively, because the social facts had changed. *See id.* at 861-64. In *Casey*, the rejected social facts include the common law understanding of a woman's role in the family and the principle that women had no legal existence separate from her husband. *Id.* at 896-97.

140. The Court used the term "principle(s)" or "principled" twelve times in just two pages of its decision while discussing its liberty analysis methodology. *Id.* at 865-66. The Court was clearly seeking some concrete standards to support its decision regarding this politically hot topic, in recognition that its legitimacy was at stake and could be undermined by frequent reversal of precedent. *Id.* at 867 ("[T]o overrule under fire in the absence of the most compelling reason to reexamine a watershed decision would subvert the Court's legitimacy beyond any serious question.").

141. 521 U.S. 702 (1997).

142. The Court stated that the "first issue to be resolved is whether there is a liberty interest in determining the time and manner of one's death." *Id.* at 722. The Court's choice of issue-framing restricted the definition of liberty "to rein in the subjective elements that are necessarily present in due-process judicial review." *Glucksberg*, 521 U.S. at 722.

143. *Id.* at 711 (quoting Stanford v. Kentucky, 492 U.S. 361, 373 (1989)).

democracies."[144] Therefore, the claimed right to assisted suicide has no "place in our Nation's traditions."[145]

The Court engaged a more abstract definition of liberty once again in *Lawrence v. Texas*, and re-framed the *Bowers* issue as "whether the petitioners were free as adults to engage in [sodomy] in the exercise of their liberty."[146] Liberty was defined to include freedom of thought, belief, expression, and certain intimate conduct.[147] The Texas sodomy law was found to invade the "most private" human conduct in the "most private" of places, the home,[148] leading the Court to conclude that the *Bowers* decision "failed to appreciate the extent of the liberty at stake."[149] The *Lawrence* Court did not interpret liberty by relying solely on history and tradition; the Court acknowledged social condemnation of sodomy and "respect for the traditional family," but stated that its obligation was to "define the liberty for all, not mandate our own moral code."[150]

In defining liberty to include protection of sodomy, the Court relied on objective facts, such as the fact that there is no longstanding precedent criminalizing sodomy *per se* and the fact that early American sodomy laws were directed at non-procreative sex, not homosexuality.[151] The Court also relied on the state law trend to abolish criminal sodomy[152] and a "history of non-enforcement" of existing sodomy laws, and announced that the laws of the past half-century are the most relevant in determining "history and tradition."[153] In addition, history and tradition are a starting point, but not the ending point, of liberty analysis:[154] *stare decisis* is "not an inexorable command,"[155] and where precedent has sustained "serious erosion,"[156] criticism from "other sources," such as sentiment expressed by state law and foreign law, may trump precedent in liberty interpreta-

144. *Id.* at 711 n.8. The Court traced the history of legal prohibitions from the early thirteenth century. *Id.* at 711-19.

145. *Id.* at 723.

146. Lawrence v. Texas, 539 U.S. 558, 564 (2003).

147. *Id.* at 562.

148. *Id.* at 567.

149. *Id.* at 567. The Court stated: "To say that the issue in *Bowers* was simply the right to engage in certain sexual conduct demeans the claim the individual put forward, just as it would demean a married couple were it to be said that marriage is just about the right to have sexual intercourse." *Id.*

150. *Id.* at 571.

151. *Id.* at 568. The Court stated: "Far from possessing 'ancient roots,' American laws targeting same-sex couples did not develop until the last third of the 20th century." *Id.* at 570.

152. *Id.* at 573 (citations omitted). The Court stated that before 1961, all 50 states had outlawed sodomy, that at the time *Bowers* was decided, 24 states and the District of Columbia had laws prohibiting sodomy, but that at the time *Lawrence* was decided, that number had been reduced to 13. *Id.*

153. *Id.* at 571-72.

154. *Id.* at 572 (quoting County of Sacramento v. Lewis, 523 U.S. 833, 857 (1998) (Kennedy, J., concurring).

155. *Id.* at 577-78 (citations omitted).

156. *Id.* at 572. Justice Scalia argued that *Roe* and *Casey* had been "eroded" by *Glucksberg's* holding that only fundamental rights deeply rooted in the country's history and tradition qualify for anything other than rational basis review. *Id.* at 599 (Scalia, J., dissenting).

tion.[157] The Court clarified that *Bowers* (unlike *Roe v. Wade*) had not induced "individual or societal reliance" that could mitigate against reversal because reversal would create "uncertainty" in the law.[158] In addition, the stigma and potential for discrimination resulting from violation of the Texas criminal statute animated the Court: the sodomy law "demeans the lives of homosexuals," and is an "invitation to subject homosexual persons to discrimination."[159]

III. ELEMENTS OF LIBERTY ANALYSIS DERIVED FROM SUPREME COURT PRECEDENT

[A] decision without principled justification [is] no judicial act at all. . . . [T]he justification claimed must be beyond dispute. . . grounded truly in principle, not as compromises with social and political pressures. . . .[160]

Although the Court has created some standards for interpreting liberty, as set forth in Section II, it has more frequently vacillated among various interpretive methods, and has expanded and retracted the meaning of liberty throughout the past century. However, the Court has considered certain elements repeatedly throughout the history of liberty jurisprudence. These elements are identified in this Section.

A. History And Tradition

Due process . . . has represented the balance . . . struck between [individual] liberty and the demands of organized society. . . . [H]aving regard to what history teaches are the traditions from which it developed as well as the traditions from which it broke.[161]

The Court has traditionally relied upon history, legal traditions, and precedent to determine proper constitutional limits to state action infringing on liberty. "History and tradition" analysis has often involved tracing current law to its origins to determine whether the claimed liberty interest is "deeply rooted in this Nation's History and tradition,"[162] and

157. *Id.* at 576. This included an opinion by the European Court of Human Rights, authoritative in forty-five nations and state constitutional protection of homosexual activity. The Court criticized Chief Justice Burger's rendition of legal history in *Bowers* as imbalanced and inaccurate, because it ignored many international authorities contradicting his rendition. *Id.* at 572-73. The Court referenced a Model Penal Code provision promulgated in 1955 advising against criminal penalties for private consensual sex, a 1957 British Parliament committee report recommending repeal of laws punishing homosexual conduct, the Wolfenden Report: Report of the Committee on Homosexual Offenses and Prostitution (1963), and the fact that Parliament enacted the report's recommendations 10 years later, as well as decisions by the European Court of Human Rights. *Id.*

158. *Id.* at 577. Indeed, the Court stated that *Bowers* itself created uncertainty. *Id.*

159. *Id.* at 575. Although a misdemeanor, convictions result in notations on defendants' records and registration as a "sex offender" in some states. *Id.* at 575-76.

160. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 865-66 (1992) (emphasis added.)

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

162. Moore v. East Cleveland, 431 U.S. 494, 503 (1977). *See also* Griswold v. Connecticut, 381 U.S. 479, 506 (1965).

"so rooted in the traditions and conscience of our people as to be ranked as fundamental."[163] "History and tradition" has been defined to include "objective" criteria such as legal precedent and recorded history,[164] as well as the maxims and rules of traditional decisions.[165] To this end, "history and tradition" has included the Court's own precedent,[166] English common law,[167] the Framers' intent,[168] political philosophy,[169] the laws of the United States,[170] and foreign law.[171]

But history and tradition may not comport with contemporary notions of justice, medical or social facts, or even basic equality among Americans. American history includes slavery and other forms of gross racism,[172] treating women and children as property of men,[173] and discrimination based on sexual orientation[174] and national origin.[175] There are therefore important limitations to relying on history and tradition in defining liberty in contemporary society. The Court's obligation to follow precedent as a stabilizing force in jurisprudence must be tempered by its concomitant obligation to reverse precedent where "a prior judicial ruling should come to be seen so clearly as error that its enforcement was for that very reason doomed."[176] History itself proves that what once was a "natural" and "self-evident" ordering may later come to be seen as an "artificial and invidious constraint on human potential and freedom."[177] Without an eye to cultural and human progression, putting stock in "tra-

163. *See, e.g., Griswold*, 381 U.S. at 487 (Goldberg, J., concurring) (quoting Snyder v. Commonwealth of Massachusetts, 291 U.S. 97, 105 (1934)).

164. *See* Duncan v. Louisiana, 391 U.S. 145, 161 (1968) (referring to precedent as "objective criteria" when it consists of "the existing laws and practices of the Nation" and to the fact that 49 of 50 states subject suspects to criminal trials without a jury in some instances).

165. *See* Rochin v. California, 342 U.S. 165, 171 (1952).

166. *See, e.g.*, Lawrence v. Texas, 539 U.S. 558, 564-68 (2003).

167. *See, e.g.*, Benton v. Maryland, 395 U.S. 784, 795 (1969).

168. *See, e.g.*, Malloy v. Hogan, 378 U.S. 1, 5 (1964).

169. *See, e.g.*, W. Coast Hotel v. Parrish, 300 U.S. 379 (1937); Lochner v. New York, 198 U.S. 45 (1905).

170. *See infra* Section III.D.

171. *See infra* Section III.F.

172. *Compare* Dred Scott v. Sandford, 60 U.S. 393 (1856), *and* Plessy v. Ferguson, 163 U.S. 537 (1896), *with* Loving v. Virginia, 388 U.S. 1 (1967), *and* Brown v. Bd. of Educ., 347 U.S. 483 (1954).

173. For example, the *Casey* Court rejected the common law concept of women having no legal status separate from her husband's, noting that as recently as 1961, women's presumed role in the family precluded her from having "full and independent legal status under the Constitution." Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 897 (1992) (quoting Hoyt v. Florida, 368 U.S. 57, 62 (1961)). The Court stated: "These views, of course, are no longer consistent with our understanding of the family, the individual, or the Constitution." *Id.* The Court went on to say that Pennsylvania's spousal notification provision "embodies a view of marriage consonant with the common-law status of married women but repugnant to our present understanding of marriage and of the nature of the rights secured by the Constitution." *Id.* at 898.

174. *See, e.g.*, Bowers v. Hardwick, 478 U.S. 186 (1986).

175. *See, e.g.*, Plyer v. Doe, 457 U.S. 202 (1982).

176. *Casey*, 505 U.S. at 854.

177. *See* Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 466 (1985) (Marshall, J., concurring in part and dissenting in part) (citations omitted).

dition" and precedent could entrench tyranny and perpetuate human injustices.[178] To this end, the Court has recognized that history and tradition may be a "starting point" in liberty analysis, but cannot be the "ending point" of the due process inquiry.[179]

Analyzing American history and tradition therefore involves determining historical legal precedent and then examining it against the backdrop of current societal norms and expectations to decide whether reasons exist to depart from precedent. In practice, this has meant reviewing progressive views of the nature of the liberty interest claimed; in-depth analysis of bodily integrity and all of its ramifications in contemporary society; medical, psychological, and social facts; and progressive cultural values, often manifested by state and foreign law trends, particularly if the trends demonstrate a rejection of precedent, and reversal would not undermine individual or societal reliance on previously-established liberty rights.[180] In addition, the laws and traditions of recent history – the past half century – are the most relevant to liberty analysis.[181] History and tradition should be considered a factor in liberty analysis, but not the sole criterion for defining liberty.

