

10-1-2006

A Different Model for the Right To Privacy: The Political Question Doctrine as a Substitute for Substantive Due Process

Patrick M. Garry

Follow this and additional works at: <https://repository.law.miami.edu/umlr>



Part of the [Law Commons](#)

Recommended Citation

Patrick M. Garry, *A Different Model for the Right To Privacy: The Political Question Doctrine as a Substitute for Substantive Due Process*, 61 U. Miami L. Rev. 169 (2006)

Available at: <https://repository.law.miami.edu/umlr/vol61/iss1/5>

This Article is brought to you for free and open access by the Journals at University of Miami School of Law Institutional Repository. It has been accepted for inclusion in University of Miami Law Review by an authorized editor of University of Miami School of Law Institutional Repository. For more information, please contact library@law.miami.edu.

A Different Model for the Right to Privacy: The Political Question Doctrine as a Substitute for Substantive Due Process

PATRICK M. GARRY

INTRODUCTION

The constitutional right to privacy first articulated by the Supreme Court in *Griswold v. Connecticut*,¹ and later used to fashion abortion rights in *Roe v. Wade*,² has been the subject of intense criticism over the past four decades. This criticism focuses on the substantive due process approach employed by the Court in its privacy decisions. Under such an approach, the Court surveys the ambiguous terrain of American history and tradition to find that a certain right, such as privacy, is to be protected on the same level as those rights and liberties specifically enumerated in the Bill of Rights. Critics of this approach argue that the Court has no business protecting rights not enumerated in the Constitution, and that a right of privacy should not be based on judicial determinations of what specific activities define the meaning and destiny of human life.

Aside from criticisms of substantive due process, the constitutional shakiness of the right of privacy can also be seen through the lens of the political question doctrine. As first announced by Chief Justice Marshall in *Marbury v. Madison*,³ the political question doctrine directs the judiciary to abstain from deciding certain political questions that are better suited for the legislative or executive branches. Even though this doctrine has generally not been applied to individual rights, and even though it has never been specifically applied to a right of privacy, it nonetheless provides a useful measuring stick for gauging whether privacy is a matter on which the judicial branch should defer to the legislative branch. Thus, the political question doctrine provides a second frame of reference, apart from the substantive due process approach, for criticizing the Court's privacy decisions.

This Article uses the political question doctrine to show that privacy is the type of right or interest that would be better protected by the political branches than by the courts. Even though the doctrine does not

1. 381 U.S. 479 (1965) (holding that a right of privacy exists).

2. 410 U.S. 113, 155 (1973) (including a woman's right to have an abortion within the zone of privacy created in *Griswold* by ruling that an unborn fetus was not a "person" under the Fourteenth Amendment).

3. 5 U.S. (1 Cranch) 137, 166 (1803).

normally apply to individual rights, privacy is not the kind of individual right that most other constitutionally protected liberties are. For instance, unlike the equal protection rights of racial minorities, privacy is not a right or interest possessed only by an insular minority group in society. Instead, privacy is an interest shared by all members of society, regardless of ethnic, gender, or racial identity. For this reason, privacy fits the criteria of the political question doctrine better than any other constitutionally recognized individual right.

The political question doctrine strives to protect the judiciary from becoming involved in issues in which it is not competent to act. The doctrine also strives to uphold the legitimacy of judicial authority by preventing the courts from being exposed to criticism and ridicule prompted by decisions that appear subjective and unprincipled and that stray from the constitutional text. Indeed, as the past four decades have revealed, the Court's privacy decisions have been just the kind of decisions the political question doctrine aims to prevent the judiciary from making. The Court has never been able to articulate a clear, principled privacy right that is immune from widespread criticism. As the events of the past four decades have suggested, the legislative branch would be a far more effective arbiter of the privacy right.

Part I of this Article examines the political question doctrine as it has evolved from its initial articulation by the Marshall Court. Part II of this Article analyzes recent scholarship and interpretations of the political question doctrine and examines these interpretations in terms of whether the doctrine could be applied to individual rights, specifically the right of privacy. Finally, Part III of this Article examines the right of privacy and its history in the Supreme Court. This analysis of the constitutional right of privacy shows that, under both the purpose and intent of the political question doctrine, privacy is a matter on which the courts have no constitutionally-principled basis for assuming exclusive jurisdiction. As indicated by the political question doctrine, the American constitutional scheme suggests that, with regard to privacy issues, the courts should defer to the political branches.

I. THE POLITICAL QUESTION DOCTRINE

A. *History and Purpose*

The political question doctrine limits the judiciary's jurisdiction by defining those constitutional questions that fall outside the proper scope of judicial decision-making.⁴ It removes from the courts' domain cer-

4. U.S. Dep't of Commerce v. Montana, 503 U.S. 442, 458 (1992) (stating that the political question doctrine recognizes "that a constitutional provision may not be judicially enforceable").

tain subjects that do not lend themselves to judicial resolution.⁵ As Professors Ferejohn and Kramer have described the political question doctrine:

What matters (and is expected) is that, over time, the Supreme Court has declared that federal courts could not, and so should not, deal with certain questions because they are too political. These are not necessarily the most controversial questions, though they are plenty controversial (or would be if the Court tried to resolve them). They are, rather, potentially controversial, questions in areas where courts are more at sea than usual, more lacking in the sort of legal resources that enable them to insulate their decisions from easy political counterattack. Sometimes this is because the constitutional text and history leave the Court more adrift than usual; other times it turns on the inherent nature of the issue itself.⁶

The roots of the doctrine reach back to *Marbury v. Madison*, where Chief Justice John Marshall recognized the existence of political questions that by their nature can never be resolved by the courts.⁷ In *Marbury*, Marshall argued that the Court's judicial power did not extend to matters falling under the political question doctrine.⁸ He also provided several guideposts for determining when to invoke the doctrine: Will the factfinding required to resolve the issue be of the type normally suited to the expertise of the political branches? Are there established legal standards that can be used to decide the issue? Does the issue involve a more general question of political judgment and discretion?⁹

5. See *Baker v. Carr*, 369 U.S. 186, 217-18 (1962) (stating that particular issues are nonjusticiable because they fall outside of the courts' domain).

6. John A. Ferejohn & Larry D. Kramer, *Independent Judges, Dependent Judiciary: Institutionalizing Judicial Restraint*, 77 N.Y.U. L. REV. 962, 1013-14 (2002).

7. *Marbury*, 5 U.S. at 170.

8. *Id.* Although the determination of when a particular issue constituted a political question would always depend on the unique nature of the issue, Chief Justice Marshall did indicate that issues of foreign policy and the presidential power of appointments would usually constitute a political question. *Id.* at 166-67. See also Walter Dellinger & H. Jefferson Powell, *Marshall's Questions*, 2 GREEN BAG 2D 367, 372-74 (1999) (stating that Marshall saw political questions as those including "a judgment about where the nation's interests lay, including its interests in justice to itself and others and in the preservation of national security," as opposed to issues of individual rights). In the field of national security, for instance, the courts' lack of expertise and information, as well as their lack of political accountability, inhibited their ability to make good judgments. *Id.* at 372. Under the political question doctrine, the Court has stayed away from issues generally involving foreign policy, treaties with foreign government, presidential use of war powers, challenges to the impeachment process, and questions pertaining to the structure of politics, including various aspects of political parties. See *Nixon v. United States*, 506 U.S. 224, 238 (1993); *O'Brien v. Brown*, 409 U.S. 1, 4 (1972); *Commercial Trust Co. of N.J. v. Miller*, 262 U.S. 51, 57 (1923); *Terlinden v. Ames*, 184 U.S. 270, 288 (1902); ERWIN CHEMERINSKY, *FEDERAL JURISDICTION* 157-58 (3d ed. 1999) (examining judicial refusals to hear challenges to U.S. foreign policy in Vietnam, El Salvador, and Persian Gulf).

9. See *Marbury*, 5 U.S. at 166; see also Oliver P. Field, *The Doctrine of Political Questions in the Federal Courts*, 8 MINN. L. REV. 485, 512 (1924) (arguing that an important consideration

This view of the political question doctrine existed alongside the limited notion of judicial review incorporated into the Constitution.¹⁰ Alexander Hamilton, for instance, believed that the judiciary could nullify legislative acts only when an “irreconcilable variance” existed between the Constitution and the statute.¹¹ Justice Chase argued that the Court could declare a law unconstitutional only “in a very clear case.”¹² Likewise, Justice Paterson argued that courts could strike down only those laws that presented “a clear and unequivocal breach of the constitution, not a doubtful and argumentative application.”¹³

In the early national period, it was “anticipated and clearly foreseen” that many constitutional issues would never be decided by the judiciary.¹⁴ According to Lawrence Sager, the structure of the Constitution envisioned that some issues would never reach the courts.¹⁵ This structure created “a spectrum of deference that recognized that the Constitution delegates authority to the political branches to different degrees, and that some of those delegations permit the political branches to give substantive meaning to the constitutional provisions in the exercise of their discretion.”¹⁶ Thus, political questions were among those questions or issues that were both outside judicial review and within the exclusive authority of the political branches.

In applying the political question doctrine, courts must first determine whether the Constitution “gives some interpretive authority to the political branches on the question being raised and to ‘specify the boundaries of what has been allocated elsewhere.’”¹⁷ The doctrine

in applying the political question doctrine is whether there is “a lack of legal principles to apply to the questions presented”).

10. See Larry D. Kramer, *Putting the Politics Back into the Political Safeguards of Federalism*, 100 COLUM. L. REV. 215, 238-40 (2000) (stating that “even a limited power of judicial review remained controversial in the 1780s”).

11. THE FEDERALIST NO. 78, at 467 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

12. *Hylton v. United States*, 3 U.S. (3 Dall.) 171, 175 (1796).

13. *Cooper v. Telfair*, 4 U.S. (4 Dall.) 14, 19 (1800).

14. James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 135-36 (1893).

15. Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1263-64 (1978).

16. Rachel E. Barkow, *More Supreme than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy*, 102 COLUM. L. REV. 237, 322 (2002). Thus, the threshold inquiry in constitutional cases is “to determine how much interpretive deference should be accorded the political branches based on the language and structure of the Constitution.” *Id.* at 323. It makes sense for the Constitution to delegate interpretive authority to the political branches in certain cases because of the factfinding ability of those branches and because of their political accountability. *Id.* at 324.

