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Bradley P. Jacob

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# GRISWOLD AND THE DEFENSE OF TRADITIONAL MARRIAGE

BRADLEY P. JACOB\*

## I. INTRODUCTION

There can be little doubt that our nation is locked in culture wars,<sup>1</sup> especially concerning sexual and family issues, with two very different views of the Good Life competing in the marketplace of ideas.<sup>2</sup> The traditionalist side believes that a family unit should consist of a husband and a wife, married for life except in unusual circumstances, raising children who have come into the home by birth or adoption.<sup>3</sup> Sexual conduct is viewed as a wonderful gift from God,<sup>4</sup> but a gift that was designed for use within a monogamous, heterosexual marriage.<sup>5</sup> The progressive side believes that

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\*Associate Professor, Regent University School of Law. B.A., *summa cum laude*, University of Delaware; J.D., University of Chicago Law School. This article on marriage, like most things of value in my life, would not be possible without the support of my beloved J.J., an amazing woman who has been the perfect wife of a far-less-than-perfect lawyer for a quarter of a century. Thanks to Dean Jeffrey A. Brauch, Regent University School of Law, and the American Center for Law and Justice for their support in preparing this article, and to the North Dakota Law Review for sponsoring this symposium issue. Special thanks to Jaired B. Hall, Regent Law School Class of 2008, for excellent research assistance.

1. See, e.g., *Romer v. Evans*, 517 U.S. 620, 652 (1996) (Scalia, J., dissenting) (“I think it no business of the courts (as opposed to the political branches) to take sides in this culture war.”); JAMES DAVISON HUNTER, *CULTURE WARS: THE STRUGGLE TO DEFINE AMERICA* *passim* (1991); Richard Jensen, *The Culture Wars, 1965-1995: A Historian’s Map*, 29 J. SOC. HIST. 17 *passim* (1995), available at <http://members.aol.com/dann01/cwar.html> (“We are at the midpoint of the Culture Wars, with the lines of battle clearly delineated for all to see, but with the ultimate winners and losers still to be decided.”); see also David E. Campbell, *A House Divided? What Social Science Has to Say About the Culture War*, 15 WM. & MARY BILL RTS. J. 59, 59 (2006) (explaining that, while the United States may not be as politically or culturally polarized as many claim, the term Culture War was “originally meant to convey . . . a tremendously significant development in American religion, society, and politics”).

2. There is, however, some room for disagreement about what portion of the American public is passionate about one of these competing worldviews, and what portion holds to a largely uninterested middle ground. MORRIS P. FIORINA, SAMUEL J. ABRAMS & JEREMY C. POPE, *CULTURE WAR? THE MYTH OF A POLARIZED AMERICA* 7-9, 15-32 (2004).

3. See, e.g., Wayne Allard, *Protect Traditional Marriage*, USA TODAY, May 31, 2006, available at [http://www.usatoday.com/news/opinion/editorials/2006-05-31-opposing-view\\_x.htm](http://www.usatoday.com/news/opinion/editorials/2006-05-31-opposing-view_x.htm); LINDA J. WAITE & MAGGIE GALLAGHER, *THE CASE FOR MARRIAGE* *passim* (2000).

4. See, e.g., *Song of Solomon* 1:2-4, 7:1-9.

5. *Matthew* 19:4-6 (NIV).

“Haven’t you read,” he replied, “that at the beginning the Creator ‘made them male and female,’ and said, ‘For this reason a man will leave his father and mother and be united to his wife, and the two will become one flesh’? So they are no longer two, but one. Therefore what God has joined together, let man not separate.”

*Id.*

sexual activity is unconnected to marriage and should be enjoyed by anyone, in any circumstances that seem attractive, at least among consenting adults.<sup>6</sup> Progressives view marriage either as an irrelevant anachronism<sup>7</sup> or an institution for sexual legitimacy that ought to be redefined to include any desired combination of numbers and sexes.<sup>8</sup>

The culture war battles have impacted a number of legal fields, but none more than family law and constitutional law. This article focuses on issues arising under the Constitution of the United States. Part II discusses the appropriate venues and methods for deciding controversial public policy issues under our constitutional system. Part III examines the sources of individual rights under the Constitution. Part IV concludes by putting all of this in the context of the culture wars and the modern sexual revolution, suggesting that *Griswold v. Connecticut*<sup>9</sup>—generally reviled by cultural traditionalists for its creation of the “right of privacy” which led to such decisions as *Roe v. Wade*,<sup>10</sup> *Planned Parenthood of Southeastern Pennsylvania v. Casey*,<sup>11</sup> and *Lawrence v. Texas*<sup>12</sup>—may have been a much stronger precedent for traditional morality and marriage than is generally assumed—if only the Supreme Court had taken *Griswold* on its own terms.

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6. Some more extreme proponents of progressive morality would not limit sexual conduct to consenting adults. For example, the “North American Man/Boy Love Association (‘NAM/BLA’) is an organization which advocates sexual relations between men and boys and the repeal of laws which restrict such relations.” *North American Man/Boy Love Ass’n v. FBI*, No. 82 CIV 2185, 1982 U.S. Dist. LEXIS 13944, at \*1 (S.D.N.Y. 1982).

7. Dennis E. Powell, *Divorce-on-Demand: Forget about Gay Marriage—What about the State of Regular Marriage?*, NAT’L. REV., Oct. 27, 2003, available at [http://findarticles.com/p/articles/mi\\_m1282/is\\_20\\_55/ai\\_108892930/print](http://findarticles.com/p/articles/mi_m1282/is_20_55/ai_108892930/print) (“Marriage is an anachronism. It’s a tax status. Nothing more.”); see also John C. Sheldon, *The Sleepwalker’s Tour of Divorce Law*, 48 ME. L. REV. 7, 48 (1996) (“The nuclear family belongs to the past; similarly, marriage seems not long for the present.”).

8. Stanley Kurtz, *Beyond Gay Marriage*, THE WKLY. STANDARD, Aug. 4, 2003, available at <http://www.weeklystandard.com/Content/Public/Articles/000/000/002/938xpsxy.asp>. (“Unlike classic polygamy, which features one man and several women, polyamory comprises a bewildering variety of sexual combinations. There are triads of one woman and two men; heterosexual group marriages; groups in which some or all members are bisexual; lesbian groups, and so forth.”).

9. 381 U.S. 479 (1965).

10. 410 U.S. 113 (1973).

11. 505 U.S. 833 (1992).

12. 539 U.S. 558 (2003).

## II. WHERE AND HOW TO FIGHT THE CULTURE WARS

The battles of the culture wars are played out on many fronts—in academia, in movies and television, and in churches,<sup>13</sup> to name just a few. From a legal perspective, conflicts over the future of marriage and family, like most other major legal battles, take place in two arenas: the political branches of government (primarily legislatures, but also occasionally executive and administrative bodies), and the courts.<sup>14</sup> The battles in the political arena, while certainly hard-fought and controversial in terms of outcome, are not particularly controversial in terms of process. Most people, even the strongest advocates on both sides, generally agree that it is appropriate for the political process to be used to resolve public policy disputes. Our system is based on representative democracy, so we accept that each side in a political debate will be attempting to persuade a majority in the appropriate decision-making body that its position is the correct one.<sup>15</sup> The side that wins has won fair and square. As Supreme Court Justice Antonin Scalia, certainly a well-known proponent of the traditionalist position, has said:

By the time Coloradans were asked to vote on Amendment 2, their exposure to homosexuals' quest for social endorsement was not limited to newspaper accounts of happenings in places such as New York, Los Angeles, San Francisco, and Key West. Three Colorado cities—Aspen, Boulder, and Denver—had enacted ordinances that listed “sexual orientation” as an impermissible ground for discrimination, equating the moral disapproval of homosexual conduct with racial and religious bigotry. The phenomenon had even appeared statewide: The Governor of Colorado had signed an executive order pronouncing that “in the State of Colorado we recognize the diversity in our pluralistic society and strive to bring an end to discrimination in any form,” and directing

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13. A current example is the debate over homosexuality within the American Episcopal Church, which is threatening to create a permanent divide within the worldwide Anglican Communion. *Anglican Conference: Rwanda Church Drops Out*, WASH. POST, July 7, 2007, at B9, available at <http://www.washingtonpost.com/wp-dyn/content/article/2007/07/06/AR2007070601838.html>; Rebecca Trounson, *Anglican Archbishops: No Consensus on Episcopal Church*, L.A. TIMES, Dec. 15, 2007, available at <http://www.latimes.com/news/nationworld/nation/la-na-episcopal15dec15,1,1720359.story?coll=la-headlines-nation>.

