

would, the city hoped, shore up the local tax base. The Supreme Court sided with the city and held that this proposed use was every bit as legitimate as if New London had planned to use Susette Kelo's lot as part of a public park. The Court's decision outraged grassroots activists and property-rights advocates across America, and many states and localities responded with new legislation narrowing or prohibiting the use of eminent domain in situations involving private redevelopment projects.

It is doubtful that *Kelo* would have provoked the same populist backlash had the case involved the taking of a piece of commercial property from an absentee investor. Thus, perhaps the deepest issue on the facts of *Kelo* was not how best to parse the phrase "public use" in the takings clause, but instead how homeowners deserve to be treated under the written and unwritten Constitution. In particular, a homeowner's emotional attachment to her home merits special respect, either in the compensation formula or in some other appropriate way.⁵⁴

It matters less what specific formula judges use to vindicate the notion that forced sales of homes are matters of special sensitivity—whether the judiciary crafts a particular doctrine for homes under the law of Fifth Amendment just compensation; or instead insists upon heightened Fourth Amendment protocols when government tries to "seize" a "house"; or alternatively affirms an unenumerated right to special consideration whenever one's home is invaded or expropriated. What matters more is that faithful interpreters of the Constitution heed America's lived Constitution, both in construing the meaning of enumerated rights and in pondering possible unenumerated rights.

"unusual"

HONORING AMERICA'S LIVED CONSTITUTION requires careful counting: We must accurately assess the daily reality of rights. But how should faithful interpreters count? How many people must "live" a right for it to cross the constitutional threshold? And if the policies of, say, Wyoming and California differ dramatically on a rights-related issue, should the norms and practices of Wyoming's half-million inhabitants be given the same weight, Senate-style, as those of California's nearly 38 million residents? Or should a proper tally reflect the population differential, House-style?

Although these questions are implicated whenever courts seek to tally up actual laws and customs, the justices have not always devoted careful attention to technical issues of counting methodology. One corner of constitutional law where counting questions have pointedly arisen, and have generated explicit judicial commentary, involves the Eighth Amendment, which prohibits, among other things, “cruel and unusual punishments.” Along with virtually all other provisions of the Bill of Rights, this punishment rule now fully applies against state governments thanks to the Fourteenth Amendment.

Although modern justices have splintered on various Eighth Amendment counting questions, the best approach here—as elsewhere—is one in which the written Constitution’s words are taken seriously even as these words are properly supplemented by unwritten practices. Thus, “unusual” should mean what it says. If 240 million modern Americans live in states that flatly prohibit punishment X, while only 60 million live in states that vigorously practice punishment X, then X is “unusual” in the ordinary everyday meaning of that word. This is true regardless of state lines—true whether the 60 million live in the two most populous states or the 26 least populous states. Citizens, not states, should count equally in interpreting both the Eighth Amendment word “unusual” and modern America’s lived Constitution more generally.⁵⁵

The historical evolution of the Eighth Amendment confirms this plain-meaning approach to the word *unusual*, a word whose significance has varied across time and space. The Founders borrowed the phrase “cruel and unusual” from the celebrated English Bill of Rights of 1689. In England, the phrase aimed chiefly to prevent bloodthirsty judges from inflicting savage penalties that were legislatively unauthorized—that is, “unusual.” If Parliament had previously approved a given punishment for a given crime, that punishment, even if unspeakably inhumane, was not “unusual” within the meaning of the 1689 declaration.⁵⁶

Of course, in England, Parliament was sovereign. It thus made perfect sense that bills enacted by Parliament restricted not Parliament itself but the king’s men—including judges, who in the 1680s still answered to the crown. The American Bill of Rights, by contrast, emerged a century later in an effort by the sovereign people to limit all federal servants, including Congress. In this new context, the Eighth Amendment punishment clause

had some bite against Congress—but not much. So long as Congress routinely authorized a particular punishment that was also widely used by various states, it would be hard to say that the punishment, even if concededly cruel, was “cruel *and unusual*.”

