The Link Between *Carolene Products* and *Griswold*: How the Right to Privacy Protects Popular Practices from Democratic Failures

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Introduction

IN HIS LANDMARK ARTICLE *Beyond* Carolene Products, Bruce Ackerman examined the Supreme Court's protection of "discrete and insular" minorities (enshrined in the famous *United States v. Carolene Products*[1] footnote[2]) and concluded that the groups who really needed protection were, in fact, the opposite—the anonymous and diffuse interests that cannot compete in the political marketplace.[3] This Article proposes that there is, in fact, a constitutional doctrine that protects at least some of these anonymous and diffuse interests—the constitutional right to privacy.

While most scholars interpret the right to privacy as a substantive right,[4] this Article disagrees. It can be understood as a procedural right—an intervention to correct a defect of the political process. By

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* Law Clerk to the Honorable Marianne O. Battani. Thanks to Mark Tushnet, who gave comments on an early draft, and to Susan McMahon and to my family, who provided support throughout the process.

1. 304 U.S. 144 (1938).

2. *Id.* at 152 n.4 (finding that "prejudice against discrete and insular minorities . . . tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities" and allows for the intervention into the decisions of democratically elected legislatures to uphold minority rights).

3. Bruce A. Ackerman, *Beyond* Carolene Products, 98 HARV. L. REV. 713, 742 (1985) ("Long after discrete and insular minorities have gained strong representation at the pluralist bargaining table, there will remain many other groups who fail to achieve influence remotely proportionate to their numbers: groups that are discrete and diffuse (like women), or anonymous and somewhat insular (like homosexuals), or *both* diffuse and anonymous (like the victims of poverty).").

4. *See, e.g.*, KATHLEEN M. SULLIVAN & GERALD GUNTHER, CONSTITUTIONAL LAW 544–629 (15th ed. 2004 & Supp. 2006). The cases that I will discuss are invariably listed under "Substantive Due Process" or something similar in the dominant constitutional law textbooks.

shielding popular but culturally stigmatized behavior from opponents who have a disproportionate influence on the legislative process, the right to privacy works to uphold the utilitarian function of democracy.[5]

Part I of this Article introduces the right to privacy and the limited areas in which courts have applied it, focusing on its modern application to contraception, pornography, abortion, and homosexuality.

Part II deals with the response to the right to privacy. Although the legal establishment critiqued the right almost immediately, the right has nonetheless endured. Over time, new critics have emerged from all over the legal spectrum. This part outlines the most salient criticisms from the schools of natural law,[6] process theory,[7] and originalism,[8] as well as the implication of these criticisms—that the right to privacy undermines the constitutional structure of democracy

5. Inasmuch as democracy assigns an equal weight to everyone's preferences and involves the balancing of these preferences to achieve something like the greater good, democracy is utility-maximizing. *See, e.g.*, JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 13 (J.H. Burns & H.L.A. Hart eds., Univ. of London 1970) (1780); John Hart Ely, *Professor Dworkin's External/Personal Preference Distinction*, 1983 DUKE L.J. 959, 979 ("I also agree that there exists a rough congruence between utilitarian and democratic models of public choice."). Therefore, when the structural defects of democracy assign disproportionate weight to certain groups, the utilitarian function begins to break down.

6. The theory of natural law posits that the law should conform to "universally recognized principles of conduct which have a basis in elementary truths concerning human beings, their natural environment, and aims." H.L.A. HART, THE CONCEPT OF LAW 193 (2d ed. 1994). This often has a religious overtone, although a religious connection is not necessary. *See* Randy E. Barnett, *A Law Professor's Guide to Natural Law and Natural Rights*, 20 HARV. J.L. & PUB. POL'Y 655, 658–59 (1997) (arguing that while some proponents identify the divine as the proper source of natural law, it is not necessary to involve religion to arrive at a set of universal principles).

7. Process theory, in general, is a school of jurisprudence that attempts to reconcile nondemocratic judicial review with democratic decision-making by separating substance and procedure in law. DANIEL A. FARBER & SUZANNA SHERRY, BEYOND ALL REASON: THE RADICAL ASSAULT ON TRUTH IN AMERICAN LAW 18 (1997) ("In the 1950s and 1960s, legal scholars ultimately restrained the insights of legal realism by focusing on the need for orderly processes to decide legal issues, rather than on substantive legal rules."). Thus, matters of substantive value are properly decided by elected bodies, while the mechanisms of the political process are appropriate for judicial review.

8. Originalism is the theory that legal documents should be interpreted in accordance with either the original intent of the framers or the original meaning of the text at the time it was written. *See, e.g.*, William E. Nelson, *History and Neutrality in Constitutional Adjudication*, 72 VA. L. REV. 1237, 1240 (1986) (defining originalism (also known as interpretivism) as "the judicial practice of giving meaning to a legal text in accordance with the original purposes or intentions of those who enacted it").

by depriving the electorate of the power to make decisions in these otherwise legitimate areas.

Part III examines the various factors that all of the right to privacy cases have in common, focusing in particular on how the different activities protected by the right share the factors of stigmatization, anonymity, diffusion, and popularity. This part introduces public choice theory and identifies those factors that lead to disproportionate political power (both over- and under- represented interests) in our system. Finally, this part shows how the common factors of the protected activities place the activities and their supporters at a severe disadvantage in the political marketplace and work to deny the supporters proper representation.

Part IV argues that the Court, perhaps subconsciously, is intentionally protecting these politically powerless groups by enveloping them in the right to privacy. The right to privacy, therefore, serves to advance the representation reinforcement goal of process theory by ensuring democratic outcomes in areas where groups lack representation proportional to their numbers. I conclude by defending this concept—judicial protection of popular practices from political market failure—as upholding the utilitarian underpinnings of democracy and by speculating what recognizing such a right would mean for other areas of the law.

I. The History of the Modern Right to Privacy

The right to privacy has brought nothing but controversy to the door of the Court. Various groups argue over its meaning: social conservatives believe it represents a subversive agenda on behalf of the Court's liberals to undermine the popular morality;[9] libertarians view the right to privacy as a first step in restoring the substantive jurisprudence of *Lochner v. New York*[10] and limited government;[11] liberals cele-

9. The rallying cry of social conservatives—to nominate judges who "interpret and apply the law, not make the law"—is a direct rebuke to the recognition of the admittedly nontextual right to privacy. *Confirmation Hearing on the Nomination of Samuel A. Alito, Jr. to be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 8 (2006) [hereinafter *Confirmation Hearing*] (statement of Sen. Orrin Hatch, Member, S. Comm. on the Judiciary, quoting Chief Justice Roberts).

10. 198 U.S. 45 (1905) (striking down a statute limiting the weekly working hours of bakers).

> The act must have a more direct relation, as a means to an end, and the end itself must be appropriate and legitimate, before an act can be held to be valid which interferes with the general right of an individual to be free in his person and in his power to contract in relation to his own labor.

brate the newfound freedom from government action, particularly in the areas of gender and sexuality,[12] as evidenced by the focus on this issue during confirmation hearings of Supreme Court Justices.[13] Their areas of disagreement are in the legitimacy and ultimate utility of that substantive right.

In this section, I will briefly examine the cases that compose the core of the modern right to privacy. The phrase "right to privacy" has existed in legal doctrine since 1890 but referred to a completely different area of the common law and had little in common with the right to privacy as we currently understand it.[14] The modern right to privacy was introduced in *Griswold v. Connecticut*,[15] invalidating a criminal prohibition on birth control,[16] and the Court has since extended it to pornography,[17] abortion,[18] and homosexual sodomy.[19] I will examine each of these areas in turn through both the facts of the cases and the rationales offered by the Court.

Id. at 57–58. *Lochner*'s central holding was essentially reversed by *Bunting v. Oregon*, 243 U.S. 426, 438–39 (1917) (upholding a law regulating overtime pay and working hours). The *Lochner* decision is commonly cited as the paradigmatic example of classical libertarian jurists imposing their own policy preferences (here, for laissez faire economics) on governments through judicial review. *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 861 (1992). Despite *Lochner* falling into ill repute during the New Deal, it was not formally overruled until *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 400 (1937), overruled *Adkins v. Children's Hospital of D.C.*, 261 U.S. 525 (1923).

11. *See generally* RANDY BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY 231–34 (2004) (recognizing the right to privacy as a bulwark against the post-*Lochner* legal tradition of legislative deference).

12. *See, e.g.*, Janet Benshoof, *The Legacy of* Roe v. Wade, *in* ABORTION: MORAL AND LEGAL PERSPECTIVES 35 (Jay L. Garfield & Patricia Hennessey eds., 1984) ("In the history of this country no Supreme Court decision has been so important to women's liberty, equality, and health as . . . *Roe v. Wade* . . . ."). *But see* Catherine MacKinnon, Roe v. Wade: *A Study in Male Ideology*, *in* ABORTION: MORAL AND LEGAL PERSPECTIVES, *supra*, at 45 ("I . . . criticize the doctrinal choice to pursue the abortion right under the law of privacy.").

13. *See Confirmation Hearing*, *supra* note 9, at 318 (statement of Sen. Arlen Specter, Member, S. Judiciary Comm.). Republican Senator Arlen Specter opened with a question to Judge Samuel Alito about a woman's right to choose an abortion. *Id.*

14. Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 198 (1890). This article was concerned primarily with the press "overstepping . . . the obvious bounds of propriety and decency" and the publication of "personal gossip." *Id.* at 196.

15. 381 U.S. 479 (1965).

16. *Id.* at 485 ("[A] law which, in forbidding the *use* of contraceptives rather than regulating their manufacture or sale, seeks to achieve its goals by means having a maximum destructive impact upon that relationship. . . . cannot stand . . . .").

