

## COUNTING STATES

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The United States Supreme Court frequently bases federal constitutional doctrine on state law,<sup>1</sup> often doing so by counting states' laws in a variety of doctrinal contexts to determine the legislative consensus among the States. For instance, state counting is used to determine the "evolving standards of decency" that define the meaning of "cruel and unusual punishment" under the Eighth and Fourteenth Amendments,<sup>2</sup> to determine whether some method of conducting jury trials is consistent with the Sixth and Fourteenth Amendments,<sup>3</sup> and to decide whether a state practice is consistent with traditions of ordered liberty implied by substantive due process.<sup>4</sup> But across this doctrinal variety, state counting involves two common elements: judicial use of state law to inform the content of federal constitutional doctrine, and judicial evaluation of states' laws collectively rather than singly to determine a state "consensus." When counting states, the Court treats the States as one large decision-making body whose members reach a single consensus.

The oddity of treating the States as a single collective decision maker has not been lost on scholars. At least one has argued that such use of state law actually undermines the purposes of federalism, which she identifies as permitting states to express the diverse preferences of their respective residents.<sup>5</sup> This criticism of state counting is mistaken. To understand why and how state counting might be valuable, it is important first

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1. For a survey of the practice, see generally Note, *State Law as "Other Law": Our Fifty Sovereigns in the Federal Constitutional Canon*, 120 HARV. L. REV. 1670 (2007).

2. See *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion).

3. See, e.g., *Duncan v. Louisiana*, 391 U.S. 145, 160–62 (1968).

4. See, e.g., *Lawrence v. Texas*, 539 U.S. 558, 570–71 (2003); *id.* at 593 n.3 (Scalia, J., dissenting).

5. See Tonja Jacobi, *The Subtle Unraveling of Federalism: The Illogic of Using State Legislation as Evidence of an Evolving National Consensus*, 84 N.C. L. REV. 1089, 1091–93, 1106 (2006).

to draw a distinction between two different ways in which the Court could be counting states. First, the Court could be using the state legislatures' consensus as a *source* of national law. Alternatively, the Court could be using the state legislatures' consensus as a *limit* on national law. In the first case, the Court would count the States' laws to determine the States' consensus position on an issue and then enforce that position against outlier states. In the second case, the Court would determine the States' consensus to place an outside limit on the judiciary's enforcement of its own view of the constitutional norm. In effect, the second version of state counting uses the States' consensus as a sort of collective veto over judicial review, not as an independent source of federal constitutional norms.

This Essay argues that the Supreme Court counts states largely for the second purpose of limiting judicial power. Seen as a mechanism of judicial self-limitation, the Court's practice of counting states is not inconsistent with federalism but is rather a natural extension of the federal principles already in the Constitution. Moreover, understanding state counting as a mechanism of judicial self-limitation helps explain why the Court tends to be casual about the details of how it counts states. One might justly complain that state counting does little to protect the novel policymaking experiments of outlier states from judicial review, but such protection is probably impossible absent restrictions on judicial review so severe that they would permit "experiments" such as Jim Crow that few would want to accept.

#### I. WHY STATE COUNTING DOES NOT PROVIDE A SOURCE OF FEDERAL LAW

The assertion that the Court's state-counting decisions might best be viewed as using state "consensus" to provide limits on, rather than sources of, federal law needs some defense, because it is in tension with the Court's own account of how it uses state law in at least some doctrinal contexts. The Court's Eighth Amendment opinions, for instance, assert that state consensus actually supplies the content of the rule that the Court enforces against the States.<sup>6</sup> According to the Court, "The clearest and

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6. See, e.g., *Enmund v. Florida*, 458 U.S. 782, 792–93 (1982); *Coker v. Georgia*, 433 U.S. 584, 595–96 (1977).

most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures."<sup>7</sup> Laws that depart from the "consensus" established by these legislatures are deemed to be so "unusual" that they violate the Eighth Amendment's ban on cruel and unusual punishment.<sup>8</sup> On this account, the Court enforces the States' mainstream position on the Eighth Amendment against outlying states.<sup>9</sup>