14. See, e.g., 32 C.F.R. Ch. 1, Part 41 (“Enlisted Personnel Separations”) (July 1, 1993 Edition), Appendix A (“Standards and Procedures”), Part 1 (“Reasons for Separation”), subpart H (“Homosexuality”).

15. This decision-making body could be the United States Congress, a state legislature, a city council, an administrative rule-making body, or, in the case of a referendum, the public at large.

state agency-heads to “ensure non-discrimination” in hiring and promotion based on, among other things, “sexual orientation.” *I do not mean to be critical of these legislative successes; homosexuals are as entitled to use the legal system for reinforcement of their moral sentiments as is the rest of society. But they are subject to being countered by lawful, democratic countermeasures as well.*<sup>16</sup>

The legal process of the culture wars becomes much more controversial and problematic when the focus shifts from legislation to litigation, from the statehouse to the courthouse. Our confidence in the fairness of the process is shaken when strongly divisive issues that will impact the future of our society, including “marriage, procreation, contraception, family relationships, child rearing, and education,”<sup>17</sup> are decided not by a majority of the people, or by the people’s duly-elected representatives, but rather by a handful of unelected, politically unaccountable judges.<sup>18</sup> Unfortunately, this has become the dominant pattern of the culture wars. Issue after issue is decided by five members of the United States Supreme Court<sup>19</sup>—in many cases a narrowly-divided Supreme Court, so that the policy preferences of Sandra Day O’Connor or Anthony Kennedy become the law of the land,<sup>20</sup> imposing their views of the Good Life on the rest of the nation. This raises serious questions about the legitimacy and desirability of the policy-making process, and those questions are the focus of this article.

Under our constitutional system of government, the people’s representatives in legislative branches (national, state, and local) are designed to be the primary makers of public policy.<sup>21</sup> In the national government,

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16. *Romer v. Evans*, 517 U.S. 620, 646 (1996) (Scalia, J., dissenting) (internal citations omitted) (emphasis added).

17. *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 851 (1992).

18. *Webster v. Reproductive Health Serv.*, 492 U.S. 490, 520-21 (1989).

19. It takes five of nine Justices to make a majority opinion of the Supreme Court the supreme law of the land. *Cooper v. Aaron*, 358 U.S. 1, 18 (1958) (“[T]he federal judiciary is supreme in the exposition of the law of the Constitution . . . . It follows that the interpretation of the [Constitution] enunciated by this Court . . . is the supreme law of the land.”).

20. To see the typical closeness of Supreme Court decisions in this area, compare *Gonzales v. Carhart*, 127 S. Ct. 1610, 1615-18 (2007) with *Stenberg v. Carhart*, 530 U.S. 914 (2000). In *Stenberg*, Justice Kennedy dissented, disagreeing with Justice Breyer that the abortion regulations at issue violated the test articulated in *Casey*, a case where Kennedy and O’Connor agreed, resulting in the overturning of certain abortion regulations. By the time of *Gonzales*, O’Connor was no longer on the Court, and Kennedy’s view held sway by a slim 5-4 majority. *Gonzales*, 127 S. Ct. at 1618.

21. See THE FEDERALIST NO. 78, at 402 (Alexander Hamilton) (Jacob Gideon ed., 2001) (“The judiciary . . . has . . . no direction either of the strength or of the wealth of the society; and can take no active resolution whatever.”).

Congress holds “*all* legislative powers.”<sup>22</sup> The national Government’s powers to regulate various areas of citizens’ lives are listed in Article I, Section 8 of the Constitution, which begins with the words, “*The Congress shall have power.*”<sup>23</sup> Legislation is the process of writing and passing laws. By contrast, the President holds “executive power,”<sup>24</sup> that is, he or she is to “take care that the laws be faithfully executed,”<sup>25</sup> and the Supreme Court is vested with “the judicial power of the United States,”<sup>26</sup> which is the power to decide real disputes,<sup>27</sup> involving specified categories of litigants, which come before the Court.<sup>28</sup> In other words, questions involving “What should be the laws of the United States?” are to be settled by Congress through the passing of legislation; the President and his Executive Branch carry out those laws and see that they are enforced; and if a dispute should arise as to the application or interpretation of the laws, it will be resolved through the judicial process and ultimately by the Supreme Court. The courts, under our constitutional system, were designed to be passive arbiters of disputes between litigants, not policy makers. As Alexander Hamilton wrote in *The Federalist No. 78*, one of the most famous passages in the *Federalist Papers*:

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

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22. U.S. CONST. art. I, § 1 (emphasis added).

23. U.S. CONST. art. I, § 8, cl. 1 (emphasis added).

24. U.S. CONST. art. II, § 1.

25. U.S. CONST. art. II, § 3.

26. U.S. CONST. art. III, § 1.

27. U.S. CONST. art. III, § 2 (“cases” and “controversies”).

28. U.S. CONST. art. III, § 2, cl. 1.

This simple view of the matter suggests several important consequences. It proves incontestably, that the judiciary is beyond comparison the weakest of the three departments of power; that it can never attack with success either of the other two; and that all possible care is requisite to enable it to defend itself against their attacks. It equally proves, that though individual oppression may now and then proceed from the courts of justice, the general liberty of the people can never be endangered from that quarter; I mean so long as the judiciary remains truly distinct from both the legislature and the Executive. For I agree that “there is no liberty, if the power of judging be not separated from the legislative and executive powers.”<sup>29</sup>

Through most of our nation’s history, this would have seemed obvious—Civics 101. But to our modern ears, there is a grating discord. In a very short space of time, our culture has been converted to the belief that the Supreme Court, composed of our nine “Platonic Guardians”<sup>30</sup> in dignified black robes, is the governmental institution that resolves our deepest social tensions by telling us what the law is as it relates to some of the most important social issues confronting our nation.<sup>31</sup> Of course, it is not at all new to suggest that the courts must “say what the law is” to decide a case properly before it; a court must interpret the applicable law and determine how it affects the legal rights of the litigants.<sup>32</sup> What is relatively new, however, is the almost-universal assumption that our most socially-divisive legal issues will ultimately be resolved not by our elected representatives in Congress, but by the Supreme Court. And if the Court’s resolution of the issue seems wrong to a majority, or even a vast majority, of the American people and our elected representatives, there is little that we can do about it. Our only recourse is a constitutional amendment,<sup>33</sup> which is, by design,

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29. THE FEDERALIST NO. 78, *supra* note 21, at 402 (citations omitted). Hamilton quoted the famous political philosopher Montesquieu who wrote “Of the three powers above mentioned, the judiciary is next to nothing.” CHARLES DE SECONDAT, BARON DE MONTESQUIEU, THE SPIRIT OF LAWS 177 (Thomas Nugent trans., Batoche Books 2003) (1900).

30. LEARNED HAND, THE BILL OF RIGHTS: THE OLIVER WENDELL HOLMES LECTURES 73-74 (1958).

31. *See, e.g.*, *Lawrence v. Texas*, 539 U.S. 558, 578 (2003) (overturning a criminal law against homosexual sodomy); *Roe v. Wade*, 410 U.S. 113, 164 (1973) (finding an anti-abortion law unconstitutional); *Griswold v. Connecticut*, 381 U.S. 479, 499 (1965) (holding that an anti-contraception law infringes on a fundamental right).

32. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) (“It is, emphatically, the province and duty of the judicial department, to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each.”)

