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## **THE SO-CALLED RIGHT TO PRIVACY**

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BY:

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## The So-Called Right to Privacy

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*The constitutional right to privacy has been a conservative bugaboo ever since Justice Douglas introduced it into the United States Reports in Griswold v. Connecticut. Reference to the “so-called” right to privacy has become code for the view that the right is doctrinally recognized but not in fact constitutionally enshrined. This Article argues that the constitutional right to privacy is no more. The two rights most associated historically with the right to privacy are abortion and intimate sexual conduct, yet Gonzales v. Carhart and Lawrence v. Texas made clear that neither of these rights is presently justified by its proponents on the Court as aspects of constitutional privacy. Other rights that might be protected by a constitutional right to privacy, such as the right to refuse medical treatment or the right to assisted suicide, are either justified on liberty grounds or are not constitutionally protected at all. The Court’s move from privacy to liberty as a constitutional basis for the freedom to make fundamental life decisions strengthens the rights themselves by anchoring them to constitutional text in a text-happy era, and represents a victory for Justice Stevens, who has long advocated such a shift.*

### Introduction

“Privacy” again?<sup>1</sup> I’m afraid so, but I come to bury the benighted doctrine, not to praise it. It lived a tough life. Its best deed—freeing millions of American women from a Hobson’s choice<sup>2</sup>—hardly went unpunished. Its father was branded an incautious fabulist and a womanizer.<sup>3</sup> Its size and scope were ever changing, its very existence under attack even from its sympathizers.<sup>4</sup> As for its enemies, they long ago took to name-calling. In a 1981 memo to Attorney General William French Smith, a young Justice Department lawyer named John

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<sup>1</sup> Cf. Charles L. Black, Jr., *Foreword: State Action, Equal Protection, and California’s Proposition 14*, 81 HARV. L. REV. 69, 69 (1967) (“‘State action’ again?”).

<sup>2</sup> See *Roe v. Wade*, 410 U.S. 113 (1973).

<sup>3</sup> See BRUCE ALLEN MURPHY, *WILD BILL: THE LEGEND AND LIFE OF WILLIAM O. DOUGLAS* (2003).

<sup>4</sup> See generally WHAT *ROE V. WADE* SHOULD HAVE SAID (Jack M. Balkin ed., 2005) (collecting alternative, ostensibly better, *Roe* opinions from legal scholars).

Roberts wrote of the “so-called ‘right to privacy’”;<sup>5</sup> the same epithet appears in the 1988 Justice Department Guidelines on Constitutional Litigation<sup>6</sup> and in Justice Scalia’s dissenting opinion in *Lawrence v. Texas*.<sup>7</sup>

This Article argues that they protest too much. The doctrinal life of the constitutional right to privacy is over. By that I do not mean that there is no constitutional protection against unreasonable search or seizure or against compelled disclosure of private information. These constitutional rights live on under the rubric of the Fourth and First Amendments and are not the intended targets of the long-running assault on the right to privacy. Nor do I mean that the privileges that the right to privacy has served to protect—paradigmatically the rights to reproductive choice, including abortion, and to intimate sexual relationships—no longer enjoy constitutional status. Plainly, they do. What I mean, rather, is that those privileges no longer owe that status to any putative right to privacy. The right to obtain an abortion is now conceptualized by its defenders either in terms of women’s equality or, non-exclusively, as a specific application of a constitutional liberty right to make fundamental life decisions. The rights to use contraception and to participate in a consensual non-commercial sexual relationship are also defended as aspects of the right to liberty protected against state abridgement by the due process clause. The projects and activities the right to privacy was crafted to protect owe it a debt of gratitude, but the right to privacy as such has no clothes.

This should be cause for celebration among progressives and libertarians. Privacy was never an apt moniker for the rights they have characteristically sought to protect. It is not impossible to construct a theoretical account that grounds a right to use contraception, to have an abortion, or to participate in intimate sexual relationships in a right to “privacy,” but doing so invites the troublesome corollary that the justice underlying these rights has anything at all to do with publicity, information-sharing, or discretion more generally. As importantly, the rights to equality and liberty can boast the textual hook that the right to privacy has always coveted. Beyond the intrinsic satisfaction of grounding constitutional rights in the text of the Constitution, this development has an obvious political benefit. To the extent the conservative textualist movement that Justice Scalia has pushed has won tactical turf battles over constitutional methodology, locating a textual basis for rights previously described under the privacy rubric beats back the infantry attack, even if it doesn’t quite win the war.<sup>8</sup>

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<sup>5</sup> Memorandum from John Roberts to Att’y Gen. William French, Erwin Griswold Correspondence (Dec. 11, 1981).

<sup>6</sup> Off. of Legal Pol’y, Dept. of Just., Guidelines on Constitutional Litigation 8 (1988).

<sup>7</sup> 539 U.S. 558, 594 (2003).

<sup>8</sup> The daunting but not insuperable enigma of “substantive” due process remains.

Eroding privacy doctrine without eroding privacy rights also marks a significant victory for the jurisprudence of Justice Stevens. He has long expressed discomfort with the constitutional right to privacy, dating back to his tenure as a Seventh Circuit judge, when he complained that classifying the right to make fundamental life decisions as a “so-called right of marital privacy” was “unfortunate.”<sup>9</sup> He reiterated that sentiment, more diplomatically, in his dissenting opinion in *Bowers v. Hardwick*.<sup>10</sup> When the Court finally overruled *Bowers* in *Lawrence*, Justice Kennedy appeared to adopt Justice Stevens’s view, not once referring to the right to engage in consensual same-sex sodomy as an aspect of a constitutional right to privacy.<sup>11</sup>

This Article describes the life and declares the death of the constitutional right to privacy, with particular reference to the significant role Justice Stevens played in its demise. Part I briefly chronicles the history of the right, from Samuel Warren and Louis Brandeis’s celebrated recognition of the privacy tort in 1890,<sup>12</sup> to Justice Douglas’s opinion in *Griswold v. Connecticut*,<sup>13</sup> through its judicial invocations in *Griswold*’s progeny and *Bowers*, and at last to its conspicuous absence in cases like *Lawrence* and *Gonzales v. Carhart*.<sup>14</sup> This Part argues that the gradual transformation of the right to make fundamental personal decisions from an aspect of privacy emerging from the penumbrae of the Bill of Rights into an aspect of constitutional liberty and equality protected by the due process clause is now complete.

Part II locates the theoretical basis for that transformation within the jurisprudence of Justice Stevens. From his foundational Seventh Circuit opinion in *Fitzgerald v. Porter Memorial Hospital*,<sup>15</sup> to his dissenting opinion in *Bowers*, to his extrajudicial writings on the subject, Justice Stevens has long advocated an emphasis on what he terms the “liberty clause” of the Constitution in deciding fundamental decision cases. This approach vindicates the concurring *Griswold* opinions of Justices Harlan and White, though by affirming the rights to abortion and to same-sex intimacy, the Court has decisively rejected their constitutional conclusions and instead embraced the conclusions of Justice Stevens.

Part III explains why this doctrinal development is not only, as Justice Stevens might say, eminently reasonable,<sup>16</sup> but also makes good political sense.

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<sup>9</sup> *Fitzgerald v. Porter Memorial Hospital*, 523 F.2d 716, 719, 721 (7th Cir. 1975), *cert. denied*, 425 U.S. 916 (1976).

<sup>10</sup> 478 U.S. 186, 214 (1986) (Stevens, J., dissenting).

<sup>11</sup> *See Lawrence*, 539 U.S. at 577-78.

<sup>12</sup> Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

<sup>13</sup> 381 U.S. 479 (1965).

<sup>14</sup> 550 U.S. 124 (2007).

<sup>15</sup> 523 F.2d 716.

<sup>16</sup> A favorite expression of his. *See, e.g., Davis v. FEC*, 128 S. Ct. 2759, 2779 (2008) (Stevens, J., dissenting); *Town of Castle Rock v. Gonzales*, 545 U.S. 748, 776 (2005) (Stevens, J., dissenting);

The right to privacy has become more symbol than substance. Its frequent invocation in confirmation hearings is entirely out of proportion to its significance in constitutional doctrine; it does no more than to signal, obliquely, comfort with or hostility to the continuing validity of *Roe v. Wade*.<sup>17</sup> Partly in response to the politics of abortion, political conservatives have, with moderate success, built a movement around attacking the methodological grounding of abortion rights (among others) in a non-originalist and non-textualist approach to interpretation.<sup>18</sup> Abandoning the right to privacy liberates progressives simultaneously to support politically popular and, some would say, morally requisite constitutional claims such as the rights to contraception and to abortion, while at the same time distancing themselves from the formless, atextual, and much-maligned right to privacy.

Finally, Part IV discusses the implications of the doctrinal migration from privacy to liberty for other, as-yet unrecognized constitutional rights, particularly the rights to of same-sex couples to marry and to adopt children and the right of individuals to purchase and use sex toys. I contend that the change I have identified argues in favor of constitutional protection for the first two rights and against protection for the last. That bit of clarity should be welcome, regardless of one's views on the rights themselves.

## **I. The Beginning and End of Privacy Doctrine**

I begin with an obituary. This Part traces the right to privacy from its early years as a key figure in the Warren Court's cautious embrace of unenumerated constitutional rights; to its role in creating a right to an abortion; to its gradual abandonment by its opponents and, eventually, its supporters. The right to privacy is now dead, I argue, even as its contributions to constitutional law endure.

### **A. A Right is Born: *Griswold v. Connecticut***

The right to privacy is polysemous, and it is important to distinguish its many meanings before proceeding. The same label may refer to the right to prevent dissemination of one's name, creative works, or photographic image; to be free from eavesdropping or physical search by government agents; to associate with others without unjustified intrusion or exposure by the state; or to exercise

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Miller v. Albright, 532 U.S. 420, 441 (1998); Melendez v. United States, 518 U.S. 120, 132 (1996) (Stevens, J., concurring in the judgment).

