

# THE QUESTION RAISED BY *LAWRENCE*: MARRIAGE, THE SUPREME COURT AND A WRITTEN CONSTITUTION

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## I. INTRODUCTION

In *Lawrence v. Texas*,<sup>1</sup> the Supreme Court concluded that state legislatures could not criminalize homosexual sodomy.<sup>2</sup> Many (including Justice Scalia in dissent) noted that *Lawrence* raises a serious question regarding the future of marriage: Can marriage still be defined as the union of a man and a woman?<sup>3</sup> But *Lawrence* also raises another sober question: Does America still have a written Constitution?<sup>4</sup> The answers are unknown.

As a result, and depending upon who is speaking, the President and the Senate are either preserving, ignoring, rewriting, or destroying the Constitution each time an individual is nominated or confirmed to the federal bench.<sup>5</sup> Because of decisions like *Lawrence*, the selection of federal judges, particularly Supreme Court Justices, has become one of the nation's

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1. 539 U.S. 558 (2003).

2. *Lawrence*, 539 U.S. at 558.

3. *Id.* at 604 (Scalia, J., dissenting).

4. See RICHARD H. FALLON, JR., *OVERCOMING THE CONSTITUTION: IMPLEMENTING THE CONSTITUTION passim* (Harvard Univ. Press 2001); see also Saikrishna B. Prakash, *Overcoming the Constitution: Implementing the Constitution*, 91 GEO. L.J. 407, 407 (2003) (book review) (“The constitutional law that emerges from [Supreme Court] opinions sometimes bears only the slightest resemblance to the Constitution itself.”).

5. The recent, politically based arguments made during the nomination and confirmation of Chief Justice John Roberts demonstrates that members of the Senate—as well as the President and the American people—rather firmly believe that the “text” of the Constitution depends, in large measure, upon the personal views of the individuals who sit on the Nation’s highest court. See, e.g., Bill Adair, *Roberts is Chief; Now Who’s Next?*, ST. PETERSBURG TIMES, Sept. 30, 2005, at 1A (stating that Bush calls John Roberts a “faithful guardian of the Constitution”); David Jackson, *A New Era Begins as Roberts Takes Oath Top Justice OK’d Despite Democrat Holdouts; Pivotal Issues Await*, DALLAS MORNING NEWS, Sept. 30, 2005, at 1A (indicating Senator Kennedy fears that Roberts will reverse the progress of equal protection gained over the last few decades).

most contentious political issues.<sup>6</sup> James Madison and Alexander Hamilton, among others, assured the Founding Generation that federal judges would merely exercise “[j]udgment,” not “[w]ill.”<sup>7</sup> Time and experience, however, have *not* borne out their reassurance that the federal judiciary would be the least dangerous branch.<sup>8</sup> Instead, the writings of such anti-Federalist essayists as Brutus, who was highly critical of the potentially unlimited power of the Article III courts to override state and federal legislatures,<sup>9</sup> provide a rather more accurate description of modern constitutional law. “[I]t is impossible . . . to say” what “the principles are, which the courts will adopt,” except that they “may, and probably will, be very liberal ones” not confined to the “letter” of the Constitution.<sup>10</sup>

The Constitution was adopted by a Founding Generation which assumed, along with Madison and Hamilton, that while the document would be subject to amendment and interpretation, the amendment process was vested where it belonged—in the hands of “the People”<sup>11</sup>—with the interpretative process safely left to judges who would apply, but not create, the

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6. Even the process of *judging* has become politicized. In determining the meaning of the Constitution, individual Justices frankly admit they consider possible political reactions to their individual votes. For example, in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992) (plurality opinion), the Supreme Court reaffirmed *Roe v. Wade*, 410 U.S. 113 (1973), *not* because *Roe* was correctly decided, but because three Justices concluded that their departure from the “central holding” of *Roe* might appear “political” and therefore undermine the Court’s “legitimacy.” *Casey*, 505 U.S. at 869. The *Casey* Court reasoned that a “decision to overrule *Roe*’s essential holding under the existing circumstances would address error, if error there was, at the cost of both profound and unnecessary damage to the Court’s legitimacy.” *Id.*

7. THE FEDERALIST NO. 78 (Alexander Hamilton), *available at* [http://press-pubs.uchicago.edu/founders/documents/a3\\_1s11.html](http://press-pubs.uchicago.edu/founders/documents/a3_1s11.html).

8. *Id.*

9. 4 THE FOUNDERS’ CONSTITUTION 236-37 (Philip B. Kurland & Ralph Lerner eds., 1987). Brutus, in this installment, argues that judicial power over the legislative branches will tend to expand leading (eventually) to the legislature accepting the Court’s (possibly) erroneous views regarding legislative powers:

It is to be observed, that the supreme court has the power, in the last resort, to determine all questions that may arise in the course of legal discussion, on the meaning and construction of the constitution. This power they will hold under the constitution, and independent of the legislature.

The latter can no more deprive the former of this right, than either of them, or both of them together, can take from the president, with the advice of the senate, the power of making treaties, or appointing ambassadors. In determining these questions, the court must and will assume certain principles, from which they will reason, in forming their decisions. These principles, whatever they may be, when they become fixed, by a course of decisions, will be adopted by the legislature, and will be the rule by which they will explain their own powers.

*Id.*

10. *Id.* at 236.

11. No one—and certainly not the authors of this article—seriously contends that the constitutional principles established in 1789 are immune from change. The Founders did not bind future generations to a rigid and unchanging document. On the contrary, they established specific mechanisms for amending the document. *See* U.S. CONST. art. V.

law.<sup>12</sup> These assumptions are seriously out-of-place in a world where lawyers, law professors, politicians and even Supreme Court Justices are fixed upon the purported virtues of “a living Constitution.”<sup>13</sup> The Constitution is now so alive that its meaning changes with each new appointment to the federal bench.<sup>14</sup>

How did America’s fundamental political charter become so vaporous that the Nation’s entire political structure trembles each time a new Justice is named to the Supreme Court?<sup>15</sup> The genealogy of *Lawrence* tells the tale.

12. The Anti-Federalists warned that the power of the judiciary would be “formidable, somewhat arbitrary and despotic” and would become “more severe and arbitrary, if not tempered and carefully guarded by the constitution, and by laws, from time to time.” *Observations Leading to a Fair Examination of the System of Government Proposed by the Late Convention, Letters From the Federal Farmer (1787 and 1788)*, in 2 THE COMPLETE ANTI-FEDERALIST 214, 315-16 (Herbert J. Storing ed., 1981). Alexander Hamilton responded by assuring that the judges would exercise “judgment” rather than “will.” THE FEDERALIST NO. 78, *supra* note 7.

13. As early as 1976 Justice Rehnquist expressed his concerns regarding the notion of a “living Constitution:”

At least three serious difficulties flaw the brief writer’s version of the living Constitution. First, it misconceives the nature of the Constitution, which was designed to enable the popularly elected branches of government, not the judicial branch, to keep the country abreast of the times. Second, the brief writer’s version ignores the Supreme Court’s disastrous experiences when in the past it embraced contemporary, fashionable notions of what a living Constitution should contain. Third, however socially desirable the goals sought to be advanced by the brief writer’s version, advancing them through a freewheeling, non-elected judiciary is quite unacceptable in a democratic society.

William H. Rehnquist, *The Notion of a Living Constitution*, 54 TEX. L. REV. 693, 699 (1976). *But see* Van Orden v. Perry, 545 U.S. 677, 730-33 (2005).