For four reasons, however, it is difficult to take this judicial description of the Court's Eighth Amendment state counting at face value. First, suppressing outlying states as an end in itself is not a coherent constitutional goal in a federal regime. The whole point of federalism is based on the premise that there is no harm in legal diversity as such. If a single state passed a statute, for instance, punishing a certain crime by ordering the offender to undergo intensive therapy and perform community service, it would not be sensible to strike down the law as "cruel and unusual" just because no other state had enacted such a reform. In a federal regime, merely being unusual (absent cruelty) is a virtue, not a vice.

Second, the Court itself acknowledges that state laws constitute "relevant" but not decisive evidence concerning the national standard of decency that it enforces.<sup>10</sup> The challenged punishment must violate not only "objective evidence" of American values as reflected by state practice but also the Court's "own judgment" of the punishment's constitutionality.<sup>11</sup> The Court does not, in short, suppress outliers from a state consensus unless those outliers offend the Court's own view of the constitutional norm.

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7. *Penry v. Lynaugh*, 492 U.S. 302, 331 (1989).

8. *See, e.g., Atkins v. Virginia*, 536 U.S. 304, 314–16 (2002) (noting that the execution of mentally retarded offenders had "become truly unusual" among the States, such that it "is fair to say that a national consensus has developed against it").

9. By enforcing the States' mainstream position against outlier states, the Court acts in a manner similar to a theory of judicial review described by Professor Michael Klarman. *See* Michael J. Klarman, *Rethinking the Civil Rights and Civil Liberties Revolutions*, 82 VA. L. REV. 1, 6 (1996) (describing the Court's typical role as suppressing outlier states that depart from national norms).

10. *See Atkins*, 536 U.S. at 312–13 (describing the Court's sequence of analysis as first, reviewing the stance of state legislatures, and second, "consider[ing] reasons for agreeing or disagreeing with their judgment").

11. *See id.* (gathering "objective evidence" from state legislatures, but ultimately relying on the Court's "own judgment" of capital punishment of the mentally retarded (quoting *Penry*, 492 U.S. at 331)).

Third, it is hard to take seriously the Court's assertions that it is enforcing the States' own consensus on norms of decency when the Court itself makes no effort to determine whether the "consensus" states' legislation was enacted for the *purpose* of establishing any national norm of decency. Yet some such effort is essential to distinguish state decisions based on administrative convenience or local policy from those intended to express an opinion on *Trop's* evolving standard of decency. That a state legislator rejects a punishment, after all, might have nothing to do with the legislator's assessment that the punishment is cruel. The legislator might instead simply believe that the punishment is administratively costly, leads to excessive litigation, or is an ineffective deterrent. Moreover, the legislator might have no desire to set national standards in voting for a particular policy—she might be a federalism-loving policy maker who believes that other states ought to be permitted to go their own way on the issue. For the Court to use such a vote as evidence of a consensus against outlying states' policies is to distort the meaning of the legislator's vote. State laws, therefore, cannot be evidence of some national consensus on the cruelty of a punishment until one has some reason to believe that the laws in question were enacted for the purpose of setting such a standard. Yet the Court largely ignores the reasons underlying state legislatures' decisions, preferring to tally state legislation according to various controversial measures<sup>12</sup> without offering any account of why state legislatures have chosen particular policies.<sup>13</sup> Such judicial dragooning of state legislatures

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12. See Jacobi, *supra* note 5, at 1123–49.