17. *Id.* at 239 (quoting Henry P. Monaghan, *Marbury and the Administrative State*, 83 COLUM. L. REV. 1, 9 (1983) (stating that the Constitution recognizes “that some questions rest within the absolute discretion of the political branches”).

reflects the realization that the legislative or executive branches may be better able to address certain issues – issues on which courts can be both poor factfinders and policymakers. To the degree that a constitutional issue “raises questions of policy or rests on factual findings, there may be sound reasons to defer to the judgment of Congress and the Executive.”¹⁸

The Framers’ views that political questions were outside the scope of judicial review prevailed well into the nineteenth century. As Mark Graber notes in his study of judicial review in Jacksonian America, political questions were rarely translated into judicial questions.¹⁹ Indeed, there were many constitutional debates or issues that were never transferred to the judicial docket. For instance, the Court did not decide any of the ethno-cultural controversies that arose during the pre-Civil War period, even when those controversies involved individual liberty. The federal courts never decided a case involving the rights of Masons; the courts never addressed the freedom of Mormons settling in Utah to adopt laws that conflicted with federal law; the judiciary never got involved in the call for a “united front” against Catholic schools and Catholic officeholders; nor did it address the nascent women’s movement.²⁰ According to Professor Graber, the “most significant differences between judicial agendas in 1835 and in 2004 reflect differences in the extent to which constitutional questions are resolved into judicial questions.”²¹

In addition to the classical version of the political question doctrine, based on the text and structure of the Constitution, a prudential version of the doctrine has evolved.²² Unlike the classical version of the political question doctrine, the prudential version is not rooted in the Constitution itself, but is a judicially created doctrine used to avoid conflict with the other branches of government.²³ This prudential version of the political question doctrine has been used “to delegate judicial authority to political actors (even when the Constitution does not contemplate

18. *Id.* at 240. Some commentators have described the political question doctrine not as a matter of justiciability, but as one of giving appropriate deference to the judgments of other branches of government. See, e.g., HERBERT WECHSLER, *Toward Neutral Principles of Constitutional Law*, in PRINCIPLES, POLITICS, AND FUNDAMENTAL LAW 11-14 (1961); LOUIS HENKIN, *Is There a “Political Question” Doctrine?*, 85 YALE L.J. 597, 622-23 (1976).

19. Mark A. Graber, *Resolving Political Questions into Judicial Questions: Tocqueville’s Thesis Revisited*, 21 CONST. COMMENT. 485, 529 (2004).

20. *Id.* at 515-16.

21. *Id.* at 534 (noting that at present, “virtually all political questions that are resolved into constitutional questions are further resolved into judicial questions”).

22. See Barkow, *supra* note 16, at 253.

23. *Id.*

such a delegation) and to avoid deciding controversial cases.”²⁴ The prudential version of the political question doctrine can perhaps best be seen through the writings of Alexander Bickel. Concerned about the judicial activism of the Warren era and its threat to the Court’s legitimacy, Bickel argued that the Court should be reluctant to decide certain controversial cases on the merits.²⁵ As an example of such restraint, Bickel cited *Naim v. Naim*, a case in which the Court avoided deciding on the merits an attempt to nullify a marriage that allegedly violated a state miscegenation statute.²⁶ According to Bickel, the prudential version of the political question doctrine provides a means by which the Court can avoid difficult matters that might threaten its legitimacy and authority.²⁷

Professor Barkow describes the political question doctrine in terms of judicial deference to the political branches’ ability to interpret the Constitution.²⁸ Because of the judiciary’s limited powers under the structure of the Constitution, the political branches in various circumstances – e.g., political questions – possess equal authority to decide constitutional issues.²⁹ This ability of the political branches to resolve certain constitutional questions arises from their accountability to the public. As John Hancock argued, the ability to vote a member of Congress out of office “will prove a security to [the people’s] liberties, and a most important check to the power of the general government.”³⁰ Thus, as Professor Barkow notes:

[T]he theory of deference to the political branches that has been with us throughout our nation’s history – a theory that, at its extreme, includes the political question doctrine – reflects not only the struc-

24. *Id.*

25. See ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 69, 168-70, 251-54 (2d ed. Yale Univ. Press 1986) (1962). The political question doctrine provides a tool with which the Court can refrain from deciding cases on the merits, when doing so would be imprudent. See Fritz W. Scharpf, *Judicial Review and the Political Question: A Functional Analysis*, 75 *YALE L.J.* 517 (1966).

26. 350 U.S. 891 (1955); Bickel, *supra* note 25, at 174 (arguing that to uphold the statute “would have been unthinkable” in the aftermath of *Brown v. Board of Education*, but that it would have been dangerous to strike down the law when the integration principles of *Brown* were still so vulnerable to attack).

27. See Alexander Bickel, *The Supreme Court, 1960 Term – Foreword: The Passive Virtues*, 75 *HARV. L. REV.* 40, 43-51, 74-79 (1961) (arguing that the political question doctrine enables courts to avoid judicial activism by avoiding certain controversial and unprecedented matters).

28. Barkow, *supra* note 16, at 319.

29. See Letter from James Madison to Spencer Roane (May 6, 1821), in 9 *WRITINGS OF JAMES MADISON* 55, 59 (Gaillard Hunt, ed., 1910) (criticizing the Court’s interpretation of the Framers’ views on nationalization and arguing that Congress should adopt its own interpretation).

30. 2 *THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION, AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA, 1787*, at 168 (Jonathan Elliot ed., 2d ed. J.B. Lippincott Co. 1881) (1836).

ture and text of the Constitution, but a very pragmatic determination that some questions should be decided by the political branches because of their accountability and institutional competence.³¹

B. *The Baker v. Carr Legacy*

The political question doctrine was most significantly defined and altered in *Baker v. Carr*, where the Court articulated a test for defining a political question from which the courts should abstain.³² According to this test, the political question doctrine applied to cases involving one or more of the following six criteria:

[1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards for resolving it; or [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [4] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.³³

In a later case, the Supreme Court tried to simplify the subject by indicating that the political question doctrine encompasses three inquiries: "(i) Does the issue involve resolution of questions committed by the text of the Constitution to a coordinate branch of government? (ii) Would resolution of the question demand that a court move beyond areas of judicial expertise? (iii) Do prudential considerations counsel against judicial intervention?"³⁴

The detailed set of criteria laid out in *Baker*, however, has not appeared to give much life or vitality to the doctrine. Since *Baker*, the Court has steered "an erratic and inconsistent course in how it has used and explained the political question doctrine over time."³⁵ As one commentator has noted, despite the carefully developed criteria, "the doctrine has rarely served as a meaningful restraint on the Supreme Court's

31. Barkow, *supra* note 16, at 329-30.

32. 369 U.S. 186 (1962). In *Baker*, the Court was presented with the issue of whether Tennessee's apportionment statute, which had not been amended in sixty years to account for a significant shift of population from rural to urban areas, violated the Equal Protection Clause by diluting the urban vote and disproportionately emphasizing the rural vote. *Id.* at 187-95. Opponents to this challenge argued that the Tennessee law, a state law governing the electoral process, raised a nonjusticiable political question. *Id.* at 266-70, 289-302 (Frankfurter, J., dissenting).

33. *Baker*, 369 U.S. at 217.

34. *Goldwater v. Carter*, 444 U.S. 996, 998 (1979).

35. Ferejohn & Kramer, *supra* note 6, at 1013.

authority.”³⁶ One reason given for the decline of the political question doctrine is that Justice Brennan’s decision in *Baker*, transforming the doctrine into a discretionary, case-by-case, six-factor test, focused exclusively on separation of powers concerns and abandoned the emphasis on federalism that had traditionally been a part of the doctrine.³⁷ As Professor Pushaw notes:

[T]he Court in the twentieth century gradually lost sight of the Federalist model of judicial review and political questions. Indeed, the doctrine was in such intellectual disarray by 1962 that it was fairly easy for the Warren Court to cherry-pick material in various cases to support its result. As we have seen, however, the Baker analysis depends almost entirely on the discretion of the majority of the Justices, untethered to any legal principles rooted in the Constitution’s structure, theory, history, or early precedent.³⁸

Subsequent to *Baker*, the Supreme Court has only invoked the political question doctrine to refrain from deciding a case on two occasions. In *Gilligan v. Morgan*, the Court ruled that the issue of whether the elected branches had been negligent in military training and procedures was a political question outside the Court’s scope of review.³⁹ Then, in *Nixon v. United States*, the Court held that the impeachment of a federal judge presented a nonjusticiable political question.⁴⁰

Some commentators have theorized that the decline of the political question doctrine results from the rise of judicial supremacy.⁴¹ Professor Tushnet argues that the political question doctrine can hardly survive “in a world where the Court is comfortable with interpreting the Consti-

36. Jesse H. Choper, *The Political Question Doctrine: Suggested Criteria*, 54 DUKE L.J. 1457, 1459 (2005) (“scholars have concluded that political questions are in serious decline, if not fully expired, because they are clearly at odds with the notion of judicial supremacy adopted by the Court in recent years”); see also Barkow, *supra* note 16, at 240 (arguing that the “demise of the political question doctrine is of recent vintage, and it correlates with the ascendancy of a novel theory of judicial supremacy”).

37. See Robert J. Pushaw, Jr., *Judicial Review and the Political Question Doctrine: Reviving the Federalist “Rebuttable Presumption” Analysis*, 80 N.C. L. REV. 1165, 1166, 1177 (2002) (stating that “the Baker Court simply cast aside a core structural and theoretical principle – federalism” and recognizing that “contrary to the majority’s assertions, many of the Court’s political question opinions had expressed concerns for preserving federalism”).

38. *Id.* at 1195-96. The Court in *Baker v. Carr* ruled that the political question doctrine did not apply to cases involving the federal judiciary’s relationship with the states. *Baker*, 369 U.S. at 210 (stating that the political question doctrine is “primarily a function of the separation of powers” between the three branches of the federal government).

39. 413 U.S. 1, 5-12 (1973).

40. 506 U.S. 224, 226-38 (1993).

41. See, e.g., Mark Tushnet, *Law and Prudence in the Law of Justiciability: The Transformation and Disappearance of the Political Question Doctrine*, 80 N.C. L. REV. 1203, 1208 (2002) (arguing that “notions of judicial supremacy” along with “skepticism about the ability of the political branches to behave in a constitutionally responsible manner undermines” the enforcement of the political question doctrine).

tution and uncomfortable with allowing anyone else to do so.”⁴² Professor Barkow similarly argues that the erosion of the political question doctrine coincided with the Court’s assertion of judicial supremacy that began during the Warren era.⁴³ Barkow notes that “the demise of the political question doctrine is part and parcel of this larger trend of refusing to accord interpretive deference to the political branches.”⁴⁴ Indeed, since the founding period, it was thought “that some constitutional questions ultimately must be decided by the political branches and not through judicial review.”⁴⁵ However, because the political question doctrine conflicts with the notion of judicial supremacy over all constitutional questions, the modern Court has eliminated that tension by essentially abandoning the former.⁴⁶

Whereas the political question doctrine went hand in hand with the judicial restraint of the New Deal Court, it contrasted sharply with the judicial activism of the Warren Court, which in turn cut back the doctrine in *Baker v. Carr*.⁴⁷ In recent decades, according to Professor Barkow, the Court “has become increasingly blind to its [policymaking] limitations as an institution – and, concomitantly, to the strengths of the political branches.”⁴⁸ Under the influence of judicial supremacy, the “unmistakable trend is toward a view that all constitutional questions are matters for independent judicial interpretation and that Congress has no

42. *Id.* at 1211 (noting that case law has shown “how difficult it is for the Justices to assert unqualifiedly that a particular constitutional provision really has no meaning the Court can identify”).