33. U.S. CONST. art. V.

very difficult to accomplish; in practice, amending the constitution may be even more difficult than the Framers intended.<sup>34</sup>

Over the past half-century, the Court has moved more and more into the role of an active social policy maker, especially in areas where it may perceive that the elected branches are not moving fast enough to correct societal problems.<sup>35</sup> How did this happen? How did the “least dangerous branch” turn into our national guardians? How did a nation of 300 million people come to a point where, on the most contentious issues of the day, we are One Nation Under Anthony Kennedy?<sup>36</sup> There are probably many factors—legal, political, and sociological—and much has been written on the subject for both academic and popular audiences.<sup>37</sup>

One major factor, certainly, has to do with the substantive breadth of constitutional law. We will turn later to specific constitutional issues involving marriage, sexuality, and the definition of the family.<sup>38</sup> In general, it is clearly true that in the modern era the Supreme Court has moved from applying the test of constitutionality only rarely, when a legislative enactment clearly violated a textual provision of the Constitution,<sup>39</sup> to much

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34. Louis W. Hensler III, *The Recurring Constitutional Convention: Therapy for a Democratic Constitutional Republic Paralyzed by Hypocrisy*, 7 TEX. REV. LAW & POL. 263, 300-03 (2003). Theoretically, Congress and the President could also respond to an overreaching Supreme Court by impeaching, removing and replacing Justices who impose their own policy choices on the nation under the pretense of interpreting the Constitution. U.S. CONST. art. I, § 2, cl. 5; art. I, § 3, cl. 6 & 7; art. II, § 4. This has never been attempted (although President Franklin Roosevelt toyed with a similar idea in his “court packing” plan in 1936-37), and would be highly controversial. See Christopher Shea, *Supreme Switch?*, BOSTON GLOBE, Dec. 4, 2005, at D1 (analyzing whether FDR’s controversial “threat” changed the course of constitutional history).

35. See *infra* notes 39-51 and accompanying text for a discussion of the development of the Supreme Court as a significant maker of public policy.

36. It is too early in the Roberts Court to know for sure, but if it develops that the Supreme Court now has four fairly consistent “conservative/traditionalist” votes (Chief Justice Roberts and Justices Scalia, Thomas, and Alito) and four fairly consistent “liberal/progressive” votes (Justices Stevens, Souter, Ginsburg, and Breyer) on issues such as marriage, family, sexuality, and abortion, then Justice Kennedy’s vote will almost always be the swing vote that determines the outcome. The entire focus of constitutional litigation could become an attempt to win Kennedy’s favor. Consider, for example, the *Casey*, *Carhart I*, and *Carhart II* trio. In *Casey*, Justice Kennedy joined O’Connor’s plurality opinion which invalidated on constitutional grounds certain state abortion regulations. 505 U.S. 833, 869-79. Justice Kennedy, however, believed that the abortion restriction in *Stenberg v. Carhart*, 530 U.S. 914, 956-57 (2000), was appropriate, so he disagreed with Justice O’Connor and dissented. When the Court in *Gonzales v. Carhart*, 127 S. Ct. 1610, 1618 (2007), addressed an almost identical issue, now that the more conservative Justice Alito had replaced O’Connor, Kennedy found himself again in the majority.

37. See, e.g., MARK R. LEVIN, *MEN IN BLACK: HOW THE SUPREME COURT IS DESTROYING AMERICA passim* (2005); ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS passim* (1962).

38. *Infra* Part IV.

39. The Supreme Court first exercised the power of judicial review to declare a federal statute unconstitutional in the famous case of *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803). It did not use this power again for more than half a century, until the infamous *Dred Scott* decision, *Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857).



more expansive interpretations of the Constitution, in which the text is merely a springboard for the Justices to apply their own sense of fundamental fairness.<sup>40</sup> Beginning in the mid-twentieth century, the Court has found statutes unconstitutional with greater and greater frequency.<sup>41</sup> As the Court has turned more legal and public policy issues, previously the province of the legislature, into matters of federal constitutional law, it is not surprising that our culture has increasingly come to assume that policy-making is the Supreme Court's proper role in our constitutional system.

However, there are also important historical factors to note throughout the last century. The genesis of the policy-making Supreme Court came in the so-called "*Lochner*<sup>42</sup> era" in the first third of the twentieth century, as the Court used "economic substantive due process" to invalidate state and federal legislative efforts to regulate wages and working conditions, and to pull the United States out of the Great Depression of the 1930s. As one federal appellate judge described this period:

The Supreme Court of the 1930s earned the increased scrutiny it received—along with FDR's threat to pack the Court with jurists more sympathetic to his legislation—not solely because its decisions were "unpopular." Unpopular though they were, the Justices' holdings were principally criticized for being little more than the thinly veiled and bluntly expressed policy preferences of a group of "Angry Old Men." They were, in short, grounded in nothing the public or the political branches recognized as the customary reasoned basis for opinions of the nation's highest court: the most noteworthy constitutional basis the Justices provided for their actions was the vague notion of "substantive due process," a concept conspicuously applied in the now-infamous case of *Dred Scott v. Sandford*, which pronounced the constitutional right of one human being to hold another as property.<sup>43</sup>

More recently, the modern era of using constitutional law to make policy seems to have built its energy out of *Brown v. Board of Education*<sup>44</sup>

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40. Bradley P. Jacob, *Back to Basics: Constitutional Meaning and "Tradition,"* 39 TEX. TECH L. REV. 261, 265-66, 265 n.26 (2007).

41. See, e.g., *INS v. Chadha*, 462 U.S. 919, 959 (1983) (providing a dramatic example, in which the Court held unconstitutional all or part of some two hundred federal statutes that had made use of the so-called "legislative veto").

42. See *Lochner v. New York*, 198 U.S. 45 (1905).

43. Diarmuid F. O'Scannlain, *Today's Senate Confirmation Battles and the Role of the Federal Judiciary*, 27 HARV. J.L. & PUB. POL'Y 169, 175-76 (2003).

44. 347 U.S. 483 (1954).

and the civil rights movement. Despite its positive impact on civil rights,<sup>45</sup> one unforeseen and negative consequence of *Brown* is that it seems to have given the Supreme Court the idea that it can jump in and solve difficult, divisive American public policy issues by pushing the nation to an enlightened future, even if public opinion and political institutions were not so sure about the enlightened course.

The civil rights movement was the first major issue in our nation's history in which private advocates deliberately used the Supreme Court's constitutional decision-making—and used it very effectively—as a tool for engineering social change over a number of years and a series of cases. It is not hard to understand why advocates opposing racial segregation and Jim Crow laws turned to the courts for remedies. In the 1930s, 1940s, and 1950s, there were strong forces for racism in the United States Congress and many state legislatures, especially, but not limited to, those in the deep South.<sup>46</sup> It did not appear that legislation was the tool that would end legally enforced racial discrimination.

Thus, advocates for racial equality turned to the Supreme Court. Attorneys working with the National Association for Advancement of Colored People, led by the brilliant Charles Hamilton Houston<sup>47</sup> and the master tactician Thurgood Marshall,<sup>48</sup> devised an incremental strategy of litigating case after case,<sup>49</sup> chipping away at the legal underpinnings of *Plessy v.*

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45. See *Brown*, 347 U.S. at 495-96 (holding that racially segregated public schools violate the equal protection clause of the Fourteenth Amendment, thus beginning the movement toward racial equality under law).

46. Years after *Brown* was decided, many southern state legislatures were still fighting desegregation. See, e.g., *Green v. County School Bd.*, 391 U.S. 430, 432-33 (1968) (footnote and citations omitted):

The respondent School Board continued the segregated operation of the system after the *Brown* decisions, presumably on the authority of several statutes enacted by Virginia in resistance to those decisions. Some of these statutes were held to be unconstitutional on their face or as applied. One statute, the Pupil Placement Act, not repealed until 1966, divested local boards of authority to assign children to particular schools and placed that authority in a State Pupil Placement Board. Under that Act children were each year automatically reassigned to the school previously attended unless upon their application the State Board assigned them to another school; students seeking enrollment for the first time were also assigned at the discretion of the State Board. To September 1964, no Negro pupil had applied for admission to the New Kent school under this statute and no white pupil had applied for admission to the Watkins school.

*Id.*

47. Leland Ware, *A Difference in Emphasis: Charles Houston's Transformation of Legal Education*, 32 HOW. L.J. 479, 479 (1989).

