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The Perverse Paradox of Privacy

Gary L. McDowell

It is . . . true that upon no legal principle can an interpretation be supported, which ignores the meaning universally accorded to a word or clause for centuries, and the meaning which must, therefore, have been intended by those who inserted it in the constitution. It is perhaps well to bear this in mind at a time where there is a manifest tendency to regard constitutional prohibitions as a panacea for moral and political evils, to look upon courts of law, as distinguished from legislatures, as the only real protectors of individual rights, and to trust to the courts for remedies for evils resulting entirely from a failure to attend to political duties,—at a time, that is to say, when there is danger of loose and unhistorical constitutional interpretation.

—Charles E. Shattuck, *Harvard Law Review*

The most recent effort of the Supreme Court of the United States to define the judicially created constitutional right to privacy has demonstrated once again why that contrived right poses such a

The author is grateful to Curtis Gannon, Ralph Rossum, and the late James McClellan for their comments and suggestions. This article is respectfully dedicated to the memory of Professor McClellan. *Epigraph*: Charles E. Shattuck, "The True Meaning of the Term 'Liberty' in those Clauses in the Federal and State Constitutions which Protect 'Life, Liberty, and Property,'" *Harvard Law Review* 4 (1891): 365, 366.

pronounced threat to constitutional self-government. In writing for the majority in *Lawrence v. Texas* (2003) to overrule a case of only seventeen years' standing that allowed the states to prohibit homosexual sodomy, Justice Anthony Kennedy insisted that the idea of liberty in the Constitution's due process clauses is not limited to protecting individuals from "unwarranted governmental intrusions into a dwelling or other private places" but has "transcendent dimensions" of a more moral sort.¹ Properly understood, this notion of liberty "presumes an autonomy of self that includes freedom of thought, belief, expression and certain intimate conduct," whether those are mentioned in the Constitution or not.² Indeed, had those who originally drafted "the Due Process Clauses of the Fifth and Fourteenth Amendments known the components of liberty in its manifold possibilities, they might have been more specific." But they could not have known since "times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress." The essence of the Constitution for Justice Kennedy and his ilk is that it falls to "persons in every generation [to] invoke its principles in their own search for greater freedom."³ Put more simply, there is nothing permanent in the Constitution, no fundamental, unalterable principles; its meaning comes only from the changing moral views of successive generations of justices.

Justice Kennedy's understanding of the changing metaphysical contours of the right of privacy was drawn in large part from *obiter dictum* in *Planned Parenthood of Southeastern Pennsylvania v. Casey*.⁴ In that opinion upholding the abortion decision of *Roe v. Wade* (1973), written by Kennedy along with Justices David Souter and Sandra Day O'Connor, the Court had insisted that lying at the

1. 156 L. Ed. 2d 508 (2003), 515.

2. *Ibid.*

3. *Ibid.*, 526.

4. 505 U.S. 833 (1992).

heart of the idea of liberty provided in the Constitution “is the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life.”⁵ This was something of a crude echo of a similar *dictum* by Justice Louis Brandeis in his dissent in *Olmstead v. United States* (1928), in which he had rhapsodically insisted that the framers of the Constitution “undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man’s spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure, and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations.”⁶ Because of these views, Brandeis insisted, the framers had “conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men.”⁷

The problem is that this “most comprehensive of rights,” the judicially discovered “transcendent dimensions” of the meaning of liberty, when embraced by the Court as a ground for judgment, is utterly at odds with the very possibility of constitutional self-government. Such understandings can only be the result of what James Madison once termed “constructive ingenuity,”⁸ an ingenuity that seeks to supplant the textual Constitution with the justices’ “own moral code,” their protests to the contrary notwithstanding.⁹

The paradox of the Supreme Court’s constructive ingenuity when it comes to the privacy right is that it is defended in the name of protecting new and often unheard of individual liberties from

5. 410 U.S. 113 (1973); 505 U.S. 833, 851.

6. *Olmstead v. United States*, 277 U.S. 438 (1928), 478.

7. *Ibid.*

8. James Madison to Robert S. Garnett, February 11, 1824, *Letters and Other Writings of James Madison*, 4 vols. (Philadelphia: J.P. Lippincott, 1865), III: 367–368.

9. *Lawrence v. Texas*, 156 L. Ed. 2d., 521, quoting *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), 850.

legitimately elected majorities who have passed “laws representing essentially moral choices.”¹⁰ But by so restricting the powers of the governments (and this is almost always a restriction on the powers of the governments of the several states) to make such moral choices part of the law, the Court has greatly limited the most important right of individuals, the right to be self-governing, a right that has its roots in the very moral foundations of American republicanism.

The essence of self-government is the right of the people to engage in public deliberation over what is right and what is wrong and to decide how those rights and wrongs are translated into what is deemed legal and illegal. In the end the elevation of a judicially created notion of privacy that can be used to trump nearly every conceivable collective moral judgment made by the people undermines constitutionalism in any meaningful sense. The history alone of the development of the right to privacy exposes its illegitimacy as a matter of constitutional law and demonstrates the danger it poses to that most basic of American political values, the rule of law. For the history shows that with the right to privacy the stability and certainty that the rule of law requires is replaced by political uncertainty and judicial arbitrariness.

A Brief History of a Bad Idea

Although the right to privacy as a matter of constitutional law is of rather recent vintage,¹¹ the roots of the idea go back much further. Usually, it is understood to have begun with a pioneering law review article, “The Right to Privacy,” by Samuel Warren and Louis Brandeis, which appeared in the *Harvard Law Review* in 1890.¹² In fact, there was a longer history of a developing tradition

10. *Bowers v. Hardwick*, 478 U.S. 186, 196 (1986).

