

# The Second Death of Substantive Due Process

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We are no longer a Court.

—Justice Benjamin N. Cardozo<sup>1</sup>

The tumultuous history of substantive due process has taken another turn. The early 1900's witnessed the first life of the doctrine, a life devoted largely to the protection of economic rights. In the 1930's, the doctrine met its death. Some thirty years later, however, *Griswold v. Connecticut*<sup>2</sup> resurrected substantive due process, no longer in its economic form, but instead as a vehicle for protecting what the Supreme Court would call a constitutional "right to privacy." Over the last twenty years, the *Griswold* line of cases has granted constitutional protection to a variety of personal decisions and relationships, the most controversial being a woman's decision to have an abortion. But now the Court has called the evolution of this doctrine to a halt and, I believe, has rendered a decision that may portend the second death of substantive due process.

In *Bowers v. Hardwick*,<sup>3</sup> the Supreme Court upheld the constitutionality of a criminal sodomy statute, as applied to homosexuals. The Court found it "evident" that homosexual acts of intimacy, even if conducted in private between consenting adults, lie outside the "right to privacy."<sup>4</sup> Referring to the first repudiation of substantive due process in the 1930's, the Court noted that "[t]here should be . . . great resistance to expand the substantive reach" of the due process clauses of the fifth and fourteenth amendments,<sup>5</sup> and that the present claim of constitutional protection was "at best, facetious."<sup>6</sup>

In this Article, I hope to establish that the constitutional claim in *Bowers* was a far cry from "facetious." To the contrary, under any plausible theory

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1. Quoted in Freund, *Storms Over the Supreme Court*, 69 A.B.A. J. 1474, 1476 (1983).

2. 381 U.S. 479 (1965).

3. 106 S. Ct. 2841 (1986).

4. *Id.* at 2844.

5. *Id.* at 2846. The fifth amendment, applicable to the federal government, provides that no person shall "be deprived of life, liberty, or property, without due process of law." U.S. CONST. amend. V. The fourteenth amendment, in the same wording, extends this prohibition to the states. *Id.* at amend. XIV, § 1.

6. *Bowers*, 106 S. Ct. at 2846.

of constitutional adjudication, the Court plainly was compelled, in light of its prior decisions, to accept the challenger's claim that the prohibited sexual conduct was constitutionally protected. Deviating sharply from the Court's own precedents, *Bowers* necessarily works to undercut the theoretical underpinnings of the modern Court's substantive due process doctrine.

Shorn of any viable theoretical foundation, substantive due process may well be headed for its second death. As in the 1930's, we are in the midst of both a rapidly changing political climate and a transformation in the Supreme Court's membership. In such an environment, *Bowers* could serve as a springboard from which the Court could renounce substantive due process once again and overturn the modern decisions it has produced. But even if this speculation proves unfounded, *Bowers* has, in a sense, already killed the doctrine of substantive due process, for as long as this decision stands beside the Court's other modern precedents, it is difficult to maintain that there is a *doctrine* of substantive due process. Instead, the Court's decisionmaking appears to rest on little more than ad hoc policymaking, hardly a defensible practice in the exercise of judicial review.

In Part I of this Article, I trace the first life and death of substantive due process. Part II considers the doctrine's reemergence in the protection of a constitutional "right to privacy." In Part III, I argue that under each of several possible theoretical approaches, the Supreme Court's ruling in *Bowers* is fundamentally inconsistent with its earlier privacy decisions. Finally, in Part IV, I speculate on the role that *Bowers* might play in an eventual unraveling of the Court's privacy doctrine in general, and I suggest that the beginning of the second death of substantive due process may be underway.