48. See generally JUAN WILLIAMS, THURGOOD MARSHALL: AMERICAN REVOLUTIONARY *passim* (1998).

49. See, e.g., *Sweatt v. Painter*, 339 U.S. 629, 635 (1950).

*Ferguson*<sup>50</sup> and legalized segregation. Their strategy culminated in the 1954 *Brown* decision, which, while it did not immediately end government-enforced racial discrimination in the United States, at least turned the corner and began the slow, difficult process of desegregation.<sup>51</sup>

At the NAACP Marshall assisted Houston in the development and implementation of an “equalization” strategy that involved challenging the southern states’ failure to establish graduate and professional schools for black students. Such a strategy allowed the NAACP to challenge discrimination without directly attacking the separate but equal doctrine of *Plessy v. Ferguson*. The equalization strategy relied on the belief that southern states could not afford to maintain separate facilities for African American students that were actually equal to white schools. After Houston left the NAACP in 1938, Marshall became the director of the legal department. In the years that followed Marshall won cases challenging discrimination in teacher salaries, housing, public transportation, voting, and criminal prosecutions. By the time *Brown* reached the Supreme Court a line of precedents had been established in which the *Plessy* rationale had been completely undermined.<sup>52</sup>

All of this seems great from a position of fifty years’ hindsight. It would be difficult today to find someone who would argue against the outcome of *Brown*. The notion that racial discrimination—certainly racial discrimination by the government—is a bad thing has filtered throughout our entire culture.<sup>53</sup> The Supreme Court, or perhaps more accurately, the NAACP’s legal strategy using the Supreme Court, has been rather spectacularly successful in the area of racial segregation. The American public was not ready to demand racial equality in the early and mid-twentieth century, but the Supreme Court’s decisions led the way to a new, enlightened way of thinking about race relations, and the American public followed the Court’s lead, albeit slowly and with many fits and starts. Constitutional litigation succeeded in changing not merely the law, but the social fabric of the nation.

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50. 163 U.S. 537 (1896).

51. *Brown v. Bd. of Educ.* II, 394 U.S. 294, 301 (1955) (stating that the process of desegregation should begin “with all deliberate speed”).

52. Leland Ware, Book Review, 86 J. AM. HIST. 1392, 1393 (Dec. 1999) (reviewing WILLIAMS, *supra* note 48), available at [http://www.historycooperative.org/journals/jah/86.3/br\\_88.html](http://www.historycooperative.org/journals/jah/86.3/br_88.html); see also WHAT *BROWN V. BOARD OF EDUCATION* SHOULD HAVE SAID: THE NATION’S TOP LEGAL EXPERTS REWRITE AMERICA’S LANDMARK CIVIL RIGHTS DECISION 29-34 (Jack M. Balkin ed., 2001).

53. This does not mean that there are no longer individual racists, and pockets of group racism, in the United States today, as the author of this article (father of African-American children) is keenly aware. However, these attitudes have become counter-cultural and have increasingly gone underground.

Problematically, in the fifty years since *Brown* was decided, virtually everyone—Justices and judges, Presidents, Senators and Representatives, lawyers, and the general public—has bought into the idea that constitutional litigation in the Supreme Court is the proper and primary venue for resolving divisive public policy issues and changing the public’s social conscience.<sup>54</sup> The people’s representatives, accountable to their constituents every two or six years, no longer hold the primary place at the policy-making table, creating the often-discussed “countermajoritarian dilemma.”<sup>55</sup> One can argue that it is both fundamentally undemocratic, and totally against the Founders’ conception of our constitutional system, for major societal issues like the definition of marriage and the future of the family to be decided this way.

In addition, the discourse of public policy debate has been cheapened: instead of a thorough study of the arguments for and against each possible outcome, litigants strive to express their positions as violations of various “rights”—some rights are clear under the Constitution, some more questionable, and others, such as the right to “be happy,” are downright silly.<sup>56</sup> Many have argued that this reliance on “rights talk” makes it very difficult to achieve wise public policy outcomes.<sup>57</sup> But if courts are determining whose “rights” have been violated in hotly contested matters of social policy, it becomes crucial to know the source and meaning of those rights.

### III. THE SOURCES OF INDIVIDUAL RIGHTS

Much has been written, by this author<sup>58</sup> and others,<sup>59</sup> concerning the source and identity of individual rights under the Constitution. Rather than repeating that discussion in detail, a brief summary will suffice.

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54. This is not to say that the legislative process is never used today to resolve important public issues, even issues of fundamental rights. See generally Bradley P. Jacob, *Free Exercise in the “Lobbying Nineties,”* 84 NEB. L. REV. 795, 796 (2006). However, even when legislation is a primary legal tool, there is often a sense that one has to wait for the Supreme Court to rule before really being certain of the outcome. See *id.* at 826 n.131 (Rep. Jerrold Nadler expressing the view that Congress could simply enact legislation, even believing it to be unconstitutional, and allow the Court to straighten it out).

55. BICKEL, *supra* note 37, at 16-23; Hensler, *supra* note 34, at 273-75.

56. Jacob, *supra* note 40, at 275 n.80.

57. MARY ANN GLENDON, *RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE passim* (1993).

58. Jacob, *supra* note 40, at 274-87.

59. See, e.g., Nelson Lund & John O. McGinnis, *Lawrence v. Texas and Judicial Hubris*, 102 MICH. L. REV. 1555, 1557-73 (2004); Helen K. Michael, *The Role of Natural Law in Early American Constitutionalism: Did the Founders Contemplate Judicial Enforcement of “Unwritten” Individual Rights?*, 69 N.C. L. REV. 421, 423-24 (1991); Michael W. McConnell, *A Moral Realist Defense of Constitutional Democracy*, 64 CHI.-KENT. L. REV. 89, 90-91 (1988); Calvin R.

Although the Declaration of Independence built the case for the existence of the United States of America as an independent nation based on individual rights arising from natural law, granted by the Creator<sup>60</sup> and not subject to revocation or revision by the government,<sup>61</sup> the original text of the Constitution contained very little specific protection for individual rights.<sup>62</sup> Many of the Founders believed that it was unnecessary, and perhaps dangerous, to list individual rights in the national constitution, because citizens' primary protection from the federal government was found in the central government's structural constraints and limited powers.<sup>63</sup>

However, the arguments of George Mason and others who felt the absence of significant individual rights protections was a major weakness in the proposed Constitution<sup>64</sup> brought about a political deal that led to the Bill of Rights being proposed and approved by the First Congress, and ratified by the states as the first ten amendments to the Constitution in 1791.<sup>65</sup> The Bill of Rights, as enacted, placed restrictions only upon the national government; it did not restrict the states in any way.<sup>66</sup> The Civil War amendments changed the balance of federalism by creating new national constitutional constraints on the states.<sup>67</sup> The Privileges or Immunities Clause of the Fourteenth Amendment<sup>68</sup> was almost certainly drafted to provide substantive protection of individual rights from state interference, but its value was

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Massey, *Federalism and Fundamental Rights: The Ninth Amendment*, 38 HASTINGS L.J. 305, 331-32 (1987).

60. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) ("We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.")

61. *Id.*

That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed—That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness.

*Id.*

62. *But see* U.S. CONST. art. I, § 9 (rights protected from federal violation) and § 10 (rights protected from state violation).

63. *See* THE FEDERALIST NOS. 84, 85 (Alexander Hamilton).

64. Jacob, *supra* note 40, at 276 n.89.

65. THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES 83-84 (Kermit L. Hall ed., 2d ed. 2005) [hereinafter OXFORD]. Ten of the twelve amendments proposed in the Bill of Rights were ratified in 1791. One of the two that failed immediate ratification became the 27th Amendment more than 200 years later, in 1992. *Id.* at 83.

66. *Barron v. Mayor & City Council of Baltimore*, 32 U.S. (7 Pet.) 243, 247 (1833).

67. U.S. CONST. amend. XIII, XIV, XV.

68. *See* U.S. CONST. amend. XIV, § 1, cl. 2 ("No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.").

largely destroyed within a decade of the Civil War by Supreme Court misinterpretation.<sup>69</sup>

Because the Privileges or Immunities Clause was stripped of most of its meaning, and because the Supreme Court has never demonstrated a willingness to revisit that decision,<sup>70</sup> efforts by the Supreme Court to enforce individual rights against state violation have primarily focused on the due process clause of the Fourteenth Amendment<sup>71</sup> through the oxymoronic doctrine of “substantive due process.” The idea that the substance of a law could so badly interfere with liberty, regardless of the legal process, that it “could hardly be dignified with the name of due process of law” was introduced by the Supreme Court in the infamous *Dred Scott v. Sanford* decision of 1857.<sup>72</sup> This notion served as the backbone of the not-quite-as-infamous-as-*Dred-Scott* era of *Lochner* and economic substantive due process.<sup>73</sup> Although the point was not clear in *Griswold* itself, substantive due process is the heart of the Court’s modern “right of privacy” jurisprudence.<sup>74</sup>

Even given the switch from the logical protection of citizens’ privileges or immunities to the illogic of substantive due process, and the initial debate within the Supreme Court about how many Bill of Rights protections ought to be incorporated through the Fourteenth Amendment to apply against the

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69. *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1873). See generally Jacob, *supra* note 40, at 276-77.