14. The current Constitution is so malleable that one can legitimately question whether it furthers such important values as stability and certainty. As Justice Scalia noted in the opening paragraphs of his dissent in *Lawrence*:

“Liberty finds no refuge in a jurisprudence of doubt.” That was the Court’s sententious response, barely more than a decade ago, to those seeking to overrule *Roe v. Wade*. The Court’s response today, to those who have engaged in a 17-year crusade to overrule *Bowers v. Hardwick*, is very different. The need for stability and certainty presents no barrier.

*Lawrence v. Texas*, 539 U.S. 558, 586 (2003) (Scalia, J., dissenting) (citations omitted). The normative content of “living” constitutional law—in particular the right to privacy at issue in *Lawrence*—can expand, erode, accrete or metastasize (depending upon whether one wants to describe the change in positive or negative terms) within a few decades. *Compare* Griswold v. Connecticut, 381 U.S. 479, 486 (1965) (erecting the constitutional right to privacy upon the “sacred” union of a man and a woman in marriage) *with Lawrence*, 539 U.S. at 574 (finding that privacy is *not* based upon marriage; rather the right rests upon an individual entitlement to determine one’s “own concept of existence, of meaning, of the universe, and of the mystery of human life”).

15. *See generally* LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW (Oxford Univ. Press 2004); Larry Alexander & Lawrence B. Solum, *Popular? Constitutionalism? The People Themselves: Popular Constitutionalism and Judicial Review*, 118 HARV. L. REV. 1594, 1594 (2005) (book review) (explaining that the Justices of the Supreme Court have become “the ultimate and final expositor of constitutional meaning”).

## II. JUDGING IN THE SHADOWS

*Lawrence* relies upon a constitutional right not set out in the actual language of the Bill of Rights and the Fourteenth Amendment—the increasingly ubiquitous modern “right of privacy.”<sup>16</sup> This right was announced in *Griswold v. Connecticut*,<sup>17</sup> a 1965 United States Supreme Court decision. The case involved the State of Connecticut’s legislative decision to regulate the use of condoms by married couples—a law that, in the mid-1960s, was quaint and anachronistic.<sup>18</sup>

But rather than wait for the ordinary processes of democratic debate to adjust state policy, the Supreme Court assumed the task of freeing the electorate of Connecticut (and America in general) from a law the dissenting Justices called “silly.”<sup>19</sup> The Court emancipated the country from the bonds of silliness by noting that the Connecticut law regulated the marital relationship, a union between a man and a woman, that was—in the words of the Court—“intimate to the degree of being sacred.”<sup>20</sup> This sacred relationship, the Court concluded, *must* be supported by a “right to privacy,” even though the Constitution nowhere mentions the right.<sup>21</sup>

The Court did not consider whether its new analysis was consistent with the long-standing history and traditions of the American people. It could *not* undertake such an analysis because any careful review of actual historical practices would have shown that—however out-of-touch Connecticut’s law appeared in the middle of the 1960s sexual revolution—states throughout the nation had regulated the sexual conduct of married and unmarried citizens by means of adultery, incest, and fornication laws from the dawn of the Republic. The policies animating these laws (as noted by the concurring opinion in *Griswold*) may have seemed less “silly” in 1965 than a prohibition on condom usage,<sup>22</sup> but adultery, incest, and

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16. See generally *Lawrence*, 539 U.S. at 564. “Privacy” has become one of the key concerns when potential Supreme Court nominees are considered, as evidenced during the John Roberts confirmation process. See *I Come Before the Committee With No Agenda. I Have No Platform*, N.Y. TIMES, Sept. 13, 2005, at A28 (providing the opening statement at the confirmation hearing of Justice Roberts, followed by a statement by Senators Arlen Specter and Dianne Feinstein announcing their specific intent to address privacy rights at the outset of the meetings).

17. 381 U.S. 479 (1965).

18. *Griswold*, 381 U.S. at 480.

19. *Id.* at 527 (Stewart & Black, JJ., dissenting).

20. *Id.* at 486 (majority opinion).

21. *Id.*

22. See, e.g., Jeremy D. Weinstein, Note, *Adultery, Law, and the State: A History*, 38 HASTINGS L.J. 195, *passim* (1986) (giving a history of the adultery statutes beginning with “barbarian times”); Jennifer A. Herold, Note, *A Breach of Vows but Not Criminal: Does Lawrence v. Texas Invalidate Utah’s Statute Criminalizing Adultery?*, 7 J.L. FAM. STUD. 253, 253-58 (2005) (referencing the punishment enforced by the Commonwealth of Massachusetts for adultery—death by hanging—and also discussing the history of the Utah adultery statute); Note,

fornication laws are rather difficult to distinguish on *constitutional grounds* from Connecticut's regulation of marital fecundity.<sup>23</sup> As the dissenting Justices pointed out, nothing in the text of the Constitution invalidated Connecticut's law simply because it was "unreasonable" or "unwise."<sup>24</sup>

The Court was required to fashion a new analysis that *would* set aside the state's condom policy because neither the words of the Constitution nor the specific history and traditions of the American people invalidated Connecticut's law.<sup>25</sup> Accordingly, the Court announced that the "specific guarantees in the Bill of Rights have penumbras" (or partial shadows) that give the actual wording of the Constitution "life and substance."<sup>26</sup>

*Constitutional Barriers to Civil and Criminal Restrictions on Pre- and Extramarital Sex*, 104 HARV. L. REV. 1660, 1661 (1991) (stating that in 1991 more than twenty-five percent of the states still had fornication statutes).

23. *Griswold*, 381 U.S. at 498 (Warren, C.J., Goldberg, & Brennan, JJ., concurring). The concurring opinion noted that Connecticut's policy was essentially a "birth-control law" because "of the admitted widespread availability to all persons in the State of Connecticut, unmarried as well as married, of birth-control devices for the prevention of disease, as distinguished from the prevention of conception." *Id.* The concurring Justices, however, ignored the fact that state condom-use policies which encourage child bearing by married couples, like state adultery laws which encourage sexual fidelity by married couples, both express political and moral judgments regarding the social value and utility of certain sexual practices within marriage; political and moral judgments that are distinguishable from each other *only* as a matter of degree. Which regulation, a rule prohibiting a married couple's use of condoms or a rule prohibiting any expression of extra-marital sexuality, intrudes more significantly on the sexual rights of the marital partners? This inquiry could be answered in various ways by various analysts. Nevertheless, while the concurring Justices found Connecticut's interest in prohibiting one method of birth control unconstitutional, they had no difficulty whatsoever in announcing that the constitutionality of adultery statutes were "beyond doubt." *Id.*

24. *Id.* at 520-21 (Black & Stewart, JJ., dissenting). As Justice Black's extensive dissent, joined by Justice Stewart, emphasized:

[T]here is no provision of the Constitution which either expressly or impliedly vests power in this Court to sit as a supervisory agency over acts of duly constituted legislative bodies and set aside their laws because of the Court's belief that the legislative policies adopted are unreasonable, unwise, arbitrary, capricious or irrational. The adoption of such a loose, flexible, uncontrolled standard for holding laws unconstitutional, if ever it is finally achieved, will amount to a great unconstitutional shift of power to the courts which I believe and am constrained to say will be bad for the courts and worse for the country. Subjecting federal and state laws to such an unrestrained and unrestrainable judicial control as to the wisdom of legislative enactments would, I fear, jeopardize the separation of governmental powers that the Framers set up and at the same time threaten to take away much of the power of States to govern themselves which the Constitution plainly intended them to have.

*Id.*

25. While the result in *Griswold* is rarely criticized, the legal soundness of the *Griswold* analysis has been questioned. See, e.g., Michael A. Woronoff, Note, *Public Employees or Private Citizens: The Off-Duty Sexual Activities of Police Officers and the Constitutional Right of Privacy*, 18 U. MICH. J.L. REFORM 195, 198-201 (1984) (noting that even though the outcome of a case may be correct under *Griswold*, the logic of the case "remains unconvincing").