Here, as elsewhere, the meaning of the Bill of Rights shifted when its words and principles were refracted through the prism of the later Fourteenth Amendment. Section 1 of that amendment—featuring our old friend, the privileges-or-immunities clause—took special aim at the abusive practices of state governments of the Deep South, a region that had lagged behind national norms of liberty and equality. Even if a state legislature consistently authorized a given punishment, that consistency hardly made the practice “usual” when judged by the *national* baseline envisioned by the Fourteenth Amendment. Thus, a clause that originated in 1689 England as a limit on (crown) judges vis-à-vis (parliamentary) legislators morphed in 1868 America into a clause empowering (federal) judges vis-à-vis (state) legislators—and also vis-à-vis federal legislators if Congress ever tried to enact harsh punishments contrary to the broad consensus of state practice.

But how, exactly, should a proper national baseline be constructed against which the policies of any given state must be measured? In a notable 2002 death-penalty case, *Atkins v. Virginia*, Justice Scalia insisted in dissent that judges trying to construct a baseline had to count each state equally regardless of state population. According to Scalia, any survey of actual state practice that gave California more weight than Wyoming, simply because California has far more people and far more punishment cases, would be “quite absurd.” What should matter is “a consensus of the sovereign States that form the Union, not a nose count of Americans for and against.”⁵⁷

Justice Scalia somehow missed the fact that the case that was before him when he wrote these words was a *Fourteenth Amendment* case—a case about whether Virginia’s specific death-penalty rules violated the Reconstruction Amendment’s vision of basic rights. (Indeed, almost all “cruel and unusual punishment” cases that arise today are, strictly speaking, Fourteenth Amendment cases.) The enactors of the Fourteenth Amendment surely believed that congressional legislation would provide important evidence of proper national norms and baselines. But on Scalia’s logic, such

legislation cannot count because it emerges from a process in which California does weigh more than Wyoming in both the House and the presidency—two of the three bodies involved in ordinary lawmaking.

Contrary to Scalia's principles, the modern Court has paid special heed to congressional legislation in measuring state penal practices. In addition, it has counted punishment practices in the national capital, which Scalia's approach, with its strict emphasis on "sovereign States," would presumably brush aside as constitutionally irrelevant. Although modern case law has not always openly paid more attention to more populous states, the justices in future cases should do precisely this in order to maximize expositional clarity and optimize the soundness of the Court's rulings. In this quadrant of case law, judges should seek to discover and channel the collective wisdom of the American people; and on certain questions, the wisest way to tap that wisdom is to survey all Americans and weight each equally.⁵⁸

The basic idea here is that there is no reason to think that citizens of small states are any wiser than citizens of larger states about the proper meaning and scope of fundamental rights. Unless there is particular reason to believe that distinct and vital interests of small states are at special risk, the views of each small-state voter should not count for more than the views of each large-state voter. Even if it makes sense in certain contexts—say, the constitutional amendment process—to overweight small states in order to help these states preserve their proper status and separate existence against potential large-state self-aggrandizement, the domain of fundamental rights does not place small states at any distinctive risk of subjugation. As any properly recognized right would bind large states in the same way that it would bind small ones, there is little risk of large-state oppression or self-dealing in this constitutional quadrant.

Treating Americans equally need not entail simple majority rule. All members of a given jury vote equally, but a criminal jury must typically be *unanimous* to convict; some civil juries, by contrast, operate by *supermajority* rules; and grand juries typically use *simple majority* rule. Similarly, different counting thresholds may be appropriate for different sorts of rights cases. If the issue is whether a given punishment is genuinely *unusual*, presumably the punishment may sometimes be upheld even if it is a minority practice. If, say, states accounting for 45 percent of the nation's population

routinely use punishment X, it would be hard to say that X is truly *unusual* even though it is a minority practice. In deciding other unenumerated-rights cases not involving the Eighth Amendment word *unusual*, however, judges might sensibly strike down a practice simply because 55 percent of ordinary Americans strongly believe that this practice violates their fundamental rights. A strongly held belief by 55 percent of Americans that they have a constitutional right against abusive practice Y may suffice as a textual matter to recognize this right as a truly unenumerated right of “the people,” a genuine privilege “of citizens” recognized as such by citizens.