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

12. Samuel D. Warren and Louis D. Brandeis, “The Right to Privacy,” *Harvard Law Review* 4 (1890): 193.

of a privacy right of which that essay was essentially a part.¹³ For understanding the current constitutional right of privacy, the most important fact about the argument Warren and Brandeis presented was that it did not advocate expanding the Constitution to protect privacy. It was a more modest effort to create an action in tort law to enable the great and the good to sue for damages when beset by the “continuous ordeal of the camera” or relentless “kodakers” who made the age of yellow journalism all that it could be.¹⁴ Their objective was to “set against the newspapers’ jealously guarded first amendment rights a countervailing right on the part of individuals, an explicit ‘right to privacy.’”¹⁵

Warren and Brandeis understood that for such a right to be embraced by “the common law, in its eternal youth,” they would have to establish a principled ground for it. Thus their basic argument was that “[p]olitical, social, and economic changes entail the recognition of new rights . . . to meet the demands of society.” In the instant case, those changed times demanded “a general right to privacy for thoughts, emotions, and sensations.” By their common law calculus, the “general object in view [was] to protect the pri-

13. See Note “The Right to Privacy in Nineteenth Century America,” *Harvard Law Review* 94 (1981): 1892–1910.

14. The term “kodakers” was used by the editorial writers at the *New York Times*, as quoted in Denis O’Brien, “The Right of Privacy,” *Columbia Law Review* 2 (1902): 437. O’Brien was a member of the New York court that had bucked the state court trend and had denied the extension of the right to privacy in *Roberson v. Rochester Folding Box Co.*, 171 N.Y. 538 (1902), a holding that led to “something of a storm of professional, as well as popular, disapproval.” Wilbur Larremore, “The Law of Privacy,” *Columbia Law Review* 12 (1912): 693, 694.

Judge O’Brien argued in his law review essay that the “right of privacy . . . is such an intangible thing and conveys such a vague idea that it is doubtful if the law can ever deal with it in any reasonable or practical way.” Any court, he further warned, “that will not respect the limitations of the law upon its own powers will not long retain the respect of the people.” In the law, he concluded, it is “easy enough to wander away from beaten paths that are safe, but it is not always easy to return.” O’Brien, “Right of Privacy,” 441, 445, 448.

15. “Right to Privacy in Nineteenth Century America,” 1910.

vacy of private life” including the “life, habits, acts, and relations of an individual.”¹⁶ The right urged by Warren and Brandeis as a matter of tort law made its way into American law nearly from the beginning, and by the 1960s was widely accepted.¹⁷ But it would also prove to be an idea that would lie dormant and be brought to constitutional life in a way that perhaps neither Warren nor Brandeis might have expected.

Although their argument did not itself contribute to the doctrinal basis of a constitutional right to privacy, Warren and Brandeis were writing at precisely the same moment as were others whose arguments would in time come to support the expansion of the Constitution to include an unwritten right to privacy. The year 1890 was the same year that the Supreme Court inched closer to formally creating the doctrine of substantive due process by which it would invalidate all manner of state laws in the name of economic liberty; for the first time the Court held that a state regulation of railroad rates violated the due process clause of the Fourteenth Amendment. Writing for a divided Court, Justice Samuel Blatchford held that the “reasonableness” of such regulations was “eminently a question for judicial investigation, requiring due process of law for its determination.”¹⁸ Perhaps the most striking coincidence was that in the

16. Warren and Brandeis, “Right to Privacy,” 193, 206, 215, 216.

17. See Larremore, “Law of Privacy”; see also William Prosser, “Privacy,” *California Law Review* 48 (1960): 383.

There had been firm critics, however. One had argued simply and forcefully near the beginning that “the right to privacy does not exist.” And the attempt to create it was especially worrying. “That our law is a system that grows and develops in response to the demands of advancing civilization, is due to the fact that new occasions and new circumstances arise which come within the principles upon which our laws were founded; not because new principles and new rights are created to afford that protection or redress which seems to be required.” Herbert Spencer Hadley, “The Right to Privacy,” *Northwestern Law Review* 3 (1894): 1, 20–21.

18. *Chicago, Milwaukee, and St. Paul Railway Co. v. Minnesota*, 134 U.S. 418 (1890), 458. Three justices dissented noting that such a rate regulation “is a legislative prerogative, not a judicial one,” p. 461. This decision would be denounced years later

same volume of the *Harvard Law Review* in which Warren and Brandeis's article "The "Right to Privacy" appeared, another article undertook to sound a warning about the dangers of judges manipulating the meaning of constitutional language—especially the word "liberty" in the due process clauses—through "loose and unhistorical . . . interpretation."¹⁹

The creation of substantive due process was a development of an older tradition in which some judges were willing to seek meaning beyond the text of the written Constitution. In the earliest days of the republic, one might see an appeal made now and then to natural law or principles of natural justice.²⁰ Later, the contracts clause of the Constitution provided a way for the Court to find principled meaning in the text that seemed to many to go far beyond the text.²¹ These early examples stand out in large measure because there were so few judicial forays beyond the text and arguable intention of the Constitution. In a sense, the generation that knew and understood best the natural law theories of the time saw

by Justice Hugo Black for using "the due process clause to protect property rights under natural law concepts." *Adamson v. California*, 332 U.S. 46, 79 (1947).

19. Charles Shattuck, "The True Meaning of the Term 'Liberty' in those Clauses in the Federal and State Constitutions which Protect 'Life, Liberty, and Property,'" *Harvard Law Review* 4 (1891): 365, 366.

20. Justice Samuel Chase in *Calder v. Bull*, for example, argued that legislative acts against "the general principles of law and reason" and at odds with "the great first principles of the social compact" are unconstitutional. 3 U.S. (3 Dall.) 386, 388 (1798).

21. Chief Justice John Marshall, for example, in *Fletcher v. Peck* argued that his decision in that case conformed with "certain great principles of justice, whose authority is universally acknowledged." 10 U.S. 87, 143 (1810). In his only dissent in his entire tenure on the Court, Marshall also saw fit to find arguments outside the text and intention of the Constitution. Individuals, Marshall argued in *Ogden v. Saunders*, do not derive from government their right to contract but bring that right with them into society; that obligation is not conferred on contracts by positive law but is intrinsic and is conferred by the act of the parties. 25 U.S. 213, 346 (1825).