26. *Griswold*, 381 U.S. at 484:

[S]pecific guarantees in the Bill of Rights have *penumbras*, formed by emanations from those guarantees that help give them life and substance. See *Poe v. Ullman*, 367 U.S. 497, 516-522 (dissenting opinion). Various guarantees create zones of privacy.

In real life, the substance of shadows (and particularly partial shadows) is questionable and they result from the lack, not the presence, of light. Nevertheless, relying upon dimness, the sacred nature of marriage and the talismanic word privacy, the Court walked away from the specific guarantees of the United States Constitution, as well as the history, experience, and traditions of the American people.<sup>27</sup> The judicial journey begun in *Griswold* has now brought into constitutional doubt the “sacred” union of “marriage” upon which *Griswold* itself rests.<sup>28</sup> As a result, Americans must act not only to protect the union lauded in *Griswold*, but to reinstate what Chief Justice John Marshall in 1803 called “the greatest improvement on political institutions” achieved in America: the establishment of “a written constitution.”<sup>29</sup>

Legal scholars applauded the rather startling analysis of *Griswold*. They wrote elaborate justifications for the use of “privacy analysis” to abolish legislative anachronisms with a minimum of fuss and bother.<sup>30</sup> They paid little heed to Justice Black’s warning that *Griswold* had dramatically altered the meaning of the Bill of Rights by “substitut[ing] for the crucial

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The right of association contained in the penumbra of the First Amendment is one, as we have seen. The Third Amendment in its prohibition against the quartering of soldiers “in any house” in time of peace without the consent of the owner is another facet of that privacy. The Fourth Amendment explicitly affirms the “right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.” The Fifth Amendment in its Self-Incrimination Clause enables the citizen to create a zone of privacy which government may not force him to surrender to his detriment. The Ninth Amendment provides: “The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.”

*Id.* A penumbra is defined as: “1. A partial shadow, as in an eclipse, between regions of complete shadow and complete illumination.” Dictionary.com, <http://dictionary.reference.com/search?q=penumbra> (last visited May 9, 2007).

27. See Woronoff, *supra* note 25, at 198-201.

28. *Griswold*, 381 U.S. at 486 (“Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred.”).

29. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 178 (1803).

30. See, e.g., Jed Rubenfeld, *The Right of Privacy*, 102 HARV. L. REV. 737, 740-52 (1989) (setting forth the “genealogy” of “privacy” and praising *Griswold* as providing the foundation for constitutional recognition of “personhood”). For an elaborate, book-length defense of *Griswold* and related cases, see BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* 88, 140-59 (Belknap Press 1991) (praising *Griswold* as an outstanding example of what he calls a “multigenerational synthesis” of new “constitutional moments” with “preexisting constitutional values”). Even generally “conservative” legal scholars—who candidly note the frailty of its constitutional analysis—generally tend to support the outcome of *Griswold*. See, e.g., Jane E. Larson, *The New Home Economics*, 10 CONST. COMMENT. 443, 449 n.20 (1993) (reviewing RICHARD G. POSNER, *SEX AND REASON* (1993)) (noting that although Posner concludes that “*Griswold* and its successors probably have no legal-doctrinal ground in the Constitution,” he nevertheless agrees with the outcome of *Griswold* and many subsequent cases on the ground that certain regulations of sexual conduct are “so offensive, oppressive, [and] probably undemocratic” as to warrant a finding of constitutional invalidity).

word or words” of various constitutional guarantees “another word”—privacy—that could be “more or less flexible and more or less restricted in meaning” than the Constitution’s original text.<sup>31</sup> They similarly ignored the grave potential that *Griswold*’s broad notion of a “living Constitution” could threaten the very existence of the “written Constitution” lauded by John Marshall.<sup>32</sup>

In the rush to support the purportedly enlightened approach of *Griswold*, too many Americans, including citizens, lobbyists, lawyers, law professors and judges, seemed to forget that constitutional law involves much more than ensuring proper results in particular (even silly) cases. Those who drafted the document viewed the Constitution’s distribution of decision making power between and among the various branches of state and federal government as its most important role; the very foundation of American liberty.<sup>33</sup> The constitutional distribution of decision-making power in 1789 was—and remains today—profoundly important because various results may be proper at different times and in different circumstances.<sup>34</sup>

The Constitution was not drafted to resolve every difficult, troublesome and/or controversial issue of public policy.<sup>35</sup> In the areas where it speaks

31. *Griswold*, 381 U.S. at 509 (Black & Stewart, JJ., dissenting).

32. See, e.g., *Marbury*, 5 U.S. (1 Cranch) at 178. As Justice Black explained in his *Griswold* dissent:

I realize that many good and able men have eloquently spoken and written, sometimes in rhapsodical strains, about the duty of this Court to keep the Constitution in tune with the times. The idea is that the Constitution must be changed from time to time and that this Court is charged with a duty to make those changes. For myself, I must with all deference reject that philosophy. The Constitution makers knew the need for change and provided for it. Amendments suggested by the people’s elected representatives can be submitted to the people or their selected agents for ratification. That method of change was good for our Fathers, and being somewhat old fashioned I must add it is good enough for me.

*Griswold*, 381 U.S. at 522 (Black & Stewart, JJ., dissenting).

33. See, e.g., THE FEDERALIST NO. 22, 73 (Alexander Hamilton), NOS. 51, 62 (James Madison or Alexander Hamilton), available at <http://www.yale.edu/lawweb/avalon/federal/fed.htm> (discussing the importance of separation of powers as the primary security for the freedom and liberty of the American people).

34. See, e.g., *Saenz v. Roe*, 526 U.S. 489, 504 n.17 (1999) (“The Framers split the atom of sovereignty. It was the genius of their idea that our citizens would have two political capacities, one state and one federal, each protected from incursion by the other.” (citing U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring))).

35. See, e.g., *Reynolds v. Sims*, 377 U.S. 533, 624-25 (1964) (Harlan, J., dissenting). Justice Harlan criticizes what he calls a “current mistaken view of the Constitution and the constitutional function of this Court”:

This view, in a nutshell, is that every major social ill in this country can find its cure in some constitutional “principle,” and that this Court should “take the lead” in promoting reform when other branches of government fail to act. The Constitution is not a panacea for every blot upon the public welfare, nor should this Court, ordained as a judicial body, be thought of as a general haven for reform movements. The

rather clearly, the Constitution leaves final decision making authority with the judiciary.<sup>36</sup> If state or federal governments exercise power in a manner that encroaches upon core constitutional values (as set out in constitutional text construed in light of the actual practices, experience and traditions of the American people),<sup>37</sup> the judiciary *must* act to protect those values.<sup>38</sup> But the drafters of the American Constitution believed this judicial role would be exceptional and rarely invoked.<sup>39</sup> As the Federalist Papers proclaim, the judiciary is the “least dangerous” branch because judges do not create policy but merely exercise “judgment.”<sup>40</sup> The *really* difficult questions, the Founders thought, were left to the people.

The Supreme Court has departed from the decision making structure established by the Founders on more than one occasion.<sup>41</sup> Prior to *Griswold*

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Constitution is an instrument of government, fundamental to which is the premise that in a diffusion of governmental authority lies the greatest promise that this Nation will realize liberty for all its citizens. This Court, limited in function in accordance with that premise, does not serve its high purpose when it exceeds its authority, even to satisfy justified impatience with the slow workings of the political process. For when, in the name of constitutional interpretation, the Court *adds* something to the Constitution that was deliberately excluded from it, the Court in reality substitutes its view of what should be so for the amending process.