Some scholars have suggested that a new unenumerated right should not be recognized unless it is endorsed by three-fourths of the states—the high bar set by Article V for constitutional amendments. But in recognizing new rights, judges are not *amending* the document. Rather, they are *applying* it, construing directives in the Ninth and Fourteenth Amendments that call for protection of fundamental but nonspecified rights—directives that *already* cleared Article V hurdles when these amendments were duly enacted. Part of the reason that Article V sets a high bar for ordinary constitutional amendments is that if the bar were set too low, then government-initiated amendments might end up weakening explicitly protected rights. But this concern about possible rights diminution is irrelevant when the issue is whether new rights rooted in evolving popular sentiments and practices should join the existing stock of enumerated and unenumerated entitlements.

Section 5 of the Fourteenth Amendment was clearly designed to empower Congress to enact legislation recognizing new rights, and this section envisioned only ordinary national majorities, not special Article V supermajorities. Since the Fourteenth Amendment also envisioned judicial recognition of new rights to supplement Congress whenever Congress was asleep at the switch, overwhelmed with other business, or controlled by critics of Reconstruction, section 5 provides a better benchmark for judicial rights-finding than does Article V. Thus, judges should look for the same broad national support for a new right that would warrant a properly functioning Congress to recognize the right under its own authority.⁵⁹

IF JUDGES MAY PROPERLY strike down highly unusual state (or even federal) laws that intrude on a lived experience of liberty, there is a risk that governmental innovation and experimentation might be unduly stifled. Trigger-happy judges might kill the first glimmerings of legal reform whenever new issues arise and new approaches begin to win popular support. But this risk can be minimized if the judges proceed with caution and humility, with close attention to the danger of what might be called “judicial lock-in.”

The danger is that once a particular government practice has been invalidated by judges, the practice will wither away and remain forever off-limits, even if a broad swath of Americans would like to see the practice revived at some later point. Such a judicially induced lock-in would turn proper unenumerated-rights jurisprudence on its head. Doubtful laws should be judicially invalidated because they are unusual, not unusual simply because they have been judicially invalidated.⁶⁰

The most democratically sensitive and sophisticated version of lived constitutionalism would avoid judicial lock-in of unenumerated rights by inviting judges (or other constitutional decisionmakers) to reconsider their initial invalidations when presented with updated evidence of recent legislative patterns. For example, if many large states were to enact new laws similar to a law previously struck down—new laws with delayed start dates so as to allow for anticipatory judicial review—such enactments themselves would be new data to ponder.

The Court’s death-penalty jurisprudence offers a suggestive case study. In the late 1960s, actual executions dropped to zero in America. In response to this apparent national consensus, the Court in 1972 seemed to hold the death penalty categorically unconstitutional. Over the next four years, both Congress and some thirty-five states representing an overwhelming majority of the American population pushed back against this ruling with a new round of death-penalty statutes. In response, the Court reconsidered its position and gave its blessing to the penalty when the underlying crime was particularly heinous and strict procedural safeguards were in place. Since then, the Court has imposed additional substantive and procedural limits on capital punishment with a close eye on evolving American practice.⁶¹

ALTHOUGH A WAVE OF NEW LEGISLATION would not ordinarily suffice to trump a precise and inflexible textual right, we must keep in mind that in this chapter we have been dealing with various rights that have not been specified in this way in the written Constitution. If the original judicial reason for deeming these rights to be full-fledged constitutional entitlements derived from the fact that American lawmakers generally respected these rights in practice, then such rights should lose their constitutional status if the legislative pattern dramatically changes. In this particular pocket of unwritten constitutionalism, what should ideally emerge is a genuine dialogue among judges, legislators, and ordinary citizens.