13. In *Kennedy v. Louisiana*, for instance, the Court seemed to presume that the "consensus" states failed to impose capital punishment for aggravated child rape because they had each made independent determinations that such a penalty was inconsistent with some important legal norm. 128 S. Ct. 2641, 2651–53 (2008). The obvious alternative explanation was that state legislatures wanted to avoid the threat that *Coker*, which had declared that rape of adults could not be a capital offense, might apply to child rape as well. See *id.* at 2653. The Court rejected this theory by observing that "there is no clear indication that state legislatures have misinterpreted *Coker* to hold that the death penalty for child rape is unconstitutional." *Id.* at 2656. But this statement adopts a presumption about the purposes of state inaction on child rape that *Kennedy* never bothers to justify or even explain. *Kennedy* declares that "[i]n the absence of evidence from those States where legislation has been proposed but not enacted we refuse to speculate about the motivations and concerns of particular state legislators." *Id.* at 2655. Although this statement superficially sounds like a textualist policy for construing state law, there were no state texts for *Kennedy* to construe; the Court was attributing a policy-setting purpose to state *inaction*—the failure to enact child rape laws—rather than state statutes. To presume that a state legislature wanted to constitutional-

into an involuntary constitutional convention—attributing to legislators’ votes some constitutional significance of which they were unaware and might, indeed, vociferously reject—is truly an odd way to define national constitutional doctrine.

Fourth, the Court bases a national “consensus” on the laws of far too few states for state counting to be regarded as a convincing source of a national constitutional norm. In *Atkins v. Virginia*,<sup>14</sup> for instance, the Court found a consensus establishing an “objective” norm against the execution of mentally retarded criminals based on thirty states that either prohibited the death penalty altogether or prohibited execution of mentally retarded individuals.<sup>15</sup> But these thirty “consensus” states represent only 50.9% of the nation’s population.<sup>16</sup> The remaining twenty states, which are inhabited by the other half of the population, permitted juries to make individual assessments of the relevance of mental retardation. It defies common sense to believe that the legal norms followed in 60% of the states representing roughly half the nation’s population are somehow “objective evidence” that the norms followed by the rest of the country (that is, in 40% of the states representing the other half of the nation’s population) violate “national standards.” Suggesting that a punishment accepted by essentially half of the nation’s population is “unusual” strains plain English usage.

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ize a decency-based objection to a punishment merely because it failed to enact the law is not only bizarre as a matter of political science but is also inconsistent with the Court’s longstanding cautions about inferring specific policies from a legislature’s rejection of a particular proposal. See, e.g., *Solid Waste Agency v. U.S. Army Corps of Eng’rs*, 531 U.S. 159, 169–70 (2001).

14. 536 U.S. 304 (2002).

15. See *Kennedy*, 128 S. Ct. at 2651, 2653 (“When *Atkins* was decided . . . 30 States, including 12 noncapital jurisdictions, prohibited the death penalty for mentally retarded offenders; 20 permitted it.”); *Roper v. Simmons*, 543 U.S. 551, app. B at 581 (2005) (listing twelve states without the death penalty: Alaska, Hawaii, Iowa, Maine, Massachusetts, Michigan, Minnesota, North Dakota, Rhode Island, Vermont, West Virginia, and Wisconsin); *Atkins*, 536 U.S. at 313–15 (listing eighteen states that, at the time, permitted capital punishment generally but prohibited the execution of mentally retarded offenders: Arizona, Arkansas, Colorado, Connecticut, Florida, Georgia, Indiana, Kansas, Kentucky, Maryland, Missouri, Nebraska, New Mexico, New York, North Carolina, South Dakota, Tennessee, and Washington).

16. See U.S. Census Bureau, *Annual Estimates of the Population for the United States, Regions, States, and Puerto Rico: April 1, 2000 to July 1, 2007* (Dec. 27, 2007), <http://www.census.gov/popest/states/tables/NST-EST2007-01.xls> (spreadsheet showing the 2007 estimated population in the thirty “consensus” states as 153,441,285, which represents 50.9% of the 2007 estimated national population of 301,621,157).

For these four reasons, it seems implausible to regard state counting as supplying the *content* of federal law.