*Id.*

36. THE FEDERALIST NO. 78, *supra* note 7 (emphasizing that if the legislature were to pass a law that were contrary to one of the clauses of the constitution then it would remain to the courts of justice “whose duty it must be to declare all acts contrary to the manifest tenor of the [C]onstitution void. Without this, all the reservations of particular rights or privileges would amount to nothing”).

37. *See, e.g.*, *Washington v. Glucksberg*, 521 U.S. 702, 710 (1997) (“[It] begin[s], as we do in all due process cases, by examining our Nation’s history, legal traditions, and practices.”).

38. THE FEDERALIST NO. 78, *supra* note 7.

39. *Id.* (asserting that the judicial invalidation of a legislative act would be quite rare since “it would require an uncommon portion of fortitude in the judges to do their duty as faithful guardians of the Constitution” to strike down “legislative invasions” of the Constitution “instigated by the major voice of the community”).

40. As THE FEDERALIST NO. 78 explains:

Whoever attentively considers the different departments of power must perceive, that in a government in which they are separated from each other, the judiciary, from the nature of its functions, will always be *the least dangerous to the political rights of the constitution*; because it will be least in a capacity to annoy or injure them. The executive not only dispenses the honors, but holds the sword of the community. The legislature not only commands the purse, but prescribes the rules by which the duties and rights of every citizen are to be regulated. The judiciary on the contrary has no influence over either the sword or the purse, no direction either of the strength or of the wealth of the society, and can take no active resolution whatever. It may truly be said to have neither Force nor Will, *but merely judgment*; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments.

*Id.* (emphasis added).

41. All of the Court’s departures from constitutional text *can* be explained as judicial attempts to keep the Constitution in tune with the times. History, however, demonstrates that keeping the Constitution in tune with the times is a questionable enterprise at best. *See, e.g.*, *Dred Scott v. Sandford*, 60 U.S. 393 (1856); *Plessy v. Ferguson*, 163 U.S. 537 (1896).

In *Dred Scott v. Sandford*, the Court invalidated the Missouri Compromise. *Dred Scott*, 60 U.S. at 432. Under the terms of that compromise, which was merely one part of an on-going attempt to negotiate a political resolution of the slavery question—Congress prohibited slavery in Missouri. *Id.* at 455 (Wayne, J., concurring). Dred Scott, the son of slaves forcibly brought to America from Africa, claimed that he, his wife and his children had been freed when their master brought them to Missouri. *Id.* at 398 (majority opinion). The majority opinion, written by Chief Justice Taney, concluded that this congressional action violated the slave owner’s “due process” rights under the Fifth Amendment to the Constitution,

which provides that no person shall be deprived of life, liberty, and property, without due process of law. And an act of Congress which deprives a citizen of the United States of his liberty or property, merely because he came himself or brought his property into a particular Territory of the United States, and who had committed no offence against the laws, could hardly be dignified with the name of due process of law.

*Id.* at 450.

According to the majority opinion, “due process” protected Mr. Sandford’s “property”—his ownership of Mr. and Mrs. Scott and their children—despite the express language of Article IV, Section 3 of the Constitution, which authorized Congress to “make all needful rules and regulations respecting the territory or other property belonging to the United States.” *Id.* at 432 (citing U.S. CONST. art IV, § 3). Prior to *Dred Scott*, congressional power to enact the sort of legislation struck down by Chief Justice Taney’s opinion had never been doubted. Article IV, Section 3 of the Constitution previously had been interpreted by Chief Justice John Marshall as conferring broad power on Congress to make *all* regulations deemed appropriate for the governance of territories and new states. *See, e.g., Am. Ins. Co. v. Canter*, 26 U.S. 541, 542 (1828) (indicating that the Territory of Florida was “governed by virtue of that clause in the Constitution, which empowers Congress to make all needful rules and regulations, respecting the territory, or other property belonging to the United States”) (quoting U.S. CONST. art IV, § 3).

*Dred Scott* is the Supreme Court’s first reported opinion invoking a free-wheeling “substantive due process” liberty analysis; an approach characteristic of *Griswold*, *Roe* and subsequent cases. *See, e.g., Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 998 (1992) (Scalia, J., dissenting) (“*Dred Scott* . . . rested upon the concept of ‘substantive due process’ that the Court praises and employs today.”). *Dred Scott*’s departure from constitutional text made the Nation’s bloodiest conflict—the Civil War—inevitable by making political resolution of the slavery question impossible.

Following the Civil War, the Nation adopted the Thirteenth, Fourteenth, and Fifteenth Amendments to reverse the holding in *Dred Scott*. For a relatively brief period following their adoption, the Supreme Court applied the express language of these important amendments to invalidate state efforts to discriminate against the Nation’s former slaves. In *Strauder v. West Virginia*, 100 U.S. 303, 312 (1879), for example, the Court invalidated a state law excluding former slaves from serving on juries. The Court noted that the Fourteenth Amendment was crafted precisely to ordain that:

[T]he law in the States shall be the same for the black as for the white; that all persons, whether colored or white, shall stand equal before the laws of the States, and, in regard to the colored race, for whose protection the amendment was primarily designed, that no discrimination shall be made against them by law because of their color[.]

*Id.* at 307. In *Railroad Co. v. Brown*, 84 U.S. (1 Wall.) 445 (1873), the Court invalidated an attempt by a railroad to comply with the commands of federal legislation and the Fourteenth Amendment by providing separate but equal “accommodations for” Blacks. *Brown*, 84 U.S. (1 Wall.) at 452. The Court noted that Congress had required “equal treatment” in the operation of the railroad and rejected the company’s “ingenious attempt to evade a compliance with the obvious meaning of the requirement.” *Id.* *See also Yick Wo v. Hopkins*, 118 U.S. 356, 374 (1886) (invalidating a municipal regulatory regime that routinely denied business licenses to Chinese residents; “the conclusion cannot be resisted that no reason for [the license denial] exists except hostility to the race and nationality to which the petitioners belong, and which, in the eye of the law, is not justified”).

and *Lawrence*, the most recent period of judicial excess was ended, at least in part, by President Roosevelt's famous threat to "pack the Court" in 1937.<sup>42</sup> From the late 1890s to the mid-1930s, the Justices of the Supreme Court invalidated various state and federal legislative judgments on the ground that the legislative judgments unduly interfered with the "liberty" of American citizens.<sup>43</sup> Back then the unwritten freedom that the Court enforced was not privacy, but economic liberty.

In *Lochner v. New York*,<sup>44</sup> for example, the Court struck down a law establishing a ten-hour workday for bakery employees who labored near hot and dangerous wood and gas-fired ovens.<sup>45</sup> Why was this seemingly

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Less than twenty years after *Strauder*, however, with its decision in *Plessy v. Ferguson*, 163 U.S. 537 (1896), the Supreme Court turned its back on a strict textual application of the Fourteenth Amendment, concluding that a railroad's provision of "separate but equal" railway cars for white and black passengers complied with all relevant constitutional commands. The opinion's refusal to follow the path marked by cases such as *Strauder*, *Railroad Company*, and *Yick Wo* was rather obviously influenced by the Court's perception of current political trends. The majority opinion attempted to justify its departure from constitutional text by citing as authoritative precedent, not its own prior opinions interpreting the Thirteenth, Fourteenth, and Fifteenth Amendments, but opinions from state courts that may well have been motivated to uphold and sanction various discriminatory actions. See *Plessy*, 163 U.S. at 550 (distinguishing *Yick Wo* by, among other things, citing five state cases discussing various discriminatory state programs). The Court feebly attempted to justify its retreat from express constitutional language and its realignment with current political views by asserting that:

[T]he underlying fallacy of the plaintiff's argument . . . [is] the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it.

