

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.