<sup>17</sup> 410 U.S. 113 (1973).

<sup>18</sup> See Jamal Greene, *Selling Originalism*, 97 GEORGETOWN L.J. 657, 672–690 (2009).

reproductive or sexual freedom.<sup>19</sup> The potential for confusion arises from the fact that these disparate rights share a common and relatively pedestrian ancestry. As Justice Black wrote in dissent in *Griswold*, recognizing a constitutional right of privacy “appears to be exalting a phrase which Warren and Brandeis used in discussing grounds for tort relief.”<sup>20</sup>

When Warren and Brandeis wrote of a right to privacy in their 1890 *Harvard Law Review* article, they had in mind civil suits against gossip-mongers and paparazzi, not constitutional defenses against abortion prosecutions.<sup>21</sup> Tort privacy is recognized in nearly every one of the fifty states,<sup>22</sup> and it is not this Article’s ambition, nor could it be, to challenge it. Nor do I here call into question the Fourth Amendment’s continuing protection of one’s “reasonable expectation of privacy,” however shrinking that expectation might be.<sup>23</sup> And the freedom to associate protected by the First and Fourteenth Amendments still presupposes the right to do so in private.<sup>24</sup> Each of these rights to privacy has been tugged at and remolded in the ordinary course of common-law adjudication, but none has wilted away.

The right to privacy this Article intends is the one Justice Douglas announced in his majority opinion in *Griswold*. The *Griswold* Court could have taken any number of doctrinal avenues to strike down Connecticut’s ban on contraceptives. It could have declared, in harmony with the opinions of Justice Harlan and Justice White, that the right of a married couple to use contraceptives is “implicit in the concept of ordered liberty,” that the state’s criminal prohibition of that use is not sufficiently justified in light of the significance of that right, and that the Connecticut law therefore violated the due process clause of the Fourteenth Amendment.<sup>25</sup> The Court might have bolstered that view, as Justice Goldberg urged, by reference to the Ninth Amendment, which provides that “the

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<sup>19</sup> See Jamal Greene, *Beyond Lawrence: Metaprivacy and Punishment*, 115 YALE L.J. 1862, 1884 (2006).

<sup>20</sup> *Griswold*, 381 U.S. at 510 n.1.

<sup>21</sup> See William L. Prosser, *Privacy*, 48 CAL. L. REV. 383, 383–84 (1960).

<sup>22</sup> Restatement (Second) of Torts § 652A. Invasion of privacy encompasses the distinct torts of “unreasonable intrusion upon the seclusion of another, [or] appropriation of the other’s name or likeness [or] unreasonable publicity given to the other’s private life [or] publicity that unreasonably places the other in a false light before the public.” *Id.*

<sup>23</sup> See Jed Rubenfeld, *The End of Privacy*, 61 STAN. L. REV. 101, 118 (2008). The phrase of course comes from Justice Harlan’s concurring opinion in *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring).

<sup>24</sup> See NAACP v. Alabama, 357 U.S. 449, 460–66 (1958); cf. McIntyre v. Ohio Elec. Comm’n, 514 U.S. 334 (1995) (protecting the right to distribute campaign literature anonymously).

<sup>25</sup> *Griswold*, 381 U.S. at 500 (Harlan, J., concurring in the judgment) (quoting *Palko v. Connecticut*, 302 U.S. 319, 325 (1937)); *id.* at 502 (White, J., concurring in the judgment); see also *Poe v. Ullman*, 367 U.S. 497, 522 (1961) (Harlan, J., dissenting).

enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.”<sup>26</sup>

Justice Douglas chose none of the above. He instead married the view, typically associated with Justice Black, that the Fourteenth Amendment should be understood to apply the Bill of Rights to the states,<sup>27</sup> to his own firmly held view that “the Bill of Rights is not enough” and should therefore be interpreted broadly. Douglas’s Madison Lecture of that title, an apparent response to Justice Black’s Madison Lecture of three years earlier, lamented the “default of the judiciary, as respects the Bill of Rights” and the erosion of civil rights by “[j]udge-made rules.”<sup>28</sup> Privacy *is* protected by the Bill of Rights, Justice Douglas seemed to say in *Griswold*, but not in so many words. The right to privacy is to the First, Third, Fourth, Fifth, and Ninth Amendments what the right to association is to the First, an unspoken implication lying within the Amendment’s interstices and penumbras.<sup>29</sup>

Douglas’s initial draft in *Griswold* did not ground the right of a married couple to use contraceptives in a right to privacy, and the briefs had not urged a privacy-based holding. Rather, that first draft had treated the intimacies of the marital relationship as protected by the First Amendment right of association.<sup>30</sup> It is ironic in retrospect that this narrower rationale likely would not have commanded a majority,<sup>31</sup> for “penumbras and emanations” has become an in-joke around the law schools as shorthand for activist constitutional adjudication, an invitation for the Court “to protect those activities that enough Justices to form a majority think ought to be protected and not activities with which they have little sympathy.”<sup>32</sup>

But the initial criticism of Justice Douglas’s opinion—and there was plenty—went less to its promiscuity than to its inscrutability.<sup>33</sup> Privacy has a common-sense connection to the marital bedroom, but as a doctrinal term of art it had never been used in quite this way. The Fourth Amendment and the Fifth Amendment had been understood to protect “privacy” from government

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<sup>26</sup> U.S. Const. amend. IX, quoted in *Griswold*, 381 U.S. at 492 (Goldberg, J., concurring).

<sup>27</sup> See *Adamson v. California*, 332 U.S. 46, 68 (1947) (Black, J., dissenting).

<sup>28</sup> William O. Douglas, *The Bill of Rights Is Not Enough*, 38 N.Y.U. L. REV. 207, 216, 220 (1963).

<sup>29</sup> *Griswold*, 381 U.S. at 484.

<sup>30</sup> See DAVID J. GARROW, *LIBERTY AND SEXUALITY: THE RIGHT TO PRIVACY AND THE MAKING OF ROE V. WADE* 245-46 (1994). The discussion of privacy rights in the final draft was included at the urging of Justice Brennan. *Id.* at 246.

<sup>31</sup> See *id.* at 246-52.

<sup>32</sup> ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 99 (1991).

<sup>33</sup> It was Justice Harlan’s concurring opinion, after all, that took the most open-textured approach to the due process clause. See *Griswold*, 381 U.S. at 500 (finding “unacceptable” the majority’s implication that “the ‘incorporation’ doctrine may be used to *restrict* the reach of *Fourteenth Amendment* Due Process”).

interference for certain purposes, namely on suspicion of untoward activity or to secure evidence to be used in a criminal prosecution.<sup>34</sup> Those protections were of no use to individuals seeking to avoid the reach of the criminal law altogether, much less those, like Estelle Griswold and Lee Buxton, who had publicly advertised their crimes and made no claim of any unwanted physical invasion.<sup>35</sup> Easy enough to understand such a right as sounding in liberty, but grounding it in privacy could well be read as restrictive rather than generative.

B. Privacy's Adolescence: *Eisenstadt v. Baird* and *Roe v. Wade*

As the constitutional right to privacy grew, it became more enigmatic. In *Eisenstadt v. Baird*, the Court relied on *Griswold* to invalidate a Massachusetts ban on the distribution of contraceptives to unmarried people.<sup>36</sup> Baird had been arrested for giving vaginal foam to an apparently unmarried woman at the close of a lecture before at least 1500 people at Boston University.<sup>37</sup> Over only one dissent, Justice Brennan wrote that “[i]f the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.”<sup>38</sup> A differently inclined Justice might have written, “If the right of *privacy* means anything, it does not license a birth-control activist to dole out medical devices to an overflow crowd of college students.” But by the time of *Eisenstadt*, “privacy” had become a constitutional metonym, a word that resonates with the vocabulary of common experience but carries a more complicated meaning in the pages of the U.S. Reports.

To be fair, the Court was hardly engaged in doublespeak. The privacy right at issue was in substance the woman's, not Baird's, and when we speak of “private” decisionmaking, we may mean not only that it is physically cached but that it is closed to external influence or input. In a liberal society, an individual decision either to risk or to invite pregnancy is simply not the community's to make, and there is nothing malapropos in conceiving of that decision as grounded in a right to privacy. A difficulty arises, however, when the right has to bear the weight of justification for an exemption from abortion restrictions, as it did the following year in *Roe v. Wade*.

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<sup>34</sup> See, e.g., *Frank v. Maryland*, 359 U.S. 360, 365 (1959) (“Certainly it is not necessary to accept any particular theory of the interrelationship of the Fourth and Fifth Amendments to realize what history makes plain, that it was on the issue of the right to be secure from searches for evidence to be used in criminal prosecutions or for forfeitures that the great battle for fundamental liberty was fought.”).

<sup>35</sup> See GARROW, *supra* note 30, at 201–207.

<sup>36</sup> 405 U.S. 438 (1972).

<sup>37</sup> See GARROW, *supra* note 30, at 320.

<sup>38</sup> *Eisenstadt*, 405 U.S. at 453.

Apart from its much-maligned trimester framework, *Roe* is not a doctrinal aberration. As Justice Brennan certainly knew, his words in *Eisenstadt* could as easily have been describing the right to obtain an abortion.<sup>39</sup> The *Roe* Court's conclusion—that “the right of personal privacy includes the abortion decision, but that this right is not unqualified and must be considered against important state interests in regulation”—was virtually unassailable as doctrine went.<sup>40</sup> The problem was that this doctrine was inadequate to its broader task. The state's interest in preserving potential human life is spectacularly weighty, and only an equally weighty interest could counteract it in a minimally satisfying way. Framed in privacy terms, the abortion right seems not to *outweigh* the state's interest but to reject it altogether: Asserting a constitutional right to privacy is precisely a declaration that the state may not legitimately be interested. To be private is, after all, not to be public. Extending privacy doctrine to abortion thereby abides conceiving of the decision whether to terminate a pregnancy as a zero-sum duel between state and woman, rather than as a respectful weighing of competing but equally legitimate interests.