17. Stanley v. Georgia, 394 U.S. 557, 568 (1969) ("private possession of obscene material").

18. Roe v. Wade, 410 U.S. 113, 154 (1973).

19. Lawrence v. Texas, 539 U.S. 558, 578 (2003) ("sexual practices common to a homosexual lifestyle").

A. Contraception in *Griswold v. Connecticut*

The Court's first endeavor[20] into the right to privacy occurred in *Griswold*, where the Court found that a law prohibiting the private use of contraceptives violated the constitutional right to privacy, a right emanating from "penumbras" in the Bill of Rights.[21] The Court explicitly denounced *Lochner*-style rationales for judicial review and instead suggested that the right was grounded both in tradition[22] and hostility towards overbreadth.[23] In *Eisenstadt v. Baird*,[24] the Court went one step further, striking down an anti-contraceptive statute aimed only at unmarried couples.[25] The Court declared that "[i]f the right of privacy means anything, it is the right of the *individual* . . . to be free from unwarranted governmental intrusion."[26] Thus, the *Griswold/Eisenstadt* decisions stand for the proposition that contraception—control of one's sex life—is protected by the right to privacy.

B. Pornography in *Stanley v. Georgia*

In *Stanley v. Georgia*,[27] the Court struck down the prosecution of an individual for the private possession of pornographic materials.[28] As the Court reasoned, the "mere categorization of these films as 'obscene' is insufficient justification for such a drastic invasion of personal liberties guaranteed by the First and Fourteenth Amendments. Whatever may be the justifications for other statutes regulating obscenity, we do not think they reach into the privacy of one's own home."[29] *Stanley* is somewhat problematic when used to bolster a Fourth Amendment right to privacy argument because the Court based its rationale partly on the First Amendment right of free speech.[30] Neither the cases that preceded *Stanley* nor those that fol-

20. While the Court relied on its decision in *Skinner v. Oklahoma*, 316 U.S. 535 (1942), striking down a mandatory felon-sterilization statute, *id.* at 541, *Griswold* was the first post-*Lochner* enunciation of the idea that the state may not regulate within the zone of the right to privacy. *Gnswold*, 381 U.S. at 484.

21. *Griswold*, 381 U.S. at 484 (holding that "specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance").

22. *Id.* at 486 (stating that "a right of privacy [is] older than the Bill of Rights").

23. *Id.* at 485 ("Would we allow the police to search the sacred precincts of marital bedrooms . . . ?").

24. 405 U.S. 438 (1972).

25. *Id.* at 453–54.

26. *Id.* at 453.

27. 394 U.S. 557 (1969).

28. *Id.* at 568.

29. *Id.* at 565.

30. *See id.* at 560–63.

lowed, however, extended First Amendment protection to obscene materials—the very materials at issue in *Stanley*.[31] Further, in a later case allowing the restriction of the distribution of obscene materials, the Court explicitly distinguished *Stanley* on the grounds that it involved "the particular privacy of the home," and the adult theater did not involve "any of the other 'areas or zones' of constitutionally protected privacy."[32] Thus, the private possession of pornography (but not the distribution or sale) is protected by the right to privacy.

C. Abortion in *Roe v. Wade*

In *Roe v. Wade*,[33] the Court famously struck down Texas's abortion prohibition, finding that the "right of personal privacy includes the abortion decision."[34] Extending the logic of *Griswold*—that the individual has the right to control his or her body with regards to procreation—the Court found that because the right to choose to terminate a pregnancy is a "fundamental right," there must be a compelling state interest and legislative enactments must be narrowly drawn.[35] *Roe* also held that the state's interest is greatest during the third trimester of the pregnancy (post-viability[36]), but is limited to matters of maternal health in the second trimester, and the state is completely forbidden from intervening during the first trimester.[37] Later case law dismantled the trimester structure, created a more amorphous viability standard, and added an "undue burden" test for abortion regulation.[38] The right to privacy thus covers abortion decisions, though offering less protection than the Court afforded contraception.

31. *See* Miller v. California, 413 U.S. 15, 23 (1973) (reiterating that "obscene material is unprotected by the First Amendment"); Roth v. United States, 354 U.S. 476, 481 (1957) (finding that "obscenity is not protected by the freedoms of speech and press").

32. Paris Adult Theatre I v. Slaton, 413 U.S. 49, 67 (1973).

33. 410 U.S. 113 (1973).

34. *Id.* at 154.

35. *Id.* at 155–56.

36. Post-viability refers to the period of time when the fetus is able to survive, with or without medical help, outside of the uterus. *Id.* at 160.

37. *Id.* at 162–65.

38. *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 874–76 (1992). "[A]n undue burden is a shorthand for the conclusion that a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus." *Id.* at 877. The Court's most recent abortion case, *Gonzales v. Carhart*, 127 S. Ct. 1610 (2007), reaffirmed and applied the *Casey* "undue burden" standard in finding that a partial-birth abortion ban did not place an undue burden on the right to an abortion. *Id.* at 1614, 1639.

D. Homosexuality in *Lawrence v. Texas*

In 1986, in *Bowers v. Hardwick*,[39] the Court upheld the constitutionality of criminal sodomy laws.[40] In 2003, the Court overruled *Bowers* in *Lawrence v. Texas*,[41] which stated that a Texas criminal statute criminalizing same-sex "deviant" sexual conduct was unconstitutional.[42] The *Lawrence* majority relied on the decisions in *Griswold*, *Eisenstadt*, *Roe*, and *Planned Parenthood of Southeastern Pennsylvania v. Casey*[43] to find that constitutional protection extends to the "overt expression" of personal sexuality through intimate conduct with another.[44] Relying on the *Griswold/Eisenstadt* concept of the individual as key to the right to privacy, the Court found that "[p]ersons in a homosexual relationship may seek autonomy for these purposes" and found that homosexual sodomy was protected by a right to liberty.[45] The Court's logic is strange in that it extends the right to privacy to sodomy without explicitly mentioning that sodomy is a "fundamental right" under the right to privacy jurisprudence; however, it is the right to privacy that serves as the basis for nearly every case it relies upon in its decision.[46] Nonetheless, the decision clearly flows from the contraception-pornography-abortion line of cases,[47] so it is likely that the same right to privacy protects homosexual sodomy as well.

39. 478 U.S. 186 (1986).

40. *Id.* at 196.

41. 539 U.S. 558, 578 (2003).

42. *Id.* at 563, 578–79.

43. 505 U.S. 833 (1992). See *Lawrence*, 539 U.S. at 564–65, 573–74, for the Court's discussion of *Griswold*, *Eisenstadt*, *Roe*, and *Planned Parenthood*.

44. *Lawrence*, 539 U.S. at 567.

45. *Id.* at 574.

46. *Id.* at 586 (Scalia, J., dissenting) ("Though there is discussion of 'fundamental proposition[s],' and 'fundamental decisions,' nowhere does the Court's opinion declare that homosexual sodomy is a 'fundamental right' under the Due Process Clause; nor does it subject the Texas law to the standard of review that would be appropriate (strict scrutiny) if homosexual sodomy *were* a 'fundamental right.'" (citations omitted)). Laurence H. Tribe, Lawrence v. Texas: *The "Fundamental Right" That Dare Not Speak Its Name*, 117 HARV. L. REV. 1893, 1916 (2004) (noting "the absence of any explicit statement in the majority opinion about the standard of review the Court employed to assess the constitutionality of the law at issue").

47. For example, one of the cornerstones of the earlier attack on anti-sodomy laws in *Bowers* was the *Stanley* decision (the mix of sexual liberty and inviolability of home). Bowers v. Hardwick, 478 U.S. 186, 195, 207 (1986). The *Eisenstadt* and *Casey* decisions are quoted heavily in *Lawrence*. *Lawrence*, 539 U.S. at 565, 573–74.

II. Commentary on the Right to Privacy in the Legal Community

The commentary on the right to privacy is both substantive (disagreeing with how it has been interpreted and how it has been applied) and procedural (arguing that it is not a legitimate constitutional right and that it stifles democratic processes). I will examine the various theories behind these critiques and conclude that the primary objections largely stem from what is perceived as an inappropriate intervention by an unelected body into democratic decision-making—the classic counter-majoritarian problem.[48]

A. Natural Law Objections

There are those who simply disagree with the right to privacy on substantive grounds, finding that it is deeply troubling on a moral[49] or ethical[50] basis. These objections, while certainly representative of a substantial body of legal and popular criticism, are not the primary concern of this Article for two reasons. First, this line of reasoning errs by equating constitutional legitimacy with the "right" result, thus achieving what Professor Cass Sunstein refers to as the "activist fallacy,"[51] as it is highly unlikely that the Constitution holds a distinct moral position. The substantive objection also fails on practical grounds. In real-world application, "the only propositions with a prayer of passing themselves off as 'natural law' are those so uselessly vague that no one will notice,"[52] and thus the application quickly becomes incoherent. In any case, Professor John Hart Ely correctly believed that a natural law—a law governed by a universal morality—is "a discredited one in our society."[53]

Second, the Court itself rejects the natural law/*Lochner* approach. The Court in *Roe* begins by quoting legal realist Justice Holmes: "[The

48. ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH 16–23 (1962) [hereinafter BICKEL, THE LEAST DANGEROUS BRANCH].

49. *See, e.g.*, Robert M. Byrn, *An American Tragedy: The Supreme Court on Abortion*, 41 FORDHAM L. REV. 807, 809 (1973) (calling *Roe* a "tragic judicial aberration that periodically wounds American jurisprudence").

50. *See, e.g.*, John M. Finnis, *Natural Law and the Rights of the Unborn*, *in* ABORTION AND THE CONSTITUTION: REVERSING *Roe v. Wade* Through the Courts 115, 115–20 (Dennis J. Horan et al. eds., 1987).

51. J.J. Helland, *Courting Disaster: Interview with Cass Sunstein*, SALON.COM, Sept.12, 2005, http://dir.salon.com/story/books/int/2005/09/12/sunstein/index.html?source=search&aim=/books/int.

52. JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 51 (1980) [hereinafter ELY, DEMOCRACY AND DISTRUST].

53. *Id.* at 50.

Constitution] is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar or novel and even shocking ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States."[54] The dissenters on the Court similarly concern themselves entirely with a process/textualist rationale, charging the Court with overreaching and an illegitimate review of a democratically elected legislature.[55] The fact that none of the Court's opinions in any of these cases relies on natural law principles in elaborating their positions[56] suggests that natural law reasoning has been discredited, and the test appears to be whether *Roe* is legitimate from a process theory perspective.