B. The Nature of the Right: Personal Autonomy, Intellectual Freedom, and Intimacy

> *At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.*[182]

The Court has consistently emphasized that the core of liberty is the individual's right to freedom from government interference with personal autonomy,[183] including intellectual development[184] and intimate relationships,[185] as means of self-determination and discovering for oneself the meaning of life.[186] Rights deemed "fundamental" under the Liberty Clause have therefore revolved around private, personal decisions relat-

178. *See, e.g.*, State v. Mann, 13 N.C. 263 (1829) (indictment for shooting slave reversed based on precedent), *superseded by* U.S. Const. amends. XIII, XIV, XV, *recognized in* Rembert v. Monroe Twp. Bd. of Educ., No. 95-4818 (JEI), 1997 WL 189318 (D.N.J. Apr. 14, 1997). *See also* Dred Scott v. Sanford, 60 U.S. 393 (1856) (also superseded by the Reconstruction Amendments).

179. "[H]istory and tradition are the *starting point* but not in all cases the *ending point* of the substantive due process inquiry." County of Sacramento v. Lewis, 523 U.S. 833, 857 (1998) (Kennedy, J., concurring) (emphasis added).

180. *See* Lawrence v. Texas, 539 U.S. 558, 575-77 (2003).

181. *Id.* at 571-72.

182. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 851 (1992).

183. *See, e.g.*, *Casey*, 505 U.S. 833 (1973); Roe v. Wade, 410 U.S. 113 (1973); Griswold v. Connecticut, 381 U.S. 479 (1965).

184. *See, e.g.*, Pierce v. Soc'y of the Sisters of the Holy Names of Jesus and Mary, 268 U.S. 510 (1925); Meyer v. Nebraska, 262 U.S. 390 (1923).

185. *See, e.g.*, Lawrence v. Texas 539 U.S. 558 (2003); Moore v. City of East Cleveland, 431 U.S. 494 (1977); Griswold v. Connecticut, 381 U.S. 479.

186. Lawrence v. Texas, 539 U.S. 558; Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1973).

ing to marriage; procreation; contraception; family relationships; child rearing, including educational decisions impacting intellectual development; bodily autonomy; abortion; sexual privacy; private spaces; and reputation or "stigma."[187]

State laws interfering with personal and intimate relationships have often been viewed as ultra vires, because they interfere with self-determination and human bonding, which in turn impacts emotional and spiritual growth, intellectual development, and often economic security. For example, the Court has explained that family relationships are particularly worthy of protection from state interference, because they "contribute so powerfully to the happiness of individuals,"[188] and because it is through the family that we "inculcate and pass down many of our most cherished values, moral and cultural."[189] Respect for the bonds between extended family members, such as cousins, aunts, and uncles, are recognized as critical relationships in terms of economic security and emotional support, and are therefore largely beyond the reach of state interference absent compelling justification.[190] Preserving the parent-child relationship is an important government concern, in recognition of the value inherent in close family ties and family harmony.[191] Sexual relationships and the personal bonds and emotional support they create are protected largely for the same reasons.[192]

State interference with intellectual freedom has similarly been declared repugnant to the Constitution since the origins of substantive due process. As early as 1897, the Court stated that liberty includes the "right of the citizen to be free in the enjoyment of his faculties; to be free to use them in all lawful ways . . . ."[193] As explained by the Court in the seminal case of *Meyer v. Nebraska*, liberty includes the right to acquire useful knowledge, which is "of supreme importance" to the American people.[194] Even more broadly, the Court has stated: "Our whole constitutional heritage rebels at the thought of giving government the power to control men's minds."[195]

Protecting private spheres such as individuals' psyches, bodies,[196] and

187. *See, e.g.*, *Roe*, 410 U.S. at 152-153.

188. Bowers v. Hardwick, 478 U.S. 186, 205 (1986) (Blackmun, J., dissenting).

189. *See, e.g.*, *Moore*, 431 U.S. at 503-504. *See also, e.g.*, Morrissey v. Brewer, 408 U.S. 471, 482 (1972) (protection of association with friends and family).

190. *Moore*, 431 U.S. at 499 (When a city undertakes "intrusive regulation of the family . . . judicial deference . . . is inappropriate.").

191. *See, e.g.*, Parham v. J.R., 442 U.S. 584 (1979).

192. *See, e.g.*, *Lawrence*, 539 U.S. 558; *Griswold*, 381 U.S. 479.

193. Allgeyer v. Louisiana, 165 U.S. 578, 589 (1897).

194. 262 U.S. at 399-400. Note that the right was expressed as the teacher's right to teach and the parents' right to control the child's intellectual development. *Id.* at 400.

195. Stanley v. Georgia, 394 U.S. 557, 565 (1969). *See also* Wisconsin v. Yoder, 406 U.S. 205 (1972) (holding that a state has interest in protecting children from ignorance by enacting compulsory education laws, but state's interest can be overcome by parent's choice of educational limitations to protect their religious (Amish) values).

196. *See infra* Sec. III.C.

residences has always been a primary liberty concern.[197] The Court has relied on the potential damage to a woman's psyche if she could be forced to carry and bear an unwanted child to find that individual liberty is broad enough to encompass a woman's abortion decision.[198] The Court has sought to protect individuals from the psychological and social damage that can result from "stigma," such as protecting women from the stigma that can result from unwed motherhood,[199] protecting minors from stigma that can result from school suspension and expulsion,[200] protecting homosexuals from sigma and discrimination,[201] and protecting prisoners from stigma resulting from mandatory drug treatment.[202] Spousal and sexual choices are largely beyond the government's reach in recognition that these choices are directly related to developing a healthy psyche and self-identity, and obtaining emotional and spiritual support necessary for self-actualization.[203] The Court recently broadened this protection consistent with "an emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives."[204]

The expectation of privacy in one's home is central to the American concept of liberty. The Constitution protects citizens from governmental intrusion into private space, such as the Fourth Amendment's protection of "people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures,"[205] and the Due Process Clause's protection of "the most private conduct" in the "most private of places, the home."[206] In determining whether a right is fundamental and worthy of heightened protection, the Court should analyze the nature of the claimed interest by considering the various aspects of liberty identified in this Section.

C. Bodily Integrity: Physical Restraint, Pain, And Invasion

No right is held more sacred, or is more carefully guarded by the common law, than the right of every individual to the possession and control of his own person, free from all restraint and interference of others. . . . Personal decisions that profoundly affect bodily integrity,

197. *See, e.g., Lawrence*, 539 U.S. at 567; Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 851 (1992).

198. Roe v. Wade, 410 U.S. 113, 153 (1973).

199. *Id.*

200. Goss v. Lopez, 419 U.S. 565 (1975).

201. *Lawrence,* 539 U.S. at 575-76.

202. *See* Vitek v. Jones, 445 U.S. 480 (1980).

203. *See, e.g., Lawrence*, 539 U.S. 558.

204. *Id.* at 572.

205. Schmerber v. California, 757 U.S. 757, 767 (1966).

206. *Lawrence,* 539 U.S. at 567. *See also* Bowers v. Hardwick, 478 U.S. 186, 203-04 (1986) (Blackmun, J., dissenting) (The right to privacy "has recognized a privacy interest with reference to certain *places* without regard for the particular activities in which the individuals who occupy them are engaged.").

identity, and destiny should be largely beyond the reach of government.[207]

Physical autonomy, referred to as "bodily integrity," has consistently been protected as a liberty right integral to self-determination.[208] The Court has repeatedly prohibited the government from physical invasion of an individual's body,[209] including invasion with drugs.[210] In defining liberty, the Court has discussed control and autonomy over one's physical body in numerous cases, and has specifically analyzed health risks imposed by state action, such as the level of risk involved in forced immunization,[211] extracting a bullet from muscle tissue,[212] and forcing a woman to bear a child.[213] Physical pain and restraint have also been elements of liberty analysis, such as in relation to corporal punishment of children and forced medical procedures.[214] A constitutionally protected liberty interest in refusing unwanted medical treatment has been recognized for over a century,[215] grounded in the concept that individuals have the right to make decisions about their physical bodies.[216] In 1990, the Court recognized that this right extends to and individual's right to refuse medical treatment that will save or prolong his or her life.[217] The Court's liberty concern relating to bodily integrity also includes a liberty right to avoid antipsychotic medication[218] and a right to avoid physical restraint.[219] Although personal prerogatives regarding one's body do not always trump a

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207. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 926-27 (1992) (Blackmun, J., concurring in part and dissenting in part) (quoting Union Pac. R. Co. v. Botsford, 141 U.S. 250, 251 (1891)).

208. As stated by Justice O'Connor: "Because our notions of liberty are inextricably entwined with our idea of physical freedom and self-determination, the Court has often deemed state incursions into the body repugnant to the interests protected by the Due Process Clause." Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261, 287 (1990) (O'Connor, J., concurring).

209. *See* Rochin v. California, 342 U.S. 165 (1952); Winston v. Lee, 470 U.S. 753 (1985).

210. *See Cruzan,* 497 U.S. at 261; Youngberg v. Romero, 457 U.S. 307, 318-19 (1982); Vitek v. Jones, 445 U.S. 480, 493 (1980).

211. *See* Jacobson v. Massachusetts, 197 U.S. 11 1905).

212. *See* Winston v. Lee, 470 U.S. 753 (1985).

213. In *Casey*, the Court expressed concern about how pervasively state interference with a woman's right to choose invades the "private sphere of the family [and] . . . bodily integrity of the pregnant woman." *Casey,* 505 U.S. at 896.

214. *See Winston*, 470 U.S. at 761, 765; Ingraham v. Wright, 430 U.S. 651, 673-75 (1977); Schmerber v. California, 384 U.S. 757, 771-72 (1966).

215. *See Cruzan*, 497 U.S. at 278 (referring to *Jacobson*, 197 U.S. at 25-27). *See also Winston,* 470 U.S. at 758-59 ("[Bodily] intrusion may be 'unreasonable' even if likely to produce evidence of a crime.").

216. *See Jacobson*, 197 U.S. at 27-28. Note, however, that the medical risks of mandatory vaccination were subverted to the state's public health concern. *Id.*

217. *Cruzan*, 497 U.S. at 278.

218. *See, e.g.*, Washington v. Harper, 494 U.S. 210, 221-22 (1990) (holding that prisoners possess a significant liberty interest in avoiding unwanted antipsychotic medication).

219. *See, e.g.*, Youngberg v. Romero, 457 U.S. 307, 321 (1982) (holding that a retarded adult has a right to freedom from bodily restraint); Parham v. J.R., 442 U.S. 584, 600 (holding that a child has a substantial liberty interest in not being confined unnecessarily for medical treatment).

state's police power,[220] protection of bodily integrity has been a historic and important consideration in liberty analysis. Whether state action infringes on bodily integrity should be a necessary element of liberty analysis.

D. State Laws

The primary and most reliable indication of [a national] consensus is . . . the pattern of enacted [state] laws.[221]

Traditionally, the Court has relied on laws, opinions, and experiences of the various United States in determining the parameters of individual liberty rights. State laws reflect social norms[222] and create expectations of governmental conduct.[223] State laws often contain relevant legislative findings, typically grounded in natural and social science, past experience, public safety, contemporary public opinion, and the outcome of a risk-utility analysis concerning the balance struck between the individual's liberty interest and the state's interest.