70. *But see* Saenz v. Roe, 526 U.S. 489, 527-28 (1999) (Thomas, J., dissenting).

As THE CHIEF JUSTICE points out, it comes as quite a surprise that the majority relies on the Privileges or Immunities Clause at all in this case. That is because, as I have explained, *The Slaughter-House Cases* sapped the Clause of any meaning. Although the majority appears to breathe new life into the Clause today, it fails to address its historical underpinnings or its place in our constitutional jurisprudence. Because I believe that the demise of the Privileges or Immunities Clause has contributed in no small part to the current disarray of our Fourteenth Amendment jurisprudence, I would be open to reevaluating its meaning in an appropriate case. Before invoking the Clause, however, we should endeavor to understand what the framers of the Fourteenth Amendment thought that it meant. We should also consider whether the Clause should displace, rather than augment, portions of our equal protection and substantive due process jurisprudence. The majority’s failure to consider these important questions raises the specter that the Privileges or Immunities Clause will become yet another convenient tool for inventing new rights, limited solely by the “predilections of those who happen at the time to be Members of this Court.”

*Id.* (citations omitted)

71. U.S. CONST. amend. XIV, § 1, cl. 3 (“[N]or shall any state deprive any person of life, liberty, or property, without due process of law.”).

72. *Dred Scott v. Sanford*, 60 U.S. (19 How.) 393, 450 (1857).

73. See *supra* notes 39-40 and accompanying text.

74. See *infra* Part IV.

states,<sup>75</sup> there is today a pretty broad consensus that at most of the individual liberties identified in the first eight amendments now bind the states through their incorporation into the Fourteenth Amendments.<sup>76</sup> The trickier question is this: Does the Fourteenth Amendment protect any fundamental individual rights that are *not* listed in the text of the first eight amendments, or elsewhere in the Constitution from state interference?

If one accepts the logically unassailable premise that original meaning textualism is the only appropriate method for interpreting the Constitution without destroying its purpose,<sup>77</sup> then the very idea of nontextual rights starts off with two strikes against it.<sup>78</sup> How can one interpret and apply the text of the Constitution by finding rights that are not in that text? To state the question is to observe that it does not make sense. In addition, the concept of courts applying nontextual rights through substantive due process creates an enormous practical problem: What are those rights, and why should a handful of politically-unaccountable federal judges or Justices be able to decide what they are, sometimes over the objections of millions of citizens? This has the potential to turn constitutional law into pure politics, an opportunity for the Justices to choose the political outcomes that they favor and force them on the nation.<sup>79</sup> As the Court itself has noted:

Substantive due process has at times been a treacherous field for this Court. There *are* risks when the judicial branch gives enhanced protection to certain substantive liberties without the guidance of the more specific provisions of the Bill of Rights. As the history of the *Lochner* era demonstrates, there is reason for concern lest the only limits to such judicial intervention become

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75. Compare *Adamson v. California*, 332 U.S. 46 (1947) (“selective incorporation” approach) with *id.* at 68 (Black, J., dissenting) (“total incorporation” of Bill of Rights).

76. OXFORD, *supra* note 65, at 491-92, 534. The only Bill of Rights protections that have not been incorporated by the Supreme Court are the Fifth Amendment right to a criminal indictment and the Seventh Amendment right to trial by jury in civil cases. *Id.*

77. Jacob, *supra* note 40, at 264-74; Vasan Kesavan & Michael Stokes Paulsen, *The Interpretive Force of the Constitution’s Secret Drafting History*, 91 GEO. L.J. 1113, 1134-48 (2003).

78. If one takes the “living Constitution” approach, of course, this is not a problem at all, as witness the myriad of cases, books, and law journal articles written from that assumption. See, e.g., *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 851 (1992) (finding a constitutional right “to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life”); *Michael H. v. Gerald D.*, 491 U.S. 110, 141 (1989) (Brennan, J., dissenting) (“The document that the plurality construes today is unfamiliar to me. It is not the living charter that I have taken to be our Constitution . . .”); *Roe v. Wade*, 410 U.S. 113, 152-54 (1973) (finding that “the abortion decision” is protected as a constitutional right, notwithstanding the absence of that right in the Constitution’s text and history); William J. Brennan, Jr., Speech at Georgetown University (Oct. 12, 1985), in *THE GREAT DEBATE: INTERPRETING OUR WRITTEN CONSTITUTION* 11 (Paul G. Cassell ed., The Federalist Society 1986).

79. One might argue that the Court has often thoroughly exploited this potential.

the predilections of those who happen at the time to be Members of this Court. That history counsels caution and restraint.<sup>80</sup>

On the other side of the equation, at least for the textualist, is the Ninth Amendment, which states, “The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.”<sup>81</sup> It is certainly possible to read the Ninth Amendment as textual confirmation that there are other fundamental rights that must be enforced by the federal judiciary.<sup>82</sup> This is always tempting, because just about everyone, regardless of political perspective, can identify some rights that seem so incredibly important as to require judicial application if they are not appropriately enforced through the political process.<sup>83</sup>

Although this conclusion may be politically tempting, it does not necessarily follow from the text of the Ninth Amendment. One problem is this: If the text of the Ninth Amendment meant that there were other federally-enforceable fundamental rights, what would have been the constitutional means of enforcing those rights at the time the Bill of Rights was ratified? The Ninth Amendment speaks of rights that are not contained in the remainder of the Constitution, including the remainder of the Bill of Rights. Although there is a federal Due Process Clause in the Fifth Amendment,<sup>84</sup> the concept of substantive due process was not dreamed up for many years. To say that the Ninth Amendment identified additional fundamental constitutional rights, which would later be enforced against the states under the Fourteenth Amendment, is to say that these same fundamental constitutional rights were unenforceable against the federal government when the Bill of Rights was ratified. This, surely, would be a very peculiar textualist result.

There are other reasons to believe that the Ninth Amendment does not affirm the existence of nontextual, fundamental, federal, judicially enforceable individual rights. As one commentator has written:

The proper understanding of the Amendment—“The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people”—is that it states a rule

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80. *Moore v. East Cleveland*, 431 U.S. 494, 502 (1977) (citations omitted).

81. U.S. CONST. amend. IX.

82. *See Griswold v. Connecticut*, 381 U.S. 479, 486-99 (1965) (Goldberg, J., concurring).

83. Compare the modern “right of privacy” discussed *infra* Part IV, which is generally viewed as essential by political liberals, with the right of parents to control the education and upbringing of their children, which is favored by many social and political conservatives. *See generally Pierce v. Soc’y of Sisters*, 268 U.S. 510 (1925); *Meyer v. Nebraska*, 262 U.S. 390 (1923).

84. U.S. CONST. amend. V, cl. 4 (“[N]or [shall any person] be deprived of life, liberty, or property, without due process of law.”).



of what we today would call “nonpreemption.” The specification of federal constitutional rights, possessed by individuals or by the people generally against the federal government (and a few possessed against state governments, set forth in Article I, Section 10), was not to work a pro tanto repeal of state law rights possessed against state governments. Such a disclaimer was necessary (if at all) only to counter Federalist arguments (like Hamilton’s) that adopting a Bill of Rights might be construed to have such an effect, thereby enlarging federal power and diminishing individual rights. The text of the Amendment, its political context, and historical evidence of its meaning and purpose all confirm this reading.

Beyond this, one could infer a general political principle that the adoption in positive constitutional law of particular rights should not be understood to supersede the natural law rights of man. There would scarcely be much need to state this, however, as no one at the time would have assumed that human law could justly abridge God-given natural rights. At the same time, no one would have mistaken the language of the Ninth Amendment as conferring, as a matter of positive law, unspecified natural law rights. At most, the Ninth Amendment could be read as stating the truism that nothing in the Constitution legitimately could take away the natural rights of all human beings—including such things as life, liberty, the pursuit of happiness, and the right of the people as a collective to alter or abolish their form of government whenever it becomes destructive of its proper ends of securing those rights. The adoption of a Bill of Rights does not somehow repeal by implication the natural rights principles embraced in the Declaration of Independence.<sup>85</sup>

The idea that there are no nontextual fundamental rights to be enforced under the Fourteenth Amendment, even with the assistance of the Ninth, may not only be the solution to the “personal predilections” problem, but also the correct textual interpretation of the Constitution. However, at this point, this approach is even further from the mainstream of legal thought than original meaning textualism itself, and so may require some time to catch on.