B. Process Theory Problems

Critics from the process theory school view the right to privacy as a reestablishment of the substantive constitutional jurisprudence that process theorists (and their predecessors in the legal realist movement[57]) decry.[58] Process theory depends on a distinction between sub-

54. Roe v. Wade, 410 U.S. 113, 117 (1973) (quoting Lochner v. New York, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting)).

55. *See, e.g., id.* at 174 (Rehnquist, J., dissenting) ("The decision here to break pregnancy into three distinct terms and to outline the permissible restrictions the State may impose in each one, for example, partakes more of judicial legislation than it does of a determination of the intent of the drafters of the Fourteenth Amendment."); Griswold v. Connecticut, 381 U.S. 479, 508–10 (1965) (Black, J., dissenting) ("The Court talks about a constitutional 'right of privacy' as though there is some constitutional provision or provisions forbidding any law ever to be passed which might abridge the 'privacy' of individuals. But there is not. . . . I have expressed the view many times that First Amendment freedoms, for example, have suffered from a failure of the courts to stick to the simple language of the First Amendment in construing it, instead of invoking multitudes of words substituted for those the Framers used. For these reasons, I get nowhere in this case by talk about a constitutional 'right of privacy' as an emanation from one or more constitutional provisions." (citations omitted)).

56. Justice Kennedy's opinion in *Lawrence* comes the closest, but his analysis of the history and tradition of the prohibition of sodomy has more to do with his notion of liberty and personal autonomy as evolving concepts and does not rest on ideas of morality. *See* Lawrence v. Texas, 539 U.S. 558, 562 (2003).

57. Legal realists preached an anti-formalist and empirical understanding of the law, and they were generally opposed to natural law theories. *See, e.g.*, Stephen Wizner, *The Law School Clinic: Legal Education in the Interests of Justice*, 70 FORDHAM L. REV. 1929, 1931 (2002) ("The legal realists developed an anti-formalist theory of law.").

58. *See* United States v. Carolene Products, 304 U.S. 144, 152 (1938) (establishing "the assumption that [legislative decision-making] rests upon some rational basis within the knowledge and experience of the legislators," which is emblematic of the process theory deference towards the legislative branch); Lochner v. New York, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting) (rejecting the majority's substantive constitutional interpretation and arguing that the "14th Amendment does not enact Mr. Herbert Spencer's Social Stat-

stantive law, which should be left to the political branches, and procedural law, which is rightly administered by the courts.[59]

According to this critique, by crafting a right that is unrelated to the legal process, unlike the right to free speech, the right to vote, or any other right that relates to the channels of political change,[60] the Court, in recognizing the right to privacy, is deciding a matter of substantive law and is vulnerable to the counter-majoritarian problem. Thus, in resurrecting the ghost of substantive due process, the Court is engaging in exactly the same kind of social policy enforcement that bedeviled the *Lochner* Court.[61]

Professor Ely attempted to explain the Court's shift back to substantive constitutional review—when everyone accuses the Court of *Lochner*ing, then, by God, it is going to *Lochner*—but he still lamented the lack of rationalization or any connection to the Constitution or democratic self-governance.[62] One can sense the disappointment in Ely's writing, as if he is mourning as the twin goals of process theory—establishing a legitimate sphere of influence for the Court and defending the democratic character of the political process—are swept

ics"); David A. Strauss, *Why Was* Lochner *Wrong?*, 70 U. CHI. L. REV. 373, 379–81 (2003) (explaining how Justice Hugo Black objected to the right to privacy as an extension of *Lochner*). *See generally* Cass R. Sunstein, Lochner's *Legacy*, 87 COLUM. L. REV. 873 (1987).

59. *See, e.g.*, Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 6, 12, 19 (1959).

> Herbert Wechsler at Columbia—once a stronghold of legal realism—was a leading proponent of process theory. In his highly influential 1959 article, *Toward Neutral Principles of Constitutional Law*, he argued that judges must be prepared to explain their decisions by reference to principles that "transcend the case at hand." Unlike legislators, courts are not free to function as "a naked power organ"; they must instead engage in a principled *judicial* process. "A principled decision," wrote Wechsler, "is one that rests on reasons with respect to all the issues in the case, reasons that in their generality and their neutrality transcend any immediate result that is involved." Formalists had demanded that decisions apply clear rules announced in advance. Process theorists were willing to live without clearcut rules and were prepared to settle instead for a fair process of decision making and a principled explanation for the ultimate decision. For process theorists, a fair hearing before an unbiased, principled tribunal is the best we can reasonably expect from the legal system.

FARBER & SHERRY, *supra* note 7.

60. *See generally* ELY, DEMOCRACY AND DISTRUST, *supra* note 52.

61. John Hart Ely, *The Wages of Crying Wolf: A Comment on* Roe v. Wade, 82 YALE L.J. 920, 937 (1973) [hereinafter Ely, *The Wages of Crying Wolf*] (suggesting that the Court in *Lochner* "had simply manufactured a constitutional right out of whole cloth and used it to superimpose its own view of wise social policy on those of the legislatures" and inviting a comparison to *Roe*).

62. *See id.* at 944. "[T]his super-protected right is not inferable from . . . any general value derivable from the provisions [the framers] included . . . ." *Id.* at 935–36.

away so carelessly by the resurgence of substantive due process embodied in *Roe*.[63]

C. Originalist/Textualist Illegitimacy

A specific right to privacy cannot be found in the text of the Constitution. To those who demand that rights flow only from the text of the Constitution, this is a mortal sin. It is also highly unlikely that the framers would have understood the Constitution to prohibit abortion, although they would likely have supported some other kinds of privacy rights, as evidenced by the Fourth Amendment.[64] According to the originalist viewpoint, this is an insurmountable problem.

Both originalism and textualism are positivist schools of jurisprudence,[65] and they argue that constitutional provisions have a single specific meaning.[66] The judiciary's job, according to these schools, is to divine what that specific meaning is, rather than formulate what the meaning should be.[67]

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63. *See id.* at 935–36.

64. *See, e.g.*, Barbara C. Salken, *The General Warrant of the Twentieth Century? A Fourth Amendment Solution to Unchecked Discretion to Arrest for Traffic Offenses*, 62 TEMP. L. REV. 221, 254 (1989) (stating that "[t]he fourth amendment was designed to prevent the arbitrary and indiscriminate searches permitted by general warrants and writs of assistance" (footnote omitted)).

65. James A. Gardner, *Whose Constitution Is It? Why Federalism and Constitutional Positivism Don't Mix*, 46 WM. & MARY L. REV. 1245, 1246 (2005) (describing both originalism and textualism as "the narrowest positivist approaches to constitutional interpretation"). In this sense, there is overlap between the textualist/originalist position and the legal realist/process theory position, in that both agree that the appropriate forum for substantive decisions is in the legislature. The devil, of course, is in the details. *Compare* Wechsler, *supra* note 59, at 18 (endorsing a flexible Constitution within the legal process model), *with* Robert H. Bork, *The Judge's Role in Law and Culture*, 1 AVE MARIA L. REV. 19, 20 (2003) [hereinafter Bork, *The Judge's Role*] (emphatically rejecting such a model). "[T]he Supreme Court is not supposed to invent law but to apply it, and there is no law that underlies those decisions; they are merely expressions of the judges' will, judicial invasions of territory that belongs to the moral choice of the American people and their elected representatives." *Id.*

66. Joseph Biancalana, *Originalism and the Commerce Clause*, 71 U. CIN. L. REV. 383, 385 (2002) (arguing that originalists "want to preserve the idea, made necessary by the institutional act of judging, that constitutional provisions have a single meaning, the original meaning").

67. "[T]he judicial responsibility begins and ends with determining the present scope and meaning of a decision that the nation, at an earlier time, articulated and enacted into constitutional text . . . Hans A. Linde, *Judges, Critics, and the Realist Tradition*, 82 YALE L.J. 227, 254 (1972). Textualism indicates a strict focus on the structure and meaning of the words—how they interact with one another within the document—as a way of divining original intent, while originalism focuses on the search for "original meaning," which is how the average person at the time of drafting would have understood the text of the document. In practice, they tend to blend together. *See* Biancalana, *supra* note 66, at 389–96.

Because the Court should recognize only those rights found within the plain text or the original understanding of the Constitution, originalists and textualists argue that the right to privacy is illegitimate.[68] Professor Robert Bork argues, with regard to the right to privacy, that "the choice of 'fundamental values' by the Court cannot be justified. . . . The judge must stick close to the text and the history, and their fair implications, and not construct new rights."[69] This argument essentially presents the right to privacy as another front in the tyranny of an unconstrained judiciary.

D. Anti-Democratic Result

Despite differing drastically with regards to their opinions about the morality of the activity, the legitimacy of judicial intervention, and even the proper source of law, all of the criticisms of the Court's interpretation of the right to privacy essentially share one common conclusion: the right to privacy undermines democratic self-governance.[70]

Liberal critics of the right to privacy assert that whether or not the Court has the power to intervene in these areas, it is ultimately wrong to do so, particularly when it comes to abortion, because of the anti-democratic effects of the decision.[71] By crystallizing areas of law and making them immune to democratic change, the Court halted progressive democratic movements and created a backlash against the right to privacy, specifically in the area of abortion.[72]

Conservative critics assert the opposite: that the Court is frustrating a democratic majority that wishes to outlaw certain practices (primarily abortion, but also homosexuality).[73] By prohibiting legislatures from basing their decisions on "morality,"[74] the Court is stifling democratic expression. As Professor Bork states, "The conclusion must be that the Constitution is indeed silent on the subject of abortion, being

68. *See* Bork, *The Judge's Role*, *supra* note 65, at 23–24.

69. Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 8 (1971).

70. *See, e.g.*, Ely, *The Wages of Crying Wolf*, *supra* note 61, at 932–33.

71. *See* Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to* Roe v. Wade, 63 N.C. L. REV. 375, 381 (1985) ("[I]n my judgment, *Roe* ventured too far in the change it ordered. The sweep and detail of the opinion stimulated the mobilization of a right-to-life movement and an attendant reaction in Congress and state legislatures.").

72. *See* CASS R. SUNSTEIN, ONE CASE AT A TIME 1–30 (1999).

73. *See, e.g.*, Bork, *The Judge's Role*, *supra* note 65, at 24.