So, too, was Justice Joseph Story willing to appeal to "the principles of natural justice" and "the fundamental laws of every free government" in reaching the decision in *Terrett v. Taylor*, 13 U.S. 43, 52 (1815).

no need to seek in them the grounds of their constitutional decisions.²² They most assuredly did not see the due process clause of the Fifth Amendment as a provision pregnant with higher law principles awaiting judicial invocation. Indeed, they understood that clause and the concept of due process as it had been understood for hundreds of years: “The words *due process of law* have a precise technical import, and are only applicable to the process and proceedings of the courts of justice; they can never be referred to an act of the legislature.”²³

It is more than slightly ironic that the doctrine that came to be a primary vehicle for the Supreme Court of the United States to invalidate state laws with which the justices disagreed would have its first appearance in a state court; it is perhaps even more ironic that the doctrine appeared in the same state in which Alexander Hamilton had explained the limits of due process of law so clearly, and that the doctrine was created to stem the tide of judicial reliance on “theories alleged to be found in natural reason and inalienable rights.”²⁴ But that was the situation in 1856, in *Wynehamer v. New York*, when a court for the first time held that legislation could be invalidated if its substantive provisions conflicted with what was demanded by the “due process of law.” The state law in question that sought to prohibit liquor was too arbitrary and unreasonable to stand; but it would fall not because it was “contrary to natural equity or justice” or violated “any fanciful theory of higher

22. See Henry Steele Commager, “Constitutional History and the Common Law,” in *The Constitution Reconsidered*, ed. Conyers Read (New York: Columbia University Press, 1938).

23. Alexander Hamilton in the New York Assembly commenting on the New York Constitution, February 6, 1787, in Harold C. Syrett, ed., *The Papers of Alexander Hamilton*, 26 vols. (New York: Columbia University Press, 1961–1979), IV: 35.

24. The reliance on such theories, Justice Comstock argued, was “subversive of the just and necessary powers of government.” *Wynehamer v. New York*, 13 N.Y. 378 (1856), 391.

law or first principles of natural rights outside the constitution.”²⁵ It was invalid, the court ruled, because such laws violated the clear text of the state constitution; they were against what was demanded by due process of law.

At the federal level, the first flirtation by the Supreme Court with the idea of substantive due process came the year after *Wynehamer* in the case of *Dred Scott v. Sandford*.²⁶ In Chief Justice Roger Taney’s view, “the rights of property are united with the rights of the person, and placed on the same ground by the fifth amendment to the Constitution, which provides that no person shall be deprived of life, liberty, and [*sic*] property, without due process of law.” Such an act of Congress that deprived Mr. Sandford of his property simply because he had taken his slave into a particular territory “could hardly be dignified with the name of due process of law.”²⁷ With the end of the Civil War and the adoption of the Fourteenth Amendment, this nascent notion would find a new and expansive constitutional field.

At first, the Supreme Court resisted the temptation to infuse the due process clause of the Fourteenth Amendment with any substantive content. When they were first asked to do so, they declined, noting that the regulation of slaughterhouses in New Orleans did not constitute the sort of “deprivation of property within the meaning of that provision.”²⁸ In a series of cases from 1873 to 1890, the Court continued to deny that any doctrine of substantive due process could be derived from the Constitution.²⁹ But there were ominous stirrings. As the personnel of the Court

25. *Ibid.*, 430 (Justice Selden), 453 (Justice Hubbard).

26. 60 U.S. (19 Howard) 393 (1857).

27. *Ibid.*, 450.

28. *The Slaughter-House Cases*, 83 U.S. 36 (1873), 81. Justice Miller insisted that to hold otherwise would have the unhappy effect of constituting the Supreme Court as a “perpetual censor” of all the legislation of the states.

29. *Munn v. Illinois*, 94 U.S. 113 (1877); *Davidson v. New Orleans*, 96 U.S. 97 (1878); *Stone v. Farmers’ Loan and Trust Co.*, 116 U.S. 307 (1886).

was changing, there was an emerging willingness on the part of some justices to see more in the due process clause.³⁰

Just how far those new inclinations extended was made clear in *Chicago, Milwaukee, and St. Paul Railway Co. v. Minnesota* when the Court for the first time invalidated the rates set by a state regulatory commission as a deprivation of property without due process of law.³¹ Then four years later the Court asserted its power to declare the enactments of state legislatures invalid because of the due process clause;³² in another four years they actually did so.³³ By 1896, Justice Rufus Peckham made clear how secure the revolution in the due process of law had become. "The liberty mentioned in the [Fourteenth] Amendment means, not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties."³⁴

The doctrine of substantive due process came into full flower in 1905 with *Lochner v. New York*.³⁵ The standard for constitutional adjudication under the due process clause was now whether the law in question was "a fair, reasonable, and appropriate exercise of the police power of the state, or [. . .] an unreasonable, unnecessary, and arbitrary interference with the right of the individual to his personal liberty."³⁶ The protection of economic liberties under the rubric of "liberty of contract" under the due process clause was finally abandoned only in 1937 in *West Coast Hotel v. Parrish*.³⁷

30. In 1887 the Court announced they were "under a solemn duty—to look at the substance of things whenever they enter upon the inquiry whether the legislature transcended the limits of its authority." *Mugler v. Kansas*, 123 U.S. 623 (1887), 661.

31. 134 U.S. 418 (1890).

32. *Reagan v. Farmers' Loan and Trust Co.*, 154 U.S. 362 (1894).

33. *Smyth v. Ames*, 169 U.S. 466 (1898).

34. *Allgeyer v. Louisiana*, 165 U.S. 578 (1897).

35. 198 U.S. 45 (1905).

36. *Ibid.*, 56.

37. 300 U.S. 379 (1937).

Between *Lochner* and *West Coast Hotel*, the Court used the doctrine of substantive due process to invalidate laws that ranged from providing minimum wages for women to prohibiting the teaching of foreign languages to denying parents the right to send their children to parochial schools.³⁸ Along the way, seemingly just for good measure, the Court also announced that the Fourteenth Amendment could be used to apply the First Amendment to the states.³⁹ In each case, the Court had openly engaged in the "loose and unhistorical . . . interpretation" that was seen to be such a danger when the justices had first begun their construction of the idea that due process of law was not merely a procedural concern but had a substantive core that allowed judges to invalidate legislation.⁴⁰ Although the Court in *West Coast Hotel* declined to invalidate a state law under the doctrine of substantive due process, it also pointedly refused to annihilate the doctrine itself, leaving it to return another day.⁴¹

In many ways 1937 would prove fundamentally important for the foundation of a right to privacy whose establishment was nearly thirty years in the future. In two decisions that year the Supreme Court established new doctrines that eventually served to allow the judicial creativity of *Griswold v. Connecticut* (1965). The first was

38. *Adkins v. Children's Hospital*, 261 U.S. 525 (1923); *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925).