If a majority of the states' laws contradict a claimant's asserted liberty right, this may persuade the Court that the challenged law is constitutional. For example, in the incorporation cases, state law majority rule was engaged to deny application of certain aspects of the Bill of Rights to the states.[224] In *Bowers v. Hardwick* and *Washington v. Glucksberg*, the Court reviewed the historical and current laws in the United States to determine whether the claimed rights to sexual privacy and suicide were of a nature deserving of exacting judicial scrutiny.[225] The *Bowers* Court relied on the fact that twenty-five states criminalized sodomy at that time, which undermined a historical and traditional "right" of sodomy.[226] The *Glucksberg* Court found that the "majority" of states criminalized as-

220. *See, e.g.*, Roe v Wade, 410 U.S. 113, 154-55 (holding that the state's interest in protecting life of viable fetus trumps woman's unfettered right to abortion); *Jacobson*, 197 U.S. at 37-38 (forced vaccine held constitutional).

221. Washington v. Glucksberg, 521 U.S. 702, 711 (1997) (quoting Stanford v. Kentucky, 492 U.S. 361, 373 (1989)).

222. *See, e.g.*, Lawrence v. Texas, 539 U.S. 558, 573 (2003) (discussing norms reflected by state law trends).

223. *See generally, e.g.*, Greenholtz v. Inmates of Neb. Penal and Corr. Complex, 442 U.S. 1 (1979); Wolff v. McDonnell, 418 U.S. 539 (1974).

224. *See, e.g.*, Duncan v. Louisiana, 391 U.S. 145, 161-62 n.33 (1968) (forty-nine of fifty states allow criminal trials without juries, but Louisiana was one of only three states that did not require trial by jury for crimes imposing sentences of more than six months).

225. *See Glucksberg*, 521 U.S. at 710-11 n. 8, 711-19 (reviewing the history of the law of assisted suicide); Bowers v. Hardwick, 478 U.S. 186, 192-94 nn.5-7 (1986).

226. The Court stated: "[T]o claim that a right to engage in [sodomy] is 'deeply rooted in this Nation's history and tradition' or 'implicit in the concept of ordered liberty' is, at best facetious. . . . [and] the sodomy laws of some 25 States should [not] be invalidated on this basis." *Bowers*, 478 U.S. at 194, 196. *See also* United States v. Carolene Products, 304 U.S. 144, 150 n.3 (1938) (relying in part on the fact that thirty-eight states had restricted the sale of filled milk to support its decision that public health policy justified deprivation of filled milk producers' property rights, upholding the Filled Milk Act of 1923 against various constitutional challenges).

sisted suicide,[227] and relied in part on this fact to conclude that there is no fundamental right to assisted suicide. Similarly, the *Ingraham* Court relied on the absence of a state law trend to abolish school corporal punishment to support its decision that no process is due prior to paddling public school students.[228]

On the other hand, if a majority of state laws support a claimed liberty right, the state laws may reflect a contemporary consensus, or a progressive understanding of liberty that should be scrutinized carefully,[229] particularly if there is a recent a trend in the law.[230] The right against double jeopardy was recognized as basic to ordered liberty in part because all states had banned it.[231] The right to abortion[232] and the right to engage in private consensual homosexual activity[233] were recognized despite their criminalization in many states, in part because the state law trend was to recognize these rights.[234] A growing state law trend that rejects the challenged law as unconstitutional should be considered most compelling where the legal trend results from strong social or scientific data, or reflects progressive concepts of privacy and self-actualization. State laws should be considered a necessary element of liberty analysis, because they reflect social norms as declared by representative bodies, and help to balance judges' personal views with social realities.

E. Legislative Facts: Scientific and Social Facts, Professional Opinion, And "Reasoned Judgment"

In each case "due process of law" requires an evaluation based on a disinterested inquiry pursued in the spirit of science, on a balanced

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227. *See Glucksberg*, 521 U.S. at 711 (reviewing state law against suicide as a starting point in deciding that there is no fundamental right to physician-assisted suicide. Forty-four states and the District of Columbia, as well as two territories prohibit or condemn assisted suicide, which is also the norm among western democracies, such as Austria, Spain, Italy, the United Kingdom, *inter alia.*). *Id.* n.8.

228. *See* Ingraham v. Wright, 430 U.S. 651, 660-63 (1977). Only two states had banned school paddling in 1977, Massachusetts and New Jersey. By 2008, however, twenty-nine states have banned school corporal punishment, as well as numerous foreign nations. *See, e.g.*, www.stophitting.com.

229. Williams v. Florida, 399 U.S. 78, 103 (noting that all states require a twelve-member jury to impose the death sentence); Benton v. Maryland, 395 U.S. 784, 794-95 (noting that all states prohibited double jeopardy).

230. *See e.g.*, Lawrence v. Texas, 539 U.S. 558, 573 (2003).

231. *Benton*, 395 U.S. at 794-95.

232. *See* Roe v. Wade, 410 U.S. 113 (1973). The Court clarified that criminalization of abortion, while in effect in many states for over a century at the time of the decision, had been controversial since ancient times, and that ancient religion did not bar abortion. *Id.* at 116, 130-40.

233. *See Lawrence*, 539 U.S. at 579.

234. *See Roe*, 410 U.S. at 118. The *Roe* Court found a right of abortion despite the fact that similar statutes existed in a majority of the states, in part because most federal and state courts that had recently heard challenges to state abortion laws had declared them unconstitutional, indicating a legal trend to protect the right to an abortion. *Id.* at 154. *See also Lawrence*, 539 U.S. at 571-72 ("[W]e think that our laws and traditions of the past half century are of the most relevance here. These references show an emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex.").

order of facts exactly and fairly stated, on the detached consideration of conflicting claims on a judgment not ad hoc and episodic but duly mindful of reconciling the needs both of continuity and of change in a progressive society.[235]

The Court has repeatedly expressed its commitment to "reasoned judgment"[236] and a "rational process"[237] grounded in "pragmatism,"[238] in defining liberty. Reviewing scientific[239] or other relevant facts as part of the liberty analysis furthers the Court's goal of producing neutral and well-reasoned constitutional decisions. In this regard, the Court has repeatedly relied upon medical facts, social facts, and professional opinion in defining liberty throughout the history of liberty jurisprudence.

As early as 1905, the Court in *Jacobson v. Massachusetts* upheld mandatory smallpox vaccine against a due process challenge[240] because, although the challenger offered proof of possible injurious effects of the vaccine, including possible death,[241] the Court found that the majority of medical professionals believed in the efficacy of the vaccine, which supported the state's decision to protect the public health with mandatory vaccination.[242] Similarly, in *United States v. Carolene Products*,[243] the Court upheld the Filled Milk Act based on an "extensive investigation," including congressional hearings in which "eminent scientists and health experts testified" regarding the injurious effects of filled milk on public health.[244] The Court in *Schmerber v. California* and *Winston v. Lee* relied

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235. Rochin v. California, 342 U.S. 165, 172 (1952) (emphasis added and citations omitted).

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

237. Poe v. Ullman, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting) (emphasis added). "[D]ue process follows the advancing standards of a free society as to what is deemed *reasonable and right.* It is to be applied . . . to *facts and circumstances as they arise. . . .*" *Id.*

238. *Casey*, 505 U.S. at 854. *See also* Winston v. Lee, 470 U.S. 753, 760-63 (1995) (giving objective factors to consider in characterizing the liberty infringement and deciding whether due process was violated, including health risks and other medical evidence).

239. Science denotes objective, systematically organized data that logically and reasonably leads to conclusions. MERRIAM-WEBSTER ONLINE, www.merriam-webster.com/dictionary/science. To the extent that scientific facts are contrary to a court's factual conclusions regarding a topic under review, the court should be bound to explain the discrepancy. To the extent that no clear scientific data exists, the court should defer to the legislatures with their "superior opportunity" to obtain scientific data concerning the issue being reviewed. Washington v. Glucksberg, 521 U.S. 702, 787-88 (1997) (Souter, J., concurring).

240. Jacobson v. Massachusetts, 197 U.S. 11 (1905). The plaintiff challenged the state law on privilege and immunities grounds as well as equal protection and due process.

241. *Id.* at 36.

242. *Id.* at 34. The Court also stated that it would be an improper invasion of the individual's rights if the vaccine had "no real or substantial relation to [the state's objectives of health, safety, or morals]." *Id.* at 31. *See also, e.g.*, Washington v. Harper, 494 U.S. 210, 226-27 (1990) (relying on psychiatric experts' findings in substantive due process analysis).

243. 304 U.S. 144 (1938).

244. *Id.* at 148-49. The Court summarized the congressional reports, finding that filled milk lacks important vitamins that whole milk contains. *Id.* at 149 n.2. The Court found: "There is now extensive literature indicating wide recognition by scientists and dieticians of the great importance to the public health of butter fat and whole milk as the prime source of vitamins, which are essential growth producing and disease preventing elements in the diet." *Id.* at 150 n.3 (relying on various academic articles and books). Note that the Fifth

on medical evidence to determine the degree of liberty infringement based on the level of health risk and pain to decide whether the state's interest in procuring criminal evidence justified invasion of a suspect's body.[245]

In *Roe v. Wade*, the Court relied extensively on the medical facts available at that time relating to fetal development and viability in creating constitutional doctrine convergent with the trimesters of pregnancy.[246] The *Roe v. Wade* Court also relied on professional opinion and resolutions of professional organizations knowledgeable about the subject matter, such as the American Medical Association ("AMA"), the American Public Health Association ("APHA"), and the American Bar Association ("ABA").[247] The *Casey* Court similarly relied on medical evidence, such as advances in neonatal care, in reaching its decision.[248] The *Casey* Court heard the testimony of numerous experts regarding the emotional and social impact on women if the state could require them to give their spouses notice prior to an abortion, including findings of the AMA and many other experts.[249] More recently, the *Stenberg v. Carhart* Court deferred to medical experts' testimony regarding increased medical risks to women resulting from Nebraska's partial birth abortion law to declare it unconstitutional.[250]

Similarly, the Court relied on social science experiments to uphold state laws requiring less than twelve jury members.[251] Justices Brennan and Marshall concurred in *Moore v. City of East Cleveland*,[252] to clarify that the challenged zoning ordinance rested on Caucasian concepts of a "nuclear family," a social construct and pattern in white suburbia that disproportionately harmed black families when used to define "fam-

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Amendment due process challenge in *Carolene Products* was brought as a property deprivation claim.

245. *See* Winston v. Lee, 470 U.S. 753, 763-65 (1985); Schmerber v. California, 384 U.S. 757, 769-72 (1966).

246. The Court held that the state's interest in the health of the mother becomes compelling at the end of the first trimester, and the state's interest in the life of the fetus becomes compelling at viability, which at that time was approximately the beginning of the third trimester (24–28 weeks into gestation). Roe v. Wade, 410 U.S. 113, 160, 163-65 (1973).

247. *Id.* at 141-47. The Court specifically noted that the AMA supported abortion under proper circumstances, based on medical safety, and that the principles of medical ethics do not prohibit the practice. *Id.* at 144 n.39. The APHA took the position in 1970 that abortion "must be readily available." *Id.* at 144. And, the ABA had approved a Uniform Abortion Act, indicating a legal trend to legalize abortion. *Id.* at 146-47. The Court considered the imminent psychological harm and emotional distress that may result from an inability to obtain an abortion, although it did not cite social science data in making this finding. *Id.* at 153.

248. *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 860 (1992).

249. *Id.* at 887-95. Ultimately, the Court found that the spousal notification requirement was too great a burden, because social research proved that it could lead to some women foregoing an abortion to avoid a violent reaction from their spouses. *Id.* The Court specifically clarified that, even if only "one percent" are restricted from obtaining an abortion, the proper focus is on "the group for whom the law is a restriction. . . ." *Id.* at 895.

250. Stenberg v. Carhart, 530 U.S. 914, 924-29 (2000).

251. *See* Williams v. Florida, 399 U.S. 78 (1970).