74. "[T]he fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice." Lawrence v. Texas, 539 U.S. 558, 577 (2003) (quoting Bowers v. Hardwick, 478 U.S. 186, 216 (1986) (Stevens, J., dissenting)).

left, as most issues are, to the moral choice of the American people expressed in the laws of their various states."[75]

Under either view, the argument is that the Court's recognition of the right to privacy is essentially contrary to the constitutionally mandated system of democratic decision-making, and, as such, is illegitimate.

III. The Role of the Right to Privacy in the Political Process

A. Common Factors to the Right to Privacy

The cases previously discussed share many common elements and characteristics of the activities that are correlated with the protection of the right to privacy.[76] The cases share four universal characteristics of the activities covered by the right to privacy: (1) the participants are anonymous and (2) diffuse; (3) the activities are stigmatized; and (4) the activities are privately popular. I will call these groups—composed

75. Bork, *The Judge's Role*, *supra* note 65, at 24.

76. This approach is informed by the statistical technique of factor analysis, a process where a set of observed variables is reduced to a smaller set of correlated unobserved variables called "factors." *See* JAE-ON KIM & CHARLES W. MUELLER, SER. NO. 07-014, FACTOR ANALYSIS: STATISTICAL METHODS AND PRACTICAL ISSUES 8–10 (E.M. Uslaner ed., 7th prtg. 1981). Factor analysis is popular in the fields of sociology, marketing, and psychology, which use it to reduce complex data sets to several factors that correlate with particular sets of variables. It has been used most notably in intelligence research to support the recognition of particular cognitive areas. *See* HANDBOOK OF MULTIVARIATE EXPERIMENTAL PSYCHOLOGY 288–329 (Raymond B. Cattell ed., 1966). As an example of a factor analysis approach, suppose that a subject demonstrates aptitude in a number of activities—say, tennis, painting, and geometry—that initially appear to be unrelated. With a large enough pool of subjects, factor analysis begins by determining if these variables are correlated (that is, if the subjects who are good at one tend to be good at the others, and, correspondingly, the subjects who are bad at one tend to be bad at the others). Factor analysis would then determine if there was an unobserved factor that influences those variables (say, a cognitive function called "spatial intelligence" that is a root factor for all three activities). It is my contention that the substantive theory behind factor analysis—and not necessarily the quantitative technique—can guide our understanding of Supreme Court doctrine. While the decisions of the Court are not numbers in an algorithm, they can be understood as discrete outcomes—in the factor analysis model, these are the observed variables. While the opinions offer legal authority and reasoned elaboration to support these decisions, legal authority or traditional legal principles are not necessarily determinative in predicting outcomes. *See, e.g.*, Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1723–24 (1976). Furthermore, the requirement of a majority in the decision-making process necessarily creates fractured and inconsistent logic. Frank H. Easterbrook, *Ways of Criticizing the Court*, 95 HARV. L. REV. 802, 831 (1982) (applying Arrow's Theorem of collective decision-making and concluding that "[a]t least some inconsistency, and probably a great deal of inconsistency, is inevitable."). By searching—in an admittedly qualitative fashion—for common factors in these cases, we can identify the unacknowledged factors that influence the direction of the doctrine.

of the participants and supporters of stigmatized-yet-popular activities—"S-groups."[77]

1. Anonymous

Perhaps as a result of the stigma associated with the activities examined in the cases, the participants are largely anonymous. These practices are largely done in two places that we have long recognized to be private: the home[78] (pornography and sodomy) and the doctor's office[79] (contraception and abortion). As a result, none of the activities involved are public knowledge.

Birth control, for example, is properly characterized as a "private" activity because its users remain largely anonymous (thanks, in part, to doctor-patient confidentiality). There are no reliable external signs of use—one simply cannot tell whether another person uses birth control just by looking at him or her. Aside from the user's sexual partners, knowledge about birth control use is disseminated exclusively at the discretion of the user.[80] Similarly, it is generally impossible to determine whether one has had an abortion, consumed pornography, or engaged in homosexual sodomy without the person voluntarily disclosing such information. Many personal characteristics that we may consider private, like wealth, which most people generally consider poor form to discuss publicly, are actually a matter of public record. S-group activities, on the other hand, by virtue of their place in the home and in the doctor's office, remain anonymous.

2. Diffuse

For each of the protected activities, those who engage in the activity and those who support the activity are diffuse; the S-group mem-

77. The term "S-groups" is a nod to the "C-groups" that Ackerman used. *See* Ackerman, *supra* note 3, at 720.

78. "The right of the people to be secure in their . . . houses . . . against unreasonable searches and seizures, shall not be violated . . . ." U.S. CONST. amend. IV; *see, e.g.*, Boyd v. United States, 116 U.S. 616, 630 (1886) (noting the traditional view of the "sanctity of a man's home and the privacies of life").

79. A majority of states recognize the doctor-patient privilege, even if the Federal Rules of Evidence do not. Catherine J. Ross, *Implementing Constitutional Rights for Juveniles: The Parent-Child Privilege in Context*, 14 STAN. L. & POL'Y REV. 85, 106 n.168 (2003); *see also* FED. R. EVID. 501.

80. In some cases, birth control users do not even tell their sexual partners. Nineteen percent of sexually active women report not talking to their sexual partner about birth control options. *See* TINA HOFF ET AL., HENRY J. KAISER FAMILY FOUND., A NATIONAL SURVEY OF WOMEN ABOUT THEIR SEXUAL HEALTH 8 (2003), *available at* http://www.kff.org/womenshealth/loader.cfm?url=/commonspot/security/getfile.cfm&PageID=14298.

bers are either demographically diverse, geographically diverse, or both. Much as stigmatization leads to anonymity, anonymity allows for geographic diffuseness. One of the reasons that the members of S-groups are distributed throughout different communities is that they are not necessarily easily identified and therefore, not always shunned or otherwise forced out of a community. As a result, they do not concentrate in a single area.

Both pornography use and homosexual sodomy are prevalent across the country—those who produce pornography claim that it sells best in the most conservative parts of the country,[81] and there are gay populations in cities in conservative Texas as well as cities in liberal California.[82] Homosexual sodomy is practiced by both genders (although in both cases, men more so than women) of all races and socioeconomic backgrounds.[83]

Even though abortion and birth control affect only women, they are still diffuse practices, as gender itself is a geographically diffuse characteristic, and both practices cut across other demographic categories. For example, women who have abortions are both young and old (about 48% above twenty-five years old), mothers and childless (about 61% have had one or more children), and racially diverse (about 41% White, 32% Black, and 20% Hispanic).[84] While it is true that abortion rates tend to be higher in certain socioeconomic groups, it is not so greatly concentrated in any community that it

81. *See* Michael Scherer, *Debbie Does Washington*, SALON.COM, Nov. 11, 2005, http://www.salon.com/news/feature/2005/11/11/porn_hearing (quoting Tom Hymes, a spokesman for the Free Speech Coalition). "The hotel rooms in Utah, for instance, download more adult movies than any other state. I have that on a very good source." *Id.*

82. Dan Black et al., *Why Do Gay Men Live in San Francisco?*, 51 J. URB. ECON. 54, 64 tbl.1 (2002). Even though the majority of gay men and women live in metropolitan communities, they do not overwhelmingly concentrate in those areas. *See id.*; *see also* GLBTQ, Social Sciences: Demographics, http://www.glbtq.com/social-sciences/demographics.html (last visited Feb. 3, 2008). Another indication of the diffuseness of the gay population is that the highest percentage of gay adults in any one congressional district is only 16.6%. GARY J. GATES, SAME-SEX COUPLES AND THE GAY, LESBIAN, BISEXUAL POPULATION: NEW ESTIMATES FROM THE AMERICAN COMMUNITY SURVEY 8 (2006), *available at* http://www.law.ucla.edu/williamsinstitute/publications/SameSexCouplesandGLBpopACS.pdf.

83. *See* Dan Black et al., *Demographics of the Gay and Lesbian Population in the United States: Evidence from Available Systematic Data Sources*, 37 DEMOGRAPHY 139, 150, 152 tbl.9 (2000). "The gays and lesbians in the census sample appear to be highly educated, span the distribution of ages, and are similar in racial makeup to the population as a whole." *Id.* at 150.

84. Rachel K. Jones et al., *Patterns in the Socioeconomic Characteristics of Women Obtaining Abortions in 2000–2001*, 34 PERSP. ON SEXUAL & REPROD. HEALTH 226, 228 tbl.1 (2002).

would be identified primarily with that community.[85] Similarly, contraception use is so widespread—62% of women between the ages of fifteen and forty-four use some form of contraception[86]—that it is also not easily identified with a specific group (except for the extremely diffuse category of "women of childbearing age").

3. Stigmatized

The cases construing the right to privacy deal largely with sex and sexuality. In our cultural climate, sexual activity is potentially embarrassing and, in some circumstances, alienating. Many forms of sexual expression, such as pre-marital sex and sodomy, are actively opposed by mainstream religious organizations, including the Catholic Church[87] and several protestant denominations, including Southern Baptists.[88] Their objection is based on the fundamental premise that it is wrong to separate procreation from sex.[89] Pornography, despite being legal, is still taboo, and revealing one's use or being caught in possession of pornography can cause embarrassment and shame. Social stigma exerts a remarkably powerful influence on human behavior and, subsequently, on expressions of social power.[90] The stigma

85. *Facts on Induced Abortion in the United States*, IN BRIEF (Guttmacher Inst., New York, N.Y.), June 2006, *available at* http://www.guttmacher.org/pubs/fb_induced_abortion.pdf (indicating that the abortion rate for women below the poverty line is more than four times as high as the abortion rate for high-income women). "[W]omen who have abortions are diverse, and unintended pregnancy leading to abortion is common in all population subgroups." Jones et al., *supra* note 84, at 232.

86. *Facts on Contraceptive Use*, IN BRIEF (Guttmacher Inst., New York, N.Y.), Jan. 2008, *available at* http://www.guttmacher.org/pubs/fb_contr_use.pdf.