### C. : Privacy Come Liberty: From *Carey* to *Casey*

The Court recognized its mistake, at least implicitly, earlier than is often thought. With the exception of *Carey v. Population Services International*, which applied *Griswold* to the distribution of contraceptives to minors,<sup>41</sup> the right to privacy has not been used to extend constitutional protection to previously unprotected acts since *Roe*. Feel free to reread the previous sentence, because this fact is easy to lose sight of amid the sequins and pyrotechnics of judicial confirmation hearings and talk radio. To the extent the Court has expanded the scope of substantive due process in the decades since *Roe*, it has generally done so under the auspices of “liberty,” in harmony with the *Griswold* opinions of Justices Harlan and White and, as we will see in Part II, with the longstanding views of Justice Stevens.

Thus, in *Cleveland Board of Education v. LaFleur*, the Court invalidated a school board's policy of requiring unpaid maternity leave for pregnant employees lasting from five months before their expected delivery date until three months after the child's birth.<sup>42</sup> Justice Stewart, who had joined the *Roe* majority but had made clear his distaste for a constitutional right to privacy,<sup>43</sup> referred in *LaFleur*

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<sup>39</sup> Justice Brennan in fact circulated his *Eisenstadt* draft, including that momentous sentence, on the day *Roe v. Wade* was argued for the first time. See GARROW, *supra* note 30, at 541-42.

<sup>40</sup> *Roe v. Wade*, 410 U.S. 113, 154 (1973).

<sup>41</sup> 431 U.S. 678, 691-99(1977).

<sup>42</sup> 414 U.S. 632 (1974).

<sup>43</sup> See *Roe*, 410 U.S. at 167 (Stewart, J., concurring).

to “a right to be free from unwarranted governmental intrusion” into the “decision whether to bear or beget a child,” but he conspicuously avoided any reference to the word “privacy.”<sup>44</sup>

Likewise, in *Moore v. City of East Cleveland*, the Court struck down the city’s cramped definition of “family” for the purpose of public housing eligibility.<sup>45</sup> Justice Powell’s plurality opinion referenced a longstanding “freedom of personal choice in matters of marriage and family life” and “a private realm of family life which the state cannot enter” but did not rely on any right to privacy as such.<sup>46</sup> If there was any doubt that the plurality was self-consciously distancing itself from the right to privacy, Justice Powell put those doubts to rest by quoting extensively from Justice Harlan’s dissent in *Poe v. Ullman* and concurrence in *Griswold*, both of which spoke in terms of liberty rather than privacy.<sup>47</sup>

Later, in *Cruzan v. Director, Missouri Department of Health*, Chief Justice Rehnquist wrote that “the Due Process Clause protects an interest in life as well as an interest in refusing life-sustaining medical treatment,”<sup>48</sup> but elsewhere in the opinion he was careful to note that “[a]lthough many state courts have held that a right to refuse treatment is encompassed by a generalized constitutional right of privacy, we have never so held [and] believe this issue is more properly analyzed in terms of a Fourteenth Amendment liberty interest.”<sup>49</sup> And again, in *Troxel v. Granville*, in affirming the right of a mother to refuse visitation to her children’s paternal grandparents, Justice O’Connor grounded the Court’s decision in liberty interests and made no reference to a constitutional right to privacy.<sup>50</sup>

Whatever might be said of cases like *Cruzan* and *Troxel*, the right to privacy had no better bellwether than *Bowers v. Hardwick*. For if there is no *privacy* right to a consensual, noncommercial sexual relationship in a private home with the partner of one’s choice, then there is no right deserving of the

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<sup>44</sup> *LaFleur*, 414 U.S. at 640.

<sup>45</sup> 431 U.S. 494 (1977).

<sup>46</sup> *Id.* at 499. Powell’s reference to a “private realm of family life” derives not from *Griswold* and its progeny but from *Prince v. Massachusetts*, 321 U.S. 158 (1944), which upheld application of the child labor laws of Massachusetts to the niece of a Jehovah’s Witness.

<sup>47</sup> *Moore*, 431 U.S. at 501 (quoting *Poe v. Ullman*, 367 U.S. 497, 542-43 (1961) (Harlan, J., dissenting)); *id.* at 503 (quoting *Griswold*, 381 U.S. at 501 (Harlan, J., concurring in the judgment)); *see also id.* at 503 n.12 (quoting *Poe*, 367 U.S. at 551-52 (Harlan, J., dissenting)). Justice Harlan’s *Poe* dissent recognized a right to privacy in the home embraced within the “liberty” protected by the due process clause. *Poe*, 367 U.S. at 551. But Harlan made clear that the privacy inherent in the institution of marriage proves a special case for protection that does not extend, for example, to “adultery, homosexuality, fornication and incest, . . . however privately practiced.” *See id.* at 552-53.

<sup>48</sup> 497 U.S. 261, 281 (1990).

<sup>49</sup> *Id.* at 279 n.7.

<sup>50</sup> 530 U.S. 57, 65-67 (2000).

name. Michael Hardwick was arrested after a police officer happened upon him engaged in oral sex with another man in his own bedroom.<sup>51</sup> In his majority opinion rejecting Hardwick's claim to constitutional protection, Justice White said, "We first register our disagreement with the Court of Appeals and with respondent that the Court's prior cases have construed the Constitution to confer a right of privacy that extends to homosexual sodomy and for all intents and purposes have decided this case."<sup>52</sup> Although the Court of Appeals had indeed relied on the right to privacy in invalidating the statute,<sup>53</sup> Laurence Tribe's Supreme Court oral argument on Hardwick's behalf had made no reference to any general right to privacy.<sup>54</sup> Indeed, at oral argument only Michael Hobbs, counsel for the state of Georgia, had framed the requested right in constitutional privacy terms, and he had done so at three different points in his argument.<sup>55</sup> Likewise, the state's merits brief had mentioned "the right of privacy" at every available opportunity, even using the phrase as the title of a section of the brief, whereas the respondent's brief had focused much more on the inadequacy of Georgia's purported state interest.<sup>56</sup> Any right invoked more enthusiastically by its enemies than its friends is not long for this Earth.

To be sure, Justice Blackmun's dissenting opinion opted to "analyze respondent Hardwick's claim in the light of the values that underlie the constitutional right to privacy."<sup>57</sup> But Justice Blackmun was a jealous guardian of his opinion in *Roe*, as made plain by his brooding partial dissent in *Planned Parenthood of Southeastern Pennsylvania v. Casey*,<sup>58</sup> and he is perhaps to be forgiven for missing the writing on the wall.

It was more plain to Justice Stevens, whose *Bowers* dissent was joined by each of the other three dissenters, but not Blackmun.<sup>59</sup> The opinion described

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<sup>51</sup> See JOYCE MURDOCH & DEB PRICE, *COURTING JUSTICE: GAY MEN AND LESBIANS V. THE SUPREME COURT* 277-78 (2001).

<sup>52</sup> 478 U.S. 186, 190 (1986).

<sup>53</sup> *Hardwick v. Bowers*, 760 F.2d 1202 (11th Cir. 1985).

<sup>54</sup> Transcript of Oral Argument, *Bowers*, No. 85-140, at 15-40 (1986).

<sup>55</sup> *Id.* at 5 ("Thus far this Court has concluded that the right of privacy includes marriage and family, procreation, abortion, child rearing and child education."), 6 ("The Court has previously described fundamental rights, whether they be under the general heading of a right of privacy or other fundamental rights, as those which are so rooted in the conscience of our people as to be truly fundamental."), 13 ("As this Court indicated in *Roe v. Wade*, the right of privacy is not [absolute].").

<sup>56</sup> Brief of Petitioner at 1, 3, 5, 6, 13, 14, 15, 18, 19, 20, 23, 24, 26, 28, 29, 30, 34, *Bowers*, No. 85-140 (1986); see Brief of Respondent at 4, *Bowers*, No. 85-140 (1986).

<sup>57</sup> *Bowers*, 478 U.S. at 199.

<sup>58</sup> 505 U.S. 833, 923 (1992) (Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting in part) ("And I fear for the darkness as four Justices anxiously await the single vote necessary to extinguish the light.").

<sup>59</sup> *Bowers*, 478 U.S. at 214 (Stevens, J., dissenting).

“individual decisions by married persons, concerning the intimacies of their physical relationship” as “a form of ‘liberty’ protected by the Due Process Clause.”<sup>60</sup> Justice Stevens further stated, “In consideration of claims of this kind, the Court has emphasized the individual interest in privacy, but its decisions have actually been animated by an even more fundamental concern.”<sup>61</sup> Then, quoting from his opinion as a Seventh Circuit judge in *Fitzgerald v. Porter Memorial Hospital*, Justice Stevens evidenced his discomfort with the privacy frame: “These cases do not deal with the individual’s interest in protection from unwarranted public attention, comment, or exploitation” but rather “the individual’s right to make certain unusually important decisions that will affect his own, or his family’s, destiny.”<sup>62</sup>

The right to set one’s own fundamentally significant projects and plans—in short, to control one’s destiny—has succeeded “privacy” as the limiting frame for the Court’s substantive due process decisions. Thus, in creatively restating the holding in *Roe*, the authors of the *Casey* joint opinion not only ditched the trimester framework but stated early in the opinion that “[t]he controlling word in the cases before us is ‘liberty.’”<sup>63</sup> The decision whether to terminate a pregnancy prior to viability must, we are told, remain the woman’s not because it is none of the state’s business, but because it is so very much the woman’s: “The destiny of the woman must be shaped to a large extent on her own conception of her spiritual imperatives and her place in society.”<sup>64</sup> The right to privacy is mentioned just twice in the joint opinion, both deep within: first, when the plurality discusses the informed consent provision of the Pennsylvania statute, which has inherently to do with information exchange rather than decisionmaking; and second, in invalidating the spousal notification requirement, where citation to *Eisenstadt*’s admonition that the “privacy” right attaches to the individual rather than to the marital couple is irresistible.<sup>65</sup> The case is otherwise silent on the right to privacy.