*Id.* at 551. Justice Harlan, in dissent, noted that the express terms of the Thirteenth, Fourteenth, and Fifteenth Amendments prohibited the officially supported discrimination involved in *Plessy*. *Id.* at 555 (Harlan, J., dissenting). He concluded that, "[i]n my opinion, the judgment this day rendered will, in time, prove to be quite as pernicious as the decision made by this tribunal in the *Dred Scott Case*." *Id.* at 559.

Justice Harlan was right. It took the Court over fifty years to begin correcting the constitutional error it condoned in *Plessy*. See, e.g., *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954). Without question, the process of eliminating the lingering effects of slavery would have been difficult even if the Court had followed the path set in *Strauder*, *Railroad Company* and *Yick Wo*. The Court's fifty year departure from the text of the post-Civil War Amendments, however, has made a difficult process seem nearly impossible. More than fifty years since *Brown*, the norms enshrined in the language of the Thirteenth, Fourteenth, and Fifteenth Amendments remain aspirations rather than realities. See generally *Gratz v. Bollinger*, 539 U.S. 244 (2003); *Grutter v. Bollinger*, 539 U.S. 306 (2003) (providing opinions struggling with the difficult issues posed by affirmative action programs, "reverse" discrimination, and the general social unrest caused by long-delayed achievement of racial equality).

42. Mary Murphy Schroeder, *The Ninth Circuit and Judicial Independence: It Can't Be Politics as Usual*, 37 ARIZ. ST. L.J. 1, 4-5 (2005) (giving a short story of the court packing plan and how Roosevelt did not want to be held to the "horse and buggy days" of the Court's interpretation of the Commerce Clause).

43. See generally *Adkins v. Children's Hosp.*, 261 U.S. 525, 561-62 (1923); *St. Louis Cotton Compress Co. v. Arkansas*, 260 U.S. 346, 347-48 (1922); *Lochner v. New York*, 198 U.S. 45, 57-58 (1905); *Allgeyer v. Louisiana*, 165 U.S. 578, 591-93 (1897).

44. 198 U.S. 45 (1905).

45. *Lochner*, 198 U.S. at 64-65.

sensible regulation unconstitutional? Because, by setting a limit on the number of hours an employee could work, New York had unduly interfered with the right of free men to negotiate their own terms of employment.<sup>46</sup> In the 1920s, the shadows of the Constitution protected a rather unusual constitutional right indeed: the “right” of New York bakers to work themselves to death.<sup>47</sup>

By 1936, cases like *Lochner* threatened to invalidate the Roosevelt Administration’s efforts to ease the economic suffering caused by the Great Depression.<sup>48</sup> Various provisions of the New Deal interfered with economic rights highly valued by the Justices.<sup>49</sup> After the Supreme Court invalidated parts of the National Industrial Recovery Act<sup>50</sup> and the Agricultural Adjustment Act<sup>51</sup> in 1935 and 1936 respectively, President Roosevelt went on the offensive. Following his election to a second term, in one of his famous “fireside chats,” he threatened in 1937 to appoint a new Supreme Court Justice for each one of the “nine old men” on the Supreme Court over the age of seventy.<sup>52</sup> These Justices, the President declared, were “out of touch” with the needs of ordinary Americans, the economic realities of the day, and even the intentions of the Founders.<sup>53</sup> Such a strong message from a popular president prompted Congress to hold hearings on the proposal, but before any changes were made, the Supreme Court abandoned its enforcement of non-enumerated constitutional liberties and the president abandoned his plan to pack the Court.

The Supreme Court made an abrupt about-face between December 1936 and the end of the first quarter of 1937. On the heels of President Roosevelt’s challenge, the Court began to implicitly condemn its prior decisions as unwarranted judicial departures from the text of the

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46. *Id.* at 57.

47. *Lochner* is generally considered the great “progenitor” of the modern substantive due process cases discussed below. See David E. Bernstein, *Lochner Era Revisionism, Revised: Lochner and the Origins of Fundamental Rights Constitutionalism*, 92 GEO. L.J. 1, 13 (2003).

48. See, e.g., William E. Leuchtenburg, *When the People Spoke, What Did They Say?: The Election of 1936 and the Ackerman Thesis*, 108 YALE L.J. 2077, 2079-80, 2082-87 (1999) (citing various cases and some of Roosevelt’s reactions to them leading up to the introduction of his court-packing plan).

49. See, e.g., *Carter v. Carter Coal Co.*, 298 U.S. 238, 316-17 (1936) (striking down the “little NRA”); *Ashton v. Cameron County Water Improvement Dist. No. 1*, 298 U.S. 513, 532 (1936) (striking down the Municipal Bankruptcy Act); *United States v. Butler*, 297 U.S. 1, 68 (1936) (striking down the Agricultural Adjustment Act); *Schechter Poultry Corp. v. United States*, 295 U.S. 495, 551 (1935) (striking down the National Industrial Recovery Act).

50. *Schechter Poultry*, 295 U.S. at 551; *Panama Refining Co. v. Ryan*, 293 U.S. 388, 433 (1935).

51. *Butler*, 297 U.S. at 68.

52. Fireside Chats of Franklin Delano Roosevelt, Fireside Chat on the Reorganization of the Judiciary, Mar. 9, 1937, available at <http://www.fdrlibrary.marist.edu/030937.html>.

53. *Id.*

Constitution.<sup>54</sup> Rather than invalidating legislation because it restricted the unenumerated economic liberties of American citizens, the Court opined regarding the obligation, duty and privilege of free men and women to govern themselves by debating and deciding difficult questions of social and economic policy.<sup>55</sup> The Court seemingly recalled, and conducted its business pursuant to, Chief Justice John Marshall's famous dictum in *Marbury v. Madison*<sup>56</sup> that "the framers of the [C]onstitution contemplated that instrument as a rule for the government of *courts*, as well as of the legislature."<sup>57</sup>

Throughout the early 1960s, the Court regularly opined regarding the dangers of enforcing judicially preferred policies, in disregard of the text, structure and history of the American Constitution.<sup>58</sup> Unfortunately, *Griswold* and subsequent privacy cases paid little heed. The contraception law in *Griswold* was, as Justice Stewart observed, "uncommonly silly" and outdated.<sup>59</sup> But however proper the *result* in *Griswold* seemed and still seems today, the *analysis* launched by the case encouraged social activists, lawyers, law professors, and judges to increasingly ignore the fact that Article III does not establish the federal courts as the perpetual censor of unreasonable legislation or as the ultimate arbiter of all divisive moral controversies.

Most legislative and executive decisions are *not* controlled (and cannot be controlled) by the presciently precise language of the Constitution.<sup>60</sup> If the "correct" answers to pressing questions are fairly debatable, those

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54. *See, e.g.*, *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 397 (1937) (overruling *Adkins v. Children's Hosp.*, 261 U.S. 525 (1923) by upholding minimum wage legislation); *Nat'l Labor Relations Bd. (NLRB) v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 49 (1937) (upholding the constitutionality of the Wagner Act).

55. *See Jones & Laughlin*, 301 U.S. at 30 (discussing the presumption of constitutionality afforded legislative enactments).

56. 5 U.S. (1 Cranch) 137 (1803).

57. *Marbury*, 5 U.S. (1 Cranch) at 179-80 (emphasis added).

58. *See, e.g.*, *Ferguson v. Skrupa*, 372 U.S. 726, 729-30 (1963) (stating that "intrusion by the judiciary into the realm of legislative value judgments" characterized a number of past decisions, but that "[t]he doctrine . . . that due process authorizes courts to hold laws unconstitutional when they believe the legislature has acted unwisely—has long since been discarded").

59. *Griswold*, 381 U.S. at 527 (Stewart & Black, JJ., dissenting).

60. *Id.* at 530-31.