252. 431 U.S. 494 (1977).

ily."[253] The justices relied on a number of social science books and data to find that the government's failure to support the establishment of extended families may lead to increases in delinquency, crime, mental illness, and drug abuse – social realities that the Court must consider in order to make a well-reasoned constitutional decision.[254] The *Lawrence* Court found as a matter of historical fact that there was no longstanding precedent criminalizing sodomy, and to the extent sodomy prohibitions existed, they were aimed at non-procreative sex, not homosexuality, contrary to Justice Burger's rendition of history in *Bowers v. Hardwick*.[255]

These so-called "legislative facts,"[256] while not without controversy,[257] have been called necessary to "the continued success of the judiciary" because courts sometimes have access to facts that were not available to the legislature at the time the challenged law was enacted.[258] In addition, judicial review of legislative facts constrains judicial discretion by forcing judges to justify their decisions in light of available objective evidence: "[N]o rule of law should outlive its basis in legislative fact."[259]

Normatively, the Court should consider scientific or other facts relevant to liberty issues, to enhance objective and reasonable constitutional interpretation. At times, scientific or social facts have imposed an "obligation"[260] on the Court to reform legal doctrine and to overrule precedent because the "facts have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification."[261] In this vein, the Court overruled *Lochner v. New York* upon finding that the philosophical underpinnings and social facts upon which *Lochner* rested had been proven false, resulting in great social harm and a need for legal reform consistent with the true social facts.[262]

253. The zoning ordinance defining families to exclude "extended" families displayed a "depressing insensitivity toward the economic and emotional needs of a very large part of our society," i.e., black families. *Id.* at 508-10 nn.4-10.

254. *Id.* at 510 n.7.

255. Lawrence v. Texas, 539 U.S. 558, 570-73 (2003).

256. *See* Kenneth L. Karst, *Legislative Facts in Constitutional Litigation*, 1960 SUP. CT. REV. 75, 77 (1960).

257. *See, e.g.*, Suzanne B. Goldbar, *Constitutional Tipping Points: Civil Rights, Social Change, and Fact-Based Adjudication*, 106 COLUM. L. REV. 1955, 1957-64 (2006); Rachael N. Pine, *Speculation and Reality: The Role of Facts in Judicial Protection of Fundamental Rights*, 136 U. PA. L. REV. 655, 657 (1987); Ann Woolhandler, *Rethinking the Judicial Reception of Legislative Facts*, 41 VAND. L. REV. 111, 126 (1988). *See also* Allison Morse, *Good Science, Bad Law: A "Multiple Balancing" Approach to Adjudication*, 46 S.D. L. REV. 410, 410 (2000-2001) (arguing that the Court should consider natural and social science, to fulfill its mission to protect fundamental rights).

258. Karst, *supra* note 256, at 76-77.

259. *Id.* at 108.

260. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 864 (1992).

261. *Id.* at 854-55. *See also* Lawrence v. Texas, 539 U.S. 558, 578-79 (2003) ("[T]hose who drew and ratified the Due Process Clauses . . . knew times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom.").

262. *See, e.g.*, W. Coast Hotel v. Parrish, 300 U.S. 379 (1937). As stated by the *Casey* Court in 1992, "the interpretation of contractual freedom protected in *Adkins* rested on fundamentally *false factual assumptions* about the capacity of a relatively unregulated mar-

Similarly, in *Brown v. Board of Education*,[263] the Court relied on "modern authority" consisting of publications produced by psychologists, such as the *Journal of Psychology*, to reach its conclusion that segregation potentially damages African American children cognitively and motivationally.[264] The Court found that the social facts upon which *Plessy* was decided were "so clearly at odds with the facts apparent to the Court in 1954 that the decision to reexamine *Plessy* was on this ground alone *not only justified but required.*"[265]

The Court's historical commitment to social and scientific fact explains why, in the Court's own words, *Meyer* and *Pierce* survived while *Lochner* and *Plessy* suffered demise.[266] The judiciary has a duty to protect individual liberty from state infringement by educating itself about all available scientific or social facts relevant to the claimed liberty right before rendering its opinion. Advances in natural and social science compel the Court to reevaluate constitutional jurisprudence regularly to avoid "doctrinal anachronism discounted by [contemporary] society."[267]

F. Foreign And International Law

The right petitioners seek in this case has been accepted as an integral part of human freedom in many other countries. There has been no showing that in this country the governmental interest in circumscribing personal choice is somehow more legitimate or urgent.[268]

The Court has traditionally considered foreign law and international policy to interpret liberty. In *Jacobson v. Massachusetts*, the Court relied

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ket to satisfy minimal levels of human welfare. . . . The facts upon which the earlier case had premised a constitutional resolution of social controversy had proven to be untrue, and *history's demonstration of their untruth not only justified but required the new choice of constitutional principle* that *West Coast Hotel* announced . . . . [T]he clear demonstration that the facts . . . were different from those previously assumed warranted the repudiation of old law." *Casey*, 505 U.S. at 861-62 (emphasis added). Similarly, the Court found that *Brown v. Board of Education* addressed "facts of life" that were not understood at the time *Plessy v. Ferguson* was decided, which required a change in constitutional jurisprudence. *Id.* at 863.

263. 347 U.S. 483 (1952). *Brown* was an equal protection case, but the Court's analysis revolved around concepts of liberty created by the Fourteenth Amendment. The Court's focus was on the "right" of education and the effect of segregation on an African American child's psyche.

264. Brown v. Bd. of Educ., 347 U.S. at 494 n.11. The *Brown* Court repudiated the social facts upon which *Plessy* was based (the separate-but-equal doctrine) recognizing that legally-sanctioned segregation indeed places a "badge of inferiority" on African American children. The Court stressed that segregation "generates a feeling of inferiority . . . that may affect [Negro children's] hearts and minds in a way unlikely ever to be undone . . . [and creates a] sense of inferiority [that] affects the motivation of a child to learn . . . [and] has a tendency to (retard) the educational and mental development of Negro children." *Id.* at 494. *See also Casey*, 505 U .S. at 862-63.

265. *Id.* at 863 (emphasis added). "In constitutional adjudication as elsewhere in life, changed circumstances may impose new obligations, and the thoughtful part of the Nation could accept each decision to overrule a prior case as a response to the Court's constitutional duty." *Id.* at 864.

266. *Id.* at 861-64.

267. *Id.* at 855.

268. Lawrence v. Texas, 539 U.S. 558, 577 (2003).

on numerous European countries' compulsory vaccination laws to uphold an early Massachusetts law requiring smallpox vaccinations.[269] In the incorporation cases, the Court often looked to European law, including English, Greek, and Roman law, to determine the origins of the claimed rights.[270] Similarly, in *Bowers v. Hardwick*,[271] the Court relied in part on English common law to determine that engaging in homosexual sodomy does not deserve fundamental rights status.[272] Later, the *Lawrence* Court clarified that the European Convention on Human Rights decided in 1981 that homosexual activity was a protected human right, undermining the *Bowers* Court's "sweeping references" to a longstanding history and tradition of Judeo-Christian moral and ethical standards criminalizing sodomy.[273] The *Glucksberg* Court upheld Washington's law against assisted suicide, noting that a blanket prohibition on assisted suicide is the norm in western democracies,[274] and that data from the Netherlands demonstrates frightening misuse of euthanasia.[275]

The Court has recently defined constitutional rights in reliance on foreign law showing a "consensus" in relation to other vague constitutional clauses as well. For example, the Court has relied on foreign policy in Eighth Amendment cases to determine whether capital punishment of juveniles and retarded persons constitutes "cruel and unusual" punishment in step with "evolving standards of decency."[276] In *Roper v. Simmons*, the Court found that imposing the death penalty on juveniles violated the Eighth Amendment in part based on the "stark reality that the United States is the only country in the world" that sanctions the juvenile death penalty.[277] The overwhelming weight of international opinion disfavoring the juvenile death penalty did not control the constitutional decision, but provided "respected and significant" support for

269. 197 U.S. 11, 31-33 (1905). The Court cited statistics and laws from Denmark, Sweden, German states, Prussia, Romania, Hungary, Serbia, France, Italy, Spain, Portugal, Belgium, Norway, Austria, and Turkey to support its determination that the state law was valid under the police power despite its infringement on liberty. *Id.* at 32 n.1.

270. *See, e.g.*, Benton v. Maryland, 395 U.S. 784, 794-95 (1969).

271. 478 U.S. 186 (1969).

272. *Id.* at 903-04 nn.5-6 (listing state laws making sodomy illegal).

273. *Lawrence*, 539 U.S. at 572-73. The Court went on to note that the reasoning of *Bowers* has been consistently rejected in the European Court of Human Rights, and that "other nations, too, have taken action consistent with an affirmation of the protected right of homosexual adults to engage in intimate, consensual conduct." *Id.* at 576-77.

274. Washington v. Glucksberg, 521 U.S. 702, 711 n.8 (1997) (citing a Canadian case discussing laws in Austria, Spain, Italy, the United Kingdom, the Netherlands, Denmark, Switzerland, and France).

275. *Id.* at 734 (noting that one study found nearly 6,000 cases of "assisted suicide" where there was no explicit patient request or consent, leading one researcher to conclude that the "risk of [assisted suicide] . . . abuse is neither speculative nor distant").

276. *See, e.g.*, Roper v. Simmons, 543 U.S. 551, 560 (2005); Atkins v. Virginia, 536 U.S. 304, 312, 316 n.21 (2002) (noting that within the "world community," imposing the death penalty for crimes committed by mentally retarded persons is overwhelmingly disapproved, which supported the Court's finding of a "national consensus").

277. *Roper*, 543 U.S. at 575 (noting that the United States is one of only two countries that has failed to ratify the United Nations Convention on the Rights of the Child—the other country being Somalia).

the Court's own conclusion.[278]

The Court's use of foreign law and international policy to shape American constitutional law has drawn sharp criticism reminiscent of the judicial conflict in the incorporation cases, grounded in concerns about judicial bias and federalism.[279] Justice Scalia has referred to the Court's use of foreign law, *inter alia*,[280] to support a "national consensus" against the use of capital punishment for retarded persons as "the Prize for the Court's Most Feeble Effort to fabricate 'national consensus,'"[281] and criticized the Court for resting its opinion "obviously upon nothing but the personal views of its Members."[282] Justice Scalia similarly criticized the *Lawrence* Court for relying on foreign law, stating that the Court "should not impose foreign moods, fads, or fashions on Americans."[283] Justice Rehnquist has referred to the Court's reliance on foreign law, *inter alia*, as "antithetical to considerations of federalism . . . ."[284]

Despite the criticism about engaging foreign law to help interpret liberty and other human rights provisions of the Constitution,[285] recent Supreme Court opinions accurately depict the established tradition of reviewing foreign law and international policy to help interpret the American Constitution.[286] Foreign law and international human rights declarations may reveal Americans' expectations of liberty, such as in *Lawrence v. Texas*. Particularly where existing constitutional interpretation diverges from the world consensus, foreign law and international policy should be considered in interpreting the American Constitution's promise of liberty.

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278. *Id.* at 578.

279. *See supra* notes 13-15, 17, & 72 and accompanying text.

280. The Court also relied on opinion polls, and the views of professional and religious organizations. *Atkins*, 536 U.S. at 347 (Scalia, J., dissenting). Justice Scalia insinuated in *Lawrence*, for example, that the AALS had "largely signed on to the so-called homosexual agenda," indicating his concern that special interest groups' opinions and agendas have been relied upon by the Court in making constitutional decisions. *See* Lawrence v. Texas, 539 U.S. 558, 602 (2003) (Scalia, J., dissenting).