87. *See* Pope Paul VI, *Declaration on Procured Abortion*, L'OSSERVATORE ROMANO (WEEKLY EDITION IN ENGLISH), Dec. 5, 1974, at 6. "If . . . one is to understand that men and women are 'free' to seek sexual pleasure to the point of satiety, without taking into account any law or the essential orientation of sexual life to its fruits of fertility, then this idea has nothing Christian in it. It is even unworthy of man." *Id.*

88. *See* Albert Mohler, Can Christians Use Birth Control? (May 8, 2006), http://www.albertmohler.com/commentary_read.php?cdate=2006-05-08 (criticizing the separation of sex from procreation). Albert Mohler is the president of the Southern Baptist Theological Seminary. Southern Baptist Theological Seminary, President, http://www.sbts.edu/President.aspx (last visited Mar. 16, 2008). Mohler argues that "[t]he effective separation of sex from procreation may be one of the most important defining marks of our age." Mohler, *supra.*

89. *See id.*

90. Kenji Yoshino, *Covering*, 111 YALE L.J. 769, 820–24 (2002) (arguing that the pervasive pressure to remain closeted diminished the social and political power of gays).

> The multiplicity of gay closets means that gays can choose to be open to pro-gay audiences while remaining closeted to anti-gay ones. That gays have exercised this choice is unsurprising, as many entitlements can turn on selective closeting. Yet while this selectivity might be empowering for individual homosexuals, it has in-

against homosexuality and other marginalized identities creates pressure to deny that identity—in essence, to become more anonymous and diffuse.[91]

The criminal prohibitions on these activities contribute to their stigmatized nature. In *Bowers*, Justice White points out that "[p]roscriptions against [homosexual sodomy] have ancient roots,"[92] and he lists the long tradition of outlawing consensual sodomy.[93] It would be hard to state, in the face of what amounts to historical state persecution, that homosexuality (and sexuality of any kind, for that matter) is not subject to stigmatization. Thus, the activities protected by the right to privacy—contraception, pornography, abortion, sodomy—are all stigmatized to some degree in our culture.

4. Privately Popular

Each of the activities that the Court outlawed in the right to privacy cases achieved a measure of privately expressed popularity at the time of the decision, and, in most cases, the activity was becoming more popular at the time the Court recognized the right.

Around the time the Court decided *Stanley* in 1969, attitudes toward pornography were generally tolerant.[94] A sizable proportion of

> hibited the ways in which the gay rights movement has been able to resist the passing norm. This collective action problem is what gives color to the wish expressed by gay activists that all gays would turn blue, a transformation that would make gays, like most racial minorities, unable to pick and choose among their audiences.

Id. at 820–21 (footnotes omitted).

91. *Id.* at 772 ("Thus a lesbian might be comfortable being gay and saying she is gay, but might nonetheless modulate her identity to permit others to ignore her orientation. She might, for example, (1) not engage in public displays of same-sex affection; (2) not engage in gender-atypical activity that could code as gay; or (3) not engage in gay activism."). While it is true that gays and lesbians have created distinct and supportive communities in larger cities,

> [i]t continues to be true that "for many gay people [the closet] is still the fundamental feature of social life; and there can be few gay people, however courageous and forthright by habit, however fortunate in the support of their immediate communities, in whose lives the closet is not still a shaping presence."

Id. at 824 (second alteration in original) (footnote omitted).

92. Bowers v. Hardwick, 478 U.S. 186, 192 (1986).

93. *Id.* at 192–94.

94. *See* Nat'l Opinion Research Ctr., Univ. of Chi., General Social Surveys, 1972–2004: Cumulative File, at question 222 (2005), *available at* http://sda.berkeley.edu/D3/GSS04/Docyr/gs040021.htm#PORNLAW (feelings about pornography law). In a 1973 poll, respondents favored pornography being legal to those over the age of eighteen by a margin of about fifty-seven to forty-three. The statistics indicate that 48% of poll respondents wanted pornography to be illegal to those under the age of eighteen, which is the same as favoring it to be legal to those over eighteen. *Id.* Combined with the 9.4% in favor of it

the American population, both male and female, had experience with pornographic materials.[95] Today, 61% of Americans believe pornography should be legal for people over the age of eighteen.[96]

Similarly, birth control at the time *Griswold* was decided in 1965 was particularly popular. Over 80% of Gallup poll respondents were in favor of wider availability of birth control in 1965 (an increase from 78% in 1963).[97] In 1972, Gallup polls "recorded a generally constant increase in the number of individuals expressing a favorable attitude toward wider availability of birth-control services."[98] Today 94% of Americans find birth control morally acceptable.[99]

In 1985, one year before *Bowers*, Americans completely disapproved of homosexual sex by a margin of about 75% to 14%.[100] In 2002, one year before *Lawrence* reversed *Bowers*, the gap narrowed by twenty percentage points to 55% to 33%.[101]

Just prior to the re-argument of *Roe* in 1972, 64% of Americans agreed with the statement that "[t]he decision to have an abortion should be made solely by a woman and her physician" (with 31% disagreeing).[102] Popular opinion tended to accept the actual procedure of abortion at the time of *Roe*, as "the largest changes [with regard to the positive view of abortion] took place in the late 1960s."[103] In 1969,

being completely legal to everyone, a total of about 57% favored pornography being legal to those over eighteen. *See id.* About 43% thought it should be illegal in all circumstances. *Id.*

95. *See* W. Cody Wilson & Herbert I. Abelson, *Experience with and Attitudes Toward Explicit Sexual Materials*, 29 J. SOC. ISSUES 19, 27 (1973) (finding that 61% of men and 50% of women reported having seen or read "depictions of an explicit sexual nature" in past two years).

96. *See* Nat'l Opinion Research Ctr., *supra* note 94. In 2004, 56.7% of poll respondents favored pornography being illegal to those under the age of eighteen, which is the same as favoring it to be legal to those over eighteen. *Id.* Combined with the 4.3% in favor of it being completely legal to everyone, a total of 61% favored pornography being legal to those over eighteen. *Id.*

97. C. THOMAS DIENES, LAW, POLITICS, AND BIRTH CONTROL 151 (1972).

98. *Id.*

99. ABC News/Wash. Post Poll, U.S. Catholics Admire the Pope yet Differ with Many of His Views (Oct. 15, 2003), *available at* http://abcnews.go.com/images/pdf/935a2Pope.pdf.

100. Nat'l Opinion Research Ctr., *supra* note 94, at question 219, *available at* http://sda.berkeley.edu/D3/GSS04/Docyr/gs040020.htm#HOMOSEX (homosexual sex relations).

101. *Id.*

102. Gallup Poll, Abortion (Aug. 25, 1972). Five percent of poll respondents answered "no opinion." *Id.* Other polls, *infra* notes 107–10, indicate less support for laws permitting women to end pregnancy.

103. Judith Blake, *The Supreme Court's Abortion Decisions and Public Opinion in the United States*, 3 POPULATION & DEV. REV. 45, 50 (1977).

when asked: "Would you favor or oppose a law which would permit a woman to go to a doctor to end pregnancy at any time during the first three months?," 40% of Americans answered "favor" and 50% answered "oppose."[104] By December of 1972, the ratio was 46% "favor" and 45% "oppose."[105] In March of 1974, one year after *Roe* was decided, the ratio increased again to 47% in favor and 44% opposed.[106] Currently, 52% believe that abortion should be legal in most or all cases, and 43% believe that abortion should be illegal in most or all cases.[107]

B. Public Choice Theory and the Distribution of Political Power

Public choice theory describes the broad field in which principles of economics are applied to political science to explain why governments act the way they do.[108] In particular, three principles of public choice theory help explain my conclusion that the right to privacy protects anonymous and diffuse popular practices.

First, public choice theory posits that the legislative process is generally controlled by the laws of supply and demand—demand created by interest groups[109] and supply furnished by legislators whose primary motivation is to maximize their chances of reelection.[110]

104. Gallup Poll, Abortions (Nov. 30, 1969). Ten percent of poll respondents answered "no opinion." *Id.*

105. Gallup Poll, Abortion (Jan. 28, 1973) (interviewing occurred in December 1972). Nine percent of poll respondents answered "no opinion." *Id.*

106. Gallup Poll, Abortion (Apr. 7, 1974) (interviewing occurred in March 1974). Nine percent of poll respondents answered "no opinion." *Id.*

107. Schulman et al., PEW RESEARCH CENTER FOR THE PEOPLE & THE PRESS SURVEY (Aug. 1–18, 2007), http://www.pollingreport.com/abortion.htm. Divining the support for abortion is a particularly difficult task, considering that public opinion depends almost entirely on how the question is phrased. For example, 34% of Americans believe that abortion should be generally available, 39% believe that there should be stricter limits than are currently established, and 25% believe that it should not be permitted. CBS News/N.Y. Times Poll (Sept. 4–9, 2007), http://www.pollingreport.com/abortion.htm. Absent *Roe*, the "stricter limits" group would determine the future of abortion regulation, but it is not at all clear that even they know what "stricter limits" means in practice.

108. *See* DANIEL A. FARBER & PHILIP P. FRICKEY, LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION 12–13 (1991).

109. *See* JAMES M. BUCHANAN & GORDON TULLOCK, THE CALCULUS OF CONSENT 43–62 (1962). *See generally* GEORGE J. STIGLER, THE CITIZEN AND THE STATE (1975) (discussing government responses to special interests).

110. George Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGMT. SCI. 3, 11 (1971).

While the extent of this motivation is debatable,[111] most commentators acknowledge that self-interest is a core concern for legislators.[112]

Second, public choice theory recognizes the necessity of interest groups and their impact on the inequality of political power. In order to acquire favorable legislation, a group must have the ability to generate political pressure by providing the money and the votes necessary to participate in the market for legislation.[113] But free riders dilute the resources of the group, and the impact of prohibition is unequally distributed across the group, which further depresses group participation.[114] Because large, diffuse groups suffer from free rider and unequal impact problems, it is more difficult for them to organize into interest groups than for easily identified smaller groups.[115]

Third, government actors have greater incentive to act to placate deep, intensely-held interests than shallow, broadly-held interests because the political cost of a motivated opponent can be greater than the marginal benefit to the broad interest.[116]

Practical limits on public choice theory involve issues of ideology. When support for special interests could damage government actors, government actors will reject those interests.[117] Thus, the perception

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111. *Compare* DAVID R. MAYHEW, CONGRESS: THE ELECTORAL CONNECTION 13–15 (1974) (arguing that legislators are interested in being reelected and "nothing else"), *with* RICHARD F. FENNO, JR., CONGRESSMEN IN COMMITTEES 1 (1973) (arguing that reelection is one of several interests, including maximizing influence in Congress and making good public policy).