## II. STATE COUNTING AS A *LIMIT* ON THE SUPREME COURT'S CONSTITUTIONAL JURISPRUDENCE

It is more helpful and coherent to think of state laws as forming a *limit* on the Court's independent interpretation. The state counting method in *Gregg v. Georgia* supports this theory.<sup>17</sup> In *Gregg*, the Court counted states to show that the public did not have a revulsion to capital punishment,<sup>18</sup> thus remedying the debacle it had created four years earlier in *Furman v. Georgia* when the Court used its *own* norm against capital punishment to strike down the practice.<sup>19</sup>

Counting states, in other words, is intended to function as a constraint on the judiciary, not on outlier states. In practice, when the Court's own assessment of a punishment's cruelty is rejected by a majority of the States, the Court refuses to enforce its own values.<sup>20</sup>

17. 428 U.S. 153 (1976).

18. *See id.* at 175–76, 179–81 (plurality opinion) (“[I]n a democratic society legislatures, not courts, are constituted to respond to the will and consequently the moral values of the people.” (alteration in original) (quoting *Furman v. Georgia*, 408 U.S. 238, 383 (1972) (Burger, C.J., dissenting))).

19. *See id.*; *Furman*, 408 U.S. at 239–40 (per curiam).

20. *See, e.g.*, *Baze v. Rees*, 128 S. Ct. 1520, 1526–27 (2008) (plurality opinion) (upholding the three-drug protocol for lethal injections used by at least thirty states). Chief Justice Roberts, author of the plurality opinion in *Baze*, noted:

[I]t is difficult to regard a practice as “objectively intolerable” when it is in fact widely tolerated. Thirty-six States that sanction capital punishment have adopted lethal injection as the preferred method of execution. The Federal Government uses lethal injection as well. . . . No State uses or has ever used the alternative one-drug protocol belatedly urged by petitioners.

*Id.* at 1532. The plurality acknowledged that “[t]his consensus is probative but not conclusive with respect to that aspect of the alternatives proposed by petitioners,” *id.* at 1532–33, but also observed that “[t]hroughout our history, whenever a method of execution has been challenged in this Court as cruel and unusual, the Court has rejected the challenge,” *id.* at 1538. Instead of relying on the Court to reform such methods, the plurality implied that evolving social norms themselves would push the legislatures toward humane methods of execution: Despite the absence of judicial intervention, “[o]ur society has nonetheless steadily moved to more humane methods of carrying out capital punishment. The firing squad, hanging, the electric chair, and the gas chamber have each in turn given way to more humane methods, culminating in today’s consensus on lethal injection.” *Id.*

But when the Court's assessment is not inconsistent with any consensus among the States, the Court feels free to charge ahead.<sup>21</sup>

This judiciary-limiting character of state law explains why the Court does not require a more robust showing of state consensus. If the only purpose of the state counting exercise is to demonstrate the negative point that no clear consensus exists among the States that is inconsistent with the Court's point of view, then it is sufficient for the Court to show that its holding has not been *rejected* by a majority of the States. The Court need not show that the judicial position has actually been endorsed by a majority of the States because the States' consensus is not intended to supply the content of the federal norm. State counting merely provides assurance against a national popular backlash against the Court. Put differently, where there is no consensus one way or the other, the Court uses the indecision of the States as an opening for the Court to impose its own values on the nation.

Likewise, once one understands that state counting functions in practice as a purely negative, judiciary-limiting device, the Court's notorious casualness in how it tallies states becomes less mystifying. If the only point of the tally is to ensure that the Court's position has not been *rejected* by a majority of states, it is unnecessary to determine *why* the States have not rejected the judicial position. It suffices that, for whatever reason, most states have not adopted a position inconsistent with the Court's view. That these state legislatures might not perceive themselves as fixing a national standard of decency is immaterial, because the Court is not relying on them to define such a constitutional standard—it is relying on them only to demonstrate that it is not trampling on any well-defined majority opinion.

The use of state laws as a limit on judicial power is not confined to the Eighth Amendment context. In substantive due process cases, for instance, the Court surveys state laws to determine whether some challenged state action has the support of most other states. Consider the Court's practice of state counting in *Washington v. Glucksberg*,<sup>22</sup> *Troxel v. Granville*,<sup>23</sup> and *Lawrence v.*

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21. See, e.g., *Kennedy v. Louisiana*, 128 S. Ct. 2641, 2646, 2652 (2008) (declaring capital punishment for child rape unconstitutional in part because "44 States have not made child rape a capital offense").