[I]t is not the function of this Court to decide cases on the basis of community standards. We are here to decide cases "agreeably to the Constitution and laws of the United States." It is the essence of judicial duty to subordinate our own personal views, our own ideas of what legislation is wise and what is not. If, as I should surely hope, the law before us does not reflect the standards of the people of Connecticut, the people of Connecticut can freely exercise their true Ninth and Tenth Amendment rights to persuade their elected representatives to repeal it. That is the constitutional way to take this law off the books.

questions must be—indeed, should *only be*—resolved by legislative action. The “correct” answers to such questions as the appropriate level of welfare assistance,<sup>61</sup> the purity of the nation’s air,<sup>62</sup> and the sexual conduct of its citizens<sup>63</sup> are fairly debatable and, therefore, should be left for resolution by state and national legislatures.<sup>64</sup>

This is particularly true when government action involves moral questions. Although it seems almost prehistoric to note that government action implicates moral issues, questions of morality abound in government decision-making.<sup>65</sup> The all-too-common contention that “government has no business regulating morality” makes a good sound bite, but not much sense. Governmental decisions *always* involve striking a balance between competing moral values. To whom should society pay welfare benefits? How much? When? These and thousands of other questions addressed daily by government necessarily will be resolved in favor of one moral view or another. The “right to privacy,” enunciated in *Griswold* and expanded in cases thereafter,<sup>66</sup> has rendered the American legal system increasingly oblivious to the reality that debatable moral and ethical questions are poor candidates for judicial resolution.

Following *Griswold*, the privacy right supposedly founded on the “sacred” institution of “marriage” was extended to unmarried couples,<sup>67</sup> a substantive result that (again) sparked little disagreement.<sup>68</sup> But the Court’s

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61. See, e.g., *Dandridge v. Williams*, 397 U.S. 471, 487 (1970) (refusing to review state-provided benefits under the Due Process and Equal Protection Clauses).

62. See, e.g., *Hancock v. Train*, 426 U.S. 167, 198 (1976) (construing respective rights and duties of state and federal governments in implementing the Clean Air Act).

63. See, e.g., *Bowers v. Hardwick*, 478 U.S. 186, 196 (1986) (noting laws should not be invalidated based on the reasoning that sodomy is immoral), *rev’d*, *Lawrence v. Texas*, 539 U.S. 558 (2003).

64. See generally ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW passim* (New York, MacMillan 1990).

65. See Dallin H. Oaks, Former Chicago Law Professor, Justice on the Utah Supreme Court, and Executive Director of the American Bar Foundation, Religious Values and Public Policy, Address to the Brigham Young University Management Society (Feb. 29, 1992), in *ENSIGN*, Oct. 1992, at 60 (stating that there is scarcely a piece of legislation that is not founded on some conception of morality; the issue is merely “whose morality and what legislation”); see also *Bowers*, 478 U.S. at 196 (“The law . . . is constantly based on notions of morality, and if all laws representing essentially moral choices are to be invalidated under the Due Process Clause, the courts will be very busy indeed.”).

66. For a good discussion of the development of the privacy right as it relates to sexual issues, see Donald H. J. Hermann, *Pulling the Fig Leaf off the Right to Privacy: Sex and the Constitution*, 54 *DEPAUL L. REV.* 909, *passim* (2005).

67. *Eisenstadt v. Baird*, 405 U.S. 438, 454-55 (1972).

68. See John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 *YALE L.J.* 920, 943 (1973) (explaining that the results of *Griswold* and subsequent cases were so popular that criticisms were like crying “wolf,” such that when the Court abandoned all pretense of judicial restraint with *Roe v. Wade*, few listened to the serious separation of powers issues raised by the case).

expansion of privacy to include abortion in *Roe v. Wade*<sup>69</sup> revealed how easy it is for judges to stumble when walking through constitutional shadows.<sup>70</sup> *Roe* starkly revealed the *kinds* of questions the Court (rather than the people) would decide under the penumbral “right to privacy.”

The *Roe* Court took pains to explain that abortion was particularly well suited for judicial resolution *precisely because* it involved, among other things,<sup>71</sup> “the difficult question of when life begins”; a question upon which the Court need not “speculate as to the answer.”<sup>72</sup> But, despite this disclaimer, the Court announced that a woman could terminate the life of an unborn child for any (or no) reason at any time prior to the point when the child could live outside the womb.<sup>73</sup> By providing a speculative response (“life,” or at least legally cognizable “life,” begins at “viability”)<sup>74</sup> to a question the Court purportedly did not need to “answer,”<sup>75</sup> the unusual contours of the a-constitutional right of privacy at last drew significant attention.<sup>76</sup> Philosophers, ethicists and many Americans recognized that the utilitarian reasoning of *Roe* raised a host of disconcerting questions.<sup>77</sup> For

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69. 410 U.S. 113 (1973).

70. *See Roe*, 410 U.S. at 153 (explaining that terminating a pregnancy is a right encompassed under personal liberty and the right to privacy).

71. *Id.* at 116-17. The Court stated:

We forthwith acknowledge our awareness of the sensitive and emotional nature of the abortion controversy, of the vigorous opposing views, even among physicians, and of the deep and seemingly absolute convictions that the subject inspires. One’s philosophy, one’s experiences, one’s exposure to the raw edges of human existence, one’s religious training, one’s attitudes toward life and family and their values, and the moral standards one establishes and seeks to observe, are all likely to influence and to color one’s thinking and conclusions about abortion.

*Id.*

72. *Id.* at 159.

We need not resolve the difficult question of when life begins. When those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary, at this point in the development of man’s knowledge, is not in a position to speculate as to the answer.

*Id.*

73. *Id.* at 163.

74. *Id.*

75. *Id.* at 159.

76. *See* Hart Ely, *supra* note 68, at 936-38 (discussing *Roe*’s dramatic departure from established standards of judicial review). The debate surrounding *Roe* is too extensive to chronicle here, but for a good general discussion of the history and legal theory, *see* N. E. H. HULL & PETER CHARLES HOFFER, *ROE V. WADE: THE ABORTION RIGHTS CONTROVERSY IN AMERICAN HISTORY* (2001). For a less scholarly, but more accessible summary, *see also* [http://en.wikipedia.org/wiki/Roe\\_v.\\_Wade#Controversy\\_over\\_Roe](http://en.wikipedia.org/wiki/Roe_v._Wade#Controversy_over_Roe).

77. The willingness of the Court in *Roe* to balance the value of unborn human life against a woman’s claim to privacy, led inevitably to claims that the Constitution also protects a right to assisted suicide, or “active” euthanasia, a position, so far, rejected by the Court. *See* *Washington v. Glucksberg*, 521 U.S. 702, 735 (1997) (rejecting assertion that the right to assisted suicide is protected by the Due Process and Equal Protection Clauses). But *Roe* raises other ethical issues as

the first time since *Griswold*, many Americans paused. It seemed the Court might, too.

*Roe* forced America, and the Court, to confront whether the Constitution in fact mandates judicial resolution of social controversies precisely because they are moral, divisive, and difficult. The legal academy that had nurtured privacy analysis<sup>78</sup> and warmly welcomed *Griswold*<sup>79</sup> now rushed to rewrite and re-explain the Supreme Court's astonishing decision. Thousands of pages in the law reviews were dedicated to sophisticated (and often incomprehensible and contradictory) justifications for *Roe*'s elimination of democratic debate and decision making at the very moment they were needed most.<sup>80</sup> These obviously *post hoc* apologetics embarrassed the Court and for many years the Court was hesitant to lengthen the shadows of *Griswold*.