39. *Gitlow v. New York*, 268 U.S. 652 (1925). For a critique of *Gitlow* and a warning of the dangers of the opinion, see Charles Warren, "The New 'Liberty' under the Fourteenth Amendment," *Harvard Law Review* 39 (1926): 431.

40. For a thorough review of the rise of the doctrine of substantive due process see Raoul Berger, *Government by Judiciary* (Cambridge: Harvard University Press, 1977), 249–282. See also Christopher Wolfe, *The Rise of Modern Judicial Review: From Constitutional Interpretation to Judge-Made Law* (New York: Basic Books, 1986), 144–163; and Eugene W. Hickok Jr. and Gary L. McDowell, *Justice vs. Law: Courts and Politics in American Society* (New York: Free Press, 1993), 80–121.

41. "Liberty under the Constitution," Chief Justice Hughes wrote, "is . . . necessarily subject to the restraints of due process, and regulation which is reasonable in relation to its subject and is adopted in the interests of the community is due process." 300 U.S. 379, 391.

Palko v. Connecticut in which Justice Benjamin Cardozo addressed the question whether the due process clause of the Fourteenth Amendment incorporated the Bill of Rights and made those provisions applicable to the states.⁴² In Cardozo's view, all the provisions of the Bill of Rights were not created equal. Only those that were "of the very essence of a scheme of ordered liberty" should be applied to the states through the due process clause.⁴³ The test, said Cardozo, was whether the rights in question were those "implicit in the concept of ordered liberty" and "so rooted in the traditions and conscience of our people as to be ranked fundamental."⁴⁴ As a general matter, those more procedural rights (such as the protection against double jeopardy, the issue in the case at hand) were not equal to such rights as "freedom of thought and speech"—rights Cardozo insisted formed "the matrix, the indispensable condition of nearly every other form of freedom."⁴⁵ The two main contributions of *Palko* were, first, the idea that all rights are not equal, that there is a hierarchy; and second, that it is up to the justices to determine which rights are fundamental and apply to the states and which ones are not. The old substantive due process standard of "reasonableness" was left alive and well.

The second case of 1937 that contributed to the creation and expansion of a constitutional right to privacy was *Carolene Products Co. v. United States*.⁴⁶ The issue in the case—the power of Congress to prohibit the interstate transportation of filled milk—is of no interest to the debate over rights or privacy. What makes the

42. The Marshall Court had denied that the Bill of Rights applied to the states in *Barron v. Baltimore*, 7 Peters 243 (1833), but most recently the Court had ruled that the Fourteenth Amendment could serve to alter that relationship in *Gitlow v. New York*, 268 U.S. 652 (1925).

43. 302 U.S. 319 (1937), 325.

44. *Ibid.*; *ibid.* Quoting himself from the majority opinion in *Snyder v. Massachusetts*, 291 U.S. 97, 105.

45. 302 U.S. 319, 327.

46. 304 U.S. 144 (1937).

case significant is the *obiter dictum* of Justice Harlan Fiske Stone that was embedded in a mere footnote to the opinion. Confirming that the Court was now willing to defer to the Congress on the propriety of economic and business regulation, it was not quite so willing when it came to personal liberties. In particular, he warned, if legislation is found by the Court to suggest a "prejudice against discrete and insular minorities," then such legislation can expect a "more searching judicial inquiry."⁴⁷ This new approach to due process of law as dealing with personal rather than property rights would still have at its core the problem of judicial arbitrariness as the justices sought to measure the "reasonableness" of the law.

These new doctrinal strands of the Court's thinking came together with an institutional vengeance in the privacy cases. The issue that became the point of *Griswold v. Connecticut* had come to the Court before in *Poe v. Ullman*, but the Court had declined to reach the merits of the case.⁴⁸ Yet in the dissent of Justice John Marshall Harlan, it was clear that the doctrine of substantive due process was still lurking just around the doctrinal corner. As he insisted, "the full scope of the liberty guaranteed by the Due Process Clause cannot be found in or limited by the precise terms of the specific guarantees elsewhere provided in the Constitution. This 'liberty' is not a series of isolated points . . . [but] is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints."⁴⁹ The split among the justices on this question was clearly revealed two years later—and two years before *Griswold*—in *Ferguson v. Skrupa* (1963). In that decision for a unanimous Court, Justice Hugo Black wrote that "[t]here was a time when the Due Process Clause was used by this Court to strike down laws which were thought unreasonable, that is, unwise or incompatible with some

47. *Ibid.*, 152, n. 4.

48. 367 U.S. 497 (1961).

49. *Ibid.*, 543.

particular economic or social philosophy.” But that time had passed. “The doctrine . . . that due process authorizes courts to hold laws unconstitutional when they believe the legislature has acted unwisely has long since been discarded. We have returned to the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws.”⁵⁰ Thus was the state of doctrinal confusion when the issues in *Poe* came back to the Court for resolution in *Griswold*.

In *Griswold v. Connecticut* the Supreme Court ruled that a Connecticut statute making the use of birth control measures by married couples illegal was a violation of “a right of privacy older than the Bill of Rights—older than our political parties, older than our school system.”⁵¹ The problem for the Court was that the law obviously violated no particular provision of the Constitution. It perhaps would not have been surprising if Justice William O. Douglas had rested his majority opinion on the discredited but not completely dead idea of substantive due process, such as in *Lochner v. New York*;⁵² but he explicitly chose to “decline that invitation.”⁵³ Instead of exhuming a doctrine many thought best left buried (and since he had joined Black’s opinion in *Ferguson* two years earlier), Douglas held that the Connecticut law had run afoul of “penumbral rights” that were, in his view, “formed by emanations” from “specific guarantees in the Bill of Rights.”⁵⁴ This sweeping opinion had been forewarned by Douglas in his dissent in *Poe*. There he had made clear that in his view “‘due process’ as used in the Fourteenth Amendment includes all of the first eight Amendments . . . [but is not] restricted and confined to them.” The idea of “[l]iberty is a

50. 372 U.S. 726 (1963), 729, 730.