22. 521 U.S. 702 (1997).

23. 530 U.S. 57 (2000).

*Texas*.<sup>24</sup> *Glucksberg* upheld Washington's ban on physician-assisted suicide after observing that the vast majority of states followed a similar ban.<sup>25</sup> In *Troxel*, the plurality admonished the state court judge for not giving special weight to the custodial parents' decision regarding grandparent visits, observing that a number of states required such deference.<sup>26</sup> The plurality struck down Washington's statute as applied to Tommie Granville, but at the same time assured the rest of the States, after surveying their respective visitation statutes, that the Court's holding would leave their statutes unaffected.<sup>27</sup> Finally, *Lawrence* reversed earlier precedent that had upheld state laws banning sodomy, in part because many states had been reversing their sodomy statutes, leaving only a handful that still retained such laws.<sup>28</sup>

The Court's reliance on state law to limit its own power is plausibly attributed to the Burger Court's painful experience with two controversial decisions that contradicted the laws of a majority of states. In the Eighth Amendment context, that controversial decision was *Furman*.<sup>29</sup> In the context of substantive due process, that experience emerged, of course, from *Roe v. Wade*.<sup>30</sup> After these decisions, the Court looked for a doctrinal device to ensure that it would not again reach conclusions inconsistent with majority opinion. Counting state laws and refusing to enforce constitutional doctrines inconsistent with a majority of those laws serves this Court-restraining function.

### III. STATE COUNTING AND "COOL FEDERALISM"

There are certain parallels between this Court-restraining function of state counting in due process cases and what Profes-

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24. 539 U.S. 558 (2003).

25. See *Glucksberg*, 521 U.S. at 705–06, 710–11 & n.8.

26. See *Troxel*, 530 U.S. at 71–72 (plurality opinion).

27. See *id.* at 60, 73 & n.\*.

28. See *Lawrence*, 539 U.S. at 570–71, 578.

29. *Furman v. Georgia*, 408 U.S. 238 (1972); see Stanley H. Friedelbaum, *Advances and Departures in the Criminal Law of the States: A Selective Critique*, 69 ALB. L. REV. 489, 518 (2006).

30. 410 U.S. 113 (1973); see Michael J. Klarman, *The Racial Origins of Modern Criminal Procedure*, 99 MICH. L. REV. 48, 53 (2000).

sor Larry Sager calls “cool federalism.”<sup>31</sup> Professor Sager describes cool federalism as the practice of allowing “maverick” states to “invent” new governmental norms that are then gradually “propagated” to other states and are eventually “consolidated” as federal norms by Congress or the federal courts once they have won sufficiently widespread support among the States.<sup>32</sup> The period of state experimentation, according to Professor Sager, provides information to national decision makers about how the “maverick” norms will operate on the ground, allowing them to decide whether to nationalize the norms after they have proven themselves to be sound policies.<sup>33</sup>

To the extent that the Court tallies states to assure itself that its decision will not offend a national majority, one could regard due process state counting as a way to glean information about public opinion from maverick state experiments. In effect, the States become the Court’s pollsters. Counting states helps the Court ensure that it will not experience *de novo* the widespread popular backlash it has incurred in the past for getting ahead of public opinion. But it is important to note the thinness of the information the Court obtains from state counting: The Court simply assures itself that the public is sufficiently divided on a controversial issue that the Court can weigh in without risking a popular backlash so great that it would have to reverse itself later. Such state counting, in other words, yields very little information about the actual merits of the position that the Court decides to endorse. Moreover, state counting as a device for restraining courts does very little to foster maverick states’ experiments because a bare majority of state legislatures has the power to stop the Court from imposing a uniform constitutional rule on the nation. Novel state policies that arguably impinge on the federal judiciary’s theories of lib-

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31. Lawrence G. Sager, *Cool Federalism and the Life-Cycle of Moral Progress*, 46 WM. & MARY L. REV. 1385, 1386 (2005).