Indeed, in the 1986 opinion of *Bowers v. Hardwick*,<sup>81</sup> the Court avoided the right to privacy altogether and looked (at long last) to the language of the Constitution and the teachings of long-standing American traditions and history.<sup>82</sup> *Bowers* concluded that states could decide whether or not to regulate homosexual conduct, even if the chosen course seemed prudish, silly, or outdated, because there is nothing in the language of the Constitution that directly addresses the question.<sup>83</sup> The right to privacy did not dictate a contrary result, the Court noted, because human sexuality involves debatable questions of morality that have been regulated for centuries—and might warrant regulation today.<sup>84</sup> The *Bowers* Court also noted that homosexual behavior, unlike that involved in *Griswold* and *Roe*, bears no resemblance to family relationships, marriage, or procreation.<sup>85</sup>

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well. For a recent example, see Larry I. Palmer, *Genetic Health and Eugenics Precedents: A Voice of Caution*, 30 FLA. ST. U. L. REV. 237, 255 (2002) (“[W]ithout a woman’s legal right to have an abortion . . . genetic liability claims would not be theoretically possible.” (citing *Hummel v. Reiss*, 608 A.2d 1341, 1343 (N.J. 1992))).

78. The legal academia proposed the right to privacy nearly eight decades prior to *Griswold*. See generally Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890). For a good discussion on the development of the privacy doctrine generally, see Amy Peikoff, *No Corn on This Cobb: Why Reductionists Should be all Ears for Pavesich*, 42 BRANDEIS L.J. 751 (2004).

79. See Rubenfield, *supra* note 30, at 740-52; ACKERMAN, *supra* note 30, at 140-59.

80. See Seth F. Kreimer, *Does Pro-Choice Mean Pro-Kevorkian? An Essay on Roe, Casey, and the Right to Die*, 44 AM. U. L. REV. 803, 808 (1995) (criticizing *Roe* and citing to numerous articles attempting to provide alternative rationales for the decision); see also sources cited *supra* notes 76, 77.

81. 478 U.S. 186 (1986).

82. *Bowers*, 478 U.S. at 192-95.

83. *Id.* at 192-96.

84. *Id.* at 195-96.

85. *Id.* at 190-91.

Even *Roe* underwent a transformation during this momentary waning of privacy analysis. In the 1992 decision of *Planned Parenthood of Southeastern Pennsylvania v. Casey*,<sup>86</sup> the Supreme Court pointedly *did not* reaffirm the reasoning of *Roe*.<sup>87</sup> As the dissenting Justices noted, the controlling opinion for the Court could not “bring itself to say that *Roe* was correct as an original matter.”<sup>88</sup> Caught in a difficult gap between *Roe*’s faulty logic and its refusal to reject *Roe*’s result, the Court resorted to *stare decisis*—a doctrine which provides that a legal question, once decided, remains decided. *Roe* may have gotten it wrong, the Court announced, but right or wrong the decision would stand.<sup>89</sup> It looked like the right to privacy had itself become penumbral.

At least in constitutional law if not in real life, never underestimate the compelling substance of partial and incomplete shadows. The decision in *Lawrence* demonstrates that the Court has recovered from the bout of judicial modesty it suffered between *Bowers* and *Casey*. The penumbra of privacy is back.

### III. OF EXISTENCE, MEANING, THE UNIVERSE AND MYSTERY

*Lawrence* announced that *Roe* did not get it wrong after all. Rather, it is *Bowers* (and the hesitant approach of *Casey*) that are constitutionally suspect. *Bowers*, in fact, is reversed.<sup>90</sup> *Lawrence* also declares that the reasoning of *Bowers*—that family, marriage and procreation are sturdy enough social interests to overcome the judicially created right to privacy—is fatally flawed. And, astonishingly enough, *Griswold* is wrong, too. Forget all that talk in 1965 about the “sacred” nature of the “marital union”; privacy (following the Court’s further consideration) has *nothing at all* to do with marriage, procreation, or the bearing and rearing of children.<sup>91</sup> Instead, privacy vests sexual partners with a constitutional entitlement to determine their “own concept of existence, of meaning, of the universe, and of the mystery of human life.”<sup>92</sup> Under this “concept of existence,” “meaning” and “mystery” clause, government may not “demean” consenting adult sexual behavior.<sup>93</sup>

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86. 505 U.S. 833 (1992).

87. *Casey*, 505 U.S. at 870-71.

88. *Id.* at 953 (Rehnquist, C.J., White, Scalia, & Thomas, JJ., dissenting).

89. *Id.* at 871 (plurality opinion).

90. *Lawrence v. Texas*, 539 U.S. 558, 578 (2003).

91. *See id.* at 574, 578-79.

92. *Id.* at 574 (citing *Casey*, 505 U.S. at 851).

93. *Id.* at 574, 578.

Accordingly, society may have no business making any distinction between a marital union of a man and a woman and a sexual partnership between two men, two women or (why not?) three men and four women.<sup>94</sup> If marriage is “sacred” (as *Griswold* declared),<sup>95</sup> can society “demean” other sexual relationships under *Lawrence* by suggesting *they* are not? Furthermore, can a state even require sexual fidelity between spouses? If it does, does that not “demean” individuals whose “meaning of the universe” includes “open marriage”? Probably. Thus, marriage may no longer mean a man and a woman, two people, sexual exclusivity, or exclude partnerships between close relatives.<sup>96</sup>

Thus, through the questionable logic of legal reasoning purposely freed from the tethers of the actual language of the United States Constitution and American tradition, a purported right which sprang from the centuries old social institution called marriage may soon become that institution’s very undoing.<sup>97</sup> No wonder Justice Scalia notes that *Lawrence* “leaves on pretty shaky grounds state laws limiting marriage to opposite sex couples.”<sup>98</sup>

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94. Robert P. George, *What’s Sex Got to Do With It? Marriage, Morality, and Rationality*, 49 AM. J. JURIS. 63, 81 n.63 (2004).

95. *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965).

96. Because human reproduction is impossible between partners in same-sex relationships, consanguinity rules (which generally prohibit marriage between close relatives to guard against, among other things, genetic concerns related to reproduction) would seemingly pose no obstacle to marriages between two sisters, two brothers, a mother and her daughter, or a father and his son.

97. The concluding paragraph of *Griswold* adulates marriage:

Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions.

*Griswold*, 381 U.S. at 486.

98. *Lawrence*, 539 U.S. at 601 (Scalia, J., dissenting). In addition to *Lawrence*, decisions from various state courts demonstrate just how “shaky” judicial action has rendered established laws related to marriage. Judicial decisions in favor of legalizing same-sex marriage or marriage-equivalent unions have come from Hawaii, Alaska, Vermont, Massachusetts and New Jersey. *Alaska*: Brause v. Bureau of Vital Statistics, No. 3AN-95-6562, 1998 WL 88743, at \*6 (Alaska Super. Ct., Feb. 27, 1998); *Hawaii*: Baehr v. Mücke, No. 91-1394, 1996 WL 694235, at \*22 (Haw. Cir. Ct. Dec. 3, 1996); Baehr v. Lewin, 852 P.2d 44, 67 (Haw. 1993); *Massachusetts*: Goodridge v. Dep’t of Public Health, 798 N.E.2d 941, 943, 959 (Mass. 2003); *New Jersey*: Lewis v. Harris, 908 A.2d 196, 224 (N.J. 2006); *Vermont*: Baker v. State, 744 A.2d 864, 889 (Vt. 1999); *In re* Opinion of the Justices to the Senate, 802 N.E.2d 565, 569-71 (Mass. 2004). Courts in New York and California have in the past rejected judicially mandated same-sex marriage. *California*: *In re* Marriage Cases, 49 Cal. Rptr. 3d 675, 726 (Cal. App. 2006) (request for review granted); *New York*: Hernandez v. Robles, 7 N.Y.3d 338, 379 (N.Y. 2006). See also Andersen v. King County, 138 P.3d 963, 998 (Wash. 2006) (Johnson, J., concurring) (explaining that executing novel changes to public policy through judicial decree erodes constitutional protections and limits constitutional balance). In 2004, a trial court in Oregon ordered the state to recognize same-sex marriages, but that decision was reversed by the Oregon Supreme Court after voters in Oregon adopted a constitutional amendment, *infra* note 101, defining marriage as the union of a man and a

Following *Lawrence*, the Massachusetts Supreme Judicial Court relied upon the reasoning of the Supreme Court's opinion to hold that the Massachusetts Constitution, although nowhere discussing or addressing the matter in its actual text, demands official recognition of same-sex marriage.<sup>99</sup> Within eighteen months of the decisions in *Lawrence* and Massachusetts, voters in eleven states amended their state constitutions to define marriage as the union of a man and a woman.<sup>100</sup> This unusual action by states ranging in political views from Mississippi to Utah to Oregon does more than prevent state courts from invoking privacy (or other judicial innovations) to redefine marriage; it also demonstrates the growing unease of Americans with expanding state and federal judicial power.