43. *See* Barkow, *supra* note 16, at 237 (“the fall of the political question doctrine is part of a larger trend in which the Supreme Court has embraced the view that it alone among the three branches of government has the power and competency to provide the full substantive meaning of all constitutional provisions”).

44. *See id.* at 317 (arguing that a strong view of judicial supremacy “demands the demise of the political question doctrine”).

45. *See id.* at 240 (theorizing that the “ascendancy of a novel theory of judicial supremacy” is responsible for the Court’s disregard of the political branches’ ability to decide constitutional questions).

46. *See id.* at 242, 244 (arguing that “the political question doctrine would still spark a heated response from defenders of a supreme judiciary because it stands in tension with the notion of judicial review; it represents the idea that some constitutional questions fall outside the purview of the judiciary”).

47. *See id.* at 263. As Professor Barkow notes, this curtailment of the political question doctrine reflects the Court’s inflated and overestimated powers vis-à-vis the political branches. *Id.* at 300 (arguing that the “political question doctrine itself cannot coexist with the current Court’s views of how interpretive power is allocated under the Constitution”). Thus, the Court’s view of judicial supremacy, “regardless of the constitutional provision at issue or the policy judgments” needed to resolve the issue, has eroded the deference due to legislative decisions under the political question doctrine, and “has allowed the Court to bypass the threshold determination of how much interpretive power a provision of the Constitution gives political actors.” *Id.* at 319.

48. *See id.* at 301. This blindness is in stark contrast to the early Court, which stated that Congress’s constitutional judgments should be struck down only if plainly erroneous. *Id.*

special institutional advantage in answering aspects of particular questions.”⁴⁹

II. APPLYING THE DOCTRINE TO INDIVIDUAL RIGHTS

In addition to the Court’s restatement of the political question doctrine in *Baker v. Carr*, a number of other versions have been proposed by scholars.⁵⁰ Most recently, Jesse Choper offered a new definition of the doctrine. Under Professor Choper’s definition, the classification of an issue as a nonjusticiable political question depends on four different factors: (1) whether there is a textual commitment in the Constitution to have the issue decided by a particular branch; (2) whether the issue at hand is a structural issue like separation of powers, or whether it is one of individual rights; (3) whether there are judicially manageable standards to resolve the issue; and (4) whether the issue presents a unique and individualized controversy, or whether it reflects a more generalized grievance.⁵¹ Professor Choper more fully describes these factors as follows:

I believe that the Court should consider four criteria in determining whether to relegate questions of constitutional interpretation to the political branches. First, the Court should refrain from deciding questions where there is a textual commitment to a coordinate political department – that is, when the Constitution itself is interpreted as clearly referring the resolution of a question to an elected branch. Second, pursuant to a functional rather than a textual approach, when

49. See *id.* at 302. On the other hand, Justice Scalia has used the political question doctrine to bolster his argument that other branches of government also have the authority to interpret the Constitution. See *Webster v. Doe*, 486 U.S. 592, 612-13 (1988) (Scalia, J., dissenting) (arguing that the political question doctrine reflects that not all constitutional violations must be resolved in the courts).

50. One of the first to do so was Alexander Bickel, whose criteria for invoking the doctrine depended on: (a) the strangeness of the issue and its intractability to principled resolution; (b) the sheer momentousness of it, which tends to unbalance judicial judgment; (c) the anxiety that the judicial judgment should be ignored, but will not be; (d) (in a mature democracy) the inner vulnerability, the self-doubt of an institution which is electorally irresponsible and has no earth to draw strength from. Bickel, *supra* note 25, at 184. Bickel’s articulation of the political question doctrine reflects his belief that the Court should act with prudence and hence refrain from deciding certain cases on the merits. See *id.* at 247-54. According to Bickel, the political question doctrine provided a way of avoiding particularly controversial issues that could weaken the Court’s public image and legitimacy. See *id.* at 125-26, 183-84. Cass Sunstein similarly advocates a cautious, restraining attitude on certain novel types of issues, on which she believes that the courts should act in a “minimalist way.” CASS R. SUNSTEIN, *ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT* 5, 9-14 (1999).

51. Choper, *supra* note 36, at 1457. The textual commitment factor resembles the first factor listed in *Baker v. Carr*; the second factor envisions areas in which the political process has a comparative advantage over the courts; the third recognizes that there may be constitutional provisions for which the Court lacks the capacity to develop clear principles; and the fourth relates to whether an issue is sufficiently tailored for judicial resolution. *Id.*

judicial review is thought to be unnecessary for the effective preservation of our constitutional scheme, the Court should decline to exercise its interpretive authority. Third, the Court should not decide issues for which it cannot formulate principled, coherent tests as a result of a lack of judicially discoverable and manageable standards. Finally, I would tentatively suggest that constitutional injuries that are general and widely shared are also candidates for being treated as political questions.⁵²

Professor Choper recognizes that in some cases involving individual rights, an area traditionally reserved to the judiciary, a conveyance of authority to the legislative branch “may result in greater protection for personal liberties than would the Court’s deciding the merits.”⁵³

Other commentators have portrayed the political question doctrine as a matter not of jurisdiction but of deference. For instance, certain constitutional provisions, such as those involving electoral matters, even though justiciable, “should be interpreted with extraordinary deference to the elected branches.”⁵⁴ Using this deferential approach, the Court should review particular issues under standards that “resolve every doubt in favor of the validity of the government’s action.”⁵⁵ Thus, even though the Court can assert jurisdiction, it should defer to the judgment of political officials, “absent a plain violation of an existing constitutional right.”⁵⁶

The political question doctrine has never been applied to individual rights issues, other than those that might arise in the context of foreign or military policy. In fact, most judges and commentators seem to presumptively disqualify individual rights from the reach of the political question doctrine. This Article argues, however, that the constitutional right of privacy first recognized in *Griswold v. Connecticut* is a unique individual right that could be treated similar to a political question.⁵⁷ This uniqueness, as further described in Part III below, stems from the fact that privacy is not a minority right in danger of oppression by the majority. As a way of introducing this thesis, the right of privacy will be briefly analyzed here under the four factors proposed by Professor Choper.

The first factor, textual commitment, ends up being a wash.

52. *Id.* at 1462-63.

53. *Id.* at 1464.

54. Pushaw, *supra* note 37, at 1199.

55. *Id.* (arguing that “the Court should not upset federal or state electoral determinations unless they violate established constitutional rights”).

56. *Id.* (arguing that the Supreme Court, before taking action in *Bush v. Gore*, should have waited for Congress and Florida’s legislature to fulfill their constitutional obligations).

57. For a discussion of the constitutional right of privacy, see *infra* notes 87-89 and accompanying text.

Although the Constitution does not assign to any branch other than the judiciary the duty to be the final arbiter of the right of privacy, the Constitution, in fact, does not even mention this right. Therefore, since the Framers intended the legislative branch to be the primary governor of society, it can be assumed that they intended any privacy interests to be determined and defined in that branch.⁵⁸

Choper's second factor relates to the distinction between structural issues and substantive issues involving individual rights. At first glance, this factor seems to work against treating privacy as a political question. According to Professor Choper, however, the basic rationale for this factor rests on notions of institutional competence.⁵⁹ Matters of government structure and operation are well-suited to the political branches, while matters of minority rights are traditionally the specialty of the courts. However, as will be demonstrated in Part III, with respect to the right of privacy, the political branches can be trusted to produce sound constitutional decisions – perhaps even more sound than the judiciary can produce. Consequently, by refraining to intervene “when the political branches may be trusted to produce a sound constitutional decision, the Justices reduce the discord between judicial review and majoritarian democracy and enhance their ability to render enforceable decisions when their participation is vitally needed.”⁶⁰ This observation has been substantiated by the abortion decisions, in which the Court's privacy jurisprudence has never been able to “reduce the discord between judicial review and majoritarian democracy.”⁶¹

As Professor Choper states, the distinction between individual rights and structural issues exists because “where personal rights of underrepresented interests are at stake, it cannot often be assumed that the majoritarian political process can produce a trustworthy result.”⁶² But unlike, for instance, the equal protection rights of political minorities, privacy does not involve an underrepresented interest – it involves an interest that every human being possesses and must balance with his or her need to participate in a strong, self-sustaining society. Indeed, even Professor Choper recognizes that situations might exist where the political question doctrine applies to individual rights issues.⁶³

58. See *United States v. Williams*, 691 F. Supp. 36, 43-44, 52-53 (M.D. Tenn. 1988) (stating that the Framers expected Congress “to assume primary responsibility for the formulation of policy [and that this] is true particularly in areas that impinge on personal liberties”).

59. See Choper, *supra* note 36, at 1466.

60. See *id.*

61. See *Id.*

62. See *id.* at 1469.

63. See *id.* (arguing that “there may be controversies implicating personal liberties that the Court concludes are governed by the political question doctrine”).

Professor Choper's third factor urges judicial restraint on issues lacking "judicially discoverable and manageable standards."⁶⁴ Such restraint is necessary when the Court is asked to deal with issues on which it "lacks the capacity to develop clear and coherent principles to govern litigants' conduct."⁶⁵ As will be further analyzed in Part III, this factor is especially applicable to the argument for treating privacy as a political question, particularly since the Court's definition of the right of privacy has been anything but clear and coherent. Furthermore, the Court's privacy jurisprudence has enabled both litigants and judges to inject their own ideological beliefs into the formation and application of constitutional doctrine.

The fourth factor – generalized grievance – addresses cases that do not involve unique and individualized injuries, but rather those that are shared by a wide group of people in a similar way. As Choper explains:

Generalized grievance cases may encompass individual constitutional rights insofar as all (or almost all) persons may truly be said to have suffered comparable injury in respect to their personal liberties. This may fairly lead to the conclusion that a decision by a government body that is accountable to an electoral majority trustworthily represents all affected.⁶⁶

The first case in which the Court recognized a constitutional right to privacy – *Griswold v. Connecticut*⁶⁷ – involved state regulation of the sale and distribution of contraceptives. This regulatory scheme did not impinge on an insular minority; it affected the vast majority of adults, regardless of ethnic, racial or gender identity. As such, any harm it caused qualified as a generalized grievance. With generalized grievances, "there is little reason to believe that the ordinary political process is not a fair and trustworthy method for resolving its concerns."⁶⁸

What distinguishes a generalized grievance from a fundamental individual right, exempt from the political question doctrine, is that the latter serves to protect "an identifiable racial, religious, or political minority that might be subject to majoritarian abuse."⁶⁹ However, this is

64. See *id.* at 1469-70. This factor, taken from *Baker v. Carr*, addresses issues involving both divisions of governmental powers and individual rights, and envisions that with some issues the Court may have to exercise a "decidedly practical restraint on justiciability." *Id.* at 1470.