## I. THE FIRST LIFE AND DEATH OF SUBSTANTIVE DUE PROCESS

The first life and death of substantive due process require only a brief recounting. Although there were earlier antecedents,<sup>7</sup> the Supreme Court's 1905 decision in *Lochner v. New York*<sup>8</sup> heralded the Court's first sustained commitment to the use of substantive due process. In *Lochner*, the Court invalidated a New York statute that set maximum hours for bakery employees at ten hours per day and sixty hours per week, finding that the statute deprived bakery employers of their "liberty" of contract without "due process of law."<sup>9</sup> Armed with nothing more than the vague, and apparently procedural, language of the due process clause, the Court had claimed for itself the power to invalidate legislative actions that interfered with the Court's own vision of fundamental liberty. The due process clause thus took

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7. See 2 R. ROTUNDA, J. NOWAK & J. YOUNG, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE §§ 15.1-15.2 (1986).

8. 198 U.S. 45 (1905).

9. *Id.* at 53.

on substantive meaning, protecting, in essence, the economic philosophy of *laissez faire*.

Over the next thirty years, through the use of substantive due process as well as other constitutional doctrines, the Supreme Court invalidated countless economic regulations.<sup>10</sup> In 1934, however, the end of the *Lochner* era was foreshadowed by *Nebbia v. New York*,<sup>11</sup> in which the Court upheld state controls on milk pricing. Although the majority opinion contained conflicting signals, some of its language appeared to eliminate the Court's substantive due process function entirely.<sup>12</sup> Two years after *Nebbia*, economic substantive due process reemerged for a final time in *Morehead v. New York ex rel. Tipaldo*,<sup>13</sup> with the Court invalidating a minimum wage law for women.

While the Supreme Court was struggling with cases like *Nebbia* and *Morehead*, American politics was undergoing a dramatic transformation, with Franklin D. Roosevelt being elected and then re-elected President, each time by landslide margins. Shortly after the Court announced its decision in *Morehead*, Roosevelt unveiled his infamous "Court-packing" plan.<sup>14</sup> While Congress debated the proposal, however, the Court sounded the death knell for substantive due process. In *West Coast Hotel Co. v. Parrish*,<sup>15</sup> the Court overruled *Morehead*<sup>16</sup> and upheld the constitutionality of minimum wage requirements for women. *West Coast*, like *Morehead*, was decided by a five-four vote, with Justice Roberts voting to overturn the two-year old decision in *Morehead*<sup>17</sup> even though he had joined the majority in that case.<sup>18</sup> Whether or not it was a "switch in time to save the nine" from the Court-packing plan,<sup>19</sup> *West Coast* brought the Court in line with prevailing political sentiments. Assisted by a series of Roosevelt appointments,<sup>20</sup> the Court rapidly

10. See 2 R. ROTUNDA, J. NOWAK, & J. YOUNG, *supra* note 7, § 15.3.

11. 291 U.S. 502 (1934).

12. "With the wisdom of the policy adopted, with the adequacy or practicability of the law enacted to forward it, the courts are both incompetent and unauthorized to deal." *Id.* at 537. *But cf. id.* at 525:

[T]he guaranty of due process . . . demands only that the law shall not be unreasonable, arbitrary or capricious, and that the means selected shall have a real and substantial relation to the object sought to be attained. It results that a regulation valid for one sort of business, or in given circumstances, may be invalid for another sort, or for the same business under other circumstances, because the reasonableness of each regulation depends upon the relevant facts.

13. 298 U.S. 587 (1936).

14. See 2 R. ROTUNDA, J. NOWAK, & J. YOUNG, *supra* note 7, § 15.3, at 49-50.

15. 300 U.S. 379 (1937).

16. In fact, *Morehead* had been grounded on an earlier precedent, *Atkins v. Children's Hosp.*, 261 U.S. 525 (1923), and *West Coast* explicitly overruled only *Atkins*. *West Coast*, 300 U.S. at 400. Nonetheless, *Morehead* obviously was repudiated as well.