51. 381 U.S. 479 (1965); *ibid.*, 486.

52. 198 U.S. 45 (1905).

53. 381 U.S. 479, 482.

54. *Ibid.*, 484.

conception that sometimes gains content from the emanations of other specific guarantees.”⁵⁵ By any measure, this was judicial creativity of unequalled boldness.

Following *Griswold*, the Court found that those penumbras were capacious enough constitutionally to protect the right of unmarried couples to use birth control and the right to abortion.⁵⁶ Because of the foundation of the right to privacy and the understanding of judicial power that had allowed the Court to create it,⁵⁷ there was never any reason to think that in any meaningful way it had reached “the limit of its logic” with the abortion decision,

55. 367 U.S. 497, 516–517.

56. *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Roe v. Wade*, 410 U.S. 113 (1973).

57. There is no doubt that the justices involved in the drafting of the decision in *Griswold* knew that what they were doing was creating a new constitutional right. On April 24, 1965, Justice William Brennan wrote to Justice William O. Douglas with suggestions for improving the draft opinion Justice Douglas had sent to him. Douglas had initially been seeking the right of marital privacy in the notion of the freedom of association, a right earlier created by the Court by blending the rights of freedom of speech and freedom of assembly that are textually present in the First Amendment. Brennan cautioned against this approach. While insisting that Douglas was right in rejecting any approach based on the old doctrine of substantive due process, Brennan counseled that the best approach would be to follow the Court’s earlier example “in *creating* a right of association . . . [from] the First Amendment to protect something not literally within its terminology of speech and assembly, because the interest protected is so closely related to speech and assembly.” As he saw it, such a tack was far better: “Instead of expanding the First Amendment right of association to include marriage, why not say that what has been done for the First Amendment can also be done for some of the other fundamental guarantees of the Bill of Rights?” Brennan’s goal was to see “a right to privacy *created* out of the Fourth Amendment and the self-incrimination clause of the Fifth, together with the Third, in much the same way as the right to associate has been *created* out of the First.” Such a ploy would allow the Court to “hurdle” the “obstacle” posed by the fact that “the association of husband and wife is not mentioned in the Bill of Rights” and thus “effect a reversal in this case.” William J. Brennan to William O. Douglas, April 24, 1965, Manuscript Division, Library of Congress. Emphasis supplied.

For a glimpse of the law office politics of the justices’ chambers as they wrestled with what to do about the opinions in *Griswold*, see David J. Garrow, *Liberty and Sexuality: The Right to Privacy and the Making of Roe v. Wade* (New York: Macmillan, 1994), 229–260.

however politically tumultuous that case would prove to be.⁵⁸ Even more important to the idea of the right to privacy and its expansion than *Roe v. Wade* and the cases that came in its wake was the decision of the Court upholding *Roe* in *Planned Parenthood of Southeastern Pennsylvania v. Casey*. For there the justices made it very clear how truly limitless was the idea of “liberty” and how great was their own self-proclaimed power to shape it as they pleased, regardless of what the representative institutions of the federal and state governments might think.

The plurality opinion of Justices Kennedy, O’Connor, and Souter in *Casey* went far beyond merely upholding *Roe*. It undertook to establish an understanding of judicial power and constitutional interpretation far more radical than what any earlier court had ever suggested. It was not enough merely to embrace as they did the intellectually rickety structure of substantive due process by noting once again that “a literal reading of the [Due Process] Clause might suggest that it governs only procedures by which a State may deprive persons of liberty.” Such a literal reading would miss the essence of modern notions of judicial power. Indeed, “for at least 105 years, at least since *Mugler v. Kansas* . . . the Clause has been understood to contain a substantive component as well.”⁵⁹ And the “outer limits of that substantive sphere of liberty” were defined by neither “the Bill of Rights nor the specific practices of States at the time of the adoption of the Fourteenth Amendment.”⁶⁰ The fact was, the boundaries of the due process clause were “not susceptible

58. Benjamin N. Cardozo, *The Nature of the Judicial Process* (New Haven, Conn.: Yale University Press, 1921), 51.

In his dissent in *Lawrence v. Texas*, Justice Scalia insisted that “[s]tate laws against bigamy, same-sex marriage, adult incest, prostitution, masturbation, adultery, fornication, bestiality, and obscenity” would be subject to invalidation since the Court had now overruled its earlier opinion in *Bowers v. Hardwick* that states have the right to pass laws “based on moral choices.” 156 L. Ed. 2d., 533.

59. 505 U.S. 833 (1992), 846.

60. *Ibid.*, 848.

of expression as a simple rule.” That substantive component of “liberty” depended on nothing besides the “reasoned judgment” of the Court itself.⁶¹

What was most shocking about the Kennedy, O’Connor, and Souter opinion in *Casey* was the utter disdain it reflected for the idea of popular government. The Court was not simply intended, as Alexander Hamilton said in *The Federalist*, to be an “intermediate” institution between the people and their government “in order, among other things, to keep the latter within the limits assigned to their authority.”⁶² It was something far more. Indeed, the essence of judicial power as presented in *Casey* was that of an institution “invested with the authority to . . . speak before all others for [the people’s] constitutional ideals.”⁶³ The power of the Court to declare such values—and the people’s willingness to acquiesce in those declarations—was to Kennedy, O’Connor, and Souter what gave legitimacy to the people as “a nation dedicated to the rule of law.”⁶⁴ It was precisely this view of its own power to “speak before all others” for the constitutional ideals of the people that would in time bring the Court to the point of overruling *Bowers v. Hardwick* (1986) in order to expand ever further the “outer limits of the substantive sphere of liberty” in *Lawrence v. Texas*.

The underlying reason that the Court in *Lawrence* could so easily overrule *Bowers v. Hardwick* in order to extend the “outer limits” of privacy to include homosexual sodomy was that *Bowers* itself rested on the same substantive due process foundation that *Griswold* and its ancestors and heirs shared. Justice Byron White’s majority opinion upholding the power of the states to prohibit homosexuality as a matter of moral choice, viewing it as “immoral

61. *Ibid.*, 849.