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<sup>60</sup> *Id.* at 216.

<sup>61</sup> *Id.* at 217.

<sup>62</sup> *Id.*

<sup>63</sup> *Casey*, 505 U.S. at 846.

<sup>64</sup> *Id.* at 852.

<sup>65</sup> *Id.* at 883, 896. Unsurprisingly, we see far more overt references of the right to privacy in the *Casey* dissents. See generally Nan D. Hunter, *Living with Lawrence*, 88 MINN. L. REV. 1103, 1109 (2004) (“Justice Blackmun’s opinion is almost poignant in its repeated use of ‘privacy,’ as if he could resuscitate the Griswold-Roe formulation by simply declaring that the majority was using it.”) Justice Blackmun wrote that the joint opinion “reaffirms the long recognized right[of] privacy,” *Casey*, 505 U.S. at 926 (Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting in part), he described the ways in which “[s]tate restrictions on abortion violate a woman’s right of privacy,” *id.* at 927, and he argued that state abortion restrictions “deprive[] a woman of the right to make her own decision about . . . critical life choices that this Court has long deemed central to the right to privacy,” *id.*; see also *id.* at 929 (“The Court has held that limitations on the right of privacy are permissible only if they survive ‘strict’ constitutional

D. The End of Privacy: *Lawrence* and *Carhart*

Given the fault lines on the Rehnquist Court, it was clear that virtually any majority opinion in a contested substantive due process case would require the agreement of at least two of the three authors of the *Casey* joint opinion—Justices O’Connor, Kennedy, and Souter. So when the Court finally reversed *Bowers* with its 2003 decision in *Lawrence v. Texas*, it should not have been surprising that Justice Kennedy, echoing his own words in *Casey*, eschewed the language of privacy rights.<sup>66</sup> The word “privacy” appears just thrice in the majority opinion: in restating the question presented, in restating the holding of *Griswold*, and in a verbatim quote from *Eisenstadt*.<sup>67</sup> By contrast, the word “liberty” appears more than twenty-five times in the majority opinion, including three times in the opening paragraph:<sup>68</sup>

Liberty protects the person from unwarranted government intrusions into a dwelling or other private places. In our tradition the State is not omnipresent in the home. And there are other spheres of our lives and existence, outside the home, where the State should not be a dominant presence. Freedom extends beyond spatial bounds. Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct. The instant case involves liberty of the person both in its spatial and more transcendent dimensions.<sup>69</sup>

From the beginning, one of the knocks on the right of privacy was that the *Griswold* Court “did not even intimate an answer to the question, ‘Privacy to do what?’”<sup>70</sup> “Liberty” may not be inherently better suited to answer that question, but it does at least invite conversation about the substance of the protected conduct rather than its location or circumstances—its “spatial bounds,” so to

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scrutiny.”). Chief Justice Rehnquist, purporting to respond to the joint opinion, nonetheless framed his argument around a proposition that the joint opinion did not contest: that the Court’s substantive due process cases through *Eisenstadt* “do not endorse any all-encompassing ‘right of privacy.’” *Id.* at 951 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part). This disjunction may result from the fact that Rehnquist drafted his *Casey* opinion on the assumption that he was writing for a majority, unaware that the joint opinion was imminent. See LINDA GREENHOUSE, BECOMING JUSTICE BLACKMUN 203 (2005).

<sup>66</sup> *Lawrence v. Texas*, 539 U.S. 558 (2003).

<sup>67</sup> *Id.* at 564, 565.

<sup>68</sup> See Randy E. Barnett, *Justice Kennedy’s Libertarian Revolution: Lawrence v. Texas*, in CATO SUP. CT. REV., 2002-2003, at 21, 34 (James L. Swanson ed., 2003); Hunter, *supra* note 65, at 1106.

<sup>69</sup> *Lawrence*, 539 U.S. at 562.

<sup>70</sup> BORK, *supra* note 32, at 99.

speak. Justice Kennedy is hinting at a freedom of self-definition, which is at least a principle, if a question-begging one. Accordingly, the *Bowers* dissent Justice Kennedy finds most fertile for his purposes is that of Justice Stevens, not Justice Blackmun. Kennedy writes, “Justice Stevens’ analysis, in our view, should have been controlling in *Bowers* and should control here.”<sup>71</sup>

*Lawrence* was, overtly, paradoxically, a mortal blow to the constitutional right to privacy,<sup>72</sup> but the final nail in its coffin was more subtle. In *Gonzales v. Carhart*, the Court rejected a facial challenge to the Partial-Birth Abortion Ban Act of 2003, a federal prohibition on what is professionally known as the intact dilation and evacuation method of terminating a pregnancy, even though the act did not include an exception for the preservation of maternal health.<sup>73</sup> The Court split 5–4, and Justice Ginsburg wrote a dissenting opinion that was joined by Justices Stevens, Souter, and Breyer. The *Carhart* dissent therefore represented the views of the Justices most likely to be sympathetic to a right to privacy. But earlier in her career, as a Court of Appeals judge, Ginsburg had said that the *Roe* Court “presented an incomplete justification for its action.”<sup>74</sup> She would have preferred the majority in *Roe* to have “added a distinct sex discrimination theme to its medically oriented opinion.”<sup>75</sup> Referring more to women’s equality would have recognized that, because of the social expectations that attend pregnancy, childbirth, and child-rearing, “[a]lso in the balance [in abortion cases] is a woman’s autonomous charge of her full life’s course— . . . her ability to stand in relation to man, society, and the state as an independent, self-sustaining, equal citizen.”<sup>76</sup>

Justice Ginsburg’s *Carhart* dissent, her first significant abortion opinion in fourteen years on the Court, picked up where she had left off more than two decades earlier. “As *Casey* comprehended,” she wrote in *Carhart*, “at stake in cases challenging abortion restrictions is a woman’s ‘control over her [own] destiny.’ . . . Thus, legal challenges to undue restrictions on abortion procedures do not seek to vindicate some generalized notion of privacy; rather, they center on a woman’s autonomy to determine her life’s course, and thus to enjoy equal citizenship stature.”<sup>77</sup> The commingling of equality and liberty interests also

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<sup>71</sup> *Lawrence*, 539 U.S. at 577.

<sup>72</sup> *Cf. Hunter*, *supra* note 65, at 1106 (“It would certainly be ironic if *Lawrence* marked the end of a right of privacy in formal constitutional taxonomy.”).

<sup>73</sup> 550 U.S. 124 (2007).

<sup>74</sup> Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade*, 63 N.C. L. REV. 375, 376 (1985).

<sup>75</sup> *Id.* at 383.

<sup>76</sup> *Id.*

<sup>77</sup> *Carhart*, 550 U.S. at 171-72. A doctrinal shift away from constitutional privacy is also welcomed by those who see in a right to privacy the implication that domestic violence is not or

appeared in *Lawrence*, in which Justice Kennedy said that “[e]quality of treatment and the due process right to demand respect for conduct protected by the substantive guarantee of liberty are linked in important respects, and a decision on the latter point advances both interests.”<sup>78</sup> On this conception, the liberty component of substantive due process protects an individual’s right to make fundamental life decisions on substantively equal terms with others.

Referring to the Court’s substantive due process cases through *Carey*, Justice White wrote in *Bowers* that “none of the rights announced in those cases bears any resemblance to the claimed constitutional right of homosexuals to engage in acts of sodomy that is asserted in this case.”<sup>79</sup> Justice Kennedy in *Lawrence* and Justice Ginsburg in *Carhart* made clear that five members of the Court have settled on a nexus, and it is grounded not in privacy but in liberty and equality. Indeed, as we shall see in Part III, the only members of the current Court likely to refer to the right to privacy are those who dissent either from its fecundity or its very existence. The next Part discusses the role played by Justice Stevens in that remarkable doctrinal evolution.

## II. Justice Stevens and the Liberty Clause

As a naval intelligence officer during World War II, John Paul Stevens was part of a team charged with deciphering the Japanese naval code.<sup>80</sup> Cryptanalysis requires the codebreaker to unlock the ciphering system that identifies the relevant numeric codes and then to translate those codes into words.<sup>81</sup> A coding system must by necessity be mysterious to outsiders, but it must at the same time be transparent to insiders. Code—good code, anyway—is designed to be understood. Indeed, that’s the key to cracking it.<sup>82</sup>

Law, too, is a kind of code, and it can be mysterious to the uninitiated. I have discussed the ways in which the right to privacy was put to work beyond its talents. This Part discusses Justice Stevens’s recognition that, circa 1975, constitutional privacy doctrine was in need of a better idiom. Section A articulates Justice Stevens’s vision of liberty, which was, like Justice Harlan’s and Justice White’s, more grounded conceptually but at the same time more generative than

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should not be a legitimate concern of the State. *See, e.g.*, ELIZABETH SCHNEIDER, BATTERED WOMEN AND FEMINIST LAWMAKING 87-100 (2000).

<sup>78</sup> *Lawrence*, 539 U.S. at 575.

<sup>79</sup> *Bowers*, 478 U.S. at 191-92.

<sup>80</sup> *See* Diane Marie Amann, *John Paul Stevens: Human Rights Judge*, 74 *FORDHAM L. REV.* 1569, 1580 (2006).