Americans are becoming aware that, over the past forty years, the judiciary's increasing disregard of constitutional strictures has deprived them of the ability to answer many of the political questions that affect them most. Marriage is just one of the more recent questions the judges are about to take from the hands of American voters. As a result, more than marriage is on shaky ground. So is America's "greatest improvement on political institutions": the idea of "a written Constitution."<sup>101</sup>

#### IV. WITHER THE CONSTITUTION TOMORROW?

The reasoning in *Lawrence* erodes democratic control of debatable—and unquestionably difficult—issues of moral concern. By substituting a potentially far-reaching (and as yet undefined) "concept of existence, of meaning, of the universe, and of the mystery of human life" test<sup>102</sup> for the actual text of the Constitution, *Lawrence* seriously erodes the ability of American citizens to engage in open and honest political discussions regarding the outcome of an unknown range of fairly debatable moral controversies. Such questions—ranging from cloning and biomedical research

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woman. *Li v. State*, No. 0403-03057, 2004 WL 1258167, at \*10 (Or. Cir. Apr. 20, 2004), *rev'd*, 110 P.3d 91, 96 (Or. 2005).

99. *Goodridge*, 798 N.E.2d at 973-74.

100. Arkansas, Georgia, Kentucky, Michigan, Mississippi, Montana, North Dakota, Ohio, Oklahoma, Oregon, and Utah have passed state constitutional amendments in 2004 defining marriage as between a man and a woman. Thomas Roberts & Sean Gibbons, *Same-Sex Marriage Bans Winning on State Ballots*, CNN.com, Nov. 3, 2004, <http://www.cnn.com/2004/ALLPOLITICS/11/02/ballot.samesex.marriage/>. In all, twenty-seven states have now amended their constitutions "in order to prevent civil unions or same-sex marriages from being legalized." List of Defense of Marriage Amendments to U.S. State Constitutions by Type, [http://en.wikipedia.org/wiki/List\\_of\\_defense\\_of\\_marriage\\_amendments\\_to\\_U.S.\\_state\\_constitutions\\_by\\_type](http://en.wikipedia.org/wiki/List_of_defense_of_marriage_amendments_to_U.S._state_constitutions_by_type) (last visited Feb. 26, 2008).

101. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 178 (1803).

102. *Lawrence*, 539 U.S. at 574.

to euthanasia<sup>103</sup> and children's rights<sup>104</sup>—involve some of the most pressing issues of modern life.

After *Lawrence*, which democratic judgments in these areas will survive the new (and apparently individualistic and idiosyncratic) “concept of existence” and “mystery of human life” test? Who can tell? Will the long-standing definition of marriage as the union of a man and a woman withstand judicial analysis? No one knows.<sup>105</sup>

Throughout America, ordinary citizens, lawyers, law professors, legislators and judges obviously disagree regarding the meaning of marriage. The existence of this deep disagreement, however, demands that the People, rather than the judges, determine the meaning, content and social role of Griswold's “sacred” relationship.<sup>106</sup> Marriage is an essential and long-standing social institution with profound importance for the social health of American society.<sup>107</sup> And, while it is unclear what impact judicial redefinition of marriage might have on American society, there is surprisingly a general agreement that further debilitation of marriage in America would be dangerous indeed.<sup>108</sup> The meaning and social role of marriage is too important—and the current health of the institution too fragile<sup>109</sup>—for its meaning and future vitality to be determined by the oligarchic votes of as

103. *See, e.g.*, *Washington v. Glucksberg*, 521 U.S. 702, 728 (1997) (rejecting the claim that the Due Process Clause establishes a constitutional right to active euthanasia; however, the Court's analysis rests upon a textual and historical examination of the meaning of the clause—the interpretative approach rejected in *Lawrence*).

104. *See, e.g.*, *Roper v. Simmons*, 543 U.S. 551, 574-78 (2005) (ascertaining the content of the Eighth Amendment by relying, in part, upon the practice of foreign nations and the terms of an international treaty never ratified by the Senate). *Compare id.* at 607-08 (Scalia & Thomas, JJ., dissenting) (asserting that the Court's holding rests not upon the language of the Eighth Amendment or the history of its implementation by the American states, but upon the majority's notions regarding “evolving standards of decency” derived in significant part from “the views of foreign courts and legislatures”).

105. *See, e.g.*, authority cited *supra* notes 98 & 101.

106. *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965).

107. INSTITUTE FOR AMERICAN VALUES, *WHY MARRIAGE MATTERS: TWENTY-SIX CONCLUSIONS FROM THE SOCIAL SCIENCES* 5-7, 9-11 (2d ed. 2005).

108. *Id.* at 6-7. Since the publication of the first edition of the study, a careful consideration of all available social scientific studies support five new findings; among these are findings that:

[1. A]n emerging line of research indicates that marriage benefits poor Americans, and Americans from disadvantaged backgrounds, even though these Americans are now less likely to get and stay married;

[2. M]arriage seems to be particularly important in civilizing men, turning their attention away from dangerous, antisocial, or self-centered activities and towards the needs of a family; and

[3. B]eyond its well-known contributions to adult health, marriage influences the biological functioning of adults and children in ways that can have important social consequences.

109. *See id.* (providing all twenty-six findings).

few as five Members of the Supreme Court. As Abraham Lincoln warned in his First Inaugural Address:

[I]f the policy of the government upon vital questions affecting the whole people is to be irrevocably fixed by decisions of the Supreme Court, the instant they are made in ordinary litigation . . . , the people will have ceased to be their own rulers, having to that extent practically resigned their Government into the hands of that eminent tribunal.<sup>110</sup>

At the end of the day, *Lawrence* raises a fundamental question regarding the *constitutional process* for determining the outcome of important social and moral controversies in America. The pressing issue is whether the People or the Court should decide the outcome of debatable, divisive, difficult, even transcendent, questions of social morality. The Supreme Court's decision in *Lawrence* portends that the meaning of marriage may be removed from the realm of democratic debate, adjustment, compromise and resolution. This is a serious, and profoundly suspect, matter of structural constitutional law.

In 2008, the United States faces the question that President Roosevelt confronted in 1936 and 1937: When the precise words of the Constitution, considered in light of the country's constitutional traditions, do not provide an indisputable answer for the resolution of a contentious moral, ethical and political question, who charts the Republic's course—the People or the Court? This is the question raised by *Lawrence*.

All Americans should care how it is answered.

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110. Abraham Lincoln, First Inaugural Address (Mar. 4, 1861), *available at* <http://www.bartleby.com/124/pres31.html>; *cf.* Abraham Lincoln, The Gettysburg Address (Nov. 19, 1863), *available at* <http://www.law.ou.edu/hist/getty.html> (noting that the Civil War involved whether “government of the people, by the people, [and] for the people” will “perish”).