65. See *id.* at 1469-70 (arguing that the real question is not just whether a particular standard is constitutionally warranted, but whether it can be "sufficiently principled to guide the lower courts and constrain all jurists from inserting their own ideological beliefs in ad hoc, unreasoned ways").

66. See *id.* at 1472.

67. 381 U.S. 479, 484 (1965).

68. Choper, *supra* note 36, at 1473.

69. *Id.* (arguing that the personal liberty established by the Statement and Account Clause is not a liberty that falls within this class of "fundamental" rights).

not the case with privacy, which is the kind of “right that belongs to the majority (rather than an endangered, constitutionally guarded minority).”⁷⁰ Therefore, the political process can be trusted to protect the right of privacy, since any law that unduly infringes on it can be repealed whenever democratic society desires a heightened protection of privacy interests. This dynamic was demonstrated in the debate over the Patriot Act.⁷¹ Indeed, the brief history of the Patriot Act shows how society should reconcile privacy rights with other social interests. After the Act was passed, there were allegations of privacy invasions. This led to a highly charged debate in Congress, two temporary extensions, and a presidential election that focused in part on this Act.⁷² Yet despite all this, the Patriot Act was renewed in the Senate by a landslide vote of 89-10.⁷³

As revealed in the legislative resolution of privacy concerns with the Patriot Act, the balance between national security and privacy rights is not a balance the courts should reach. According to Professor Lerner, the resolution of conflicts between the executive’s duty to uncover information regarding threats to national security and the consequent compromises to privacy rights is a political question.⁷⁴ Privacy is not an individual right subject to majority infringement in the same way that religious exercise by minority religions or equal protection of racial minorities are. With privacy, as with term limits, “there is no structural barrier to the electorate’s repealing previously enacted [laws] if they no longer command the majority’s support.”⁷⁵ Thus, the ordinary political process can provide a sufficient protection of the right to privacy.

In *Vieth v. Jubelirer*, a plurality of the Court supported a ruling that all political gerrymandering issues constituted political questions and hence were nonjusticiable.⁷⁶ The plurality relied on the argument that a judicial drawing of electoral districts would be unmanageable and

70. *Id.* (arguing that the Statement and Account Clause is a majority right which a future majority, if it so wishes, may reclaim through the political process).

71. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT) Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (codified in scattered sections of U.S.C.).

72. Extension of Sunset of Certain Provisions of the USA PATRIOT ACT, Pub. L. No. 109-160, 119 Stat. 2957 (2005) (extending provisions from December 31, 2005 to February 3, 2006); Extension of Sunset of Certain Provisions of the USA PATRIOT ACT, Pub. L. No. 109-170, 120 Stat. 3 (2006) (extended provisions to March 10, 2006).

73. 152 CONG. REC. S1598, S1631-32 (2006).

74. Craig S. Lerner, *The USA Patriot Act: Promoting the Cooperation of Foreign Intelligence Gathering and Law Enforcement*, 11 GEO. MASON L. REV. 493, 511 (2003).

75. Choper, *supra* note 36, at 1475-76 (arguing that term limit laws do not threaten to subject any identifiable racial, religious, or political minority to the abuse of the majority).

76. 541 U.S. 267 (2004).

unprincipled.⁷⁷ As Professor Choper has observed about issues of political gerrymandering:

Ultimately, this may be one of those contexts in which the judicial branch cannot develop effective safeguards for individual rights, but where the political process may afford some meaningful protection, however flawed. A political party in power, for example, may restrain itself from the worst excesses of gerrymandering because it fears either future retaliation within its own jurisdiction should the electorate reverse its advantage, or the possibility that its avarice will be presently emulated in other states where its opponents are in control.⁷⁸

But this same argument can be made about the right of privacy, which requires the Court to make unprincipled and unfounded decisions about what areas of life a diverse and democratic people believe to be crucial to their individual sense of human dignity and autonomy.

In a way, privacy rights are like education rights. They are rights – or more accurately, interests – that each member of society shares; neither privacy nor education is a right or interest confined to any discreet social minority. Every person wants privacy, as he does an education, but these privacy and education interests must also be balanced against other social interests – e.g., the cost of education, and how this cost will be paid. The question of privacy is a question of how society is going to balance social values with individual ones, just as the question of how society funds education is one involving the basic vision of a society, as well as a balancing of the interests of individual opportunity and social progress.⁷⁹

In litigation challenging disparities in education funding, petitioners have asked the courts to essentially derive and enforce a certain constitutional standard of education.⁸⁰ Cases involving the adequacy of education funding, however, inject the courts into an inappropriate policymaking role, which in turn makes courts vulnerable to criticisms regarding unwarranted judicial activism and institutional incompetence.⁸¹ Traditionally, issues relating to education finance have been the province of legislative bodies.⁸² Courts are not nearly as well equipped

77. *Id.* at 291, 297-300.

78. Choper, *supra* note 36, at 1489.

79. Avidan Y. Cover, Note, *Is "Adequacy" a More "Political Question" than "Equality?"*: *The Effect of Standards-Based Education on Judicial Standards for Education Finance*, 11 CORNELL J.L. & PUB. POL'Y 403, 403 (2002) (noting that "the question of how society funds education is simultaneously a question regarding the definition of education itself and hence a vision of that society as well").

80. *Id.* at 404-05.

81. *Id.* at 405-06.

82. *See* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 38-53, 58-59 (1973)

as are the legislative and executive branches to determine education finance criteria and formulae.⁸³ Thus, given these considerations, courts should refrain from hearing education finance cases, just as they abstain from political question cases.

Perhaps privacy should be treated as religious exercise rights are treated. Under the rule of *Employment Division v. Smith*, courts do not upset legislative infringements on religious exercise rights unless certain religious practitioners are singled out and treated differently than those of majority religions.⁸⁴ *Smith* allows the state to regulate religious exercise with neutral, generally applicable laws that are judged under a less rigorous standard of review. Likewise, privacy is inherently a neutral right, possessed in equal degrees by all members of society. Consequently, only if a legislature singles out the privacy rights of institutionalized minorities should the courts intervene.

III. PRIVACY AS A POLITICAL QUESTION

A. *Judicial Development of Privacy Rights*

Even though privacy is not strictly a political question, we can use the political question doctrine as a useful analogy. In particular, the current constitutional right of privacy reflects the same view of judicial supremacy that has been allowed to erode the political question doctrine.

The Court's recognition of a constitutional right of privacy began in *Griswold v. Connecticut*, where the Court struck down a Connecticut law prohibiting the use of contraceptives, even by married couples.⁸⁵ The Court ruled that the statute violated "a zone of privacy" created by the "penumbras" that gave "life and substance" to the specific guaran-

(upholding a state education finance system that resulted in unequal levels of spending among local school districts caused by unequal distributions of taxable wealth).

83. See MICHAEL A. REBELL & ARTHUR R. BLOCK, EDUCATIONAL POLICY MAKING AND THE COURTS: AN EMPIRICAL STUDY OF JUDICIAL ACTIVISM, 5-15 (1982). This criticism is focused on decisions such as the one made by the Kentucky Supreme Court in *Rose v. Council for Better Education*, 790 S.W.2d 186 (Ky. 1989). In that case, the court not only held that the funding of Kentucky schools violated a constitutional provision requiring the legislature to "establish an efficient system of common schools throughout the State," but also that the entire education system was constitutionally inadequate. *Id.* at 216, 215. Likewise, in 2001, a New York trial court ruled that the New York education system was unconstitutional because it failed to provide adequate funding to New York City students. *Campaign for Fiscal Equity v. New York*, 187 Misc. 2d 1, 4 (N.Y. Sup. Ct. 2001).

84. 494 U.S. 872, 879 (1990) ("[T]he right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'",), *superseded by statute*, Religious Freedom Restoration Act of 1993, 42 U.S.C.A. §2000(b)(b) (1993), as recognized in *Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal*, 126 S. Ct. 1211 (2006).

85. 381 U.S. 479 (1965) (holding that a right of privacy exists).

tees in the Bill of Rights.⁸⁶ In outlining this zone of privacy, the Court stated that even though some rights are not specifically enumerated in the Constitution, they are nonetheless “peripheral” to various freedoms in the Bill of Rights.⁸⁷

Although *Griswold* may have initially appeared to link the constitutional protection of sexual activity to married couples, *Eisenstadt v. Baird* removed any such linkage.⁸⁸ In *Eisenstadt*, the Court extended *Griswold*'s holding to include “the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.”⁸⁹ As Justice Brennan declared, “[i]f under *Griswold* the distribution of contraceptives to married persons cannot be prohibited, a ban on distribution to unmarried persons would be equally impermissible.”⁹⁰ This decision marked a shift from privacy as “freedom from surveillance or disclosure of intimate affairs,” to privacy as “the freedom to engage in certain activities” and “to make certain sorts of choices, free of interference by the state.”⁹¹

The Court, in *Carey v. Population Services International*, reiterated that “the reasoning of *Griswold* could not be confined to the protection of rights of married adults.”⁹² *Carey* extended the right of privacy to minors engaging in consensual sexual behavior by overturning a state statute that banned the distribution of contraceptives to minors as part of a state policy against teen pregnancy.⁹³ The *Carey* Court saw the right of privacy, as protected by the Due Process Clause of the Fourteenth Amendment, to include “the interest in independence in making certain kinds of important decisions.”⁹⁴

In *Roe v. Wade*, the Court held that the right of privacy recognized in the previous contraception cases was “broad enough to cover the abortion decision.”⁹⁵ Later, in *Planned Parenthood of Southeastern*

86. *Id.* at 484, 485.

87. *Id.* at 483-84.

88. 405 U.S. 438 (1972) (holding that a law banning the distribution of contraceptives to unmarried persons violates the right of privacy, and hence extending the ruling in *Griswold* to non-married individuals).

89. *Id.* at 453.

90. *Id.* (arguing for expanding the right of privacy to the individual from the couple).

91. Michael J. Sandel, *Moral Argument and Liberal Toleration: Abortion and Homosexuality*, 77 CAL. L. REV. 521, 527-28 (1989).