17. See *West Coast*, 300 U.S. 379.

18. See *Morehead*, 298 U.S. 587.

19. For evidence that it was not, see Frankfurter, *Mr. Justice Roberts*, 104 U. PA. L. REV. 311, 313-17 (1955).

20. For a listing of Roosevelt's appointments to the Supreme Court, see G. GUNTHER, CONSTITUTIONAL LAW, at B-5 (11th ed. 1985).

eliminated substantive due process as a serious ground of constitutional challenge.<sup>21</sup> The first life of substantive due process was at an end.<sup>22</sup>

## II. THE SECOND LIFE OF SUBSTANTIVE DUE PROCESS: THE EMERGENCE AND EVOLUTION OF A CONSTITUTIONAL "RIGHT TO PRIVACY"

Although substantive due process in the *Lochner* period had been devoted primarily to freedom of contract, the Supreme Court occasionally had employed the doctrine to protect non-economic freedom of choice as well. In *Meyer v. Nebraska*,<sup>23</sup> for example, the Court had invalidated a Nebraska prohibition on the teaching of foreign languages, finding that the law interfered not only with the "calling" of language teachers, but also with the rights of parents to decide the appropriate education for their children.<sup>24</sup> Likewise, in *Pierce v. Society of Sisters*,<sup>25</sup> the Court had found that a requirement of public schooling "unreasonably interfere[d] with the liberty of parents and guardians to direct the upbringing and education of children under their control."<sup>26</sup> As these cases suggest, the *Lochner* Court had drawn no obvious line between economic and non-economic rights. Thus, when the Supreme Court abandoned *Lochner* in the 1930's, it was widely understood

21. At least on some occasions, the Court continued to perform the ritual of "applying" a doctrine of substantive due process, but the standard of review had become so deferential as to render the doctrine meaningless. In *Williamson v. Lee Optical of Oklahoma, Inc.*, 348 U.S. 483 (1955), for example, the unanimous Court declared:

The Oklahoma law may exact a needless, wasteful requirement in many cases. But it is for the legislature, not the courts, to balance the advantages and disadvantages of the new requirement. . . . [T]he law need not be in every respect logically consistent with its aims to be constitutional. It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it.

The day is gone when this Court uses the Due Process Clause of the Fourteenth Amendment to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought. . . . We emphasize again what Chief Justice Waite said in *Munn v. Illinois*, 94 U.S. 113, 134 [(1877)], "For protection against abuses by legislatures the people must resort to the polls, not to the courts."

*Id.* at 487-88.

22. The first death of substantive due process, of course, did not eliminate the Supreme Court's use of the due process clause of the fourteenth amendment as a vehicle for "incorporating" substantive Bill of Rights norms, such as those grounded in the first amendment, for application to the states. When I refer to substantive due process, however, I am excluding this "incorporation due process" and am referring instead to substantive constitutional doctrine grounded neither directly nor by virtue of "incorporation" on any constitutional language more specific than the due process clause.

23. 262 U.S. 390 (1923).

24. *Id.* at 401 ("[T]he legislature has attempted materially to interfere with the calling of modern language teachers, with the opportunities of pupils to acquire knowledge, and with the power of parents to control the education of their own.").

25. 268 U.S. 510 (1925).

26. *Id.* at 534-35.

that the Court was abandoning substantive due process generally, and not merely the use of substantive due process in the protection of economic rights.<sup>27</sup>

In 1965, however, some thirty years after the Court's initial abandonment of substantive due process, the doctrine was resurrected in *Griswold v. Connecticut*.<sup>28</sup> *Griswold* invalidated a Connecticut statute prohibiting the use of contraceptives, as applied to married persons. Operating under the weight of the discredited legacy of substantive due process, the Court purported to disavow *Lochner*<sup>29</sup> and to rest its holding on the "penumbras" of a variety of more specific constitutional provisions.<sup>30</sup> But the Court's decision could not fairly be understood as an application of any constitutional provision more specific than the due process clause.<sup>31</sup> However the Court might choose to characterize its decisionmaking,<sup>32</sup> the second period of substantive due process was underway. In particular, *Griswold* was the first of a series of cases in which the Supreme Court would recognize and define a constitutional "right to privacy," a right nowhere to be found in the constitutional text. Matters falling within this right would be treated as presumptively protected,

27. Only two years before the Court's decision in *Griswold v. Connecticut*, 381 U.S. 479 (1965), the Court's own description of substantive due process gave no hint that any part of it had survived the end of the *Lochner* era:

There was a time when the Due Process Clause was used by this Court to strike down laws which were thought unreasonable, that is, unwise or incompatible with some particular economic or social philosophy. . . .