<sup>81</sup> *See* MICHAEL SMITH, *THE EMPEROR’S CODES: THE BREAKING OF JAPAN’S SECRET CIPHERS* 59-60 (2000).

<sup>82</sup> *See id.*

privacy. Section B then explains how Justice Stevens's conception of liberty has indeed generated doctrine consistent with his substantive constitutional views.

#### A. Justice Stevens and the Liberty Clause

In trying to bridge the divide between Justice Black and Justice Harlan, Justice Douglas had created a paradox: an unenumerated right grounded in positive law. Such rights are not unknown to constitutional law, as Justice Douglas sought to demonstrate with his reference in *Griswold* to the right of association, which lives in the long shadow of the First Amendment.<sup>83</sup> But as such rights expand into realms not originally contemplated by their begetters, and not welcomed by their detractors, they become too easy a target to sustain a controversial doctrine. Abortion rights do not sound in privacy. That does not mean, of course, that such rights do not deserve constitutional protection, but having to speak in the language of privacy unduly complicates the task of those who would defend them.

Then-Judge John Paul Stevens, a Nixon appointee to the U.S. Court of Appeals for the Seventh Circuit, faced the paradox of constitutional privacy in full form in 1975, when he had before him a case in which several married couples sued for paternal access to the delivery room of a public hospital during the birth of their children.<sup>84</sup> The plaintiffs were claiming a privacy right, not to *preclude* state access to an intimate event or decision, but to *obtain* it for themselves; the state's presence was not only conceded as legitimate but was in fact invited. This was all profoundly weird, and Judge Stevens effectively said so:

It is somewhat unfortunate that claims of this kind tend to be classified as assertions of a right to privacy. For the group of cases that lend support to plaintiffs' position do not rest on the same privacy concept that Brandeis and Warren identified in their article in the 1890 Edition of the *Harvard Law Review*.<sup>85</sup>

Significantly, however, in distancing himself from the right to privacy, Judge Stevens did not retreat to the strict formalist position associated with Justices Black and Stewart in *Griswold*.<sup>86</sup> Rather, Stevens laid out an affirmative vision of

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<sup>83</sup> See *Griswold*, 381 U.S. at 483.

<sup>84</sup> *Fitzgerald v. Porter Memorial Hosp.*, 523 F.2d 716 (7th Cir. 1975).

<sup>85</sup> *Id.* at 719.

<sup>86</sup> See *Griswold*, 381 U.S. at 510 (Black, J., dissenting) ("I like my privacy as well as the next one, but I am nevertheless compelled to admit that government has a right to invade it unless prohibited by some specific constitutional provision."); *id.* at 527 (Stewart, J., dissenting) ("I think this is an uncommonly silly law. . . . But we are not asked in this case to say whether this law is unwise, or even asinine.").

constitutional liberty that is tethered neither to the concept of privacy nor to any formula dictated by the Constitution's text. Referring to *Griswold*, *Eisenstadt*, and *Roe*, he said, "The character of the Court's language in these cases brings to mind the origins of the American heritage of freedom—the abiding interest in individual liberty that makes certain state intrusions on the citizen's right to decide how he will live his own life intolerable."<sup>87</sup>

This should sound familiar, of course, since it approximates the Court's current doctrine. As Part I discusses above, Justice Stevens wrote his *Fitzgerald* opinion into the U.S. Reports in his *Bowers* dissent, and Justice Kennedy in turn relied on that dissent for the majority in *Lawrence*. Crucially, Justice Stevens's formulation is no more restraining than Justice Douglas's or Justice Blackmun's, and it is in some respects less so. In *Fitzgerald* he quoted Justice Harlan's statement in *Griswold*:

Judicial self-restraint will not . . . be brought about in the 'due process' area by the historically unfounded incorporation formula advanced by [Black and Stewart]. It will be achieved in this area, as in other constitutional areas, only by continual insistence upon respect for the teachings of history, solid recognition of the basic values that underlie our society, and wise appreciation of the great roles that the doctrines of federalism and separation of powers have played in establishing and preserving American freedoms.<sup>88</sup>

One is reminded of Justice Sutherland's statement, dissenting in *West Coast Hotel v. Parrish*, that "[s]elf-restraint belongs in the domain of will and not of judgment."<sup>89</sup> A belief that judicial restraint is a constitutional value, but an endogenous one, enables Justice Stevens to be comfortable taking the constitutional term "liberty" at face value, as the freedom to follow the dictates of one's conscience bound only by the competing needs of a reasonable sovereign.<sup>90</sup>

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<sup>87</sup> *Fitzgerald*, 523 F.2d at 719-20.

<sup>88</sup> *Fitzgerald*, 523 F.2d at 719 n.14 (quoting 381 U.S. at 501 (Harlan, J., concurring)).

<sup>89</sup> 300 U.S. 379, 402 (1937) (Sutherland, J., dissenting).

<sup>90</sup> See John Paul Stevens, *The Bill of Rights: A Century of Progress*, 59 U. CHI. L. REV. 13, 37-38 (1992) ("Those who won our independence believed that the final end of the State was to make men free to develop their faculties; and that in its government the deliberative forces should prevail over the arbitrary." (quoting *Whitney v. California*, 275 U.S. 357, 375 (1927) (Brandeis, J., concurring))); cf. John Paul Stevens, *The Third Branch of Liberty*, 41 U. MIAMI L. REV. 277, 280 (1986) ("It is quite wrong . . . to assume that regulation and liberty occupy mutually exclusive zones—that as one expands, the other must contract. . . . [O]ne of the inner complexities of the concept of liberty is that the application of coercive governmental power may enlarge the sphere of liberty.").

Justice Stevens made the point more explicitly in his dissenting opinion in *Meachum v. Fano*, in which the Court held that prison inmates have no constitutional liberty interest in avoiding transfer to a prison facility with materially worse conditions.<sup>91</sup> Justice Stevens criticized the majority's implication that a protected liberty interest must originate either in the Constitution or in a statute. Stevens wrote:

If man were a creature of the State, the analysis would be correct. But neither the Bill of Rights nor the laws of sovereign States create the liberty which the Due Process Clause protects. The relevant constitutional provisions are limitations on the power of the sovereign to infringe on the liberty of the citizen. The relevant state laws either create property rights, or they curtail the freedom of the citizen who must live in an ordered society. Of course, law is essential to the exercise and enjoyment of individual liberty in a complex society. But it is not the source of liberty, and surely not the exclusive source.<sup>92</sup>

Like Justice Harlan and Justice White before him, Justice Stevens countered Douglas's expansive positivism with a careful naturalism.<sup>93</sup> Rather than protecting an unenumerated right grounded in positive law, Justice Stevens's due process clause—what he has called the “liberty clause”—protected an enumerated right grounded in natural law.

### B. Reaching the Right Side of History

Quite unlike Harlan's or White's, however, Stevens's substantive views on the reach of the due process clause have carried the day.<sup>94</sup> Harlan intimated in *Poe v. Ullman* that the moral judgments of the community may justify State prohibitions on, for example, “adultery, fornication and homosexual practices.”<sup>95</sup> That is very nearly the opposite of the position Justice Stevens espoused in his *Bowers* dissent, and which Justice Kennedy in *Lawrence* lifted verbatim from Justice Stevens: “the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a

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<sup>91</sup> 427 U.S. 215, 223–229 (1976).

<sup>92</sup> *Id.* at 230 (Stevens, J., dissenting).

<sup>93</sup> Upon White's retirement from the Court, Justice Stevens wrote that White's opinion in *Griswold* “squarely and correctly rested its conclusion that the statutory prohibition against the use of contraceptives was unconstitutional on the Liberty Clause of the Fourteenth Amendment.” John Paul Stevens, “Cheers!” *A Tribute to Justice Byron R. White*, 1994 B.Y.U. L. REV. 209, 213.

<sup>94</sup> See Stevens, *supra* note 90, at 20.

<sup>95</sup> *Poe v. Ullman*, 367 U.S. 497, 546 (1961) (Harlan, J., dissenting).

law prohibiting the practice.”<sup>96</sup> And although Harlan left the Court two months before (and died two weeks after) *Roe* was argued, Charles Fried, who drafted *Poe*, suggests quite plausibly that “[t]he argumentation of Harlan’s dissent in [*Poe*], as well as his refusal to condemn laws proscribing adultery, fornication, and homosexuality leave little doubt that he would have held with the dissenters in *Roe*.”<sup>97</sup> For his part, Justice White of course dissented in *Roe* and wrote the now-discredited majority opinion in *Bowers*.<sup>98</sup>

It is difficult to know what gives one judge a better eye for doctrinal progression than another. I want to suggest, though, that crucial to Justice Stevens’s conception of constitutional liberty is an appreciation for its connection to equality, and a law sense that enables him to follow their respective arcs where they lead him. As I discuss above, a majority of the current Court has come to the view that denial of certain particularly significant liberty interests inexorably effects a denial of equal protection of the laws.<sup>99</sup> Restricting a woman’s right to terminate her pregnancy subjects her body and her subsequent life to a set of physical and social burdens that cannot befall a man. Denying someone the right to sexual intimacy with the partner of his choice denies him a choice that he may consider central to his humanity, and that others not so denied consider central to theirs.

Conversely, denying an individual certain public benefits on an arbitrary basis, such as the color of her skin, denies her a liberty interest without sufficient justification. That, as Justice Stevens has noted, was the basis for the Court’s

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<sup>96</sup> *Lawrence*, 539 U.S. at 578 (quoting *Bowers*, 478 U.S. at 216 (Stevens, J., dissenting)).