92. 431 U.S. 678, 687 (1977) (overturning a state law banning the distribution of contraceptives to minors under 16 years of age).

93. *Id.* at 681.

94. *Id.* at 684 (quoting *Whalen v. Roe*, 429 U.S. 589, 599-600 (1977)).

95. 410 U.S. 113, 155 (1973) (including a woman's right to have an abortion within the zone of privacy created in *Griswold* by ruling that an unborn fetus was not a “person” under the Fourteenth Amendment).

Pennsylvania v. Casey, which reaffirmed *Roe*, Justice Kennedy elaborated on the right to privacy:

These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life.⁹⁶

This "right to define one's own concept of . . . the universe,"⁹⁷ linking the right to an abortion to other kinds of intimate choices, thus became the latest evolution of the emanations from penumbras in *Griswold* that first led to a recognized right to privacy.⁹⁸

The latest significant pronouncement from the Supreme Court on the right of privacy came in *Lawrence v. Texas*,⁹⁹ which held that a state statute criminalizing same-sex sodomy violated the Fourteenth Amendment's Due Process Clause. In *Lawrence*, the Court applied the right of privacy to hold that a Texas statute prohibiting people of the same sex from engaging in certain sexual conduct violated the Due Process Clause.¹⁰⁰ Justice Kennedy's opinion recognized that the Court's earlier decision in *Eisenstadt* had established that the right to make certain decisions regarding sexual conduct extended to all adults, regardless of marital status.¹⁰¹ But in *Lawrence*, the Court now gave explicit recognition to a right of sexual intimacy, which it had been unwilling to make in previous cases.¹⁰² Even though the Court seventeen years earlier in *Bowers v. Hardwick* had found that there was not a fundamental right of homosexuals to engage in sodomy, based upon a lack of history or tradition in protecting such a practice,¹⁰³ the *Lawrence* Court found just the opposite type of history and tradition, ruling that sodomy statutes offended an individual's right to privacy.¹⁰⁴ Consequently, in the wake of *Lawrence*, there is no longer any question as to whether a right to sexual privacy exists; the only question is what specific aspects of sexual privacy can or cannot be regulated.¹⁰⁵ In his dissent, for instance,

96. 505 U.S. 833, 851 (1992).

97. *Id.* See *Stenberg v. Carhart*, 530 U.S. 914, 930 (2000) (ruling that a Nebraska law prohibiting partial-birth abortion overly burdens a woman's ability to choose, thus expanding privacy rights to cover partial-birth abortions).

98. *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965).

99. 539 U.S. 558, 578 (2003).

100. *Id.* at 567.

101. *Id.* at 565.

102. See Donald H.J. Hermann, *Pulling the Fig Leaf off the Right of Privacy: Sex and the Constitution*, 54 DEPAUL L. REV. 909, 928-930 (2005).

103. 478 U.S. 186, 190 (1986).

104. *Lawrence*, 539 U.S. at 571-72.

105. See *Williams v. Att'y Gen'l of Ala.*, 378 F.3d 1232, 1233 (11th Cir. 2004) (addressing the

Justice Scalia predicted that the next logical step in the reasoning of *Lawrence* would be the legalization of same-sex marriage.¹⁰⁶

B. *A Privacy Right Requires Unprincipled Judicial Line-Drawing*

The Court's privacy rulings presume that judges have the ability and duty to determine those personal choices that define human life and sustain personal dignity. These rulings presume that courts can adequately draw the fine lines between individual privacy, democratic values, and social policies. The constitutional doctrines on privacy further presume that a centralized judiciary can better determine the parameters of individual autonomy than can any democratically-elected legislature.

In its privacy decisions, the Court has not only used a right not mentioned in the Constitution to dictate policy choices and social values uniformly to every community in the nation, but in doing so it has defined what constitutes the vital ingredients of personal dignity and autonomy for all Americans. Moreover, as the privacy cases show, the Supreme Court has decided that constitutional privacy is to be defined almost exclusively in terms of sexual activity freedoms.

The Court defines privacy as involving those individual choices "central to personal dignity and autonomy" that help "define one's own concept of existence, of meaning, of the universe, and of the mystery of human life."¹⁰⁷ The types of choices that qualify as those vital to human development, according to the Court, include the choice to engage in sexual conduct and the choice to have an abortion.¹⁰⁸ Even though human privacy is being assaulted every day by technologies that allow unlimited opportunities to collect and disseminate intimate personal information, the Court has not extended its privacy concerns to those conditions or concerns. Indeed, individual claims against media or technological invasion of privacy have not found a receptive ear in the Court.¹⁰⁹

The irony of the constitutional right of privacy is that it exists in a society where every aspect of personal privacy other than sexual conduct is being eroded. Sexual privacy is constitutionally protected, even

constitutionality of an Alabama statute regulating the distribution of sexual devices, including the specific issue of whether the right to sexual privacy includes the right to use sexual devices).

106. *Lawrence*, 539 U.S. at 604 (Scalia, J., dissenting).

107. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 851 (1992). Under the Court's privacy rulings, a judicially-articulated national value on sexual privacy can trump all other community values or morals.

108. *Id.*

109. See Clifford S. Fishman, *Technology and the Internet: The Impending Destruction of Privacy by Betrayers, Grudgers, Snoops, Spammers, Corporations, and the Media*, 72 GEO. WASH. L. REV. 1503, 1548-49 (2004).

though identity and informational privacy is under increasing assault from new technologies.¹¹⁰ Professor Fishman has outlined the ways in which technology is invading individual privacy.¹¹¹ He describes the ubiquity of surveillance technology, the ease with which the Internet can disseminate private information, and the ways in which personal data can be acquired through the use of credit cards, e-mail, and even supermarket discount cards.¹¹² Even more ironically, especially when one considers the constitutional efforts the judiciary has made to create a right of privacy, the Supreme Court has greatly aided the invasion of privacy by ruling that the media may publish or broadcast with impunity the contents of intercepted communications known to have been unlawfully intercepted, so long as the media did not participate in the unlawful interception and the subject matter of the intercepted communications was a matter of public concern.¹¹³

Another paradox in the Court's privacy rulings is that, as it has been developing a right to privacy, the Court has continued to downplay or ignore property rights, which for a century and a half were an explicit and primary focus of constitutional law. In fact, only after the Court stopped treating property rights as fundamental rights, requiring a substantive due process analysis, did it begin to adopt a substantive due process analysis for issues involving non-economic individual rights.¹¹⁴

110. See generally PATRICK RADDEN, CHATTER: DISPATCHES FROM THE SECRET WORLD OF GLOBAL EAVESDROPPING (2005); ROBERT O'HARROW, NO PLACE TO HIDE (2005) (outlining ways in which personal data can be acquired and how people's movements and activities can be followed or recorded). See also Rebecca A. Murray, Book Note, 3 HIGH TECH. L.J. 1 (2004) (reviewing CLAY CALVERT, VOYEUR NATION: MEDIA PRIVACY, AND PEERING IN MODERN CULTURE (2000)) (discussing various types of voyeurism made possible by new technologies, as well as how the media uses its judicially-granted constitutional rights to invade individual privacy).

111. Fishman, *supra* note 109.

112. *Id.* at 1505-11.

113. *Bartnicki v. Vopper*, 532 U.S. 514, 525 (2001) (ruling that, in certain situations, the media are immune from civil damages suits brought under the Wiretap Act). Aside from the media, the government also participates in the erosion of personal privacy. For instance, nearly every state employs a data encryption method on their driver's licenses. John T. Cross, Comment, *Age Verification in the Twenty-first Century*, 23 J. MARSHALL J. COMPUTER & INFO. L. 363, 372 (2005). However, when the license is swiped through a digital scanner (for age verification purposes, for example), the private data stored on the card's magnetic strip is susceptible to theft. Currently, more than seven million Americans are victimized by identity theft; and the driver's license is a frequent means by which this theft occurs. *Id.* at 394.

114. See *Nat'l Labor Relations Bd. v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 43-44 (1937), where the Court refused to scrutinize legislation regulating labor relations under a substantive due process analysis. Instead, the Court merely deferred to the congressional finding that there was a rational basis for the regulations and that the regulated activities had a substantial economic effect. Prior to 1937, property rights were seen by the *Lochner*-era Court as fundamental to the Constitution's view of a free and independent life. *Lochner v. New York*, 198 U.S. 45, 64 (1905). But the New Deal constitutional revolution abandoned the doctrine of substantive due process (that had been applied exclusively to property rights). Later, with the creation of privacy rights,

But the unanswered question resulting from this legacy is whether property rights are actually more important to individuals than are sexual privacy rights.¹¹⁵

Due to the way privacy has evolved as a court-created right, there is an arbitrariness to the current constitutional doctrines. Why, for instance, did the Court pick sexual activity as the area covered by privacy rights? What if there are many people who define themselves not through their sexual activities, but through some other activity?¹¹⁶ Who is to say that the only real measure of privacy is in sexual relations, as the Court has suggested? Is sexual privacy so much more important to human autonomy and dignity than informational privacy? Why is there not a constitutional right of privacy against media disclosure of private information, which seems far more violative of privacy rights than restrictions on abortion? Daniel Solove, for instance, presents a comprehensive argument for legal protections against the public disclosure of private information.¹¹⁷ As he suggests, protecting one's identity may be a much more meaningful way of protecting privacy.

Privacy is not the kind of minority rights issue on which the courts should possess sole authority.¹¹⁸ If one is to believe the courts, everyone sees sexual conduct as being essential to their self-definition; thus, everyone has an interest in, for example, the issue of contraception availability. Consequently, privacy can be best protected by the political branches. Moreover, the Court's current approach to privacy prevents

the doctrine was revived; but this time, the nature of liberty that was found essential under the Constitution for individual freedom and to which the Court gave heightened protection was not economic liberty, but autonomy in intimate relations.

115. This is particularly evident in the public outrage to the 'public use takings' case of *Kelo v. City of New London*, 125 S. Ct. 2655, 2661 (2005), where the Supreme Court held that a city's exercise of eminent domain power in furtherance of an economic development plan, even if used to transfer property from one private party to another, satisfies the constitutional public use requirement.

116. Evidence that the Framers did not recognize or even contemplate any kind of right to sexual privacy can be seen in the plethora of eighteenth and nineteenth century laws punishing adultery. See generally Carolyn B. Ramsey, Book Note, *Sex and Social Order: The Selective Enforcement of Colonial American Adultery Laws in the English Context*, 10 YALE J.L. & HUMAN. 191, 208-13 (1998) (reviewing MARY BETH NORTON, *FOUNDING MOTHERS AND FATHERS: GENDERED POWER AND THE FORMING OF AMERICAN SOCIETY* (1996)).