62. Jacob E. Cooke, ed., *The Federalist* (Middletown, Conn.: Wesleyan University Press, 1961), No. 78, 525.

63. 505 U.S. 833, 868.

64. *Ibid.*, 865.

and unacceptable,” did not rest on the fact that the Constitution was silent on such matters, thus leaving them to the states.⁶⁵ Instead, the state statute was valid because such moral prohibitions had “ancient roots.”⁶⁶ As in *Griswold*, so also in *Bowers*: such rights rest on nothing firmer or more certain than that the Court found them to be “so rooted in the traditions and conscience of our people as to be ranked fundamental.”⁶⁷ All Justice Kennedy had to do in *Lawrence* was to show that Justice White’s history in *Bowers* was, at the very least, “not without doubt.”⁶⁸ It certainly was not enough to sustain the “substantive validity” of the law in question.⁶⁹ Justice Kennedy’s history, he insisted, displayed “an emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex.”⁷⁰ The “ethical and moral principles” that were deeply enough felt by the people of Texas to pass the law at hand were no match for the justices’ confidence in their “own moral code.”⁷¹ Such is the judicial advantage of an unwritten constitution of evolving meaning over a written one with fixed meaning.

The Political Price of Privacy

From the beginning of the Court’s infatuation with an implicit right to privacy there had been an older tradition of thinking about courts

65. 478 U.S. 186, 196.

66. *Ibid.*, 192. Having accepted the line of substantive due process cases as precedent, Justice White tried to draw a line: “Nor are we inclined to take a more expansive view of our authority to discover new fundamental rights imbedded in the Due Process Clause. The Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution.” *Ibid.*, 194.

67. *Palko v. Connecticut*, 302 U.S. 319, 324–325.

68. 156 L. Ed. 2d., 521.

69. *Ibid.*, 523.

70. *Ibid.*, 521.

71. *Ibid.*

and constitutions, a tradition that stood in opposition to the likes of Justices Douglas and Kennedy. This tradition found expression in dissent throughout the judicial creation of the right to privacy, beginning in *Griswold* itself when Justice Black indicted the Court's resurrection of the doctrine of substantive due process "based on subjective considerations of 'natural justice'" in order to strike down the Connecticut law as simply unacceptable.⁷² It is not the duty of the Supreme Court, he insisted, "to keep the Constitution in tune with the times."⁷³ The framers knew there would be need for change and had provided for it through the formal process of amendment. Although he could agree with Justice Potter Stewart's characterization of the law as "uncommonly silly,"⁷⁴ that was not grounds enough for the Court to invalidate it.

Similarly in *Roe v. Wade*, Justice White derided what the Court had done in expanding the right to privacy as nothing more than "an exercise of raw judicial power . . . an improvident and extravagant exercise of the power of judicial review that the Constitution extends to this Court."⁷⁵ And to Justice William Rehnquist, the majority decision was more a matter of "judicial legislation than it [was] of a determination of the intent of the drafters of the Fourteenth Amendment." It was, Rehnquist said, "closely attuned" to the opinion of Justice Peckham in *Lochner v. New York*.⁷⁶

When it came to the *Casey* decision upholding *Roe*, Justice Antonin Scalia considered the claim in the opinion by Kennedy, O'Connor, and Souter that it fell to the Court to speak "before all others" for the fundamental constitutional ideals of the people—to be nothing less than a "Nietzschean vision" that had no place in constitutional law.⁷⁷ Indeed, the decision went beyond even the old

72. 381 U.S. 479, 522.

73. *Ibid.*, 521.

74. *Ibid.*, 527.

75. *Doe v. Bolton*, 410 U.S. 179 (1973), 222.

76. 410 U.S. 113, 174.

77. 505 U.S. 833, 996.

line of substantive due process cases. The result was “a new mode of constitutional adjudication that relies not upon text and traditional practice to determine the law, but upon what the Court calls ‘reasoned judgment’ . . . which turns out to be nothing but philosophical predilection and moral intuition.”⁷⁸ To Scalia, the lesson of *Casey* was simple: “The Imperial Judiciary lives.”⁷⁹

In both *Casey* and *Lawrence*, Justice Scalia emphasized that what is at stake when the Court is “impatient of democratic change” and undertakes to create new constitutional rights is the right of the people to constitutional self-government.⁸⁰ If, as Justice Kennedy insisted, “later generations can see that laws once thought necessary and proper in fact serve only to oppress,” then “later generations can repeal those laws.” In Scalia’s view (a view shared by Rehnquist and Clarence Thomas), “it is the premise of our system that those judgments are to be made by the people, and not imposed by a governing caste that knows best.”⁸¹ One need not agree with the moral choices made by the people of a state about abortion or homosexuality to recognize the innate right of the people under the Constitution to make those choices free from judicial intervention based on a contrived constitutional right. As he would put it elsewhere, “[i]t is simply not compatible with democratic theory that laws mean whatever they ought to mean, and that unelected judges should decide what that is.”⁸²

This dissenting tradition from Justice Black to Justice Scalia has roots deep in the constitutional history of the United States, and even beyond.⁸³ One of the earliest and most famous refutations

78. *Ibid.*, 1000.

79. *Ibid.*, 996.

80. 156 L. Ed. 2d, 542.

81. *Ibid.*

82. Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law* (Princeton, N.J.: Princeton University Press, 1997), 22.