281. *Atkins*, 536 U.S. at 347 (Scalia, J., dissenting).

282. *Id.* at 337 (Scalia, J., dissenting).

283. *Lawrence*, 539 U.S. at 598 (Scalia, J., dissenting) (citations omitted).

284. *Atkins*, 536 U.S. at 322-23 (Rehnquist, J., dissenting) (arguing that punishment is a question of legislative policy, and that the reason state legislation is considered the clearest and most reliable objective evidence of contemporary values is because of the constitutional role legislatures play in expressing state policy).

285. *See also, e.g.*, Ernest A. Young, *Foreign Law and the Denominator Problem*, 119 HARV. L. REV. 148, 149 (2005). Professor Young argues that the Court factored foreign law into the denominator of the capital punishment equation to decrease the percentage of support for capital punishment in cases such as *Roper*, and that while considering foreign policy as persuasive authority in making policy choices, "counting noses" of countries opposed to capital punishment of certain individuals unjustifiably accords authoritative weight to worldwide numbers in interpreting the American Constitution. *Id.* at 149-53. Professor Young, like Scalia, argued that the Court's own moral predilections are the driving force behind cases such as *Roper*. *Id.* at 156. Professor Young also shared Rehnquist's and Scalia's concerns about separation of powers and federalism. *Id.* at 163-65.

286. "Over the course of nearly half a century, the Court has consistently referred to foreign and international law as relevant to its assessment of evolving standards of decency." Roper v. Simmons, 543 U.S. 551, 604 (2005) (O'Connor, J., dissenting) (citations omitted).

IV. THE DANGER OF INCONSISTENT LIBERTY ANALYSIS

The Court's power lies . . . in its legitimacy, a product of substance and perception that shows itself in the people's acceptance of the Judiciary as fit to determine what the Nation's law means . . . . The legitimacy of the Court would fade with the frequency of its vacillation.[287]

Inconsistent interpretive methods in liberty cases are not desirable. When the Court chooses definitions of liberty on a case-by-case basis, the risk is that similar liberty interests may be treated differently. The result is incoherent and unpredictable liberty analysis, which fails to provide Americans with a clear and stable understanding of their liberty rights and fails to engender trust in the judiciary. This Section demonstrates inconsistent liberty analyses in similar cases, resulting in unreliable liberty precedent, and argues that adopting the six element test proposed herein is a step toward more consistent liberty analysis and more reliable liberty decisions.

A. *STANLEY & MICHAEL H.*

In both *Stanley v. Illinois*[288] and *Michael H. v. Gerald D.*,[289] unwed fathers sought to have their relationships with their children declared protected liberty rights after losing custody[290] of their children through application of state statutory presumptions. The Court reviewed the two matters in 1972 and 1989, respectively.

Peter Stanley had lived with his children's mother intermittently for 18 years and had "sired and raised" three children with her.[291] When the mother died, state law presumed that Stanley was an unfit parent without a hearing or proof of neglect, based on the fact that he was not married to the children's mother.[292] The children were therefore declared wards of the state.[293] Stanley challenged the state law presumption as an unconstitutional interference with his liberty right to maintain relationships with his children. The state argued that its legal presumption that unmarried fathers are "unfit" parents was valid, because most unwed fathers are "unsuitable and neglectful" parents,[294] and that therefore, a blanket presumption was appropriate, rendering consideration of adjudicative facts

287. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 865-66 (1992).

288. 405 U.S. 645 (1972).

289. 491 U.S. 110 (1989).

290. In *Stanley*, Mr. Stanley had been living with his children intermittently throughout his 18 year relationship with their mom, and had control and custody of his children as a practical reality. *Stanley*, 405 U.S. at 646. In *Michael H.*, Michael had visitation rights, which are essentially partial custody and considered "joint custody" under some states' laws. *Michael H.*, 491 U.S. at 116.

291. *Stanley*, 405 U.S. at 650.

292. *Id.* at 646.

293. *Id.* at 650.

294. *Id.* at 654.

unnecessary.[295]

The *Stanley* Court focused on the nature of the interest at stake. Relying on the "importance of the family" and cases broadly construing family autonomy, such as *Meyer* and *Griswold*, the Court found that Stanley's interest in a relationship with his children was "cognizable and substantial."[296] The Court found that family relationships "unlegitimized by a marriage ceremony" were protected liberty interests because the bonds between non-marital children and their parents are "often as warm, enduring, and important as those arising within a more formally organized family unit."[297] The presumption against Stanley was declared unconstitutional:

> Procedure and presumption is always cheaper and easier than individualized determination. But when, as here, the procedure forecloses the determinative issues of competence and care, when it explicitly disdains present realities in deference to past formalities, it needlessly risks running roughshod over the important interests of both parent and child.[298]

To the contrary, the *Michael H.* Court[299] upheld a California law that created a presumption of paternity in favor of a mother's husband that could never be challenged by the child's biological father.[300] Michael and Carole began an adulterous affair in Los Angeles when Carole's husband, Gerald, was living in New York. Michael's daughter, Victoria, was conceived. After Victoria was born, Carole and Victoria lived in a "variety of quasi-family units," including a quasi-family unit with Michael intermittently,[301] during which time Michael supported Victoria and held her out

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295. "[U]nwed fathers are presumed unfit to raise their children and . . . it is unnecessary to hold individualized hearings to determine whether particular fathers are in fact unfit parents before they are separated from their children." *Id.* at 647.

296. *Id.* at 652.

297. *Id.*

298. *Id.* at 656-57.

299. *Michael H.* was a 5-4 plurality decision. Chief Justice Rehnquist and Justices Kennedy and O'Connor joined (in whole or part) Scalia's opinion. Stevens cast the fifth vote, based on the erroneous understanding that Michael had standing to challenge paternity under California law. *See infra* note 302. The remaining justices dissented, with Justice Brennan writing a detailed dissent.

300. The statute allowed for a challenge to the "conclusive" presumption that the husband is the father of a child born into a marriage only by the husband and wife. *Michael H.*, 491 U.S at 117-18. Blood tests showed a 98% probability that Michael was Victoria's natural father, and the child's mother, Carole, had signed a stipulation admitting that Michael was Victoria's father, but later instructed her attorneys not to file it with the court. *Id.* at 114-15. Michael could not challenge the presumption under California law; Justice Stevens was mistaken in his belief that Michael had standing to challenge paternity. *See id.* at 133 (Stevens, J., concurring); E-Mail from Leslie Ellen Shear, Counsel for Michael H., to Deana Pollard Sacks, Professor of Law, The Thurgood Marshall School of Law (Feb. 18, 2008, 11:40:19 A.M.) (on file with the author). Victoria's lack of standing to challenge paternity gave rise to her equal protection claim. *Michael H.*, 491 U.S. at 130-31.

301. The family unit between Michael, Carole, and Victoria was less enduring than Stanley's family unit. *Id.* at 113-14. Michael lived with Victoria and her mother between January and March, 1982 in St. Thomas where Michael "held Victoria out as his child," and again in Los Angeles from August, 1983 until May, 1984. *Id.* at 114-15. Carole and Victoria lived with Gerald for a total of seven months between 1981 and 1984, and never for

as his daughter, and Victoria called Michael "Daddy."[302] After Carole and Michael had a falling-out and Carole denied Michael access to Victoria,[303] Michael and Victoria both challenged the law on asserted rights to a parent-child relationship with one another.

The Court framed Michael's claim to know his daughter as "whether the relationship between persons in the situation of Michael and Victoria has been treated as a protected family unit under the historic practices of our society."[304] Victoria's asserted right was framed as "a due process right to maintain filial relationships with both Michael and Gerald . . . that a state must recognize multiple fatherhood . . . ."[305] The Court looked to the "history and tradition" of presumptions against declaring children illegitimate to determine whether the claimed liberty interests were "so rooted in the traditions and conscience of our people as to be ranked as fundamental."[306] The Court relied on two policies derived from sources as old as 1836:[307] the "primary policy" of avoiding declaring a child illegitimate, which could deprive children of financial rights and render them "wards of the state;"[308] and the "secondary policy" of "promoting peace and tranquility of States and families."[309] The Court found that the "marital family"[310] has been protected historically in our society, not a "relationship established by a married woman, her lover, and their child,"[311] concluding that Michael's and Victoria's claims were "not the stuff of which fundamental rights qualifying as liberty interests are made."[312]

The difference in liberty analysis between *Stanley* and *Michael H.* is striking. In *Stanley*, the adjudicative facts concerning the bonds that had been formed through Stanley's involvement with his children were critical, and the Court's focus was on the nature of the parent-child relation-

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longer than three months at a time. Brief for Appellant Victoria D. at 9-10, *Michael H. v. Gerald D.*, 491 U.S. 110 (No. 87-746) [hereinafter Brief for Appellant Victoria D]. Carole and Victoria lived with another man, Scott K., from May, 1982 until March, 1983. *Id.* at 10.

302. *Michael H.*, 491 U.S. at 114.

303. *See infra* note 319.

304. *Michael H.*, 491 U.S. at 124.

305. *Id.* at 130-31. "When identifying and assessing the competing interests of liberty and authority, for example, the breadth of expression that a litigant or a judge selects in stating the competing principles will have much to do with the outcome and may be dispositive. . . . Just as results in substantive due process cases are tied to the selections of statements of the competing interests, the acceptability of the results is a function of the good reasons for the selections made." Washington v. Glucksberg, 521 U.S. 702, 769-70 (1997).

306. *Michael H.*, 491 U.S. at 122 (quoting Snyder v. Massachusetts, 291 U.S. 97, 105 (1934)).

307. *Id.* at 124-25 (citing, *inter alia*, H. NICHOLAS, ADULTINE BASTARDY 1 (1836), and J. SCHOULER, LAW OF THE DOMESTIC RELATIONS, Sec. 225 (1882)). Justice Brennan openly criticized Justice Scalia's opinion for relying on "exclusively historical analysis" grounded in "old" law such as Bracton, Blackstone, and Kent because it provided the "history" Scalia was looking for to support his morality-based decision. *Id.* at 137-138 (Brennan, J., dissenting).

308. *Id.* at 125.

309. *Id.* (citing SCHOULER, *supra* note 309, at 304).

310. *Id.* at 125.

311. *Id.* at 124 n.3.

312. *Id.* at 127.

ship as part of the privacy aspect of the Liberty Clause. In *Michael H.*, the Court engaged an "exclusively historical analysis"[313] grounded in obsolete assumptions about non-marital children. The precedent relied upon in *Stanley* was broad and basic,[314] whereas the precedent relied upon in *Michael H.* was narrow, at least somewhat obsolete, and entirely undermined by the adjudicative facts; Victoria was not subject to the financial risks of being declared "illegitimate" in prior eras,[315] and the marriage between Carole and Gerald had not been "peaceful and tranquil" during the relevant periods.[316] The *Michael H.* Court dismissed the protected liberty rights precedent contained in the "unwed father" cases, which had produced a unifying theme: where a biological father has demonstrated a commitment to his child by helping to rear the child, he acquires protection for his relationship with his child under the Due Process Clause.[317] The *Michael H.* Court distinguished *Stanley* as protecting the "unitary family," not relationships between children and their fathers.[318] But this distinction is superficial considering that in neither case was a traditional "unitary family" established; Stanley's and Michael's relationships with their offspring's mothers were both "intermittent" and not particularly stable.[319]

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313. *Id.* at 142-43 (Brennan, J., dissenting).