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85. Michael Stokes Paulsen, *Colloquium: How To Interpret the Constitution (and How Not To)*, 115 YALE L.J. 2037, 2047-48 (2006); see also Michael Stokes Paulsen, Paulsen, J., *Dissenting*, in WHAT ROE V. WADE SHOULD HAVE SAID: THE NATION’S TOP LEGAL EXPERTS REWRITE AMERICA’S MOST CONTROVERSIAL DECISION 196, 198-99 (Jack M. Balkin ed., 2005).

If one accepts that substantive due process includes fundamental individual rights not found in the text of the Constitution, is there no hope for an understanding of fundamental rights that has real, fixed meaning rather than mere personal opinions? Have we at that point descended into constitutional law that is defined by the fads of the day, the personal opinions and idiosyncrasies of five Supreme Court Justices? Is there, within that understanding, no way of restoring any principle or lasting content to fundamental rights jurisprudence?

Only one possibility appears in the case law, although it has been observed as often in the breach as in the application. This position is that the language of the Constitution, including the Ninth Amendment, permits judicial protection of rights not specified in the text, but only when those rights are self-evident<sup>86</sup> to all, and only when they have been broadly accepted in Anglo-American law and culture for centuries.<sup>87</sup> The Court, using this analytical approach, has said that in order to be judicially recognized, a fundamental right must be “implicit in the concept of ordered liberty,” and “so rooted in the traditions and conscience of our people as to be ranked as fundamental.”<sup>88</sup>

For example, in its 1997 decision of *Washington v. Glucksberg*,<sup>89</sup> the Supreme Court found that there is no fundamental constitutional right to end one’s life through suicide, or to seek assistance in committing suicide. Regarding substantive due process rights, the Court stated:

We begin, as we do in all due-process cases, by examining our Nation’s history, legal traditions, and practices. In almost every State—indeed, in almost every western democracy—it is a crime to assist a suicide. The States’ assisted-suicide bans are not innovations. Rather, they are longstanding expressions of the States’ commitment to the protection and preservation of all human life . . . .

Our established method of substantive-due-process analysis has two primary features: First, we have regularly observed that the Due Process Clause specially protects those fundamental rights and liberties which are, objectively, “deeply rooted in this Nation’s history and tradition,” and “implicit in the concept of ordered liberty,” such that “neither liberty nor justice would exist if they were sacrificed.” Second, we have required in substantive-due-

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86. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

87. See Jacob, *supra* note 40, at 281-83.

88. *Palko v. Connecticut*, 302 U.S. 319, 325 (1937).

89. 521 U.S. 702 (1997).

process cases a “careful description” of the asserted fundamental liberty interest. Our Nation’s history, legal traditions, and practices thus provide the crucial “guideposts for responsible decision-making,” that direct and restrain our exposition of the Due Process Clause . . . .

The history of the law’s treatment of assisted suicide in this country has been and continues to be one of the rejection of nearly all efforts to permit it. That being the case, our decisions lead us to conclude that the asserted “right” to assistance in committing suicide is not a fundamental liberty interest protected by the Due Process Clause.<sup>90</sup>

Justice Scalia, in his famous footnote 6 of *Michael H. v. Gerald D.*,<sup>91</sup> suggested an additional limiting factor to make sure that alleged fundamental rights are truly rooted in longstanding history: identify the right in question at the most specific level at which it could be identified.<sup>92</sup> Thus, Justice Scalia asked whether there is a traditional fundamental right of a man to have a parental relationship with a child that he fathered through an adulterous relationship with another man’s wife, while the Court’s dissenters characterized the alleged right as “parenthood.”<sup>93</sup>

This is not to say that finding nontextual fundamental rights through substantive due process is the correct interpretation of the Constitution’s text;<sup>94</sup> instead, it suggests that even if nontextual rights are accepted as representing a legitimate methodology, they can still be limited through a focus on liberties that have been self-evident through centuries of history. This approach will prevent constitutional law from degenerating into the mere fads and current policy preferences of the Justices.

#### IV. APPLICATION: *GRISWOLD* AND THE FUTURE OF THE FAMILY

So far, this article has explored the ways in which the culture wars’ battles are fought in our society, and we have seen that the federal courts constitute a dubious forum for such battles.<sup>95</sup> The constitutional text and history as the sources of fundamental individual rights were explored, and it was suggested that the correct constitutional understanding of judicially-enforceable rights is that they are limited to those specifically identified in

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90. *Washington v. Glucksberg*, 521 U.S. 702, 710, 720-21, 728 (1997).

91. 491 U.S. 110 (1989).

92. *Michael H.*, 491 U.S. at 127-28 & n.6.

93. *Id.* at 128 & n.6.

94. *See supra* note 78 and accompanying text.

95. *See supra* Part II.

the text of the Constitution.<sup>96</sup> However, if non-textual rights are considered, they can still be kept from total subjectivity by requiring that they be “implicit in the concept of ordered liberty,” and “so rooted in the traditions and conscience of our people as to be ranked as fundamental.”<sup>97</sup> It is time to bring the discussion back around to *Griswold*, and the defense of traditional marriage (that being, after all, the title of the article).

Nowhere can the Supreme Court’s self-confident plunge into the resolution of social conflicts and the establishment of cultural values better be seen than in the realm of marriage and the family. The Court in recent years has been reasonably consistent in grounding its decisions relating to marriage, family, and the creation and destruction of children in the liberal/progressive culture wars camp, and in the remnants of the 1960s sexual revolution.<sup>98</sup> One can argue that abortion has become the “third rail”<sup>99</sup> of Supreme Court decision-making. Whatever constitutional text may be under examination, whatever other principles of constitutional law may come into play, when they come up against the right to abortion, they invariably lose. As Justice Scalia noted:

What is before us, after all, is a speech regulation directed against the opponents of abortion, and it therefore enjoys the benefit of the “ad hoc nullification machine” that the Court has set in motion to push aside whatever doctrines of constitutional law stand in the way of that highly favored practice. Having deprived abortion opponents of the political right to persuade the electorate that abortion should be restricted by law, the Court today continues and expands its assault upon their individual right to persuade women contemplating abortion that what they are doing is wrong. Because, like the rest of our abortion jurisprudence, today’s decision is in stark contradiction of the constitutional principles we apply in all other contexts, I dissent.

Colorado’s statute makes it a criminal act knowingly to approach within 8 feet of another person on the public way or sidewalk area within 100 feet of the entrance door of a health care facility for the purpose of passing a leaflet to, displaying a sign to, or engaging in oral protest, education, or counseling with such person. Whatever

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96. See *supra* Part III.

97. *Palko v. Connecticut*, 302 U.S. 319, 325 (1937).

98. See, e.g., *Roe v. Wade*, 410 U.S. 113 (1973); *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992); *Romer v. Evans*, 517 U.S. 620 (1996); *Lawrence v. Texas*, 539 U.S. 558 (2003).

99. The reference is to the rail on a subway or electrified transit system through which high-voltage current is transferred, so that touching a third rail is generally fatal.

may be said about the restrictions on the other types of expressive activity, the regulation as it applies to oral communications is obviously and undeniably content-based. A speaker wishing to approach another for the purpose of communicating *any* message except one of protest, education, or counseling may do so without first securing the other's consent. Whether a speaker must obtain permission before approaching within eight feet—and whether he will be sent to prison for failing to do so—depends entirely on *what he intends to say* when he gets there. I have no doubt that this regulation would be deemed content based *in an instant* if the case before us involved antiwar protesters, or union members seeking to “educate” the public about the reasons for their strike. “It is,” we would say, “the content of the speech that determines whether it is within or without the statute’s blunt prohibition.” But the jurisprudence of this Court has a way of changing when abortion is involved.<sup>100</sup>

In *Hill*, the case in which this dissent was written, the need to promote abortion rights triumphed even over such a core constitutional principle as the requirement that government not assess negative consequences against individuals based on their ideas, the content of their speech.<sup>101</sup> And even Justice O'Connor, generally one of the Court's progressive leaders on abortion, expressed the following view:

This Court's abortion decisions have already worked a major distortion in the Court's constitutional jurisprudence. Today's decision goes further, and makes it painfully clear that no legal rule or doctrine is safe from ad hoc nullification by this Court when an occasion for its application arises in a case involving state regulation of abortion. The permissible scope of abortion regulation is not the only constitutional issue on which this Court is divided, but—except when it comes to abortion—the Court has generally refused to let such disagreements, however longstanding or deeply felt, prevent it from evenhandedly applying uncontroversial legal doctrines to cases that come before it.<sup>102</sup>

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100. *Hill v. Colorado*, 530 U.S. 703, 741-42 (2000) (Scalia, J., dissenting) (emphasis in original) (citations omitted); *see also* *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 785 (1994) (Scalia, J., concurring in part and dissenting in part).