83. See Raoul Berger, “‘Original Intention’ in Historical Perspective,” *George Washington Law Review* 54 (1986): 296.

of the idea that judges could recur to fundamental principles or natural law in reaching their decisions came from Justice James Iredell against Justice Samuel Chase's claim in *Calder v. Bull* in 1798. "If . . . the legislature . . . shall pass a law within the general scope of their constitutional powers," he wrote, "the court cannot pronounce it void, merely because it is, in their judgment, contrary to the principles of natural justice." The reason was plain: "The ideas of natural justice are regulated by no fixed standard: the ablest and the purest men have differed upon the subject; and all that the court could properly say, in such an event, would be that the legislature possessed of an equal right of opinion, had passed an act which in the opinion of the judges, was inconsistent with the abstract principles of natural justice."⁸⁴

Similarly, both Chief Justice John Marshall and Justice Joseph Story, despite their rare and insignificant flirtations with a realm of rights beyond the textual Constitution, were committed to the idea of the positive law of the Constitution and its representative institutions. For Marshall, the very idea of a written constitution was "the greatest improvement on political institutions." It was the embodiment of the people's "original right to establish, for their future government, such principles as, in their opinion, shall most conduce to their own happiness." Those principles once established in a constitution "are deemed fundamental . . . [and] are designed to be permanent."⁸⁵ It was not empty rhetoric when he later exhorted his fellow justices to "never forget that it is a *constitution* we are expounding."⁸⁶ And when the argument was made before the Court that the provisions of the first ten amendments to the Constitution applied to the states, Marshall rejected that claim, noting that "[h]ad the framers of these amendments intended them to be limitations on the powers of the state governments, they would

84. 3 U.S. (3 Dall.) 386, 398–399.

85. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), 176, 178.

86. *McCulloch v. Maryland*, 17 U.S. (Wheaton) 316 (1819), 407.

have imitated the framers of the original constitution, and have expressed that intention . . . in plain and intelligible language.” Without that expressed intention, the Court could not so apply them.⁸⁷ For Marshall, no matter how alluring might be the principles of natural justice, there was no doubt that “*intention* is the most sacred rule of interpretation” and that “the great duty of a judge who construes an instrument is to find the intention of its makers.”⁸⁸

Justice Story was equally clear on these matters. “The first and fundamental rule in the interpretation of all instruments,” he said in introducing his chapter “Rules of Interpretation” in his *Commentaries on the Constitution of the United States*, “is to construe them according to the sense of the terms and the intention of the parties.”⁸⁹ Any judicial departure from the “true import and sense of [the Constitution’s] powers” would be a “usurping of the functions of a legislator, and deserting those of an expounder of the law.”⁹⁰ In Story’s view, the Constitution was to have “a fixed, uniform, permanent construction. It should be . . . not dependent upon the passions or parties of particular times, but the same yesterday, to-day, and forever.”⁹¹ And should a Court undertake to be guided by “the rights . . . arising from natural law and justice,” this undertaking would prove “the most formidable instrument of arbitrary power that could well be devised.”⁹² Story understood constitutions as “instruments of a practical nature”; when it came to interpreting them, he did not think they were “designed for met-

87. *Barron v. Baltimore*, 32 U.S. (7 Peters) 243 (1833), 250.

88. Gerald Gunther, ed., *John Marshall’s Defense of McCulloch v. Maryland* (Stanford, Calif.: Stanford University Press, 1969), 167, 168–169.

89. Joseph Story, *Commentaries on the Constitution of the United States*, 4th ed., 2 vols. (Boston: Little, Brown and Co., 1873), I: 295.

90. *Ibid.*, 314–315.

91. *Ibid.*, 315.

92. Joseph Story, *Commentaries on Equity Jurisprudence*, 12th ed., 2 vols. (Boston: Little, Brown and Co., 1877), I: 15.

aphysical or logical subtleties, for niceties of expression, for critical propriety, for elaborate shades of meaning, or for the exercise of philosophical acuteness or judicial research." The language was to be "expounded in its plain, obvious, and common sense"; there was no place for "any recondite meaning or extraordinary gloss."⁹³

This same understanding constituted the foundation of Justice Benjamin Curtis's dissent to Chief Justice Taney's opinion in *Dred Scott*. Although Taney insisted that his opinion was based on the original meaning and intention of the Constitution "when it came from the hands of its framers and was voted on and adopted by the people of the United States,"⁹⁴ Justice Curtis thought otherwise. He knew Taney's effort to be a blatant and intentional misconstruction of the Constitution "upon reasons purely political."⁹⁵ In Curtis's view, "when a strict interpretation of the Constitution, according to the fixed rules which govern the interpretation of laws is abandoned, and the theoretical opinions of individuals are allowed to control its meaning, we have no longer a Constitution; we are under the government of individual men, who for the time being have power to declare what the Constitution is, according to their own views of what it ought to mean."⁹⁶ Such an interpretation means the demise of "republican government."⁹⁷

It was this question of the legitimate bounds of republican government under a federal constitution that also concerned Justice Oliver Wendell Holmes over the course of the first era of substantive due process, at least when it came to striking down economic legislation. He had grave and nagging doubts about the "vague contours" of the idea of substantive due process as the grounds for invalidating statutes rather than explicit constitutional provisions.⁹⁸

93. Story, *Commentaries on the Constitution*, I: 322.

94. 60 U.S. (19 Howard) 393, 426.

95. *Ibid.*, 621.

96. *Ibid.*

97. *Ibid.*

98. *Adkins v. Children's Hospital of the District of Columbia*, 261 U.S. 525, 568.

He saw danger in “the ever increasing scope given to the Fourteenth Amendment in cutting down . . . the constitutional rights of the states.” He could not believe, he said, that “the amendment was intended to give [the Court] *carte blanche* to embody [the justices’] economic and moral beliefs in its prohibitions.” As things stood, it seemed to Holmes that the sky was the limit to what the Court might choose to do.⁹⁹

Conclusion

Constitutional self-government is not possible if the Supreme Court of the United States assumes—and is allowed to assume—the power to declare invalid, based on the right to privacy, the state laws that seek to express moral choices. That the Court has undertaken to do this because of the notion of substantive due process is the bad news. But it is not the worst news. Far more troubling is the fact that there is not now on the Court any justice willing to repudiate the idea that the due process clauses do not deal simply with procedures but reach to the “substantive validity” of the laws.