32. *See id.* at 1386–88. Professor Sager distinguishes this norm-testing view of federalism from “hot federalism.” *Id.* at 1385. Hot federalism is intended to enable political subdivisions (states) with relatively homogeneous groups to enter a federal structure with other groups from different regions and with different religions or cultures, while preserving a more or less permanent division of policymaking among the different groups as well as between the different groups and the federal authority. *See id.*

33. *See id.* at 1396–98.

erty or equality—like covenant marriage<sup>34</sup>—would need an additional and more robust restraint on judicial review.

#### IV. JUSTICE HARLAN'S TRADITION-BASED THEORY OF SUBSTANTIVE DUE PROCESS

One such restraint on judicial review is the tradition-based theory of due process pressed by Justice Harlan (with which state counting is sometimes mistakenly conflated). According to Justice Harlan's theory, due process may be invoked only against state laws that contradict the vast majority of other states' laws *and* violate deeply-rooted social norms.<sup>35</sup> Justice Harlan elaborated on this tradition-based theory of judicial review in his dissent in *Poe v. Ullman* when he called for a theory of substantive due process that preserved a "balance . . . between . . . liberty and the demands of organized society" based on "what history teaches are the traditions from which it developed as well as the traditions from which it broke."<sup>36</sup> Because this "tradition is a living thing,"<sup>37</sup> Justice Harlan was willing to enforce liberties not recognized by the Fourteenth Amendment's framers as part of the original understanding of "life, liberty, [and] property."<sup>38</sup> But unlike the practice of state counting, Justice Harlan's tradition-based theory requires that a judicially protected liberty have longstanding support in past political practice and widespread social custom—that the liberty take "its place in relation to what went before and further [cut] a channel for what is to come."<sup>39</sup>

Thus, Justice Harlan's tradition-based theory of liberty is a far more drastic restriction on judicial power than merely counting states to make sure that the Court's decision does not

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34. Arizona, Arkansas, and Louisiana remain the only states to have enacted statutes authorizing "covenant marriages," which are, essentially, marriages with a two-year waiting period before a divorce may become effective. ARIZ. REV. STAT. §§ 25-901 to -906 (2007); ARK. CODE §§ 9-11-801 to -811 (2008); LA. REV. STAT. §§ 9:272 to 9:276, 9:307 (2008); see Cecil VanDevender, Note, *How Self-Restriction Laws Can Influence Societal Norms and Address Problems of Bounded Rationality*, 96 GEO. L.J. 1775, 1791 (2008).

35. See *Poe v. Ullman*, 367 U.S. 497, 541–46, 554–55 (1961) (Harlan, J., dissenting).

36. *Id.* at 542.

37. *Id.*

38. U.S. CONST. amend XIV, § 1. For example, Justice Harlan was willing to recognize that the Constitution protected the right of married couples to use contraceptives. See *Ullman*, 367 U.S. at 539, 540–41 (Harlan, J., dissenting).

39. *Ullman*, 376 U.S. at 544 (alteration in original) (internal quotation marks omitted) (quoting *Irvine v. California*, 347 U.S. 128, 147 (1954) (Frankfurter, J., dissenting)).

contradict a majority of the states' laws. Indeed, the tradition-based theory requires some showing that the state law being challenged contradicts liberties not merely honored in a majority of states but throughout the nation. Justice Harlan condemned Connecticut's Comstock Act, for instance, because it "punish[ed] married people for the private use of their marital intimacy" and thereby encroached on "what, by common understanding throughout the English-speaking world, must be granted to be a most fundamental aspect of 'liberty,' the privacy of the home in its most basic sense."<sup>40</sup>

Unlike mere state counting, the tradition-based theory of judicial review gives outlier states plenty of time to experiment with restrictive legislation that falls short of offending dominant social norms throughout the country. Indeed, Justice Harlan expressly defended his tradition-based conception of liberty precisely to protect experiments currently popular in only a handful of states, noting that "it is all wrong, in my view, for the Court to adopt the political doctrines popularly accepted at a particular moment of our history and to declare all others to be irrational and invidious, barring them from the range of choice by reasonably minded people acting through the political process."<sup>41</sup>