117. Daniel J. Solove, *The Virtues of Knowing Less: Justifying Privacy Protections Against Disclosure*, 53 Duke L.J. 967 (2003).

118. Regarding privacy and abortion rights, the Supreme Court has been accused of creating new rights. See TOM CAMPBELL, *SEPARATION OF POWERS* 20 (2004). But to apply the right to privacy to abortion, the Court has had to set in motion a whole train of consequences, including the ruling that an unborn child is not a person. Consequently, the right to privacy became a "super-right," which trumps even the interest in protecting potential life. *Id.* at 145, 147. Thus, to arrive at a right to abortion through a general right to privacy, the Court had to find in the Constitution a substantive right of privacy beyond anything that had ever previously existed.

the public from putting the issue into a broader perspective, encompassing a larger set of individual interests.

The legal concern with privacy and the recognition of a constitutional right of privacy stemmed from an 1890 article by Samuel Warren and Louis Brandeis.¹¹⁹ This article focused on the public disclosure of private matters and called for legal restraints on surveillance practices conducted not just by the state, but by private parties, especially the press.¹²⁰ Indeed, the technological and media developments of the twentieth century, vastly increasing the automated processing of personal information, have proven these concerns to be justified. Given the reality of contemporary society, privacy should probably be defined more in terms of control over personal information than solely in terms of sexual choices. This is an area in which the political branches have long been active. In fact, data protection laws show how privacy should be protected – through legislatures, not courts.

Through its information privacy laws, America has often preferred the free flow of information over individual privacy rights.¹²¹ For instance, although the Privacy Act of 1974 applied the fair information practices to the federal public sector, there is no comprehensive information privacy law applying information privacy principles to the private sector.¹²² Furthermore, information privacy laws have been enacted on a piecemeal basis to deal with specific problems in isolated sectors, such as in relation to credit information and financial institutions.¹²³ Thus, the political process has balanced America's need for privacy with its desire for public openness of information. As a reflection of this balancing, and because indications exist that the public is becoming more concerned about the technological assault on privacy, Congress has become far more active in its legislative agenda on privacy.¹²⁴

119. Samuel Warren & Louis Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

120. *See id.*

121. *See* Irving Louis Horowitz, *Privacy, Publicity and Security: The American Context*, 7 EMBO REPORTS S40, S42 (2006) (observing that the desire for privacy coincides with “a demand for maximum access to information”).

122. Privacy Act of 1974, 5 U.S.C. § 552 (2002).

123. *See, e.g.*, Fair Credit Reporting Act of 1971, 15 U.S.C. § 1681 (2005); Gramm-Leach-Bliley Act, 15 U.S.C. § 2710 (2000).

124. *See* Horowitz, *supra* note 121, at S42 (noting that the national legislative agenda is currently contemplating the following privacy laws: the Financial Services Act, the Financial Information Privacy Act, the Personal Privacy Protection Act, the Integrity in Voter Registration Act, the Freedom and Privacy Restoration Act, the Consumer Intent Privacy Protection Act, the Collections of Information Anti-Piracy Act, the Patient Protection Act, the Fraud Protection Act and the Transportation Equity Act). Furthermore, Congress in its 2006 revisions of the Patriot Act added certain privacy protections. *Id.* at S43.

C. Privacy and Substantive Due Process

Since *Griswold*, the Due Process Clause of the Fourteenth Amendment has served as the Court's "chosen vessel" for the protection of unenumerated rights.¹²⁵ Under a substantive due process approach, the Court recognizes a right as fundamental when it can be shown that the right is grounded in tradition.¹²⁶ However, tradition can be a highly subjective concept.¹²⁷ John Hart Ely states that "people have come to understand that tradition can be invoked in support of almost any cause."¹²⁸ Consequently, the substantive due process approach has been criticized as allowing judges to impose their own personal views at the expense of the democratic process. According to Chief Justice Rehnquist, judges can use substantive due process to effectively rob the legislatures of their ability to consider important issues of self-governance.¹²⁹

With substantive due process, judges must first decide whether a certain right is fundamental. Yet, despite the Court's use of history and tradition to make this determination, the definition of a fundamental right seems to be a matter of judicial picking and choosing. There seems to be little logic in determining what qualifies as a fundamental freedom, unless one simply concludes that anything connected with sexual activity has a much greater chance of receiving fundamental rights status than does any other human act or decision.

In *Washington v. Glucksberg*, which declined to hold physician-assisted suicide a fundamental right, the Court emphasized the need to resist expanding the scope of substantive due process.¹³⁰ This was an echo of Justice Harlan, who, in a pre-*Griswold* case involving state restrictions on contraceptives, rejected the kind of expansive jurisprudence needed to arrive at a constitutional right of privacy.¹³¹ Heeding Justice Harlan's advice, the Court in *Glucksberg* upheld the state of Washington's ban on assisted suicide, despite Justice Scalia's acknowledgment in an earlier case that there was little difference between refusing medical treatment and physician-assisted suicide.¹³²

125. Isaac J.K. Adams, *Growing Pains: The Scope of Substantive Due Process Rights of Parents of Adult Children*, 57 VAND. L. REV. 1883, 1889 (2004).

126. *Id.*

127. *Id.* at 1890.

128. John Hart Ely, *The Supreme Court, 1977 Term – Foreword: On Discovering Fundamental Values*, 92 HARV. L. REV. 5, 39 (1978-1979) (noting that the problems that arise from relying on tradition involve those of cultural geography, time, competing tradition, and levels of generality).

129. See *Furman v. Georgia*, 408 U.S. 238, 470 (Rehnquist, J., dissenting).

130. 521 U.S. 702, 720-21, 735 (1997) (rejecting due process challenges to Washington's law banning assisted suicide).

131. See *Poe v. Ullman*, 367 U.S. 497, 548-49 (1961) (Harlan, J., dissenting).

132. See *Cruzan v. Dir., Mo. Dept. of Health*, 497 U.S. 261, 293-94 (1990) (Scalia, J.,

The *Glucksberg* Court distinguished its ruling from that in the abortion rights case of *Planned Parenthood v. Casey* by stating that a fundamental right involved only “those personal activities and decisions that this Court has identified as so deeply rooted in our history and traditions, or so fundamental to our concept of constitutionally ordered liberty, that they are protected by the Fourteenth Amendment.”¹³³ The Court also admitted that just because “many of the rights and liberties protected by the Due Process Clause sound in personal autonomy does not warrant the sweeping conclusion that any and all important, intimate, and personal decisions are so protected.”¹³⁴ But the underlying questions remain: How is assisted suicide so much less of a fundamental right than assisted fetal termination? Why is sodomy protected, but not prostitution? Why doesn’t the right of privacy extend to polygamy or the use of recreational drugs? Although in *Glucksberg* the Court found no substantive due process right, the Court in *Cruzan* had stated that the “choice between life and death is a deeply personal decision” in which the “Due Process Clause protects an interest in life as well as an interest in refusing life-sustaining medical treatment.”¹³⁵

A comparison of *Glucksberg* with *Casey* and *Lawrence* suggests that substantive due process permits, and perhaps requires, a continually fluid approach to constitutional interpretations, in which each generation will read its own cultural practices into the Constitution. A comparison of the cases also indicates the heightened status given to sex by substantive due process. According to the Court, a person’s destiny and meaning of life is uniquely tied to her sexual orientation and activities.¹³⁶ Sexual activity thus becomes the key component of personal dignity, which under the *Lawrence* analysis seems to be more important than either history or tradition in determining fundamental rights status.¹³⁷

The subjectivity and unpredictability inherent in the substantive due process approach can also be seen in *Lawrence*’s overruling of *Bowers*. As recognized in *Bowers*, a fundamental right is one “deeply rooted in this Nation’s history and tradition.”¹³⁸ It has been observed that “the

concurring in the holding that a competent person has a constitutional right to refuse lifesaving measures).

133. *Glucksberg*, 521 U.S. at 727.

134. *Id.* at 727 (citing *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 33-35 (1973)).

135. *Cruzan*, 497 U.S. at 281.

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

137. *Lawrence v. Texas*, 539 U.S. 558, 602-05 (2003) (Scalia, J., dissenting) (arguing that the Constitution is not committed to substantive protection of sexual liberty against government regulation and that sodomy reform is a matter of moral judgment better left to state political processes).

138. *Bowers v. Hardwick*, 478 U.S. 186, 192 (1986) (quoting *Moore v. East Cleveland*, 431 U.S. 494, 503 (1977)). The *Bowers* Court also rejected any other analysis used to find

given values of a particular democratic community are the underpinnings for fundamental rights.”¹³⁹ This community approach envisions that “a state is free to act unless in doing so it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.”¹⁴⁰ In *Bowers*, the Court found no constitutional basis for “a fundamental right to engage in homosexual sodomy.”¹⁴¹ After examining whether American history and tradition had in effect created such a fundamental right, the *Bowers* Court concluded that prohibitions against sodomy “have ancient roots” in history and that the act of sodomy had been criminalized by many states since the colonial era.¹⁴²

Seventeen years later, however, the Court reversed itself. In *Lawrence*, Justice Kennedy conducted the same kind of historical examination that swayed the Court’s decision in *Bowers*, but this time found no national history or tradition of condemning homosexual sodomy.¹⁴³ As Justice Kennedy wrote, history and traditions “show an emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex.”¹⁴⁴ In dissent, however, Justice Scalia argued that “‘an emerging awareness’ does not establish a ‘fundamental right.’”¹⁴⁵ Scalia also noted that, contrary to the majority’s ruling that the Texas anti-sodomy law had no rational basis, “[c]ountless judicial decisions and legislative enactments have relied on the ancient proposition that a governing majority’s belief that certain sexual behavior is ‘immoral and unacceptable’ constitutes a rational basis for regulation.”¹⁴⁶

fundamental rights: “Nor are we inclined to take a more expansive view of our authority to discover new fundamental rights imbedded in the Due Process Clause. The Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution.” *Id.* at 194. Thus, *Bowers* refused to expand the fundamental rights protected by the Due Process Clause to include homosexual sodomy.

139. Davin J. Hall, Note, *Not So Landmark After All?* *Lawrence v. Texas*, 13 WM. & MARY BILL RTS. J. 617, 624 (2004).

140. *Id.*

141. *Bowers*, 478 U.S. at 191. The Court also rejected the finding of a more general right to sexual intimacy from which a right to engage in homosexual sodomy could be derived. *Id.* at 190-91.

142. *See id.* at 192-93 (finding that sodomy was a common law crime at the time the Bill of Rights was ratified, as well as when the Fourteenth Amendment was adopted).