112. *See* Kenneth A. Shepsle, *Prospects for Formal Models of Legislatures*, 10 LEGIS. STUD. Q. 5, 12–13 (1985).

113. *See* FARBER & FRICKEY, *supra* note 108, at 12–37.

114. Free riders are created when members of the group can reap the benefits of group action without contributing to the group. RICHARD CORNES & TODD SANDLER, THE THEORY OF EXTERNALITIES, PUBLIC GOODS, AND CLUB GOODS 30 (1996) ("[F]ree riding . . . indicates one agent's reliance on the public good provision of another." (citation omitted)); *see also* Lehnert v. Ferris Faculty Ass'n, 500 U.S. 507, 537–38 (1991). The problem of unequal impact occurs when only a few members of the group are affected (and are therefore motivated to act), while the rest of the group remains safe (and is therefore not motivated to act). *See* Ry. Express Agency v. New York, 336 U.S. 106, 112 (1949) (Jackson, J., concurring) (stating that "nothing opens the door to arbitrary action so effectively as to allow those officials to pick and choose only a few to whom they will apply legislation and thus to escape the political retribution that might be visited upon them if larger numbers were affected").

115. *See* MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS 165–67 (1965).

116. *See* WILLIAM N. ESKRIDGE, JR. & PHILIP P. FRICKEY, CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY 55–56 (2d ed. 1995). This is known as the theory of the "ungrateful electorate." *Id.* at 55.

117. *See, e.g.*, Daniel Shaviro, *Beyond Public Choice and Public Interest: A Study of the Legislative Process As Illustrated by Tax Legislation in the 1980s*, 139 U. PA. L. REV. 1, 107 (1990)

of the dominant cultural ideology provides a strong limit on what government actors do.

The tenets can be summarized as follows: "(1) that reelection is an important motive of legislators, (2) that constituent and contributor interests thereby influence legislators, and (3) that small, easily organized interest groups have an influence disproportionate to the size of their membership."[118]

C. The Structural Effects on the Political Power of S-Groups

The final step of the factor analysis approach is to determine why the four characteristics of S-groups influence the decisions of the Court. Public choice theory illuminates why these particular characteristics are important. Specifically, the first three factors—anonymous, diffuse, and socially stigmatized—explain why these activities and their supporters lack political power. The final factor, popularity, explains why this lack of political power is unfair.

1. Organizational Disadvantages of S-Groups

The structural defects surrounding S-groups are the anonymous, diffuse, and stigmatized nature of their activities. Each of these characteristics serves to reinforce the others, and together they deny effective political representation to proponents of the affected activities and supporters of their decriminalization.[119]

The anonymity of S-group members works against their ability to effectively organize.[120] Because the members can successfully remain anonymous (so long as they are not caught by the haphazardly enforced criminal prohibitions[121]), the burdens of criminalization are

("Reelection depends . . . on accumulating goodwill and avoiding illwill. To many in Congress, this fact suggested paying close attention to how the media portrayed tax reform, notwithstanding the lack of strong public support for any actual reform proposal. Given the public's relative inattention, a member could be harmed by a story portraying her as a venal hack even if the public agreed with her position.").

118. FARBER & FRICKEY, *supra* note 108, at 33.

119. *Id.* at 146 (stating that "beyond the normal disadvantages of organizing large, diffuse groups, opponents of 'morals' legislation have a special disadvantage"). The authors go on to suggest that *Griswold* might be read to support a majority interest that has been suppressed and cannot compete fairly in the political market. *Id.* at 146–49.

120. *See* Ackerman, *supra* note 3, at 726.

121. Consider the absurd chain of events that occurred for the participants in *Bowers* to be apprehended: the police had to have valid permission to search the plaintiff's home and, at the same time, observe him and another man engaged in sodomy. *See* PETER IRONS, THE COURAGE OF THEIR CONVICTIONS 381 (1988). Similarly, the plaintiffs in *Stanley v. Georgia*, 394 U.S. 557, 558 (1969) (involving a plaintiff who was arrested when police were searching for "bookmaking" activity and found pornography instead) and *Lawrence v.*

not forced equally upon the group in a way that would generate the pressure to organize to change the system.[122] By limiting an act to the privacy of one's home, one also limits the ability of supporters to politically organize.

S-group members are also hurt by their diffuseness. The consumers of pornography, for example, exist (anonymously) across socioeconomic and racial classes, and therefore, there is no easily identified group that can band together to advance their agenda. While there may be some variance between the groups,[123] pornography use is not overwhelmingly concentrated among one identifiable demographic cohort.[124] Because pornography users are widely dispersed, there are significant organizational costs in creating a political lobby: the cost of communication between members;[125] the free rider problem that exists when the community is connected only loosely;[126] and geographic diversity, which serves to dilute any political representation that could arise from concentrating in a specific location.[127]

Finally, stigmatization is perhaps the strongest factor suppressing the organization necessary to achieve political power. Americans recognize the need for anonymity in electing representatives. We use a secret ballot in elections because it allows us to vote for our preferred candidate without suffering any unwanted attention based on our choice.[128] But it is clear that the process that influences representa-

Texas, 539 U.S. 558, 562 (2003) (involving a plaintiff who was arrested when police responded to a deliberately false weapons disturbance report called in by an irate neighbor), were ensnared largely by chance.

122. As a contrasting example, one's wealth is a matter of public record. Because the Internal Revenue Service ("IRS") can easily identify the rich, our tax laws are enforced equally, and thus they affect every member of that group. Thus, each member of the group has equal incentive to change the laws that affect them, and they can more successfully organize and exert pressure.

123. Pornography is consumed far more frequently by men than women, *see* Wilson & Abelson, *supra* note 95, but even that does not cure the diffuse aspect, as men are distributed fairly evenly throughout the country.

124. Frank Rich, *Naked Capitalists*, N.Y. TIMES, May 20, 2001, (Magazine), at 50 (quoting the founder of Adult Video News as saying, "Porn doesn't have a demographic—it goes across all demographics").

125. *See* FARBER & FRICKEY, *supra* note 108, at 146. In part because communication costs are lower, "relatively compact groups are likely to exercise undue influence." *Id.*

126. *See* OLSON, *supra* note 115.

127. *See* Ackerman, *supra* note 3, at 722–32.

128. As such, a secret ballot is universally recognized as a hallmark of fair elections. *See* Christopher Hewitt, *The Effect of Political Democracy and Social Democracy on Equality in Industrial Societies: A Cross-National Comparison*, 42 AM. SOC. REV. 450, 457 (1977).

tives is not at all anonymous;[129] the organizations that affect legislative decisions through lobbying and vote-delivery (such as unions, religious organizations, and topical interest organizations like the National Rifle Association ("NRA")) essentially require open membership.[130] Being a member in an S-group lobbying organization would admit, however, to participation in a stigmatized activity, which is undesirable where there are specific social penalties associated with it, so the development of a political lobby is permanently stunted.

Ultimately, the combination of these factors intensifies the impact of each individually. The anonymity of S-groups is heightened by their stigmatization; members are that much more reluctant to express their opinions openly. The diffusion of members is exacerbated by their anonymity—the lack of concentration prevents them from openly affiliating with one another. The stigmatization of S-group activity is aggravated by the anonymous nature of its members. If more people were aware of just how many of their friends and colleagues were members of an S-group, they might be more reluctant to vilify and marginalize the group. Finally, the criminalization of the S-group activities further escalates both the anonymity of S-group members and the stigmatization of the activity. All of these factors combine to severely handicap the ability of S-group members to form an effective political lobby, to organize a voting bloc, and to openly campaign for their position. Because these are the only ways to influence power in our democracy, S-group members are denied proportionate political power.[131]

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129. Indeed, "fear that political involvement will indirectly reveal [group members'] private conduct" works to suppress the ability of groups to organize. FARBER & FRICKEY, *supra* note 108, at 146. "It is hard enough to organize car buyers into an effective political force, but it would be much harder if most people were embarrassed to admit in public to owning a car." *Id.*

130. An organization that cannot accurately identify and contact their members is hampered in its ability to effectively pledge votes. While there are legal protections grounded in the freedom of association, they are not absolute. *See* NAACP v. Alabama, 357 U.S. 449, 463–64 (1958). In addition, campaign finance laws could force disclosure of individual donor identities. David D. Storey, Note, *The Amendment of Section 527: Eliminating Stealth PACs and Providing a Model for Future Campaign Finance Reform*, 77 IND. L.J. 167, 180 (2002) (finding that "[t]he new § 527 disclosure rules require organizations that were formerly allowed to conduct extensive issue advocacy and keep their donors' identities—and thus their true agendas—a secret to now reveal who in fact contributed the large sums of cash to pay for the advertisements" (footnote omitted)).

131. There are, of course, many lobbying organizations for S-groups (e.g., Emily's List for abortion, Human Rights Campaign for homosexuality, etc.), and this Article should not be taken to deny their existence or to disparage the work they do.

2. Inability of S-Groups to Compete in the Political Marketplace

One thread throughout the right to privacy cases is that the activities involved are particularly popular and yet, with the possible exception of abortion,[132] are underrepresented in the political marketplace.

As an example, in November 2005, Kansas Senator Sam Brownback held a series of hearings about the allegedly devastating effect of pornography on America.[133] Despite pornography's status as a multibillion dollar business[134] and the widespread popularity of pornography consumption among American men (and, perhaps surprisingly, women),[135] not a single senator articulated the pro-pornography position.[136] Of course, this cannot be considered a surprise—there are no advantages to courting the diffuse and anonymous constituency that would oppose a ban on pornography, and there are clear disadvantages in alienating a responsive and motivated constituency that would likely support it.