101. *Hill*, 530 U.S. at 719-24.

102. *Thornburgh v. Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747, 814 (1986) (O'Connor, J., dissenting) (citations omitted).

If abortion isn't the third rail of constitutional law, then homosexuality certainly is. Once again, in the context of a particular, and particularly divisive, social issue, all of the normal rules and assumptions of constitutional interpretation go out the window. When the Supreme Court decides a case under the Fourteenth Amendment and finds that no suspect classification or fundamental right is at stake, it applies rational basis scrutiny.<sup>103</sup> To survive a constitutional challenge under rational basis scrutiny, the government need only show that its statute or action is "rationally related to a legitimate government interest."<sup>104</sup> This is an exceptionally deferential standard; the government almost never loses under rational basis scrutiny, because government rarely acts in a way that can legitimately be characterized as "irrational." Even if a judge disagrees with a particular law or public policy, the judge is almost never so arrogant as to say, in effect, "anyone who disagrees with me on this point must be insane." The one exception: cases involving homosexuality. In both *Romer v. Evans*<sup>105</sup> and *Lawrence v. Texas*,<sup>106</sup> the Supreme Court made its decision without finding homosexual sodomy to be a fundamental right, or those who practice it to be a suspect class, either finding would have triggered a more rigorous form of scrutiny, but rather by finding the amendment and the statute, respectively, to be *irrational*.<sup>107</sup> In the Court's view, no sane person today could believe that these laws were legitimate public policy—notwithstanding the fact that throughout the centuries of Anglo-American legal history there have been many statutes prohibiting homosexuality and other extra-marital sexual conduct, and only a handful of very recent legislative acts granting legal protection to sexual orientation. The Court has decided how it wants the culture wars to be decided, and popular opinion no longer matters.

What is the common factor in these abortion and homosexuality cases? The Court assumes that sexuality is without moral content. It assumes that sexual conduct between a husband and a wife, married for life and raising a family together, deserves no more respect and honor than sexual conduct involving an unmarried man and woman, or a gay couple, or two teenagers in the back seat of a car, or a group, or people and animals.<sup>108</sup> The Court

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103. See, e.g., *Pennell v. San Jose*, 485 U.S. 1, 8-11 (1988).

104. *Id.* at 14.

105. 517 U.S. 620 (1996) (involving a Colorado constitutional amendment, adopted by a significant majority of statewide voters, prohibiting municipalities from creating special legal protections on the basis of "sexual orientation").

106. 539 U.S. 558 (2003) (declaring unconstitutional a state statute criminalizing homosexual sodomy).

107. *Romer*, 517 U.S. at 635; *Lawrence*, 539 U.S. at 580-85.

108. *Lawrence*, 539 U.S. at 564. Justice Kennedy, writing for the majority in *Lawrence*, drew no distinction within sexual conduct, but described the issue before the Court as the freedom

assumes that the idea that sexual acts should be practiced only by a heterosexual married couple is a quaint anachronism from a bygone era. Therefore, since the availability of abortion makes it easier for people to have sex without the complication of a baby, abortion is a good thing.<sup>109</sup> And since marital relations have no more moral validity than unmarried or homosexual conduct, it would be irrational for any jurisdiction to use its laws to promote its view of The Good Life in the context of sex and family.

The positions that the Court is trying to promote are certainly rational. Many people in our society hold these views, and they are free to try to influence public policy through the elected branches of government.<sup>110</sup> But the idea that sexual conduct outside of heterosexual marriage is a good thing that should be promoted and held without societal stigma is not the only rational response. Even today, vast numbers of Americans disagree.

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of people “as adults to engage in the private conduct in the exercise of their liberty under the Due Process Clause of the Fourteenth Amendment to the Constitution.” *Id.* See also *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972) (“whatever the rights of the individual to access to contraceptives may be, the rights must be the same for the unmarried and the married alike”).

109. See Betty Friedan, *Abortion: A Woman’s Civil Right*, Speech at the First National Conference for Repeal of Abortion Laws (January 1969), in BETTY FRIEDAN, *IT CHANGED MY LIFE* 171, available at <http://guerillawomentn.blogspot.com/2006/02/betty-friedan-abortion-womans-civil.htm>.

The right of woman to control her reproductive process must be established as a basic, inalienable civil right, not to be denied or abridged by the state. What right has any man to say to any woman-you must bear this child? What right has any state to say? This is a woman’s right, not a technical question needing the sanction of the state, or to be debated in terms of technicalities-they are all irrelevant. This question can only be confronted in terms of the basic personhood and dignity of woman, which is violated forever if she does not have the right to control her own reproductive process. This is the only way that abortion is worth talking about; we’re going to demand it and see what happens. . .

*Id.* See also Margaret Montoya, *Un/Braiding Stories About Law, Sexuality and Morality*, 24 CHICANO-LATINO L. REV. 1, 10 (2003).

We must break this silence. We should initiate an ad campaign that identifies those of us who have had abortions, those of us who have survived sexual abuse or sexual assaults, those of us who love other women. This ad campaign should emphasize that our responses to sexuality are moral ones. Good and moral women have abortions.

*Id.* Elizabeth Bartholet, *Beyond Biology: The Politics of Adoption & Reproduction*, 2 DUKE J. GENDER L. & POL’Y 5, 12 (1995) (“[T]he recent edition of the Boston Women’s Health Collective’s *Our Bodies Ourselves*, takes an extremely hostile position on adoption. The advice given to birth mothers is pure and simple: abortion is good, and adoption is bad.”); Stephanie Seguin, *NOW Emergency Campaign Plans for Abortion Speakouts* (2002), available at [http://www.afn.org/iguana/archives/2002\\_01/20020105/htm](http://www.afn.org/iguana/archives/2002_01/20020105/htm).

Speakouts shattered the silence on abortion, showing other women that they were not alone, and indicating how the demand for abortion without restriction was a central part of the fight for women’s freedom in every realm . . . abortion isn’t always a big scary deal or something we did because we were “irresponsible”; it’s as simple as not wanting to have a child.

*Id.*

110. See *supra* note 14 and accompanying text.

And there is certainly nothing in the text of the United States Constitution that appears to dictate answers to questions like these.

The “culture wars” cases<sup>111</sup> do not rest on broad societal agreement; although more Americans accept non-marital sexuality and non-traditional family structures now than in the past, there is no evidence that this has become a culture-wide consensus. Just as importantly, these cases have no constitutional authority to support them. Not one word in the United States Constitution speaks to the issues of sex, marriage, or abortion. And even if one accepts the idea of nontextual due process rights, it is clear that the “rights” to have sex outside of marriage, to redefine marriage, to engage in homosexuality, and to abort children are neither “implicit in the concept of ordered liberty,”<sup>112</sup> nor “so rooted in the traditions and conscience of our people as to be ranked as fundamental.”<sup>113</sup> The Court’s discovery of these “rights” can be seen as no more than an effort to mold legal and societal policy from the bench. “If Americans cannot understand sexual freedom,” the Court’s opinions suggest, “then we will simply impose it on them and they will, sooner or later, come to realize that we were right.”

There are many problems with this approach. First, it is illegitimate. The Constitution gives the Supreme Court no power to act as a national super-legislature on matters of social policy and cultural mores. Second, it is not working. Just as *Roe v. Wade*<sup>114</sup> may be best understood as an attempt by the Court to end abortion’s divisiveness, which backfired by increasing division, there is no evidence that the Court’s attempt to redefine marriage and sexuality will, in the final analysis, persuade the American people. All of these issues relating to marriage, family, sexuality and abortion continue to polarize American culture.

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111. In particular, *Roe v. Wade*, 410 U.S. 113 (1973), *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), and other abortion-related cases which work to disconnect sexual activity from its marriage and family contexts, as well as *Romer v. Evans*, 517 U.S. 620 (1996), and *Lawrence v. Texas*, 539 U.S. 558 (2003).