To his credit, Justice White in his opinion in *Bowers* was at least willing to cast doubt on the prudence of those precedents—albeit stopping far short of rejecting them as a matter of principle. The willingness of earlier courts, he suggested, to assume that the due process clauses have a “substantive content . . . recognizing rights that have little or no textual support in the constitutional language” had posed problems in the past. But while “much of the substantive gloss” had been repudiated, there was much that remained. Thus he was willing to resist the call to find the right of homosexual sodomy included in the meaning of liberty in those clauses. “The Court,” he pointed out, “is most vulnerable and comes nearest to illegitimacy when it deals with judge-made con-

99. *Baldwin v. Missouri*, 281 U.S. 586 (1930), 595.

stitutional law having little or no cognizable roots in the language or design of the Constitution.”¹⁰⁰

Today Justice Scalia is willing to condemn the idea of substantive due process but most explicitly only outside the pages of the *United States Reports*.¹⁰¹ In views expressed off the bench, he has argued forcefully that the “inescapable terms” of the due process clauses guarantee “only process.” The result of the line of cases creating and perpetuating the idea of substantive due process has been “to render democratically adopted texts mere springboards for judicial lawmaking.”¹⁰² But the weight of the precedents is such that even he tends to acquiesce in their lingering legitimacy as a matter of binding constitutional law. The only question is how to prevent expanding the doctrine to include new judge-made rights that might satisfy his colleagues’ yearning for social justice.¹⁰³

100. 478 U.S. 186, 191, 194. Justice White here was repeating part of his dissent in *Moore v. East Cleveland*, 431 U.S. 494 (1977), 544. He there went on to argue that “the present construction of the Due Process Clause represents a major judicial gloss on its terms, as well as on the anticipation of the Framers.” As a result, he warned, “the Court should be extremely reluctant to breathe still further substantive content into the Due Process Clause so as to strike down legislation adopted by a State or city to promote its welfare.” *Ibid.*

101. Justice Scalia has come closest to denouncing the doctrine in a series of cases dealing with punitive damages wherein he has raised fundamental questions about the idea of substantive due process. See *Pacific Mutual Life Insurance Co. v. Haslip*, 499 U.S. 1 (1991), 24–39; *TXO Production Corp. v. Alliance Resources*, 509 U.S. 443 (1993), 470–472; *BMW of North America v. Gore* 517 U.S. 559 (1996), 598–607. He has also extended his criticism to criminal procedure in *Albright v. Oliver*, 510 U.S. 266 (1994), 275–276. In *Albright* (p. 275) he insisted that while the due process clause may be understood to incorporate “certain explicit substantive protections of the Bill of Rights,” it was not home to other “(unspecified) liberties.” He had been even more explicit in *TXO Production Corp.* (pp. 470–471) where he argued that he was unwilling to “accept the proposition that [the due process clause] is the secret repository of all sorts of other, unenumerated rights—however fashionable that proposition may have been . . . at the time of the *Lochner*-era cases. . . .”

102. Scalia, *Matter of Interpretation*, 24–25.

103. See, for example, his opinion in *Michael H. v. Gerald D.* in which he conceded that substantive due process “is an established part of our constitutional jurisprudence” but sought to fence it in by recourse to history and tradition, relying on Cardozo’s

The claims of precedent in a common law system are compelling; they are less so as a matter of constitutional law. To allow previously and wrongly decided cases to alter in perpetuity the original meaning of the Constitution is to misunderstand the nature of constitutional government and inevitably to supplant the founders' intentions with contemporary judges' personal notions of justice. A strict and unyielding adherence to precedent would allow nothing to be done about what has been called "the derelicts of constitutional law," universally abhorred errors of judicial lawmaking such as *Dred Scott v. Sandford* and *Plessy v. Ferguson*.¹⁰⁴ Although Justices Kennedy, O'Connor, and Souter in *Casey* might be willing to defend such a strict embrace of *stare decisis* as essential to maintaining the Court's legitimacy, one is reminded of a more sober view of the doctrine, that "precedents prove only what was done, and not what was well done."¹⁰⁵ That is most assuredly the case when it comes to the misbegotten string of cases imposing the notion of substantive due process.

Unless a repudiation of the doctrine takes place, and it is expunged as unconstitutional from the body of the nation's constitutional law—and that is likely to take place only by a constitutional amendment emphasizing that due process of law is a procedural, not a substantive, concern—government by the judiciary will continue and with it the further erosion of constitutional self-government in any meaningful sense. Indeed, it is impossible to avoid the conclusion that the species of judicial activism in the right to privacy cases is inconsistent not only with the origin, his-

standard of protections "so rooted in the traditions and conscience of our people as to be ranked fundamental." 491 U.S. 110 (1989), 121, 122.

104. 60 U.S. (19 How.) 393 (1857); 163 U.S. 537 (1896). Philip B. Kurland, *Politics, the Constitution, and the Warren Court* (Chicago: University of Chicago Press, 1970), 186.

105. Thomas Hobbes, *A Dialogue between a Philosopher and a Student of the Common Laws of England*, ed. Joseph Cropsey (Chicago: University of Chicago Press, 1971), 129.

tory, and meaning of the Constitution but with the understanding of popular government in its most fundamental sense. And, as history shows, there is no reason to think that the expansion of this judicially created right has reached its limits.

There is, in fact, every reason to believe, as Justice Scalia warned in his dissent in *Lawrence*, that there will be few laws that allegedly impinge on the notion of privacy that will be found constitutional in the years ahead. Indeed, since *Bowers v. Hardwick* was overruled on the ground that the states do not have the legitimate authority to pass laws "based on moral choices" when it comes to sexual intimacy, it is hard to see how "[s]tate laws against bigamy, same-sex marriage, adult incest, prostitution, masturbation, adultery, fornication, bestiality, and obscenity" could ever pass constitutional muster.¹⁰⁶ Justice Kennedy's choice of words in his opinion in *Lawrence* seems to make that clear. Under the substantive due process logic of Kennedy's opinion, liberty "presumes an autonomy of self that includes . . . certain intimate contact."¹⁰⁷ Precisely what sort of "intimate contact" is included will depend not on constitutional text or intention or even the legal history and traditions of the country; it will depend only on what a majority of the justices conclude is "reasonable."

At the height of the controversies over judge-made law in the 1930s, it was lamented that "[u]nder the guise of the supremacy of the law, we have established the supremacy of the judges."¹⁰⁸ As *Lawrence v. Texas* makes clear, nothing has changed.

106. 156 L. Ed. 2d., 533.

107. *Ibid.*, 515.

108. J. A. C. Grant, "The Natural Law Background of Due Process," *Columbia Law Review* 31 (1931): 56, 81.