314. *See* Stanley v. Illinois, 405 U.S. 645, 651 (1972).

315. Both Michael and Gerald had supported Victoria financially and wanted to be declared her legal father. There was no risk that Victoria could be rendered destitute or a ward of the state. *Michael H.*, 419 U.S. at 114-15. In addition, the "primary policy" had been rendered moot since children have been declared constitutionally entitled to parental support since the 1970s. *See, e.g.*, Trimble v. Gordon, 430 U.S. 762 (1977) (intestate inheritance); Gomez v. Perez, 409 U.S. 535 (1973) (child support).

316. *See infra* note 319. Carole's marriage with Gerald had not stabilized between September, 1980, when Carole began her relationship with Michael, until June, 1984, when she reconciled with Gerald. *Michael H.*, 491 U.S. at 113-15.

317. *Id.* at 142-43 (Brennan, J., dissenting). Justice White criticized Justice Scalia's approach as failing to consider the Court's own precedent: "The basic principle enunciated in the Court's unwed father cases is that an unwed father who has demonstrated a sufficient commitment to his paternity . . . has a protected liberty interest in a relationship with his child." *Id.* at 157-58 (White, J., dissenting). *See also* Lehr v. Robertson, 463 U.S. 248, 261 (1983) ("When an unwed father demonstrates a full commitment to the responsibilities of parenthood by 'com[ing] forward to participate in the rearing of his child,' his interest in personal contact with his child acquires substantial protection under the due process clause. At that point it may be said that 'he acts as a father toward his children' . . . . [T]he emotional attachments . . . derive from the intimacy of daily association.") (internal quotations and citations omitted).

318. *Michael H.*, 491 U.S. at 123.

319. The *Stanley* Court found on the basis of uncontradicted testimony of Peter Stanley that he had lived with the mother of his children for 18 years "intermittently." *Stanley*, 405 U.S. at 646. In *Michael H.*, during the time that Michael H. and Carole D. were fighting over visitation, Carole and Gerald were living in Los Angeles and New York, respectively, and the trial court ordered visitation for Michael pursuant to a court-appointed psychologist's recommendation based on Victoria's best interests. *Michael H.*, 491 U.S. at 115. Soon thereafter, Carole D. fled the jurisdiction with Victoria, taking her to New York to be with her husband. *Id.* While contempt proceedings were pending based on Carole's unauthorized move to New York with Victoria, Gerald D. intervened in the action, and the trial court decided to wait to determine whether Michael could get visitation under California Civil Code Section 4601 until after the appeal pending on the constitutionality of California Evidence Code Section 621 was resolved. By the time that the Supreme Court finally

The *Michael H.* Court's exclusive focus on precedent of questionable relevance appears to be an excuse for the Court to impose its own moral code: the Court sounded disgusted by Michael's "unfamiliar or repellant"[320] practice of conceiving a child in the context of an adulterous affair, and repeatedly referred to Michael as the "adulterous" natural father.[321] Indeed, the Court's analysis reveals a presumption about Michael's moral character similar to the presumption that the Court condemned the State of Illinois for making about Stanley's moral character.[322] The *Michael H.* Court denied Michael the same liberty right to know his offspring that it granted Stanley, despite the fact that the cases were factually similar, based apparently on one repeatedly-noted distinction: Michael was an adulterer, not just an unmarried father.

The Court's one-dimensional analysis[323] in *Michael H.* illustrates the danger of defining liberty by the moral viewpoints of nine elite justices. Although adultery may be relevant, the Court should have considered a number of critical factors that it disregarded. For example, the Court did not even address Victoria's psychological best interests, the usual standard for determining custody between parents[324] and a "compelling" state interest.[325] The court-appointed psychologist[326] determined that visitation with Michael was in Victoria's best interests, because Victoria was "equally attached" to her biological mother and father.[327] Indeed, the psychologist concluded that it was important for Victoria to maintain contact with Michael because Michael was "the single adult in Victoria's life *most committed* to caring for her needs on a long term basis."[328]

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resolved the constitutional issue, Michael had been deprived of visitation with Victoria for about five years, and the Court relied upon the fact that Gerald and Carole had established a stable marital environment during those years to deny Michael's rights to visitation. Telephone interview with Robert Boraks, Counsel for Michael H. (Feb. 12, 2008); Telephone interview with Joel Aaronson, Counsel for Michael H. (Feb. 12, 2008). *See also Michael H.*, 491 U.S. at 117-19.

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

321. *See id.* at 144 (Brennan, J., dissenting) ("[N]o fewer than six times, the plurality refers to Michael as the '*adulterous* natural father' or the like.").

322. *See Stanley,* 405 U.S. at 656-57 (noting that "present realities" trump marital "formalities").

323. *Id.* at 137 (Brennan, J., dissenting) (the plurality opinion engaged "exclusively historical analysis" that was an "unfortunate departure from our prior cases and from sound constitutional decisionmaking."). *See also id.* at 145-47 (discussing precedent regarding family integrity).

324. *See id.* at 118 (citing CAL. CIV. CODE ANN. § 4601 (West 1983).

325. States have a compelling interest in safeguarding children's psychological well-being. New York v. Ferber, 458 U.S. 747, 756 (1982).

326. *See* Brief for Appellant Victoria D., *supra* note 301, at 12-13.

327. *See id.* at 12 (Victoria was found to be attached "principally and equally" to Michael and Carole.). Michael originally was awarded visitation based upon the psychologist's evaluation finding that Victoria had "equal attachments to Carole and Michael." E-Mail from Leslie Ellen Shear, Counsel for Michael H., to Deana Pollard Sacks, Professor of Law, Thurgood Marshall School of Law (Feb. 18, 2008, 11:40:19 A.M.) (on file with author). *See also Michael H.*, 491 U.S. at 115. However, a trial judge later denied visitation, apparently concluding on his own that having two father figures could confuse Victoria. *Id.* at 135.

328. Brief for Appellant Victoria D., *supra* note 301, at 12-13 (emphasis added).

Based on the psychologist's report, the court-appointed guardian ad litem sought to secure Victoria's right to maintain a relationship with Michael. Yet, the Court summarily dismissed the experts' opinions: "[W]hatever the merits of the guardian ad litem's belief that [visitation with Michael and Gerald] can be of great psychological benefit to a child, the claim that a State must recognize multiple fatherhood has no support in the history or traditions of this country."[329] No legislative facts bearing on the psychological risks to Victoria were presented or analyzed.[330] In addition, state laws were brought to the Court's attention that undermined the "history and tradition" of denying rights to biological fathers of children born into extant marriages, but the fact that a number of states allowed a natural father to rebut marital presumptions of paternity was dismissed as "irrelevant."[331]

Michael was shocked and "devastated" by the Court's decision, because he, like his lawyers, believed that he had a liberty interest in his relationship with his daughter,[332] an understandable expectation created by *Stanley* and the Court's other unwed father cases, as well as the Court's generally strong protection of even extended family relationships against state infringement.[333] The Court should be required to "dig" a little deeper than it did in *Michael H.*,[334] to analyze fully and reasonably claims as important as the ones presented by Michael and Victoria. While it may not be clear what the Court's ultimate decision would have been in *Michael H.* had the Court fully analyzed the relevant precedent, expert opinion, state law trends, and any legislative facts or foreign trends had they been presented, what is clear is that he opinion smacks of disdain for Michael and supplied "no objective means" for subsequent liberty inter-

329. *Michael H.*, 491 U.S. at 130-31.

330. The only evidence presented regarding Victoria's best interests was the court-appointed psychologist's recommendation from 1984, which found that Victoria should have visitation with both "fathers." E-Mail from Leslie Ellen Shear, Counsel for Michael H., to Deana Pollard Sacks, Professor of Law, Thurgood Marshall School of Law (Mar. 8 2008, 6:04:28 P.M.) (on file with author). In other liberty cases, the Court relies on social science data to reach a fully-informed decision. *See, e.g.*, Moore v. City of East Cleveland, 431 U.S. 494, 508 (1976); Brown v. Bd. of Educ., 347 U.S. 483, 494-95 (1954). It would seem that, in the absence of contradictory professional opinion, the court-appointed psychologist's opinion should have been respected or investigated, but not summarily dismissed.

331. Justice Scalia stated that these state laws beg the issue of whether the states "in fact award substantive parental rights to the natural father of a child conceived within, and born into, an extant martial union . . . . We are not aware of a single case, old or new, that has done so." *Michael H.*, 491 U.S. at 127. Indeed, the California legislature amended the presumption of legitimacy statute relied upon in *Michael H.* in reaction to the *Michael H.* decision to allow both putative fathers and children to rebut the conclusive presumption of legitimacy in certain cases, instead of just the husband and wife, as in *Michael H. See* CAL. EVID. CODE § 621 (West 1966) (repealed in 1994). *See also* Mindy S. Halpern, *Father Knows Best—But Which Father? California's Presumption of Legitimacy Loses its Conclusiveness:* Michael H. v. Gerald D. *and its Aftermath*, 25 LOY. L. A. L. REV. 275, 305-11 (1991).

332. Telephone interview with Robert Boraks, counsel for Michael H. (Feb. 12, 2008).

333. *See, e.g.*, Moore v. City of East Cleveland, 431 U.S. 494 (1976).

334. *See* Tribe, *supra* note 23, at 496 (stating that the geological form of rights construction involves "digging beneath a recognized enumerated right . . . to unearth the logical or sociological presuppositions of those rights . . . .").

pretation,[335] causing Justice Brennan to suggest that moral judgment and personal bias motivated the plurality.[336]

B. *Bowers & Lawrence*

The Court addressed the issue of whether liberty precludes a state from criminalizing sodomy twice in a seventeen-year period and reached opposite conclusions. In *Bowers v. Hardwick*,[337] the Court reversed the Eleventh Circuit's decision that the nature of liberty as defined by *Griswold* and *Roe, inter alia*, protects private and intimate associations, including homosexual activity.[338] The *Bowers* Court framed the issue in a way that restricted the meaning of liberty,[339] instead of construing liberty broadly as it did in *Meyer, Griswold*, and *Roe, inter alia*.

The *Bowers* Court found that its prior privacy precedent did not bear "any resemblance" to the asserted right of sodomy: "No connection between family, marriage, or procreation on the one hand and homosexual activity on the other has been demonstrated . . . ."[340] The Court looked to its definitions of liberty in *Palko v. Connecticut* and *Moore v. City of East Cleveland*, concluding that "to claim that a right to engage in such conduct is 'deeply rooted in this Nation's history and tradition' or 'implicit in the concept of ordered liberty' is, at best, facetious."[341] Georgia's law was upheld based on the notion that it reflected "majority sentiments about the morality of homosexuality."[342]

Justice Blackmun criticized the *Bowers* Court's issue-framing choice because it "distorted" the issue presented and smacked of animosity towards homosexuals.[343] According to Blackmun, Hardwick's claim was about the "right to be let alone."[344] Blackmun criticized the Court for its "refusal to consider the broad principles that have informed our treat-

335. *Michael H.*, 491 U.S. at 138.

336. Justice Brennan referred to the fact that Justice Scalia based his decision on the fact of the marriage between Carole and Gerald, and kept referring to Michael as an "adulterer." *Id.* at 144. Ironically, Justice Scalia's plurality opinion in *Michael H.* criticized Brennan's dissent as providing such "imprecise guidance [that its analysis would] permit judges to dictate rather than discern society's views . . . leaving judges free to decide as they think best." *Id.* at 127 n.6.