Only Senator Russ Feingold offered a response, and, rather than speaking out on behalf of pornography consumers, he advised that any anti-pornography legislation would likely be unconstitutional.[137] The right to privacy, in essence, speaks for these functionally disenfranchised groups[138] and protects their interests when our political

132. At least on a federal level, the representation for abortion rights seems to generally mirror the level of public approval for the procedure. The public seems to want strict restrictions on abortion, yet keep the procedure legal, and that is by and large what has been expressed in state legislatures. *See* CBS News/N.Y. Times Poll, *supra* note 107. *But see* Monica Davey, *Ripples from Law Banning Abortion Spread Through South Dakota*, N.Y. TIMES, Apr. 16, 2006, at A1.

133. Scherer, *supra* note 81.

134. *Porn in the U.S.A.*, CBS NEWS.COM, Sept. 5, 2004, http://www.cbsnews.com/stories/2003/11/21/60minutes/main585049.shtml.

135. Scherer, *supra* note 81 ("Women . . . make up about 30 percent of the audience for online pornography.").

136. *See id.* (indicating, however, that the panelists did not reflect a full range of views about porn).

137. *Id.* Senator Feingold's objection, that "[t]he subject of this hearing suggests that we may be faced with proposals that go well beyond what Congress can constitutionally undertake," *id.*, was in all likelihood a reference to the right to privacy, which protects the possession of pornography.

138. A not entirely dissimilar phenomenon occurs with regards to the constitutional rights of criminal defendants—those accused of crimes will have almost no ability to fight back against persecution by a majority, so the Constitution establishes rights that protect their interest in a fair trial. *See* U.S. CONST. amends. IV, V, VI. Because it is prohibitively difficult to organize on behalf of accused criminals (a cohort that is not immediately identifiable), the Constitution removes these considerations from the normal democratic arena.

system makes it impossible for them to influence their elected representatives.

The right to privacy functions as a rule that prevents the government from prohibiting popular yet socially taboo behavior unless it is clear that the activity simply could not win in the political marketplace, even absent the cultural stigma. This becomes particularly apparent when we examine areas where the court has not found a right to privacy. Activities which are universally unpopular have not been recognized as implicating any kind of privacy interest. For example, the private consumption of child pornography in *New York v. Ferber*,[139] unlike the private possession of pornography in *Stanley*, would never, under any conditions, be able to garner support in the democratic process, and it is therefore legitimately prohibited.[140]

The lack of political power is not problematic just for those S-groups that compose a majority—sufficiently popular minorities suffer as well. Even construing the data liberally, heterosexuals greatly outnumber homosexuals in this country, and from that we can expect that recognizing gay rights is a minority position.[141] Merely being a numerical minority, however, does not immediately remove a group from the political process. It is possible that, absent inherent disadvantages and cultural pressure preventing political mobilization, minority groups could realistically create cohesive voting blocs[142] and thus participate effectively within the system.[143] Because logrolling[144] is a fundamental part of a democratic system, the level of popularity does not

139. 458 U.S. 747 (1982).

140. *See id.* at 762–63 (analyzing "value" as one of the factors in determining whether the material was obscene and could be banned). Value necessarily involves a weighing of public interest and support, which was found to be entirely lacking in this case. *See id.*

141. "Studies on the total number of gay and lesbian people in the United States show a range from 2 percent to 10 percent of the total population," but the percentage is estimated to be 5% of the total population. DAVID M. SMITH & GARY J. GATES, GAY AND LESBIAN FAMILIES IN THE UNITED STATES: SAME-SEX UNMARRIED PARTNER HOUSEHOLDS (2001), *available at* http://www.urban.org/UploadedPDF/1000491_gl_partner_households.pdf.

142. Ackerman, *supra* note 3, at 728.

143. This is at the core of the dilemma faced by the gay rights movement. Not only are homosexuals in America anonymous and diffuse (gay neighborhoods in major metropolitan areas notwithstanding), they are stigmatized to the point that membership in a pro-gay rights organization offers significant disadvantages to individual gays. If being an open member of a gay rights group, however, lacked the particularly harmful stigma that it possesses today—if belonging to such a group were as culturally innocuous as belonging to a union or being an NRA member—it might have greater organizational power and therefore greater political influence.

144. Logrolling and interest-sharing refer to the processes whereby smaller political interests band together with other interests to form a majority and pass favorable legislation. *See* WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION 37 (1994).

necessarily need to rise to the level of a majority to be politically powerful. Because of the aforementioned structural defects in their constituency, however, homosexuals lack both direct representation (only one openly gay member of Congress, Barney Frank of Massachusetts) and functional representation (the issues considered most important to the gay community are not a part of any major party platform).

Finally, contraception, despite its massive popularity, provides another example of this political disadvantage. The structural disadvantages of S-groups also explain how the pro-life movement, which has "[i]ncreasingly . . . moved to attack and denigrate contraception," has succeeded in achieving recent anti-birth control policy victories, such as the stifling of over-the-counter sales of the Plan B contraceptive, despite the fact that birth control has a 93% approval rating.[145] Similarly, Americans come out 78% to 16% in opposition to "right of refusal" laws,[146] yet "[m]ore than a dozen states are considering new laws to protect health workers who do not want to provide care that conflicts with their personal beliefs," including a half-dozen that "would shield pharmacists who refuse to fill prescriptions for birth control and 'morning-after' pills."[147] A possible reason for this state and federal legislative impotence is that, aside from pharmaceutical companies whose interest in the area is substantial, any lobbying campaign on behalf of women who use contraceptives would likely be weakened by anonymity, diffuseness, and stigmatization.

3. The Problem with a Counter-Majoritarian Democracy

The Court in *Carolene Products* implicitly assumed that democracies should reflect the influences of their constituents on a proportional basis—that a group should not have significantly less power than its numbers warrant.[148] Applying this theory, the Court identified the process theory goal of representation reinforcement as an appropriate goal of judicial review.[149] In the view of the Court, the "discrete

145. Russell Shorto, *Contra-Contraception*, N.Y. TIMES, May 7, 2006, (Magazine), at 48.

146. N.Y. Times/CBS News Poll (Nov. 18–21, 2004), *available at* http://www.nytimes.com/packages/html/politics/20041123_poll/20041123_poll_results.pdf. The remaining 6% of Americans either did not know or did not answer. *Id.*

147. Rob Stein, *Health Workers' Choice Debated*, WASH. POST, Jan. 30, 2006, at A1.

148. *See* Ackerman, *supra* note 3, at 720 (stating that "[b]y intervening on behalf of C-groups, a *Carolene* court merely produces the substantive outcomes that the C-group would have obtained through politics if it had not been so systematically disadvantaged in the ongoing process of pluralist bargaining").

149. *Id.* at 715 ("*Carolene* proposed to make the ideals of the victorious activist Democracy serve as a primary foundation for constitutional rights in the United States.").

and insular minorities" would lose more often than they deserved to, and therefore any regulation directed at them should be subject to stricter review.[150] The Court explicitly recognized the deficiency inherent in a majority-rule democratic process and resolved to correct it—to "seize the high ground of democratic theory" and overrule laws when the "challenged legislation was produced by a profoundly defective process."[151]

Similarly, the right to privacy can be understood as a correction in the profoundly defective democratic marketplace—a natural extension of *Carolene Products* and its concern for the unfairly unrepresented. This kind of intervention to negate the disproportionate influence of specific interest groups and promote diffuse popular interests[152] works to preserve the basic utilitarian nature of democracy and avoids the judicial counter-majoritarian problem of unelected judges thwarting the majority will.[153] It is therefore entirely consistent with the tenets of process theory.[154]

Bruce Ackerman came to a similar conclusion in *Beyond Carolene Products*, finding that a representation reinforcement approach would justify protection for groups that are neither discrete nor insular and are thus disadvantaged in the political process.[155] However, another variable—stigmatization—plays just as important a role in suppressing the expression of political interests and therefore belongs in the analysis.[156] It is at this intersection of Ackerman's anonymous and diffuse groups with the socially stigmatized where protection of political mi-

150. United States v. Carolene Products, 304 U.S. 144, 153 n.4 (1938) (demanding a "more searching judicial inquiry").

151. Ackerman, *supra* note 3, at 715.

152. Farber and Frickey, from the perspective of advocates for republicanism and the "public good," also argue for the reduction of the power of special interests. *See* FARBER & FRICKEY, *supra* note 108, at 132–43. Their methods include limiting the power of Political Action Committees ("PACs") through campaign finance reform, reinforcing the Court's anti-delegation doctrine, and limiting legislative deference in the face of legislative obsolescence. *Id.*

153. *See* BICKEL, THE LEAST DANGEROUS BRANCH, *supra* note 48.

154.
> The Court's job in such cases is to look at the world as it exists and ask whether such a right [such as the right to vote] is in fact being abridged, and if it is, to consider what reasons might be adduced in support of the deprivation, without regard to what actually occasioned it. To the extent that there is a stoppage, the system is malfunctioning, *and the Court should unblock it without caring how it got that way.*

ELY, DEMOCRACY AND DISTRUST, *supra* note 52, at 136 (footnote omitted) (emphasis added).

155. Ackerman, *supra* note 3.

156. An alternate title for this Article is *Beyond* Beyond Carolene Products.

norities is most needed. Tellingly, it is at this point where the right to privacy has been recognized.

When the right to privacy is applied in a manner consistent with process theory and *Carolene Products*'s goal of representation reinforcement, it ultimately benefits democratic self-governance by curbing the power of counter-majoritarian interests. What is troubling about our system, and should be troubling to anyone invested in a democratic system of government, is that S-groups are denied effective political representation because of their secondary characteristics (anonymity, diffusion, and stigmatization) and despite their popularity. Shouldn't popularity be the criterion that really matters in a democracy?

IV. Conclusion

A. The Court and the Political Process Rationale for the Right to Privacy

The Court has never articulated protecting popular practices from democratic failure as a justification for the right to privacy. But there are three reasons why the Court might feel its pull.

The first is historical—the framers of the Constitution deliberately structured the government to be multi-headed with the intention of making change difficult.[157] They were worried about "factions" seizing control of the government based on temporary hysteria and using the government for self-interested means.[158] The right to privacy reflects the framers' concerns, as it prevents parties whose strength is disproportionate to their numbers from gaming the system and using the democratic branches to advance their agendas.