The doctrine that prevailed . . . —that due process authorizes courts to hold laws unconstitutional when they believe the legislature has acted unwisely—has long since been discarded. We have returned to the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws.

*Ferguson v. Skrupa*, 372 U.S. 726, 729-30 (1963).

28. 381 U.S. 479 (1965). Between the Court's 1937 decision in *West Coast Hotel Co. v. Parish*, 300 U.S. 379 (1937), and its 1965 decision in *Griswold*, the Court did render one decision that appeared to rest largely on a substantive due process methodology, although the Court's opinion in that case purported to follow an equal protection analysis. See *Skinner v. Oklahoma*, 316 U.S. 535 (1942) (invalidating Oklahoma's requirement of compulsory sterilization for certain habitual felons).

29. *Griswold*, 381 U.S. at 481-82 ("[W]e are met with a wide range of questions that implicate the Due Process Clause of the Fourteenth Amendment. Overtones of some arguments suggest that *Lochner v. New York* should be our guide. But we decline that invitation . . .") (citation omitted).

30. The Court cited the first, third, fourth, and fifth amendments, arguing that each protects a certain "zone of privacy." *Id.* at 482-85.

31. *Cf. id.* at 509-10 (Black, J., dissenting) ("I get nowhere in this case by talk about a constitutional 'right of privacy' as an emanation from one or more constitutional provisions.")

In an earlier challenge to the Connecticut statute, Justice Douglas, the author of the majority opinion in *Griswold*, had been more willing to endorse substantive due process as such. See *Poe v. Ullman*, 367 U.S. 497, 516-18 (1961) (Douglas, J., dissenting).

32. In addition to the "penumbra" theory of *Griswold*, the ninth amendment occasionally has been invoked as at least a *source of authority* for the Court to recognize constitutional rights not stated in the constitutional text. Justice Goldberg advanced this argument in his concurring opinion in *Griswold*. 381 U.S. at 486-93 (Goldberg, J., concurring).

and subject to governmental control only if the attempted regulation could pass the rigors of strict judicial scrutiny.<sup>33</sup>

In *Griswold*, the Court found the relationship of marriage to lie within this "zone of privacy," and it held that a prohibition on the use of contraceptives within marriage was constitutionally impermissible. "Marriage is a coming together for better or for worse," wrote the Court, "hopefully enduring, and intimate to the degree of being sacred."<sup>34</sup> Expressly re-establishing the validity of *Meyer* and *Pierce*,<sup>35</sup> *Griswold*, like those early cases, extended constitutional protection to matters of personal choice within conventional—and traditionally state-supported—family relationships.<sup>36</sup>

Beginning in 1972, however, the Supreme Court dramatically departed from the reasoning of *Griswold* and rapidly expanded the "right to privacy." In *Eisenstadt v. Baird*,<sup>37</sup> the Court put aside its previous focus on the sanctity of marriage and family and invalidated a contraceptive prohibition that applied to *single* persons.<sup>38</sup> Although the Court again struggled to avoid an explicit reliance on substantive due process,<sup>39</sup> it broadly announced that the constitutional right to privacy it had recognized in *Griswold* must be taken to include "the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."<sup>40</sup> The following year, the Supreme Court further expanded the right to privacy in *Roe v. Wade*,<sup>41</sup> one of the most controversial judicial decisions in the history of the United States. By now more openly embracing substantive due process as such,<sup>42</sup> the Court boldly asserted that the right to privacy "is broad enough to encompass a woman's decision whether or not to terminate her

33. *Cf. id.* at 497-98 (Goldberg, J., concurring) ("Although the Connecticut birth-control law obviously encroaches upon a fundamental personal liberty, the State does not show that the law serves any 'subordinating [state] interest which is compelling' or that it is 'necessary . . . to the accomplishment of a permissible state policy.'").

34. *Id.* at 486.