337. 478 U.S. 186 (1986).

338. *Id.* at 189.

339. *See supra* note 129 and accompanying text.

340. *Bowers*, 478 U.S. at 190-91.

341. *Id.* at 193-94.

342. *Id.* at 196. As noted by Justice Blackmun, the Court presented no facts showing a moral consensus by the majority of Georgians that homosexuality is immoral; indeed, the electorate's representatives had enacted a law reflective of the belief that *all* sodomy is immoral, not homosexual sodomy. *Id.* at 219 (Blackmun, J., dissenting).

343. *Id.* at 199-200 (Blackmun, J., dissenting). *See also id.* at 212 ("Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect. No matter how uncomfortable a certain group may make the majority of this Court, we have held that [m]ere public intolerance or animosity cannot constitutionally justify the deprivation of a person's physical liberty.") (Internal quotations and citations omitted).

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

ment of privacy,"[345] and expressed concern about the lack of legislative facts: the record was "barren of any evidence" that sodomy spreads communicable diseases or fosters criminal activity, as asserted by the state of Georgia.[346] Blackman argued that "decency" and "morality" are subjective terms and not a proper basis for denying liberty rights, because the Court is bound to protect citizens "whose choices upset the majority."[347] Six years later, the Court agreed with this latter conclusion, stating that its obligation is to "define the liberty for all, not mandate our own moral code."[348]

In 2003, the *Lawrence* Court engaged a multi-dimensional analysis and overruled *Bowers*.[349] The Court carefully characterized the liberty at stake by conducting a thorough analysis of the four relevant elements proposed herein:[350] history and precedent; the nature of the infringement, such as stigma resulting from the law and the law's impact on the human psyche, the emotional need to bond and to form intimate relationships, and self-actualization; the state law trend to de-criminalize sodomy (from fifty states in 1961, to twenty-four in 1986, to thirteen in 2004);[351] and the rejection of *Bowers* in the world community, such as the European Convention on Human Rights, binding on twenty-one nations at the time of *Bowers* and forty-five nations at the time of *Lawrence*.[352]

Engaging a full-bodied, multi-dimensional liberty analysis grounded the *Lawrence* Court in reality because the objective facts revealed a real life consensus that overwhelmingly mitigated in favor of recognizing Lawrence's claimed liberty right. Indeed, the *Lawrence* Court implied that the *Bowers* Court should have conducted a more thorough review of the claimed liberty interest, and that if it had, it would have known that Hardwick's privacy claim was supported by the American Law Institute and European law at the time *Bowers* was decided.[353] In addition, had the Court investigated the legislative facts supposedly supporting the Georgia statute, it may have discovered that the nexus between the sodomy law and the "ill effects" it sought to prevent may not have survived even rational basis review, because the facts were, at best, contradictory.[354] The Court's choice to analyze *Bowers* based on a "cramped"

345. *Id.* at 206.
346. *Id.* at 208.
347. *Id.* at 211.
348. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 850 (1992).
349. *See supra* notes 153-61 and accompanying text for more details about *Lawrence*'s analysis.
350. Bodily integrity was not at stake because the state was not physically intruding into a human body. Medical and other legislative facts were not discussed, although the Court alluded to the social fact of discrimination resulting from criminalizing sodomy. *See generally* Lawrence v. Texas, 539 U.S. 558 (2003).
351. *Id.* at 572-73 (cataloging the states that had decriminalized sodomy in 1961 (all 50) to the time of *Bowers* decision (24 plus the District of Columbia) to the time of *Lawrence* (13)).
352. *Id.* at 573.
353. *See id.* at 572-73. *See also supra* note 157.
354. Bowers v. Hardwick, 478 U.S. 186, 209 n.3 (1986) (Blackmun, J., dissenting).

reading of the issue and biased rendition of history and tradition precluded a complete and objective analysis.[355]

Liberty rights are too precious to be treated as "seasonal," and should not depend on whether the Supreme Court has a good year or a drought.[356] It may not be possible to stop the Court from basing an opinion on an inaccurate or biased rendition of history and tradition, which is precisely why "history and tradition" should be just one of several elements of liberty analysis, as opposed to the sole criterion.

Conscious or unconscious bias,[357] idiosyncratic decision-making, and judicial "vacillation" might be controlled to some degree by injecting objective elements into liberty analysis. A multi-factor analytical method spreads the risk of error by obligating the Court to consider expressly all relevant legislative facts as well as adjudicative facts and precedent.[358] Elevating the various factors extracted from the Court's precedent to mandatory elements of liberty interpretation furthers objective "reasoned judgment"[359] by creating a "reality check"[360] on the Court's liberty analysis.

The proposed interpretive method should create more coherent and reliable liberty jurisprudence by imposing an obligation on the Court to consider a variety of factors and to explain its decisions more fully. Reliable liberty analysis is desirable because it allows people to conduct their lives according to clear rules.[361] Consistent and reliable liberty jurisprudence would enhance the Court's credibility and the persuasive value of

355. *Id.* at 202.

356. *Michael H.* was decided during the first term that Justice Kennedy was on the Court; Justice Kennedy provided the fifth vote in a number of cases reflecting a conservative majority and contraction of civil rights. *See supra* note 19.

357. Unconscious bias is constantly at work for all of us, and manifests in assumptions and judgments about other people. *See, e.g.*, Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489, 1498-1506 (2005); Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Opportunity*, 47 STAN. L. REV. 1161, 1168-90 (1995); Justin Levinson, *Forgotten Racial Equality: Implicit Bias, Decisionmaking, and Misremembering*, 57 DUKE L. J. 345 (2007); Deana A. Pollard, *Unconscious Bias and Self-Critical Analysis: The Case for a Qualified Evidentiary Equal Employment Opportunity Privilege,* 74 WASH. L. REV. 913, 917-25 (1999).

358. *See* Karst, *supra* note 256. Legislative facts "transcend the particular dispute and have relevance to legal reasoning and the fashioning of legal rules." David L. Faigman, *"Normative Constitutional Fact-Finding": Exploring the Empirical Component of Constitutional Interpretation*, 139 U. PA. L. REV 541, 552 (1991). Legislative facts should be distinguished from adjudicative facts, which are the facts particular to the dispute at hand, that is, the facts decided by the trier of fact. *Id.* (citing Kenneth Culp Davis, *An Approach to Problems of Evidence in the Administrative Process*, 55 HARV. L. REV. 364, 402-03 (1942)).

359. Roe v. Wade, 410 U.S. 113, 116 (1973).

360. As stated by Justice Brennan in *Michael H.*, "[w]hen and if the Court awakes to reality, it will find a world very different from the one it expects." Michael H. v. Gerald D., 491 U.S. 110, 157 (1989) (Brennan, J., dissenting).

361. For example, Michael may have made different choices in his relationship with Carole if he had known that he could be divested of his relationship with Victoria if Carole decided to stay married to Gerald.

its rulings,[362] and allow Americans to trust the Court's pronouncements concerning liberty rights. The Court should adopt the test proposed herein as a check on the inevitable biases of its Members, and to create more predictable and enduring liberty jurisprudence.

V. TOWARD A CONSISTENT METHOD FOR LIBERTY ANALYSIS

A. APPLYING THE PROPOSED INTERPRETIVE TEST

To illustrate how the proposed test would operate, proposed legislation mandating human papilloma virus ("HPV") vaccine for all girls ages eleven and twelve as a prerequisite to entering the sixth grade in public schools will be analyzed by reference to the six elements of liberty.[363] If a mandatory HPV vaccine law is passed, it will likely be challenged as a violation of substantive due process.

The state law challenger should bear the burden of proving that the liberty interest at stake is "fundamental" by producing evidence of the six elements proposed herein. This data helps to avoid judicial analysis based on a rendition of "history and tradition" that is inconsistent with the relevant legislative facts or other elements of the proposed test. The state presumably will present additional and contradictory evidence to the extent that it exists. The reviewing court should then describe the nature and degree of the liberty interest and make findings in support of its characterization by analyzing each of the six elements.

1. History and Tradition

Precedent from prior constitutional rulings, including cases in which mandatory vaccination and forced medical treatment have been declared

362. *See, e.g.*, Bowers v. Hardwick, 478 U.S. 186, 202-203 (1986) (Blackmun, J., dissenting) ("The Court's cramped reading of the issue before it makes for a short opinion, but it does little to make for a persuasive one.").

363. Legislators in forty-one states and the District of Columbia have introduced legislation to require, study, fund, or educate the public about the HPV vaccine. *Id.* For information about HPV presented by the Centers for Disease Control ("CDC"), see CDC, QUADRIVALENT HUMAN PAPILLOMAVIRUS VACCINE (2007), http://www.cdc.gov/mmwR/preview/mmwrhtml/rr56e312a1.htm. *See also, e.g.*, Lindsey Tanner, *1 In 4 Girls Has Sex Disease,* HOUSTON CHRONICLE, March 12, 2008, at A1 (discussing HPV and the "heated debate in Austin" regarding the vaccine). The Michigan Senate was the first to introduce such legislation, *Michigan HPV Mandate Bill Fails; Similar Bill Introduced in Kentucky*, VACCINE ETHICS, Jan. 9, 2007, http://blog.vaccineethics.org/2007/01/michigan-hpv-mandate-bill-fails-bill.html, in September, 2006, but the bill was not enacted. Ohio's proposed law also failed in 2006. *See HPV Vaccine (Gardasil): A Research Note* (April 18, 2007), http://www.senatorhannon.com/topics10_Gardasil.htm. Numerous states have legislation pending or withdrawn for further study, and many have added "opt out" provisions. NAT'L CONFERENCE OF STATE LEGISLATURES, *HPV Vaccine*, Feb. 2008, http://www.ncsl.org/programs/health/HPVvaccine.htm. In Texas, Governor Rick Perry signed Executive Order 4 on February 2, 2007, mandating that all girls entering sixth grade receive the HPV vaccine, creating outrage based on his attempt to circumvent the political process, conservative parents' concerns about the moral message, and financial links between the Governor and Merck, the manufacturer of the vaccine. Perry's Executive Order was promptly overridden by House Bill 1098. *See* Tanner, *supra*, at A1.

constitutional, are obvious starting points for characterizing the liberty infringement involved with mandatory HPV vaccine. For example, *Jacobson v. Massachusetts* is relevant to show the long history of forced vaccination, but may be distinguished by the fact that smallpox cannot be avoided by personal choices, whereas the cancer-causing types of HPV inhibited by the vaccine can be avoided by personal choice, such as sexual abstinence.[364] The HPV vaccine therefore implicates personal autonomy, religion, and self-determination on a different level than the smallpox vaccine. *Cruzan v. Director, Missouri Dept. of Health* is also relevant to the right to avoid unwanted medical treatment. However, this case may be distinguished because the forced medical treatment in *Cruzan* impacted only the individual receiving treatment, whereas the refusal to accept the HPV vaccine conceivably could impact an infinite number of other people, based on the exponential nature of sexual disease proliferation.[365] Precedent concerning the parents' right to control their child's upbringing should also be considered, since the vaccine unavoidably impacts sex education and the social messages inherent in sexual disease vaccines. Forced HPV vaccination may violate the parents' educational and religious prerogatives in child-rearing, and perhaps more importantly, may expose the child to health risks that the parent and child may wish to avoid, rendering cases such as *Meyer v. Nebraska* relevant.