143. *See Lawrence v. Texas*, 539 U.S. 558, 567-74. The Court’s conclusion here is contradicted by what Richard John Neuhaus calls “five millennia of moral teaching about the right ordering of human sexuality. . . .” Richard John Neuhaus, *A Strange New Regime: The Naked Public Square and the Passing of the American Constitutional Order*, A Salvatori Lecture at the Heritage Foundation (Oct. 8, 1996), in *HERITAGE FOUNDATION REPORTS* (1996), at 3.

144. *Lawrence*, 539 U.S. at 571-72.

145. *Id.* at 598 (Scalia, J., dissenting).

146. *Id.* at 589 (Scalia, J., dissenting). Scalia called the decision an example of judicial

Aside from the *Bowers* reversal, substantive due process has historically proved to be unreliable. The first era of substantive due process took place from the latter part of the nineteenth century to the 1930s. During this era, defined by the Court's decision in *Lochner v. New York*,¹⁴⁷ property and economic rights were protected under a substantive due process approach.¹⁴⁸ *Lochner* rested on the Court's assertion that liberty of contract was a fundamental right protected by the Due Process Clause.¹⁴⁹ It was a conclusion that flowed from an earlier decision in *Allgeyer v. Louisiana*, in which the Due Process Clause was interpreted as protecting

the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion the purposes above mentioned.¹⁵⁰

Likewise, to the *Lochner* Court, liberty of contract was seen as central to free life, a value of the highest order to be zealously protected by the Fourteenth Amendment.¹⁵¹

During the *Lochner* era, the Court struck down nearly two hundred state laws for violating the liberty of contract inherent in the Due Process Clause.¹⁵² But the constitutional revolution of the New Deal brought an end to this era.¹⁵³ Under pressure from President Roosevelt's court-packing plan, the Court ceased using substantive due process to strike down New Deal economic legislation.¹⁵⁴ *Lochner* was not only

activism that seeks to declare homosexuality a fundamental right, even though "the court does not have the boldness" to say so. *Id.* at 594, 604-605.

147. *Lochner v. New York*, 198 U.S. 45, 61, 64-65 (1905) (striking down a New York law imposing limitations on the maximum hours per week that bakers could work on the grounds that the Due Process Clause gave heightened protection to economic liberty, which according to the Court was fundamental to the Constitution's understanding of a free life). See also Peter Berkowitz, *The Court, the Constitution, and the Culture of Freedom*, POL'Y REV. (Aug.-Sept. 2005), at 3, 6.

148. See Jeffrey M. Shaman, *On the 100th Anniversary of Lochner v. New York*, 72 TENN. L. REV. 455, 506 (2005) (noting that the *Lochner* Court "equated due process with laissez-faire economics").

149. *Lochner*, 198 U.S. at 53.

150. 165 U.S. 578, 589 (1897).

151. See *Lochner*, 198 U.S. at 53.

152. See Shaman, *supra* note 148, at 496-97 (arguing that "the Court made active and frequent use of the Due Process Clause to strike down laws that the Court perceived as interfering with its favorite fundamental right: liberty of contract").

153. See, e.g., *United States v. Carolene Prods. Co.*, 304 U.S. 144, 145, 154 (1938) (holding that the Filled Milk Act, a federal statute prohibiting the shipment of filled milk in interstate commerce, was "a constitutional exercise of [Congress's] power to regulate interstate commerce").

154. See Shaman, *supra* note 148, at 457.

abandoned, it was roundly criticized as being “not merely a wrong decision, but a very bad one, as well.”¹⁵⁵ Critics have since condemned *Lochner* as a result of individual Justices injecting their personal views into the Constitution.¹⁵⁶ Others have argued that the Due Process Clause should address only procedural and not substantive matters.¹⁵⁷ Still others have argued that the Fourteenth Amendment was aimed solely at eliminating racial inequity in the aftermath of the Civil War.¹⁵⁸

Despite this criticism of substantive due process as a means to protect the liberty of contract during the pre-New Deal period, it has nonetheless been embraced as a source of protection for another judicially-created fundamental right: the right of privacy. The Court in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, in language reminiscent of the *Lochner* era, ruled that substantive due process protects those matters and choices “central to personal dignity and autonomy.”¹⁵⁹ And yet, the *Casey* Court admitted that the *Lochner* era cases had been wrongly decided and had rested on “fundamentally false factual assumptions” about human needs.¹⁶⁰ Even when *Lochner* was overruled in

155. *See id.* at 475.

156. *See id.* at 475, 492.

157. *See id.* at 476 (noting the argument that “the phrase, ‘due process,’ after all, is indicative of procedural matters”). Moreover, a historical examination of the meaning of “due process” yields the conclusion that in 1791 the phrase “was generally understood to refer only to procedural matters.” *Id.* Even though substantive due process has been the path used by courts to create privacy rights, procedural due process has also been a venue through which courts have expanded rights at the expense of the legislative branch. In *Goldberg v. Kelly*, 397 U.S. 254 (1970), the Court concluded that welfare benefits qualify as a kind of “new property,” entitled to the protections of procedural due process. Cass R. Sunstein & Randy E. Barnett, *Constitutive Commitments and Roosevelt’s Second Bill of Rights: A Dialogue*, 53 *DRAKE L. REV.* 205, 213 (2005). However, since the nation’s beginning, welfare benefits had been seen as a mere privilege, not a right. *See Goldberg*, 397 U.S. at 262. *See, e.g.,* *Flemming v. Nestor*, 363 U.S. 603, 611 (1960) (holding that social security benefits did not constitute an “accrued property right”). Prior to *Goldberg*, the Court had restricted the category of rights to the old kind of “property,” such as land, cash, bank accounts, and investments. Sunstein & Barnett, *Constitutive Commitments*, 53 *DRAKE L. REV.* at 213. In *Goldberg*, however, the Court abandoned the right-privilege distinction and ruled that welfare was indeed a form of constitutional “property.” *Goldberg*, 397 U.S. at 262-65. This ruling exists despite the fact that there is no constitutional right to receive welfare benefits in the first place. *See Dandridge v. Williams*, 397 U.S. 471, 484, 486 (1970) (rejecting a constitutional right to welfare benefits). But in expanding the constitutional definition of property, the Court has ignored a crucial element in the traditional definition: property is that which individuals gather in their private and social lives, apart from the government. Individuals have no political recourse to a government taking their home, whereas individuals do have a political recourse to a cutback in welfare benefits – they can reform the law through the political process.

158. *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 71 (1872) (stating that the “one pervading purpose . . . at the foundation” of the Fourteenth Amendment was to remedy the oppression suffered by the recently freed slaves).

159. 505 U.S. 833, 851 (1992).

160. *Id.* at 861-62.

1937, the Court questioned the use of substantive due process to define liberty of contract as a fundamental right:

What is this freedom? The Constitution does not speak of freedom of contract. . . . There is no absolute freedom to do as one wills or to contract as one chooses. The guaranty of liberty does not withdraw from legislative supervision that wide department of activity which consists of the making of contracts. . . . Liberty implies the absence of arbitrary restraint, not immunity from reasonable regulations and prohibitions imposed in the interests of the community.¹⁶¹

The fate of *Lochner* and the demise of economic substantive due process create real doubts as to the constitutional basis of the right of privacy. Economic rights were once considered the pillar of human dignity and independence, just as non-economic rights now seem to be regarded. If economic and property rights, seen as fundamental during the early twentieth century, could be suddenly downgraded because of the changing political environment of the New Deal, then what is to deny that privacy rights, now seen as fundamental, might also suffer the same fate if political sensibilities change?¹⁶² Indeed, the Court has become so indifferent to property rights that in *Kelo v. City of New London* it ruled that the government could take by eminent domain a group of working-class homes from their owners and turn the property over to private parties for the purpose of economic development.¹⁶³

161. *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 391-92 (1937) (citing *Chicago, B & Q. R. Co. v. McGuire*, 219 U.S. 549, 567 (1911)).

162. Economic rights were once considered the pillar of human dignity and independence, just as non-economic rights now seem to be. See *The Slaughter-House Cases*, 83 U.S. at 97-98 (Field, J., dissenting) (referencing the liberty protected by the Fourteenth Amendment, describing the sanctity of private property as circumscribing a person's freedom); *Munn v. Illinois*, 94 U.S. 113, 136 (1876) (Field, J., dissenting) (arguing that "[t]he principle upon which the opinion of the majority proceeds is . . . subversive of the rights of private property, heretofore believed to be protected by constitutional guaranties against legislative interference. . ."). Both these dissents provided the impetus for the substantive due process epitomized by *Lochner*.

163. *Kelo v. City of New London*, 125 S. Ct. 2655, 2668 (2005). This ruling obviously threatens the most sacred of American domains – the home. Furthermore, the homes were marked for eminent domain not because they were blighted, but because they were needed to ensure an economic development that would increase the city's tax base. *Id.* at 2664-65. And the justification for this decision rested on a very broad reading of the term "public use" in the Fifth Amendment's takings provision that private property could "be taken for public use" on payment of just compensation. *Id.* at 2665-66. Writing for the Court, Justice Stevens ruled that courts should be highly deferential to government decisions to displace one private property owner in favor of another private party in the name of economic development. *Id.* at 2668. But even if economic compensation is given, the first owner is not compensated for any subjective losses incurred as a result of not wanting to be forced out of a home in which they have many emotional attachments. *Id.* at 2686 (Thomas, J., dissenting).

The decision set off a storm of protest. See Timothy Egan, *Ruling Sets Off Tug of War Over Private Property*, N.Y. TIMES, July 30, 2005, at A1 (stating that the decision "set off a storm of legislative action and protest, as states have moved to protect homes and businesses from the expanded reach of eminent domain"). In Connecticut, where the case originated, the governor

D. *The Political Aspect of Privacy*

The modern Court's use of substantive due process renders uncertain the proper balance between legislative and judicial power. In 1824, Chief Justice John Marshall expressed the prevailing view of the Court's role: "Judicial power is never exercised for the purpose of giving effect to the will of the judge; always for the purpose of giving effect . . . to the will of the legislature."¹⁶⁴ Marshall also suggested that, on doubtful questions of constitutionality, the judgments of the political branches "ought to receive a considerable impression."¹⁶⁵

The weakness of the substantive due process approach is that it places before the Court issues that should be addressed in the democratic arena. Through this approach, the Court seals off the democratic process from addressing the matter at issue; but in doing so, as shown by the abortion decisions, the Court only intensifies and prolongs the political and legal anguish over the issue.¹⁶⁶ As John Hart Ely theorized, an overactive judiciary exerts a suffocating influence on the democratic process.¹⁶⁷ Justice Kennedy repeated this theme when he said that "[s]ociety has to recognize that it has to confront hard decisions in neutral, rational, dispassionate debate . . . [a]nd not just leave it to the courts . . . [because it's] a weak society that leaves it to courts."¹⁶⁸

In *Glucksberg*, the Court recognized the dangers that substantive due process posed, and it refused to transfer an important issue from the political process to the judiciary. The Court noted that throughout the nation, "Americans are engaged in an earnest and profound debate about the morality, legality, and practicality of physician-assisted suicide [and our holding permits this debate to continue, as it should in a democratic society]."¹⁶⁹ Substantive due process cases require the courts not just to judge the specifics of individual personal cases, but to lay down a general rule that will govern a whole array of cases. The question is where

likened the public outrage to "the Boston Tea Party." *Id.* This reaction suggests that, contrary to the Court's current substantive due process rulings, property rights might be even more vital to a person's sense of autonomy than are sexual rights.