35. *Id.* at 482-83. Consistent with its "penumbra" theory, the Court reinterpreted *Meyer* and *Pierce* to rest on first amendment rather than substantive due process grounds. *Id.*

36. *Cf. Poe v. Ullman*, 367 U.S. 497, 553 (1961) (Harlan, J., dissenting) (describing marriage as "an institution which the State not only must allow, but which always and in every age it has fostered and protected").

37. 405 U.S. 438 (1972).

38. *Id.* Unlike in *Griswold*, the ban in *Eisenstadt* was directed to the *distribution* of contraceptives, not their use. *Id.* at 440-42. *See also id.* at 472 (Burger, C.J., dissenting).

39. The Court framed its opinion as an application of "rational basis" equal protection review. Under the statute, married persons were permitted to obtain contraceptives for birth control purposes from physicians or pharmacists, whereas unmarried persons were not. The Court found no "rational" explanation for this distinction between married and unmarried persons. *Id.* at 446-55.

40. *Id.* at 453 (emphasis in original).

41. 410 U.S. 113 (1973).

42. *See id.* at 153 (attributing the right to privacy to "the Fourteenth Amendment's concept of personal liberty and restrictions upon state action").

pregnancy.”<sup>43</sup> *Roe* thereby granted presumptive constitutional protection to the abortion decisions of married and single women alike.<sup>44</sup>

In the years since *Eisenstadt* and *Roe*, the Supreme Court consistently has reaffirmed the teachings of these cases, applying “strict scrutiny” to invalidate numerous contraceptive and abortion regulations.<sup>45</sup> In the early months of pregnancy, for example, a woman’s right to have an abortion is essentially absolute. It thus cannot be conditioned on waiting periods or special requirements of informed consent,<sup>46</sup> nor can the right of a married woman be conditioned on the consent of her husband.<sup>47</sup> Indeed, less than three weeks before the Court announced its ruling in *Bowers v. Hardwick*, it rejected an invitation from the Justice Department to reconsider *Roe*,<sup>48</sup> and it issued yet another decision granting extensive protection to the right of abortion.<sup>49</sup>

### III. *BOWERS V. HARDWICK*: THE FIRST SHOE?

Under *Griswold* and the cases that followed it, modern substantive due process protects the “right to privacy.” This right includes the right to acquire and use contraceptives and the right to have an abortion.<sup>50</sup> As a

43. *Id.*

44. The Court codified this presumptive protection by prescribing guidelines for each of the three trimesters of pregnancy. *Id.* at 162-66.

45. See, e.g., *City of Akron v. Akron Center for Reproductive Health*, 462 U.S. 416 (1983); *Carey v. Population Serv's Int'l*, 431 U.S. 678 (1977).

There has been one notable, and apparently unprincipled, exception to the Court’s basic approach to abortion: the Court’s stance in the abortion funding cases. In these cases, the Court rejected strict scrutiny and used a deferential standard of review to sustain public funding measures that discriminated against women seeking abortions. See *Harris v. McRae*, 448 U.S. 297 (1980); *Maher v. Roe*, 432 U.S. 464 (1977). See generally Perry, *Why the Supreme Court was Plainly Wrong in the Hyde Amendment Case: A Brief Comment on Harris v. McRae*, 32 STAN. L. REV. 1113 (1980).

46. *City of Akron*, 462 U.S. at 442-51.

47. *Planned Parenthood v. Danforth*, 428 U.S. 52, 67-72 (1976). Cf. *City of Akron*, 462 U.S. at 439-42 (holding that a state can require parental consent to a minor’s abortion only if the state also provides an alternative judicial procedure through which the minor can avoid the consent requirement).

48. See *infra* note 121 and accompanying text.

49. *Thornburgh v. American College of Obstetricians*, 106 S. Ct. 2169 (1986). *Thornburgh* was decided on June 11, 1986, and *Bowers* on June 30.