<sup>97</sup> Charles Fried, *The Conservatism of Justice Harlan*, 36 N.Y.L.S. L. REV. 33, 52 n.121 (1991) (citation omitted); see also *Poe*, 367 U.S. at 547 (“Certainly, Connecticut’s judgment [as to contraception] is no more demonstrably correct or incorrect than are the varieties of judgment, expressed in law, on marriage and divorce, on adult consensual homosexuality, abortion, and sterilization, or euthanasia and suicide.”). Unlike the Connecticut law banning contraceptive use, there was a long history of anti-abortion regulations leading up to *Roe*. See *id.* at 554 (“[C]onclusive, in my view, is the utter novelty of this enactment. Although the Federal Government and many States have at one time or other had on their books statutes forbidding or regulating the distribution of contraceptives, none, so far as I can find, has made the use of contraceptives a crime.”). Of course, Justice Harlan’s views in 1961 cannot be presumed to be the same as what they would have been in 1973. See generally John Paul Stevens, *Learning on the Job*, 74 FORDHAM L. REV. 1561 (2006). Harlan was a firm believer, moreover, in the capacity of constitutional protections to evolve with society. See *Poe*, 367 U.S. at 542 (Harlan, J., dissenting) (“Due process has not been reduced to any formula; its content cannot be determined by reference to any code. The best that can be said is that through the course of this Court’s decisions it has represented the balance . . . struck by this country, having regard to what history teaches are the traditions from which it developed as well as the traditions from which it broke. That tradition is a living thing.”).

<sup>98</sup> *Doe v. Bolton*, 410 U.S. 179, 221 (1973) (White, J., dissenting); *Bowers v. Hardwick*, 478 U.S. 186 (1986).

<sup>99</sup> See Section I.D, *supra*.

decision in *Bolling v. Sharpe*.<sup>100</sup> “The self-evident proposition enshrined in the Declaration [of Independence]—the proposition that all men are created equal—is not merely an aspect of social policy that judges are free to accept or reject,” he told a University of Chicago Law School audience in 1991. “It is a matter of principle that is so firmly grounded in the ‘traditions of our people’ that it is properly viewed as a component of the liberty protected by the Fifth Amendment.”<sup>101</sup> On this view the equal protection clause and the due process clause are mutually reinforcing rather than mutually exclusive.<sup>102</sup>

Linking the liberty interests in obtaining an abortion or in engaging in homosexual conduct to the constitutional equality concerns that they implicate would not likely have impressed Justice Harlan. The equal protection clause was first applied to sex discrimination in *Reed v. Reed*,<sup>103</sup> which was argued the month after Harlan retired from the Court. No Court majority was willing even to apply heightened scrutiny to sex discrimination until 1976, five years after Harlan’s death.<sup>104</sup> It was not that the Court just hadn’t gotten around to reaching such claims or applying such standards; rather the same women’s movement that pushed passage of the Equal Rights Amendment altered the cultural landscape and, consequently, the Court’s case law in the 1970s.<sup>105</sup> Justice Harlan authored the Court’s unanimous opinion in *Hoyt v. Florida*, which upheld Florida’s practice of presumptively excluding women from jury service on the ground that “woman is still regarded as the center of home and family life.”<sup>106</sup> Questioning an abortion ban on sex equality grounds would have been an impossibly difficult leap for him.

Likewise, Justice Harlan did not live to see the full flowering of the gay rights movement. Although the Warren Court did not have much opportunity to confront gay rights issues, we get a glimpse of Justice Harlan’s attitude towards gays in *Manual Enterprises v. Day*, in which the Court reversed the Post Office Department’s determination that a number of gay soft porn magazines were obscene.<sup>107</sup> Writing only for himself and for Justice Stewart, Justice Harlan announced the opinion of the Court but wrote gratuitously that the magazines

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<sup>100</sup> 347 U.S. 497 (1954) (holding that segregation of the D.C. public schools violated the due process clause of the Fifth Amendment).

<sup>101</sup> Stevens, *supra* note 90, at 23-24.

<sup>102</sup> See generally Akhil Reed Amar, *Constitutional Redundancies and Clarifying Clauses*, 33 VAL. U. L. REV. 1, 2 (1998) (“A considerable number of constitutional clauses are redundant in a certain sense; they illuminate and clarify what was otherwise merely implicit.”).

<sup>103</sup> 404 U.S. 71 (1971).

<sup>104</sup> See *Craig v. Boren*, 429 U.S. 190, 197 (1976).

<sup>105</sup> See Reva B. Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the De Facto ERA*, 94 CALIF. L. REV. 1323 (2006).

<sup>106</sup> 368 U.S. 57, 62 (1961).

<sup>107</sup> 370 U.S. 478 (1962).

were “dismally unpleasant, uncouth, and tawdry” and described their readers as “unfortunate persons.”<sup>108</sup> At the time of Harlan’s death, gays and lesbians were not only subject to anti-sodomy laws in many states but they remained ineligible for federal civil service employment.<sup>109</sup> In a due process challenge to that exclusion in 1960, the Court had denied cert without any internal dissent.<sup>110</sup> Five years after Harlan’s death, the Court summarily affirmed—without merits briefing or oral argument—the denial of a challenge to Virginia’s sodomy ban.<sup>111</sup> Three Justices indicated that they would have noted probable jurisdiction and scheduled the case for oral argument: Justice Brennan, Justice Marshall, and Justice Stevens.<sup>112</sup>

It may be surprising that a well-bred Republican antitrust lawyer would be so responsive to the sexual revolution, but Justice Stevens’ writings on and off the bench have long emphasized a judge’s capacity for change. At a symposium on his career hosted by Fordham Law School in 2005, Justice Stevens said that “learning on the job is essential to the process of judging.”<sup>113</sup> He has explained, for example, that when he first became a federal judge, he believed that the due process clause “provides procedural safeguards, but has no substantive [content].”<sup>114</sup> He changed his view after rereading the opinions of Justice Holmes in *Lochner v. New York*<sup>115</sup> and Justice Brandeis in *Whitney v. California*.<sup>116</sup> Justice Stevens has also said that careful examination of the relevant precedents and arguments likewise changed his view over whether political patronage in civil service violated the First Amendment.<sup>117</sup> Witness as well his transformation into a death penalty abolitionist,<sup>118</sup> a generation after co-authoring the controlling opinion in *Gregg v. Georgia*, which lifted the Court’s nationwide moratorium and announced, *inter alia*, that “the punishment of death does not invariably violate the Constitution.”<sup>119</sup> Instead of assuming that that view must be true for all time, Justice Stevens in *Baze v. Rees* “relied on [his] own experience” in concluding

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<sup>108</sup> *Id.* at 490.

<sup>109</sup> See LOUIS DIAMANT, *HOMOSEXUAL ISSUES IN THE WORKPLACE* 49 (1993).

<sup>110</sup> See *Kameny v. Brucker*, 282 F.2d 823 (D.C. Cir. 1960), *cert denied* 365 U.S. 843 (1961), discussed in William N. Eskridge, Jr., *Some Effects of Identity-Based Social Movements on Constitutional Law in the Twentieth Century*, 100 MICH. L. REV. 2062, 2168-69 (2002).

<sup>111</sup> *Doe v. Commonwealth’s Attorney for Richmond*, 425 U.S. 901 (1976).

<sup>112</sup> *Id.*

<sup>113</sup> Stevens, *supra* note 97, at 1567.

<sup>114</sup> *Id.* at 1561.

<sup>115</sup> 198 U.S. 45, 74 (1905) (Holmes, J. dissenting).

<sup>116</sup> 274 U.S. 357, 372 (1927) (Brandeis, J., concurring); see Stevens, *supra* note 97, at 1561-62.

<sup>117</sup> See Stevens, *supra* note 97, at 1562-62.

<sup>118</sup> See *Baze v. Rees*, 128 S. Ct. 1520, 1542 (2008) (Stevens, J., concurring in the judgment).

<sup>119</sup> 428 U.S. 153, 169 (1976) (opinion of Stewart, Powell, and Stevens, JJ.).

that the death penalty has become cruel and unusual punishment in violation of the Eighth Amendment.<sup>120</sup>

Like a conscientious jurist, law itself can change as the society that sustains it grows older and wiser. Justice Stevens' confidence in that quality underwrites his lack of formalism. Unlike Justice White, for example, Justice Stevens has long insisted that the tiers-of-scrutiny analysis that remains a feature of the Court's equal protection jurisprudence too rigidly describes the proper analysis.<sup>121</sup> Lacking the formalist's preference for clear rules likewise, I think, has sensitized Justice Stevens to the interdoctrinal overlay that drives his view of the importance of liberty to equality, and vice versa. A judge who believes there is, in effect, more than one equal protection clause is bound to have a difficult time in seeing which one dovetails with the due process clause, and how.<sup>122</sup> By contrast, Justice Stevens can approach his task unburdened by any compulsion to maintain sharp cleavages between doctrinal areas and self-conscious about the need to be receptive to new arguments and perspectives. It is perhaps more accurate, then, to say that his responsiveness to the claims of the sexual revolution is not in spite of his background as a well-bred Republican antitrust lawyer, but is rather because of it.

### III. The Politics of Privacy

The decaying of the right to privacy described in Part I and effectively presaged by Justice Stevens as early as 1975 has gone largely unnoticed in our constitutional politics. At the 2006 Supreme Court nomination hearing of Justice Alito, the very first question he was asked, by Senator Specter, was whether "the Liberty Clause and the Constitution carries with it the right to privacy."<sup>123</sup> At

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<sup>120</sup> *Baze*, 128 S. Ct. at 1551 (Stevens, J., concurring in the judgment).