The Court has been divided on the issue of whether it will use tradition or state counting to restrict its substantive due process jurisprudence. *Lawrence's* emphasis that "our laws and traditions in the past half century are of most relevance here"<sup>42</sup> suggests a turn away from tradition and toward state counting. Against this view, however, the *Lawrence* majority also noted that laws penalizing same-sex intercourse had fallen into desuetude, being virtually unenforced by public prosecution.<sup>43</sup> *Lawrence* seems caught between two methods of self-restraint—

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40. *Id.* at 548. Connecticut's law was uniquely restrictive because it restricted the *distribution* as well as the *use* of contraceptives for the purpose of preventing pregnancy. *See id.* at 554–55. On the distinctive nature of the Connecticut Comstock Act and for a detailed historical account of the "struggle" to overturn or repeal it, see DAVID J. GARROW, *LIBERTY AND SEXUALITY: THE RIGHT TO PRIVACY AND THE MAKING OF ROE V. WADE* 79–130 (1994). By the time *Ullman* was decided, the statute had lapsed into desuetude and was enforced only against those distributors who advocated for and instructed in the use of contraceptives—like the birth control clinic in *Griswold v. Connecticut*. *See* *Griswold v. Connecticut*, 381 U.S. 479, 505–06 (1965) (White, J., concurring); *Ullman*, 367 U.S. at 554 (Harlan, J., dissenting).

41. *Harper v. Va. Bd. of Elections*, 383 U.S. 663, 686 (1966) (Harlan, J., dissenting).

42. *Lawrence v. Texas*, 539 U.S. 558, 571–72 (2003).

43. *See id.* at 572–73.

a tradition-based theory in which the Court strikes down only those laws that seem to have lapsed into disuse because they offend widespread norms limiting governmental interference with private relationships, and a state counting theory in which the Court enforces its own libertarian theories restrained by the need to respect practices prevalent in a majority of states.<sup>44</sup>

#### CONCLUSION

State counting is more an assurance that a judicial opinion is consistent with the national majority's current preferences than a protection of outlier states' experimentation. If one assumes that the only function of federalism is to protect outlying states' experiments, then state counting will not seem to be consistent with the spirit of federalism.<sup>45</sup> But American federalism has more justification than protection of regulatory diversity. Since the Anti-Federalists' attack on the proposed U.S. Constitution as a device for serving the interests of mercantile elites, supporters of state power have argued that state governments—whose officials are generally elected from small electoral districts—are more responsive to voters, more egalitarian, and less dominated by cultural and financial elites than the federal government.<sup>46</sup> Uniting the States as a single force to counterbalance the federal government, therefore, is a venerable theme in American federalism. The Court's device of counting states is essentially a judicially crafted version of this populist idea.

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44. For a commentary noting an analogous ambiguity in *Lawrence* between "desuetude" and "autonomy" readings, see Cass R. Sunstein, *Liberty After Lawrence*, 65 OHIO ST. L.J. 1059, 1061–63 (2004).

45. Tonja Jacobi seems to make this assumption in her attack on Eighth Amendment state counting. See Jacobi, *supra* note 5, at 1091–92.

46. On Anti-Federalist ideology, see, for example, JACKSON TURNER MAIN, *THE ANTI-FEDERALISTS: CRITICS OF THE CONSTITUTION, 1781–1788*, at 130–31 (1961), and see generally Saul Cornell, *Aristocracy Assailed: The Ideology of Backcountry Anti-Federalism*, 76 J. AM. HIST. 1148 (1990). On later Jacksonian reiterations of the same theme, see, for example, JOHN ASHWORTH, 'AGRARIANS' & 'ARISTOCRATS': PARTY POLITICAL IDEOLOGY IN THE UNITED STATES, 1837–1846, at 36–37 (1983).