50. The right to privacy also extends beyond the context of contraception and abortion. Thus, for example, the Court has built upon the rationale of *Meyer*, *Pierce*, and *Griswold* in protecting individual choice with respect to marital and family relationships. See, e.g., *Zablocki v. Redhail*, 434 U.S. 374, 384 (1978) (invalidating economic restrictions on the right to marry and noting that “the right to marry is part of the fundamental ‘right of privacy’ implicit in the Fourteenth Amendment’s Due Process Clause”); *Moore v. City of East Cleveland*, 431 U.S. 494 (1977) (invalidating a housing ordinance that limited the occupancy of a dwelling unit to members of a single nuclear family, holding that the ordinance violated the substantive due process rights of other relatives who wished to live together). See generally *Developments in the Law—The Constitution and the Family*, 93 HARV. L. REV. 1156 (1980). The Court also has made limited use of substantive due process even outside the contours of the right to

result, it protects, at least incidentally, the underlying sexual relations that give rise to the use of contraceptives and to the procuring of abortions. This protection, moreover, is not confined to the marital relationship, but rather extends to single persons as well. In *Bowers v. Hardwick*, however, the Supreme Court found it "evident that none of the rights announced in [the *Griswold* line of] cases bears any resemblance to the claimed constitutional right of homosexuals to engage in acts of sodomy . . . ."51 Let us consider what is "evident" and what is not.

In *Bowers*, the Court addressed the constitutionality of Georgia's criminal sodomy statute,<sup>52</sup> as applied to adult homosexuals<sup>53</sup> engaged in consensual, private conduct.<sup>54</sup> Reversing a contrary ruling by the Court of Appeals for the Eleventh Circuit,<sup>55</sup> the Supreme Court found that homosexual sodomy

privacy. See, e.g., *Youngberg v. Romeo*, 457 U.S. 307, 319 (1982) (holding that involuntarily committed mentally retarded persons have substantive due process interests requiring the state "to provide minimally adequate or reasonable training to ensure safety and freedom from undue restraint").

51. 106 S. Ct. 2841, 2844 (1986).

52. "A person commits the offense of sodomy when he performs or submits to any sexual act involving the sex organs of one person and the mouth or anus of another." GA. CODE ANN. § 16-6-2(a) (1984). The crime is punishable "by imprisonment for not less than one nor more than 20 years." *Id.* at § 16-6-2(b).

53. Finding that "[t]he only claim properly before the Court . . . is *Hardwick's* challenge to the Georgia statute as applied to consensual homosexual sodomy," the Court "express[ed] no opinion on the constitutionality of the Georgia statute as applied to other acts of sodomy." *Bowers*, 106 S. Ct. at 2842 n.2.

The dissenters challenged the Court's narrow focus on homosexual activity, arguing that "[t]he sex or status of the persons who engage in the act is irrelevant as a matter of state law" and that *Hardwick's* privacy claim "does not depend in any way on his sexual orientation." *Id.* at 2849 (Blackmun, J., dissenting). See also *id.* at 2856 (Stevens, J., dissenting) ("Like the statute that is challenged in this case, the rationale of the Court's opinion applies equally to the prohibited conduct regardless of whether the parties who engage in it are married or unmarried, or are of the same or different sexes.") (footnotes omitted). Although the dissenters' arguments on this point are cogent, I am willing to take the issue as the majority states it. Moreover, I am willing to put aside any equal protection question that might be suggested by the majority's framing of the issue. See *id.* at 2850 n.2 (Blackmun, J., dissenting).

Several months after its decision in *Bowers*, the Supreme Court denied certiorari in a case raising the question of whether heterosexual sodomy is constitutionally protected. See *Post v. Oklahoma*, 715 P.2d 1105 (Okla. Crim. App.), *cert. denied*, 107 S. Ct. 290 (1986).

54. The Court also considered, and rejected, a claim that constitutional protection should at least extend to consensual homosexual sodomy conducted in the privacy of one's own home. In *Stanley v. Georgia*, 394 U.S. 557 (1969), the Supreme Court held that the Constitution protects the private possession and use, in one's home, of obscene materials that are otherwise unprotected under the first amendment. The Court in *Bowers* dismissed the *Stanley* precedent as irrelevant in the absence of first amendment considerations. 106 S. Ct. at 2846. Although the *Bowers* dissenters disagreed, *id.* at 2852-53 (Blackmun, J., dissenting), I am willing to assume, arguendo, that the Constitution provides no greater protection to private sexual activity conducted in the home than it does to private sexual activity conducted elsewhere.