<sup>121</sup> Compare *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 439-47 (1985) (opinion of White, J.) (explaining that the mentally retarded are neither a suspect nor a quasi-suspect class); *with id.* at 451 (Stevens, J., concurring) ("[O]ur cases reflect a continuum of judgmental responses to differing classifications which have been explained in opinions by terms ranging from 'strict scrutiny' at one extreme to 'rational basis' at the other. I have never been persuaded that these so-called 'standards' adequately explain the decisional process."); see also *Craig v. Boren*, 429 U.S. 190, 212 (1976) (Stevens, J., concurring) ("I am inclined to believe that what has become known as the two-tiered analysis of equal protection claims does not describe a completely logical method of deciding cases, but rather is a method the Court has employed to explain decisions that actually apply a single standard in a reasonably consistent fashion.").

<sup>122</sup> See *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 800 (2007) (Stevens, J., dissenting) ("The Court's misuse of the three-tiered approach to equal protection analysis merely reconfirms my own view that there is only one such Clause in the Constitution.").

<sup>123</sup> See Confirmation Hearing on the Nomination of Samuel A. Alito, Jr. To Be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary, 109th Cong. 318 (2006).

Chief Justice Roberts's hearing months earlier, Senators Specter, Biden, Kohl, Schumer, and Feinstein all asked Roberts whether he believed in a constitutional right to privacy; Biden and Schumer asked the same question in two separate rounds of questioning.<sup>124</sup> Senator Specter opened the hearing by confronting Roberts with a memo Roberts had written in 1981 as an attorney in the Justice Department in which he had referred to the "so-called 'right to privacy.'"<sup>125</sup>

Both Roberts and Alito answered that there is a right to privacy in the Constitution deriving from *Griswold*, even though I have suggested that *Lawrence v. Texas* effectively marked constitutional privacy's doctrinal end. That doesn't mean Roberts and Alito were necessarily wrong. Both men surely recognized that the questions they were being asked were not doctrinal but political. In the latter realm, of course, describing oneself as opposed to the right to privacy is but shorthand for declaring one's hostility to the constitutional right to an abortion. That is so even if, in the realm of doctrine, the abortion right is no longer conditioned on a right to privacy. A judge who describes herself as opposed to the right to privacy also risks the demonization that befell Robert Bork in 1987. Try as he did to argue, in the way of many academics, that the Connecticut ban on contraceptive use might have been struck down on desuetude or some other ground, Bork's rejection of the right to privacy is widely viewed as having doomed his nomination.<sup>126</sup> His was a fate Roberts and Alito were doubtless eager to avoid.

The Bork nomination demonstrated that disclaiming a right to privacy was no way to ingratiate oneself with certain segments of the public. But just as surely, applying the "so-called" label signals fraternity with many of the rest, becoming something of a secret handshake on the right.<sup>127</sup> The "so-called" formulation boasts a distinguished pedigree within conservative legal circles: it was used not only by Roberts in that 1981 memo, but by the Reagan Justice Department in its 1988 Guidelines on Constitutional Litigation;<sup>128</sup> by Scalia in his dissenting opinion in *Lawrence*;<sup>129</sup> and by Federalist Society co-founder Steven

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<sup>124</sup> See Confirmation Hearing on the Nomination of John G. Roberts, Jr. To Be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary, 109th Cong. 146-47, 186, 207-08, 259, 324, 351, 372-74 (2005) [hereinafter Roberts Hearing].

<sup>125</sup> See *id.* at 146; Memorandum, *supra* note 5.

<sup>126</sup> See NORMAN VIEIRA & LEONARD GROSS, SUPREME COURT APPOINTMENTS: JUDGE BORK AND THE POLITICIZATION OF SENATE CONFIRMATIONS 71-79 (1998).

<sup>127</sup> That, indeed, was the substance of Roberts' defense of the phrase at his hearing: that at the time he was informing Attorney General Smith about a speech of Erwin Griswold's and knew that Smith was skeptical of the right to privacy. See Roberts Hearing, *supra* note 124, at 147.

<sup>128</sup> Guidelines on Constitutional Litigation, *supra* note 6, at 8 ("The so-called 'right to privacy' cases provide examples of judicial creation of rights not reasonably found in the Constitution.").

<sup>129</sup> *Lawrence*, 539 U.S. at 594-95 (Scalia, J., dissenting) ("[*Griswold*] expressly disclaimed any reliance on the doctrine of 'substantive due process,' and grounded the so-called 'right to privacy' in penumbras of constitutional provisions *other than* the Due Process Clause.").

Calabresi in his introduction to a volume on the history of the originalism debate.<sup>130</sup>

The label had more humble beginnings. The formulation appears to have first been used by New York Court of Appeals judge Alton Parker in the case of *Roberson v. Rochester Folding Box Company*.<sup>131</sup> Abigail Marie Roberson's claim had nothing to do with contraception, abortion, or sexual intimacy. Rather, she wanted equitable relief and damages for the unauthorized use of her likeness—"said to be a very good one"—in an advertisement for Franklin Mills Flour.<sup>132</sup> Referring to the celebrated Warren and Brandeis article, Judge Parker dismissively wrote that "[t]he so-called right to privacy is . . . founded upon the claim that a man has the right to pass through this world . . . without having his picture published, his business enterprises discussed, his successful experiments written up for the benefit of others, or his eccentricities commented upon . . ."<sup>133</sup> Roberson lost, but the (so-called) "so-called right to privacy" has since peppered the opinions of state and federal courts. Nearly all such references echo that of Prosser and Keeton, who speak of "the so-called 'right of privacy'" in the context of unwanted publicity or commercial exploitation rather than immunity from state morals legislation.<sup>134</sup>

The strange career of the right to privacy may suggest an amendment to Robert Dahl's famous observation that "the policy views dominant on the Court are never for long out of line with the policy views dominant among the lawmaking majorities of the United States."<sup>135</sup> Dahl's suggestion is that the political branches have a certain corrective capacity that makes the legal doctrine of the Court tend to follow the political predilections of majorities rather than those of minorities. But defenses of the right to privacy show a converse order of influence. Biden's belief "with every fiber of [his] being" in a general right to privacy is one that he shares with perhaps no one on the Court.<sup>136</sup> The Court invented, and then abandoned, the right to privacy, but its initial use as a justification for politically relevant doctrine nominated it as a litmus test in the politics of the confirmation process. Its potency as such a test makes it insensitive to the Court's doctrinal evolution. Jack Balkin and Sanford Levinson have argued

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<sup>130</sup> Steven G. Calabresi, *A Critical Introduction to the Originalism Debate*, in ORIGINALISM: A QUARTER-CENTURY OF DEBATE 1, 24 (2007) (writing that "[o]bviously, the so-called right to privacy" is not "deeply rooted in history and tradition").

<sup>131</sup> 664 N.E. 442 (N.Y. 1902).

<sup>132</sup> *Id.* at 442.

<sup>133</sup> *Id.* at 443.

<sup>134</sup> See W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 117, at 849 (5th ed. 1984).

<sup>135</sup> Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policymaker*, 6 J. PUB. L. 279, 285 (1957).

<sup>136</sup> Roberts Hearing, *supra* note 5, at 18.

that political parties change positive constitutional law over time by using the appointments process to effect what Balkin and Levinson call “partisan entrenchment.”<sup>137</sup> Certain doctrinal formulae and rhetoric, such as the right to privacy, can likewise influence constitutional politics through what one might call doctrinal entrenchment. Confirmation fights are prime locales for both forms of entrenchment: a judicial formulation can infest the politics of judging every bit as much as a President’s politics can take over the Court.

There are good reasons, however, for progressives to take the Court’s more recent cues on the right to privacy. I have argued that the right to privacy faces certain rhetorical challenges in justifying a right to abortion.<sup>138</sup> Those challenges are more acute in the current methodological climate on the Court and within the legal academy. Consider the words of Chief Justice Roberts at the Rehnquist Center Lecture at the University of Arizona James E. Rogers College of Law:

When Justice Rehnquist came onto the Court, I think it’s fair to say that the practice of constitutional law—how constitutional law was made—was more fluid and wide-ranging than it is today, more in the realm of political science. . . . Now, over Justice Rehnquist’s time on the Court, the method of analysis and argument shifted to the more solid grounds of legal arguments—what are the texts of the statutes involved, what precedents control.<sup>139</sup>

Roberts’s perspective is somewhat hortatory, but it is safe to say that the Court, and the legal and academic discourses that encircle it, are less hospitable than they once were to non-textual arguments.<sup>140</sup> The transformation of sexual intimacy and abortion from privacy to liberty rights accommodates politically popular liberal demands for a progressive Constitution with legally ascendant conservative demands for one whose text is authoritative.<sup>141</sup>

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<sup>137</sup> Jack M. Balkin & Sanford Levinson, *Understanding the Constitutional Revolution*, 87 VA. L. REV. 1045, 1066-67 (2001).

<sup>138</sup> See Section I.B, *supra*.

<sup>139</sup> John G. Roberts, Jr., 2009 Rehnquist Center Lecture, Feb. 4, 2009, available at [mms://www.law.arizona.edu/archive/events/RehnquistCenterLecture2009.wmv](https://www.law.arizona.edu/archive/events/RehnquistCenterLecture2009.wmv).

<sup>140</sup> See William N. Eskridge, Jr., *Textualism? The Unknown Ideal*, 96 MICH. L. REV. 1509, 1513-14 (1998) (reviewing ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* (1997)); Greene, *supra* note 18.

<sup>141</sup> See Jack M. Balkin, *Abortion and Original Meaning*, 24 CONST. COMM. 291, 308-09 (2007) (describing the tug-of-war over constitutional meaning between “mobilizations and counter-mobilizations”); Robert C. Post, *Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 HARV. L. REV. 4, 8 (2003) (describing the ways in which “constitutional law and culture are locked in a dialectical relationship, so that constitutional law both arises from and in turn regulates culture”).