2. *The Nature of the Right*

Physically invasive sexual disease vaccination impacts personal autonomy and intimate choices similar to the nature of the interest infringed in cases such as *Schmerber v. California, Winston v. Lee, Griswold v. Connecticut, Roe v. Wade*, and *Planned Parenthood of Southeastern Pennsylvania v. Casey, inter alia*. The challenger should carefully describe why the vaccine constitutes a liberty infringement of fundamental importance by explaining its impact on personal choice, self-concept, bodily integrity, sexual autonomy, and religious beliefs. A girl's personal or religious belief in abstinence, for example, would alter the cost-benefit analysis in terms of medical risks: if the girl is committed to abstinence, her risk of contracting HPV through sex is non-existent in theory, yet the health risks of the vaccine remain the same. The state would presumably seek to prove that its interests outweigh the infringement of personal choice, since personal choices historically have given way when they adversely impact public health. In this example, medical and scientific evidence regarding the vaccine's efficacy and risks are critical to balance the state's interest against individual liberty properly.

364. *See* CDC, *supra* note 363.
365. Deana A. Pollard, *Sex Torts*, 91 MINN. L. REV. 769, 784 (2007).

3. Bodily Integrity

Forced vaccine infringes bodily integrity, based on prior cases in which the government punctured or otherwise invaded a person's body without consent, such as *Rochin v. California, Schmerber v. California,* and *Winston v. Lee.* The liberty interest is particularly serious if the vaccine has serious or "unknown" medical risks,[366] as in *Winston v. Lee.* The state may counter that the individual medical risks are small relative to the social costs of not mandating the vaccine if the medical facts support this, as in *Jacobson v. Massachusetts*, rendering medical facts critical to the liberty analysis.

4. State Laws

The challenger should present evidence of similar state laws that have failed or that are distinguishable such as by having "opt out" provisions.[367] If similar laws have been challenged on due process grounds, the outcome of such challenges should be provided to the court by the party benefiting from the outcome in prior cases, as persuasive authority that may demonstrate a growing consensus.

5. Legislative Facts

The most critical element in this example is legislative facts. Medical and other scientific data pertaining to the efficacy of the vaccine and its risks are critical to an impartial constitutional analysis. This could include published medical research and professional opinion by the AMA and other experts, as well as records from the Food and Drug Administration's approval of the vaccine. The data should include both the health risks posed to the individual by the vaccine and the risk HPV poses to society. Sociological research relating to contemporary sexual practices and other sexual disease data may help to clarify HPV's risk to society at large and the urgency of the state's interest.[368] This may include data on youth sexual disease rates and contemporary sexual practices and norms of which the court may be unaware. Evidence of the efficacy of alternate methods of preventing the disease should be produced by whichever party benefits from the data, such as the efficacy (or lack thereof) of educational programs, or use of protective devices other than vaccine, such as condoms.[369] Legislative facts should also include the costs of the vaccine

366. Considering that researchers are unsure exactly how many strains of HPV exist, it seems likely that medical risks are at least somewhat unknown. *See* Pollard, *supra* note 365, at 772-83. *See also* CDC, *supra* note 363. Indeed, girls have suffered serious health consequences after being vaccinated with Gardasil, such as seizures and epilepsy. *See, e.g.*, Hilary Hylton, *Anti-Vaccine Activists v. Gardasil,* TIME, June 19, 2008.

367. *See* NAT'L CONFERENCE OF STATE LEGISLATURES, *supra* note 363 (stating that most or all of the proposed laws mandating HPV vaccine have opt out provisions).

368. *See* Pollard, *supra* note 365, at 772-83 (factual summary of prevalence diseases, including HPV, and associated costs to society).

369. Unfortunately, some research has shown that condoms do not prevent the spread of some types of HPV, which may support the state's interest in mandating HPV vaccine. *See, e.g.*, Pollard, *supra* note 365, at 777 n.47. However, more recent research indicates that

and the medical costs of treating persons afflicted with HPV, so that the court can conduct a cost-benefit analysis with the most accurate economic data. Medical evidence explaining the state's gender-based vaccine choice should be produced by the state to show that there are not less discriminatory, gender-neutral means to further its interest in public health.

6. Foreign Law

If foreign law or international human rights treaties have addressed the issue of mandatory HPV vaccination, the party benefiting from such law or policies should bring them to the court's attention. This may have limited persuasive value, however, if sexual disease proliferation in the United States is significantly higher that the sexual disease rates of other countries.[370]

7. Element-Driven Analysis

Only upon a careful and objective review of all of the elements identified herein is a court poised to characterize the degree of liberty infringement and to test the state's interest against the individual's liberty right to be free from the potentially harmful physical invasion. The individual liberty infringement implicated by the HPV vaccine should be considered fundamental because it involves many of the types of liberty infringement that have been declared fundamental in Supreme Court precedent.

Assuming the liberty interest at stake is declared fundamental, a state may demonstrate a compelling interest if it could show that the HPV epidemic has created a serious economic or public safety risk. The state bears the burden of proof that its chosen means are narrowly tailored to effectuate its purpose,[371] such as by proving that there are not less intrusive means of controlling the spread of HPV (for example, means that do

condom use may reduce the risk of infection up to 70%, which supports a challenger's claim that less invasive alternatives are available. *See* CDC, *supra* note 363.

370. Available data indicates that the United States has the highest STD infection rate in the industrialized world, a rate of 50 to 100 times the rate of other industrialized countries. *See* Pollard, *supra* note 365, at 770 (citing AM. SOC. HEALTH ASS'N, SEXUALLY TRANSMITTED DISEASES: HOW MANY CASES AND AT WHAT COST? 10 (Linda L. Alexander et al. eds., 1998), *available at* http://www.kff.org/womenshealth/1445-std_rep.cfm; Mary G. Leary, *Tort Liability for Sexually Transmitted Disease, in* 88 AM. JUR. *Trials* § 1 (2003).

371. *See, e.g.*, Roe v. Wade, 410 U.S. 113, 155 (1973) (articulating strict scrutiny). The test for whether the state's interest in liberty infringement is sufficient to pass constitutional muster is not clear after *Lawrence v. Texas*, which did not announce a standard. The Court has vacillated in terms of how to balance individual rights against state interests similar to the way it has vacillated among interpretations of liberty. *See, e.g.*, Washington v. Glucksberg, 521 U.S. 702 (1997) (fundamental rights analytical framework (strict scrutiny or rational basis) employed); Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992) (adopting the "undue burden" test for fundamental right of abortion). Another line of Supreme Court cases has simply balanced the interests at stake without announcing any standard of review. *See, e.g.*, Youngberg v. Romero, 497 U.S. 261 (1990); Cruzan v. Director, Mo. Dept. of Health, 457 U.S. 307 (1982). This Article assumes that the liberty interest involved with mandatory HPV vaccine is fundamental and applies strict scrutiny, although the analysis would be similar under other standards provided the court considers the elements proposed herein. The difference would be the strength of nexus required between the state's means and ends to pass constitutional scrutiny.

not involve physical risks, like education) or less discriminatory means (for example, a vaccine for all children, not just girls). If medical experience and knowledge about HPV and its link to various cancers is unclear,[372] this may undermine the state's proof of the vaccine's necessity. It seems unlikely that a state could meet its burden of showing that the vaccine is necessary if the HPV strains at issue[373] are entirely avoidable through personal choices such as sexual abstinence or very careful sexual practices, considering the potential health risks of vaccine and the nature of its impact on individual liberty.[374] However, if the state includes an opt-out provision, the preservation of individual autonomy may sufficiently protect personal autonomy to render the law constitutional.

B. The Proposed Method Is Superior To Current Analysis

The proposed liberty test is superior to the current state of liberty jurisprudence because it limits courts' ability to disregard important legislative or other facts in analyzing the constitutionality of mandatory HPV vaccine. For example, under the current law, the Court could pick among the smorgasbord of tests and choose a one-dimensional analysis of "history and tradition" as it did in *Michael H.* and *Bowers*. That is, the Court could simply make a finding that mandatory vaccine for school children has always been the law of the land, that states are in the best position to determine what is necessary for public health, and therefore, that concerns about federalism and separation of powers militates against second-guessing the state's decision to mandate the HPV vaccine. Or, the Court could rely on certain results-oriented legislative facts, such as the high rate of sexual disease transmission in the United States and the extraordinary medical costs and personal suffering that results from contracting HPV, and defer to the state to make the cost-benefit analysis (similar to the way it characterized the issue in *Bowers*, then deferred to Georgia's "morality" justification). The Court conceivably could ignore all medical evidence of the efficacy of the vaccine and potential health risks in the same way that it summarily dismissed the experts' opinions in *Michael H.*

It can be dangerous for courts to defer to states when liberty interests are at stake, as courts offer individuals the only source of prompt protection from legislative overreaching. State action may appear public health-oriented, but may mask a less respectable motive.[375] Adopting the pro-

372. *See* Pollard, *supra* note 365, at 776-77 (noting that researchers believe that at least thirty strains of HPV exist, only a few of which cause serious harm, including cancer; research is continuing).

373. There are at least thirty strains of the human papilloma virus (HPV), some of which cause cancer. *Id.* at 776-77. The more recent consensus of the experts at the CDC is that approximately 100 types have been identified, forty of which infect the genital area. *See* CDC, *supra* note 363.

374. Contracting a disease, and even death, are known risks of vaccination. *See, e.g.*, Jacobson v. Massachusetts, 197 U.S. 11 (1905).

375. Indeed, the first "mandate" for HPV vaccine of elementary school girls was made by way of Executive Order of Texas Governor Rick Perry, who had financial ties to the vaccine's manufacturer, Merck. Liz Austin Peterson, *Perry's Staff Discussed Vaccine on*

posed test would prevent courts from disregarding critical medical or other facts in a "willy-nilly" fashion. The Court should adopt a multi-factor liberty test to instruct all lower courts that when a law impinges on liberty, the law must be analyzed carefully and with regard to all scientific and other relevant evidence identified as elements in this Article.

VI. CONCLUSION

Liberty is a cornerstone of American democracy, and far too important to be relegated to unpredictable and unstable judicial interpretation. Current liberty doctrine is undesirable because a variety of interpretive methodologies are engaged in an ad hoc manner, some of which do not require principled decision-making by reference to any concrete or objective standards, rendering liberty analysis vulnerable to purely subjective and biased judicial interpretation. This Article argues that a more principled liberty method of review is possible and consistent with a century of Supreme Court precedent. The Supreme Court should eliminate the present lack of predictability and consistency in liberty interpretation by adopting a more scientific method of review. The Court should adopt a multi-dimensional interpretive method, such as the six factor test proposed herein, to limit subjective value judgments in liberty interpretation and to create more predictable, principled, and enduring liberty jurisprudence.

Day Merck Donated to Campaign, AUSTIN AMERICAN-STATESMAN, Feb. 22, 2007, *available at* http://www.statesman.com/news/content/region/legislature/stories/01/22/22perry.html. The Texas Legislature reacted swiftly and thwarted the governor's actions, but the issue will likely come before a federal district court at some point due to pending legislation. *See, e.g.*, Alliance for Human Research Protection, *Merck Payola Pays Off: Texas Governor Orders STD Vaccine for ALL Girls*, Feb. 3, 2007, *available at* http://www.ahrp.org/cms/content/view/455/28/; *Texas Governor Orders STD Vaccine for All Girls*, MSNBC, Feb. 3, 2007, *available at* http://www.msnbc.msn.com/id/16948093/from/RS.4/.

Comments


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