The second reason is doctrinal—the Court, in several of its decisions, specifically identified a nexus between utilitarian results and democratic processes.[159] The "one person, one vote" principle in the right to vote cases, for example, is evidence that the Court considers the structure that best represents the interests of the electorate when determining what the appropriate political process should be.[160] Simi-

157. *See, e.g.*, THE FEDERALIST No. 51 (James Madison) (indicating Madison's concern with majority interests abusing minority rights and his advocacy for the separation of powers as well as the bicameral legislature as checks against sweeping changes by powerful interests).

158. *See* THE FEDERALIST No. 10, at 56 (James Madison) (Jacob E. Cooke ed., 1961).

159. *See, e.g.*, Reynolds v. Sims, 377 U.S. 533 (1964); United States v. Carolene Products, 304 U.S. 144 (1938).

160. *Reynolds*, 377 U.S. at 562, 579–80 (holding that one person, one vote was constitutionally mandated because "[l]egislators represent people, not trees or acres" and "neither

larly, the endorsement of representation reinforcement[161] is an implicit acknowledgment of this nexus.[162] It is not only that democracy is the only form of government the Constitution recognizes as legitimate, but also that the unique structure of democratic processes brings us closer to a utilitarian ideal. Thus, results that do not reflect a true utilitarian process where everyone's interests are weighed equally might be suspect in the eyes of the Court. The right to privacy, as a way of striking down the results of an anti-utilitarian process, reinforces the connection between democracy and utility.

The final reason is experiential—protecting popular yet stigmatized positions historically fared better than allowing the opposition to prohibit the practices. Commentators have long encouraged the Court to craft decisions and legal rulings that will be "durable,"[163] and the right to privacy has proven surprisingly enduring. Supreme Court nominees are essentially forced to pledge that they will uphold *Griswold*.[164]

The country's experience with the Eighteenth Amendment prohibiting alcohol, on the other hand, provides an illuminative counterexample: the attempt to outlaw a popular yet demonized practice did not endure.[165] Prohibition, enacted as a result of a well-organized temperance movement relying on religious morality and bad science,[166] serves as a particularly effective cautionary tale. It demonstrated the powerlessness of a stigmatized, diffuse interest base (no interest groups effectively organized against the movement), the inevitable failure that any such prohibition will engender (rampant bootlegging, flagrant lawbreaking, misery, etc.), and the ultimate backlash it will generate (the Twenty-First Amendment[167]).

history alone, nor economic or other sorts of group interests, are permissible factors in attempting to justify disparities from population-based representation").

161. *See* discussion *supra* Part III.C.3.

162. *See* Ackerman, *supra* note 3, at 716 n.4 ("Like *Carolene*, the reapportionment cases try to identify situations of disproportionate influence *without* making substantive judgments about the political interests that the judges think the legislature ought to favor. Instead, the concept of illegitimate influence is elucidated through a formula—'one person, one vote'—grounded on the theory of democratic process.").

163. *See* ALEXANDER M. BICKEL, THE SUPREME COURT AND THE IDEA OF PROGRESS 99 (1969) [hereinafter BICKEL, THE SUPREME COURT].

164. *See Confirmation Hearing*, *supra* note 9, at 318 (statements of Arlen Specter, Member, S. Judiciary Comm., and Samuel Alito, Judge).

165. *See* U.S. CONST. amend. XVIII, *repealed by* U.S. CONST. amend. XXI.

166. Lambert v. Yellowley, 272 U.S. 581, 589–93 (1926) (deferring to Congress's findings regarding the value of alcohol).

167. U.S. CONST. amend. XXI.

In the end, the Court's position is some combination of these three reasons. Ten years after *Roe,* Professor Ely, echoing the feeling of many scholars, has admitted that even if there is no legitimate basis for the right to privacy, "[i]n many ways the country is better off" for having the right.[168] The fact that we are better off with the right to privacy confirms that the right serves a utilitarian function. As both the founders and the Court acknowledge, democracy must be tailored to produce true democratic (utilitarian) results.[169] The right to privacy therefore fits squarely within a political process theory of constitutional jurisprudence and is a legitimate right.

B. Protecting Popular Practices from Democratic Failure

The purpose of the right to privacy is to provide protection to easily stigmatized yet popular practices that, for systemic reasons, cannot compete in the political marketplace. This form of representation reinforcement recognizes the distinct problem of a "moral minority" taking advantage of a group (often a majority) that is unable to defend itself.[170] The right to privacy counteracts this problem by shifting the burden to the state to prove that absent structural defects—the combination of anonymity, diffusion, and stigmatization that suppresses opposing views—the opponents of the prohibition would still fail.

There are other areas in addition to the established privacy cases where this right could apply. For example, 90% of Americans in their twenties have engaged in pre-marital sex,[171] and only 36% of all Americans believe it to be morally wrong.[172] Yet pre-marital sex (fornication) is still criminal conduct in some states.[173] Similarly, private

168. Steven Pressman, *Ten Years Later, Abortion Ruling Still Stirs Turmoil,* L.A. DAILY J., Jan. 21, 1983, at 1.

169. *See* Reynolds v. Sims, 377 U.S. 533, 565–66 (1964) (finding that because "legislatures are responsible for enacting laws by which all citizens are to be governed, they should be bodies which are collectively responsive to the popular will," and "the achieving of fair and effective representation for all citizens is concededly the basic aim of legislative apportionment").

170. Jonathan Cohn, *Moral Minority,* NEW REPUBLIC ONLINE, Nov. 3, 2006, http://www.demos.org/pubs/Moral%20Minority%20TNR%2011.3.06.pdf.

171. *Id.*

172. Gallup Poll, The Cultural Landscape: What's Morally Acceptable? (June 22, 2004).

173. IDAHO CODE ANN. § 18-6603 (2004) (indicating that fornication is punishable by fine, imprisonment, or both); MINN. STAT. ANN. § 609.34 (West 2003) (indicating that fornication is a misdemeanor); UTAH CODE ANN. § 76-7-104 (2003) (indicating that fornication is a misdemeanor); State v. Saunders, 381 A.2d 333 (N.J. 1977); State v. Frankum, 425 S.W.2d 183, 188 (Mo. 1968) (indicating that fornication is the "illicit sexual intercourse between a man, whether married or single, and an unmarried woman" (citation omitted)).

marijuana use is both popular and tolerated: 47% of Americans report using marijuana at some point in their lives[174]—a number that will only increase as the population ages and the baby boom generation replaces the Depression-era generation—and 76% of Americans want to see it decriminalized.[175] Yet, Alaska remains the only state in the union that has decriminalized the private possession of marijuana.[176] Tellingly, Alaska did not decriminalize possession of marijuana via the state legislature but through the state constitution's right to privacy.[177]

This theory of the right to privacy is distinct from the views of those who believe that the Supreme Court uses substantive due process to predict the values of future generations.[178] Professor Ely was correct in casting this approach as fundamentally anti-democratic: "Controlling today's generation by the values of its grandchildren is no more acceptable than controlling it by the values of its grandparents . . . ."[179] The Court is instead attempting to determine the relative strength of society's attitudes in the present and whether such attitudes are prevented from being adequately expressed. Of course, this still exposes the Court's decision-making to charges of self-fulfilling prophesies,[180] but at least it is a slightly more value-neutral endeavor than attempting to predict future public sentiment.

Of course, there are those who believe the Court should not be in the business of gauging public opinion at all. For these theorists, the task of measuring public preferences necessarily belongs exclusively to the political branches.[181] It is clear that the Court already crossed this Rubicon, however, for several established constitutional doctrines and a handful of explicit constitutional provisions require the Court to answer constitutional questions by examining the values and the beliefs of the society at large.[182] While the task of gauging public opinion is

174. CNN/Time Magazine Poll (Oct. 23–24, 2002), http://norml.org/index.cfm?Group_ID=5550.

175. *Id.* Seventy-two percent would favor the penalty being reduced to a fine and 4% would favor no penalty whatsoever. *Id.*

176. Ravin v. State, 537 P.2d 494, 504 (Alaska 1975).

177. *Id.*; *see* ALASKA CONST. art. I, § 22.

178. *See, e.g.*, BICKEL, THE SUPREME COURT, *supra* note 163.

179. ELY, DEMOCRACY AND DISTRUST, *supra* note 52, at 70.

180. *See* Duncan Kennedy, *Legal Formality*, 2 J. LEGAL STUD. 351, 385 (1973) ("*The judge cannot claim that legislative acquiescence legitimizes his action because he himself creates, through his decision of particular cases, the situation from which will emerge an as yet indeterminate constellation of legislative power.*").

181. *See* Wechsler, *supra* note 59, at 9–10.

182. For First Amendment challenges, the Court uses "community standards" as the baseline for determining protected speech. Miller v. California, 413 U.S. 15, 24 (1973) (citation omitted). For Eighth Amendment challenges, the Court surveys the "evolving

difficult, and the task of determining when there has been a failure in the political marketplace even more so, the Court must police the legislature to align it with the Constitution and the utilitarian ideal that informs our system of democratic self-governance. After all, if the Court does not, who else will?

Ultimately, the right to representative democracy and the invalidation of prohibitions against stigmatized-yet-popular practices raises a unique dilemma. The problem with these prohibitions is that they are clearly counter-majoritarian, but the virtue of these prohibitions is that they are enacted by a democratically elected legislature. Solving this dilemma requires us to answer the question of what is more important in our system of government: the people or the process? By using the right to privacy to strike down unpopular yet democratic prohibitions, the Supreme Court has apparently made its choice, and for that it should be applauded.

standards of decency." *See* Atkins v. Virginia, 536 U.S. 304, 311–12 (2002) (citations omitted). Even under a textualist approach, the Court would still have to determine what qualifies as "unusual" punishment. *See id.* at 312. For common law actions, courts all over the country must determine what—or who—is the "reasonable man" in any given locality. *See* OLIVER WENDELL HOLMES, THE COMMON LAW 93 (Mark DeWolfe Howe ed., Belknap Press 1963) (1881). Other difficult and value-laden determinations include the determination of fair market value for property in takings cases and the determination of what counts as partiality in Sixth Amendment jury composition cases. *See* Irvin v. Dowd, 366 U.S. 717, 725 (1961) (examining the "current community pattern of thought"); United States v. Miller, 317 U.S. 369, 374 (1943) (instructing courts to determine "market value" for property in takings cases).