It was Justice Douglas's aim to ground the substantive due process right to use contraceptives more firmly in the text of the Bill of Rights than Justice Harlan or Justice White would have it, but he failed to do so. "Liberty" is hardly self-defining, but it can boast three appearances in the Constitution, including in the Fifth and Fourteenth Amendments<sup>142</sup>—that's of course three more than "privacy."<sup>143</sup> A case like *Lawrence*, then, was not an example of finding a new right in the Constitution but rather defining an ancient and enumerated one. Justice Stevens makes that point to great rhetorical effect in *Meachum v. Fano*: "I had thought it self-evident that all men were endowed by their Creator with liberty as one of the cardinal unalienable rights. It is that basic freedom which the Due Process Clause protects, rather than the particular rights or privileges conferred by specific laws or regulations."<sup>144</sup>

#### IV. The Long Arm of Liberty

It might be objected that all I have said is merely semantics. That it is naive to imagine that the labels judges apply to doctrine drives the results in actual cases. That this is so much inside baseball, and the actual winning and losing is responsive to other discourses. An article of this scope is not the place to stake out and defend a position in the great debates over the elements of judicial decisionmaking. If doctrinal labels are nothing more, then the internment of the privacy label remains a point worth making. Nonetheless, I do believe that more can be said. Whether the Court is hospitable to certain substantive claims seems to depend in significant part on the work that is done to change the language in which the Court speaks. The decision in *District of Columbia v. Heller*, striking down the District's handgun ban, required that the profile and credibility of originalism be enhanced.<sup>145</sup> The decision in *Parents Involved in Community Schools v. Seattle School District No. 1*, invalidating voluntary public school integration plans in Seattle and Louisville, required a makeover of the idea of a color-blind Constitution.<sup>146</sup> More than any other public institution, the Court's word is its bond; it takes language—of statutes, of regulations, of its own prior opinions—seriously, more seriously perhaps than language is usually meant to be taken. Referring to a potential class of rights as deriving from liberty rather than

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<sup>142</sup> The Constitution's other reference to liberty is in the Preamble.

<sup>143</sup> Of course, the text of the Constitution appears to modern readers to give solely procedural, and not substantive protections to individual liberty. This is an obstacle for textualists, but surely easier to surmount than the complete absence of the word "privacy" from the document.

<sup>144</sup> 427 U.S. 215, 230 (1976) (Stevens, J., dissenting).

<sup>145</sup> 128 S. Ct. 2783 (2008); see Greene, *supra* note 18, at \_\_\_; Reva B. Siegel, *Dead or Alive: Originalism as Popular Constitutionalism in Heller*, 122 HARV. L. REV. 191 (2008).

<sup>146</sup> 551 U.S. 701 (2007); see *id.* at (Stevens, J., dissenting) ("It is my firm conviction that no Member of the Court I joined in 1975 would have agreed with today's decision.").

privacy is not merely cosmetic. The limited doctrinal reach of privacy, as I have endeavored to show, reflects the limitations of language itself.

Going forward, the shift in language I have identified might carry consequences for three of the most active doctrinal areas falling under the rubric of substantive due process: marriage rights for same-sex couples, adoption by gays and lesbians, and the purchase and use of sex toys. Although the constitutional right to privacy has its origins in the desire to protect the institution of marriage from state interference, the language of privacy rights is an exceptionally poor fit for extending constitutional protection to same-sex marriage. Marriage is a quintessentially public institution—the notoriety of the commitment is a source of its symbolic gravity. As Massachusetts Supreme Judicial Court Chief Justice Marshall wrote in *Goodridge v. Department of Public Health*, the case requiring legal recognition of same-sex marriage in Massachusetts, “marriage is at once a deeply personal commitment to another human being and a highly public celebration of the ideals of mutuality, companionship, intimacy, fidelity, and family.”<sup>147</sup> Just as the deeply felt public interest in abortion makes “privacy” a non-starter for many abortion rights opponents, reliance on privacy interests to extend constitutional marriage rights to same-sex couples would give opponents an inviting target for criticism.

Likewise, resorting to a privacy rubric to defend the rights of gays and lesbians to adopt children is too easily characterized as discounting—rather than overcoming—the traditional public concern for the best interests of the child, particularly one in the state’s care. Indeed, the plaintiffs in *Lofton v. Secretary of the Department of Children and Family Services*, in which the Court of Appeals for the Eleventh Circuit upheld Florida’s ban on adoption by “homosexual[s],” raised a marital privacy claim and were rebuffed precisely on the ground that adoption is inherently a public affair.<sup>148</sup> Judge Birch wrote:

The decision to adopt a child is not a private one, but a public act. At a minimum, would-be adoptive parents are asking the state to confer official recognition . . . on a relationship where there exists no natural filial bond. In many cases they are also asking the state to entrust into their permanent care a child for whom the state is currently serving as in loco parentis. In doing so, these prospective adoptive parents are electing to open their homes and their private lives to close scrutiny by the state.<sup>149</sup>

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<sup>147</sup> 798 N.E.2d 941, 954 (Mass. 2003).

<sup>148</sup> 358 F.3d 804 (11th Cir. 2004); see Fla. Stat. § 63.042(3) (“No person eligible to adopt under this statute may adopt if that person is a homosexual.”).

<sup>149</sup> *Lofton*, 358 F.3d at 810-11 (internal citations omitted).

In the absence of *Griswold* and its progeny, no one would think to argue that the right to legal adoption presupposes state indifference to the fitness of the prospective parents. But the privacy rationale encourages that distracting line of argument, to the detriment of the equality rights of gays and lesbians.

Focusing instead on liberty, and by extension on equality, is no guarantee of success, and in *Lofton* it was no more successful than the privacy argument.<sup>150</sup> But a conversation about equality in marriage or family planning invokes an interest that is both compelling and, unlike the right to privacy, exogenous to the interest of the state. Even the most monumental of interests in state intervention must still remain competitive with the independent mandate to treat persons equally in matters of fundamental importance. Adoption and marriage may never sound in privacy. But the Constitution's words do not admit limitation to the prejudices of any particular age. Over time, as society evolves—and judges, too—it may come to be axiomatic that any reasonable conception of equality must overcome the speculations of public officials bearing social theories.<sup>151</sup>

On a third active substantive due process issue, the right to purchase and use sex toys, the shift from privacy to liberty offers far less comfort. There is currently a circuit split over whether a state may ban the sale of sexual gratification devices, with the Eleventh Circuit upholding Georgia's ban under rational basis review and the Fifth Circuit invalidating Texas's prohibition without specifying a level of scrutiny.<sup>152</sup> Both panels assumed without discussion that the same analysis applies to a ban on sale as would apply to a ban on use. Unlike same-sex marriage or gay adoption, a right to sex-toy use fits comfortably within the rubric of privacy. If there is a constitutional right to use sex toys, it is very likely because the state has no legitimate business regulating, as such, the means through which its constituents reach orgasm.<sup>153</sup> By contrast, extending the liberty right recognized in *Casey* and in *Lawrence* to the right to use sex toys threatens to trivialize it, and thereby unwittingly to undermine efforts to protect same-sex marriage and adoption rights.<sup>154</sup> Whatever the merits of the three rights,

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<sup>150</sup> See *id.* at 811–17.

<sup>151</sup> See generally Alexander M. Bickel, *The Original Understanding of the Segregation Decisions*, 69 HARV. L. REV. 1 (1955) (arguing that although the Equal Protection Clause was not originally thought to outlaw segregated schools, it was adopted in recognition that its capacious language was capable of growth); cf. *Parents Involved*, 551 U.S. at 780–81 (2007) (Thomas, J., concurring) (“[I]f our history has taught us anything, it has taught us to beware of elites bearing racial theories.”).

<sup>152</sup> *Williams v. Morgan*, 478 F.3d 1316 (11th Cir. 2007); *Reliable Consultants v. Earle*, 517 F.3d 738 (5th Cir. 2008).

<sup>153</sup> Cf. *Stanley v. Georgia*, 394 U.S. 557 (1969) (holding that laws criminalizing private possession of obscene materials violate the First Amendment).

<sup>154</sup> See *Williams*, 478 F.3d at 1250 (“Hunting expeditions that seek trophy game in the fundamental-rights forest must heed the maxim ‘look before you shoot.’”).

our law, and our legal discourse, will benefit from recognizing that they attach to distinct sets of interests.

## Conclusion

The right to privacy has what a PR man would call bad optics.<sup>155</sup> It is missing from the text of the Constitution; it is freighted with the baggage of terms like “penumbras” and “emanations;” and it seems at first blush to bear little relationship to some of the specific rights with which it has been associated, such as abortion and same-sex marriage. Justice Stevens saw as much a quarter-century ago, when he wrote for a panel of the Seventh Circuit that privacy was an “unfortunate” label for the set of decisional rights warranting protection under what he has called the liberty clause of the Fourteenth Amendment. In the years since, Justice Stevens has played no small role in nudging the Court itself toward the same view. The Justices supporting the rights to abortion and sexual intimacy no longer speak in terms of privacy but instead, like Justice Stevens, affiliate those rights with an individual’s interest in control of her destiny. Justice Stevens and the Court have both recognized that interest as sounding in liberty and equality alike.

Retiring the right to privacy may have salutary effects on the framing of marriage and adoption rights for gays and lesbians, but both liberals and conservatives perceive political benefits in its continued service. Losing privacy would deprive conservatives of a favorite bogeyman and, in the eyes of many liberals, would endanger the right to an abortion. But just as doctrine must change to accommodate our politics, politics must sometimes change to accommodate the Court’s doctrine. And so, eventually, it will.

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<sup>155</sup> See, e.g., Nick Paumgarten, *The Death of Kings*, NEW YORKER, May 18, 2009, at 40, 43 (describing “optics” as new corporate jargon for “‘appearances’—something that looks good or bad, in a public relations sense”).