112. *Palko v. Connecticut*, 302 U.S. 319, 325 (1937). It is not hard to imagine a free society with representative government and the absence of these rights, since the United States was such a society for most of its history.

113. *Id.* The fact that these activities were subject to criminal proscription throughout most of Anglo-American legal history makes it quite certain that they have not been viewed as fundamental rights. See *Casey*, 505 U.S. at 952-53 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part); *Lawrence*, 593 U.S. at 596 (Scalia, J., dissenting).

Whether homosexual sodomy was prohibited by a law targeted at same-sex sexual relations or by a more general law prohibiting both homosexual and heterosexual sodomy, the only relevant point is that it was criminalized—which suffices to establish that homosexual sodomy is not a right ‘deeply rooted in our Nation’s history and tradition.’

*Id.*

114. 410 U.S. 113 (1973).



Finally, this effort destroys the fundamental meaning and purpose of a written Constitution. The Constitution is meant to act as an outer parameter for the actions of popularly elected governments. It is difficult to amend because, as the basic ground rules of our political order, it should not easily sway with the political winds and social fads of the day. If a majority of the Supreme Court can overrule the elected branches of government, without support in constitutional text, simply because they believe that the times have changed, then the Constitution is meaningless and we would be better off without it.<sup>115</sup>

What, then of *Griswold*? Modern substantive due process jurisprudence began in 1965 with *Griswold*, in which a Connecticut statute banning the use of contraceptives was held unconstitutional in its application to married couples.<sup>116</sup> Because *Griswold* began the modern path of substantive due process that led to *Casey* and *Lawrence*, it is easy for moral traditionalists to attack it. And, indeed, there is much about the *Griswold* opinion to ridicule. It accepts without any real analysis the idea that there are judicially enforceable nontextual constitutional rights, and it does so without even the honesty of a substantive due process analysis.<sup>117</sup> Instead, the Court came up with the bizarre notion of “penumbras”<sup>118</sup> of the First, Third, Fourth, Fifth and Ninth Amendments that created constitutional “zones of privacy.”<sup>119</sup> There is no way to defend any of this as an exercise to determine the correct meaning of the written words of the United States Constitution.

But I have come to praise *Griswold*, not to bury it.<sup>120</sup> Even given these weaknesses, if one can get past the use of nontextual fundamental rights, *Griswold* need not have been the disaster for traditional marriage, family and sexuality that its progeny have become and are becoming. *Griswold* defined the right that it created in a way that survives analysis under the

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115. Jacob, *supra* note 40, at 264-74.

116. *Griswold*, 318 U.S. at 485-86.

117. By the time *Roe* came around eight years later, the Court had clearly identified its right of privacy jurisprudence as grounded in substantive due process. See *Roe v. Wade*, 410 U.S. 113, 153 (1973) (“This right of privacy, whether it be founded in the Fourteenth Amendment’s concept of personal liberty and restrictions upon state action, as we feel it is . . . is broad enough to encompass a woman’s decision whether or not to terminate her pregnancy.”).

118. See THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (4th ed. 2006), available at <http://dictionary.reference.com/browse/penumbra> (defining penumbra as “a partial shadow, as in an eclipse, between regions of complete shadow and complete illumination”).

119. *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965) (“The foregoing cases suggest that specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance.”).

120. With apologies to the Bard, WILLIAM SHAKESPEARE, JULIUS CAESAR act 3, sc. 2 (“I come to bury Caesar, not to praise him.”).

tests of “implicit in the concept of ordered liberty,” and “so rooted in the traditions and conscience of our people as to be ranked as fundamental.” The Court’s opinion in *Griswold* was an ode to the traditional family based on the sacred marriage of a man to a woman. For example:

This law, however, operates directly on an intimate relation of husband and wife and their physician’s role in one aspect of that relation.<sup>121</sup>

The present case, then, concerns a relationship [i.e., marriage] lying within the zone of privacy created by several fundamental constitutional guarantees. And it concerns 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. . . . Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives? The very idea is repulsive to the notions of privacy surrounding the marriage relationship. We deal with a right of privacy older than the Bill of Rights—older than our political parties, older than our school system. Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions.<sup>122</sup>

I agree with the Court that Connecticut’s birth-control law unconstitutionally intrudes upon the right of marital privacy . . . . My conclusion [is] that the concept of liberty is not so restricted and that it embraces the right of marital privacy . . . a right so basic and fundamental and so deep-rooted in our society as the right of privacy in marriage . . . . The Connecticut statutes here involved deal with a particularly important and sensitive area of privacy—that of the marital relation and the marital home . . . . Of this whole “private realm of family life,” it is difficult to imagine what is more private or more intimate than a husband and wife’s marital relations. The entire fabric of the Constitution and the purposes that clearly underlie its specific guarantees demonstrate that the rights to marital privacy and to marry and raise a family are of

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121. *Griswold*, 381 U.S. at 482.

122. *Id.* at 485-86.

similar order and magnitude as the fundamental rights specifically protected. Although the Constitution does not speak in so many words of the right of privacy in marriage, I cannot believe that it offers these fundamental rights no protection. The fact that no particular provision of the Constitution explicitly forbids the State from disrupting the traditional relation of the family—a relation as old and as fundamental as our entire civilization—surely does not show that the Government was meant to have the power to do so.<sup>123</sup>

Surely the right invoked in this case, to be free of regulation of the intimacies of the marriage relationship, “come[s] to this Court with a momentum for respect lacking when appeal is made to liberties which derive merely from shifting economic arrangements.”<sup>124</sup>

The legitimacy of government regulation of sexual conduct outside of a traditional husband/wife marriage was also emphasized by the Justices:

The State, at most, argues that there is some rational relation between this statute and what is admittedly a legitimate subject of state concern—the discouraging of extra-marital relations . . . . Finally, it should be said of the Court’s holding today that it in no way interferes with a State’s proper regulation of sexual promiscuity or misconduct. As my Brother HARLAN so well stated in his dissenting opinion in *Poe v. Ullman*, . . . “Adultery, homosexuality and the like are sexual intimacies which the State forbids . . . but the intimacy of husband and wife is necessarily an essential and accepted feature of the institution of marriage, an institution which the State not only must allow, but which always and in every age it has fostered and protected. It is one thing when the State exerts its power either to forbid extra-marital sexuality . . . or to say who may marry, but it is quite another when, having acknowledged a marriage and the intimacies inherent in it, it undertakes to regulate by means of the criminal law the details of that intimacy.”<sup>125</sup>

This right of a husband and a wife to the privacy of their sexual relationship within the marital bedroom is one that meets the tests outlined in *Palko*, *Glucksberg*, and even footnote 6 of *Michael H.* It is narrowly defined. It is “implicit in the concept of ordered liberty,” in that no free,

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123. *Id.* at 486, 491, 495-96 (Goldberg, J., concurring).

124. *Id.* at 502-03 (White, J., concurring in the judgment; citations omitted).

125. *Id.* at 498 (Goldberg, J., concurring).

democratic society has existed in human history that permitted the government to control the sexual activities of husbands and wives within their homes. And it is “so rooted in the traditions and conscience of our people as to be ranked as fundamental,” because, as the Justices pointed out so eloquently in *Griswold*, the sanctity and privacy of marriage has been accepted through centuries of Anglo-American common law history. As the Court mentioned in the 1977 case of *Moore v. City of East Cleveland*,<sup>126</sup> which overturned a woman’s conviction for violating a local housing ordinance’s narrow definition of “family” by living with her son and two grandsons: “Our decisions establish that the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation’s history and tradition.”<sup>127</sup>

Had the Supreme Court entered the culture wars only to the extent of *Griswold*, it would not have splintered our nation’s fabric as it has in subsequent decisions, which disconnected the “right of privacy” from its historical roots in marriage. No doubt battles over marriage, family, sexuality, homosexuality, abortion and similar issues would still be taking place even without cases like *Eisenstadt*, *Casey*, and *Lawrence*. But without the Supreme Court cutting off the possibility of legislative resolutions for these culture wars, the political process would have been able to work as it was designed to do. Political problems would move toward political solutions, and the courts could allow the American people to choose their own social agendas.

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126. 431 U.S. 494 (1977).

127. *Moore*, 431 U.S. at 503.