164. CHARLES L. BLACK JR., *THE PEOPLE AND THE COURT* 159-60 (1960).

165. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 401 (1819).

166. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 1002 (1992) (Scalia, J., dissenting) (stating that *Roe* foreclosed all democratic efforts at whatever consensus might have emerged from the various political processes in the states).

167. "[A]t least in some situations judicial intervention becomes appropriate when the existing processes of representation seem inadequately fitted to the representation of minority interests, even minority interests that are not voteless," otherwise, the political process should be relied upon to fix bad or undesirable laws. JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 85-88 (1980). Thus, only when the democratic process is broken, according to Ely, should the courts intervene. *Id.*

168. Jeffrey Rosen, *The Agonizer*, *THE NEW YORKER*, Nov. 11, 1996, at 90.

169. *Washington v. Glucksberg*, 521 U.S. 702, 735 (1997).

the lines should be drawn between privacy and social morality or community values, and this question – the matter of balancing interests to arrive at social policy – is best addressed by the legislative branch.¹⁷⁰ The judiciary “is at a disadvantage in trying to ascertain facts not of the kind presented as evidence in trials.”¹⁷¹

One measure of the degree of opposition to the Court’s right of privacy decisions can be seen in the reaction of state courts to the use of economic substantive due process. Although economic substantive due process was frequently used in the 1940s, 1950s, and 1960s, it has recently gone into a significant decline.¹⁷² According to Professor Sanders, this decline stems from the widespread opposition to the use of substantive due process to arrive at the privacy right that in turn produced the right to an abortion in *Roe v. Wade*.¹⁷³ Because the critics of *Roe* “had to find fault with the case in order to have any hope of overturning it . . . [t]he easiest way to do so was to discredit substantive due process itself.”¹⁷⁴ As Professor Sanders has noted:

When faced with the choice of (1) distinguishing “economic substantive due process” from substantive due process and the “right to privacy,” and (2) discrediting the use of substantive due process altogether, enough conservative state justices appear to have chosen the latter approach so that the number of economic substantive due process cases has had nowhere to go but down.¹⁷⁵

As a result of their opposition to how substantive due process was used to produce a right to an abortion, even the supporters of economic and property rights have ceased relying on substantive due process as a means of protecting those rights.

Similar to those who argue that the political question doctrine commands the judiciary to defer to the political branches on various constitutional matters, some scholars claim that the Court should not be given the exclusive job of constitutional interpretation. Larry Kramer insists that Madison “never wavered in his belief that final authority to resolve disagreements over [the Constitution’s] meaning must always rest with

170. See TOM CAMPBELL, SEPARATION OF POWERS IN PRACTICE 20, 22-25 (2004).

171. *Id.* at 22.

172. See Anthony B. Sanders, *The New Judicial Federalism Before Its Time: A Comprehensive Review of Economic Substantive Due Process Under State Constitutional Law Since 1940 and the Reasons for its Recent Decline*, 55 AM. U. L. REV. 457, 499-500, 507, 512 (2005) (arguing that there has been such a complete opposition to substantive due process that many traditional advocates of economic substantive due process have now turned against substantive due process review generally).

173. 410 U.S. 113, 153 (1973) (finding that the right of privacy includes the right to choose an abortion); Sanders, *supra* note 171, at 499-500.

174. Sanders, *supra* note 172, at 505 (stating that this approach “would assist in overturning *Roe*, but would also discredit the use of due process clauses in protecting economic liberty”).

175. *Id.* at 510.

the people.”¹⁷⁶ In Madison’s view, the judiciary was never to be the supreme judge of constitutional meaning.¹⁷⁷ According to Professor Kramer, the notion of judicial supremacy, which is based on a widespread belief that the Supreme Court is the ultimate constitutional authority, has sapped much of the life from democratic politics. He dates the victory of judicial supremacy back to the Warren Court of the 1960s, when “the principle of judicial supremacy came to monopolize constitutional theory and discourse,” at least in the area of individual rights.¹⁷⁸ Thus, he disagrees with those who claim that the Court has been the supreme voice in constitutional interpretation throughout most of the nation’s history.¹⁷⁹

For certain highly contentious issues, the Court should not impose a single, uniform resolution, but should instead remand the issues to the democratic process to flush out all the viewpoints, educate the polity, and reach a compromise consensus.¹⁸⁰ This process allows for individual freedoms and interests to be shaped according to the democratic desires of the people possessing those freedoms. The constitutional right to privacy, for instance, reflects a rigid judicial mandate on a matter in which every citizen has an interest and which continually changes as society and social relationships change.

In the early abortion cases, the Court prematurely removed from the political process one of the most difficult and divisive public law debates of American history.¹⁸¹ Because state legislatures all over the country were beginning to rethink their abortion laws in the early 1970s,¹⁸² the Court should have denied review in *Roe* so that the issue

176. LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* 47 (2004). Although Madison tried to place structural barriers between government and popular rule, he continually maintained that the people defined the Constitution, not only through the amendment process, but also through political action like elections. See EDMUND S. MORGAN, *INVENTING THE PEOPLE: THE RISE OF POPULAR SOVEREIGNTY IN ENGLAND AND AMERICA* 94-121 (1988).

177. Daniel Hulsebosch, *Bringing the People Back In*, 80 N.Y.U. L. REV. 653, 678 (2005) (reviewing LARRY D. KRAMER, *POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* (2004)).

178. KRAMER, *supra* note 176, at 219-220, 224 (noting that judicial supremacy took hold in the middle of the twentieth century when the Court, after having given up monitoring structure-of-government issues during the New Deal, became active in protecting individual rights).

179. *Id.* at 208. Kramer’s views are supported by John Marshall and Joseph Story, both of whom considered Congress to have the primary role in interpreting the Constitution and adapting it to changing circumstances. Robert J. Kaczorowski, *Popular Constitutionalism Versus Justice in Plainclothes: Reflections from History*, 73 FORDHAM L. REV. 1415, 1425 (2005) (noting that the Court’s power of judicial review permitted it to nullify acts of Congress only in very limited circumstances where Congress had clearly exercised constitutionally prohibited powers).

180. William Eskridge, Jr., *Pluralism and Distrust: How Courts Can Support Democracy by Lowering the Stakes of Politics*, 114 YALE L.J. 1279, 1283 (2005).

181. *Id.* at 1282.

182. *Id.* at 1312.

could ripen.¹⁸³ Furthermore, abortion does not represent a minority right that only the courts can protect. Women constitute a voting majority, and there is no procedural reason why the political process should not take account of their interests.¹⁸⁴ For this reason, John Hart Ely argued that it would be more legitimate for women's rights reforms to win in the legislative rather than the judicial process.¹⁸⁵

The rise of judicial supremacy, which has not only weakened the political question doctrine but also transferred policy-making powers from the legislative to the judicial branch, has caused an unjustified expansion in the types of cases heard by the courts, as well as a distortion in how those cases are decided. Privacy serves as a good example. Within the judicial arena, privacy has come to reflect an unrealistic and unworkable notion of individual autonomy. The Court's privacy doctrine, for instance, promotes "the illusion that individuals are sovereign jurisdictions, entitled to and able to exercise the most significant personal liberties without concern for others."¹⁸⁶ This illusion views the individual as completely separate from society, owing no duties to society and not dependent on society for his or her physical comfort, emotional satisfaction or personal security and liberty. It sees individuals as radically self-determining, denying that individuals are socially constructed or that they are social creatures.

Privacy rights activists see the individual ideal as being in a state of nature. But this is not how the Constitution sees individuals, especially individuals who are members of a democratic society.¹⁸⁷ The Constitution is primarily concerned with the workings of the democratic community, not with trying to return individuals to some imaginary state of nature. The Framers did not see human beings as solitary creatures, with no relationships or obligations to society.¹⁸⁸ Indeed, by joining democratic society, the individual is no longer in a state of nature. Therefore, laws should not be crafted as if individuals lived separate from society, disconnected from its democratic process. According to William Black-

183. *Id.* at 1313. A criticism of *Bush v. Gore*, 531 U.S. 98 (2000), but also a criticism of the privacy decisions, is that judicial resolution of the issue removes it from the political process and wipes out any room for deliberation or dialogue. Barkow, *supra* note 16, at 296. With the Court injecting itself into the democratic process in a way it had not done before, the public never was able to take part in the deliberations or to have a role in resolving the controversy. *Id.* at 297.

184. JOHN HART ELY, *DEMOCRACY AND DISTRUST* 164-69 (1980).

185. *Id.*

186. Robert F. Nagel, *Privacy and Celebrity: An Essay on the Nationalization of Intimacy*, 33 U. RICH. L. REV. 1121, 1140 (2000).

187. See Horowitz, *supra* note 121, at S43 (stating that "[t]aken to one extreme, privacy results in total isolation and denies the social bases of human existence. At the other extreme, unlimited communication and the end of privacy leaves the human depleted of self and of personality.").

188. Ely, *supra* note 184, at 67.

stone, when society was formed, individuals gave up the liberty they enjoyed in the state of nature and exchanged it for a more limited set of liberties and rights under civil society.¹⁸⁹ However, the Court's privacy rulings seem to presume that individual freedom cannot truly exist within majoritarian rule, as if majoritarian rule is inherently oppressive.

CONCLUSION

The Court derived its constitutional right of privacy through the substantive due process approach. But critics have maligned this approach, arguing that the judicial articulation of fundamental rights involves a subjective and ideologically-infused approach. Critics have also argued that substantive due process involves the courts in the kind of policymaking process that belongs to the political branches. This Article adds to that criticism by applying the political question doctrine to the constitutional right of privacy.

Even though the political question doctrine does not normally apply to matters of individual rights, its framework and analysis can provide a useful and insightful model for determining whether privacy matters belong in the courts or in the legislatures. By examining the criteria of the political question doctrine, this Article reveals how the constitutional right of privacy is not well-suited for judicial resolution and should instead be left to the democratic legislatures. Employing the political question doctrine methodology also demonstrates that the substantive due process approach used in deriving the constitutional right of privacy may very well be the wrong approach.

189. 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 121-22 (Univ. of Chi. Press 1979) (1765).