55. *Hardwick v. Bowers*, 760 F.2d 1202 (11th Cir. 1985). Two other courts of appeals had rejected similar constitutional challenges, relying in part on a summary decision by the Supreme Court in *Doe v. Commonwealth's Attorney*, 425 U.S. 901 (1976), *aff'g* 403 F. Supp. 1199 (E.D. Va. 1975). See *Baker v. Wade*, 769 F.2d 289 (5th Cir. 1985) (*en banc*); *Dronenburg v. Zech*, 741 F.2d 1388 (D.C. Cir. 1984). In *Bowers*, the Supreme Court stated that it "prefer[red] to give plenary consideration to the merits of this case rather than rely on our earlier action in *Doe*." 106 S. Ct. at 2843 n.4.



falls outside the right to privacy and therefore does not warrant the protection of strict judicial scrutiny.<sup>56</sup> Applying an exceedingly deferential standard of review, the Court upheld the statutory prohibition based on "the presumed belief of a majority of the electorate in Georgia that homosexual sodomy is immoral and unacceptable."<sup>57</sup>

As the Supreme Court noted in *Bowers*, the Court's substantive due process decisions "have little or no textual support in the constitutional language."<sup>58</sup> Nor is there any plausible evidence that the framers, despite their chosen language, nonetheless intended to confer constitutional protection on what the Court has called the "right to privacy."<sup>59</sup> The Court's substantive due process doctrine thus rests on nonoriginalist judicial review, the process of granting constitutional protection to values that cannot fairly be traced to the framers and ratifiers of either the original Constitution or of any constitutional amendment.<sup>60</sup>

The exercise of nonoriginalist review by the unelected justices of the Supreme Court is exceedingly controversial, and the practice has been attacked as an undemocratic and illegitimate usurpation of power by the judiciary.<sup>61</sup> Nonoriginalist review, however, can be defended against these attacks through the use of three general sorts of theoretical argument. First, under a process-oriented approach, nonoriginalist review can be defended to the extent that it works to enhance the fairness of the democratic process. Second, under a theory of common values, nonoriginalist review can be seen as a vehicle for protecting values that, by virtue of their historical or contemporary support in the national society, should be placed beyond the power of temporary or local majoritarian decisionmaking. Finally, under a philosophical approach, one can argue that the Court properly may search out and identify political-moral principles that, without regard to societal consensus, should be protected from governmental transgression.

I make no brief here for any of these theories, nor do I maintain that they are sufficient to establish either the legitimacy of nonoriginalist judicial

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56. *Bowers*, 106 S. Ct. at 2843-46.

57. *Id.* at 2846.

58. *Id.* at 2844.

59. Although the framers and ratifiers could have decided to delegate to the judiciary an open-ended authority to create constitutional rights that they themselves did not contemplate, there is no persuasive evidence that they did. See, e.g., Bork, *The Impossibility of Finding Welfare Rights in the Constitution*, 1979 WASH. U.L.Q. 695, 697.

60. This is not to suggest that substantive due process is the only area in which the Court exercises nonoriginalist review. Cf. M. PERRY, *THE CONSTITUTION, THE COURTS, AND HUMAN RIGHTS: AN INQUIRY INTO THE LEGITIMACY OF CONSTITUTIONAL POLICYMAKING BY THE JUDICIARY* 91 (1982) (arguing that "virtually all of [the] constitutional doctrine regarding human rights fashioned by the Supreme Court in this century" is based upon nonoriginalist review). Substantive due process, however, may well be the area in which the nonoriginalist character of the Court's decisionmaking is the most obvious and indisputable.

61. See, e.g., R. BERGER, *GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT* (1977); Meese, *The Supreme Court of the United States: Bulwark of a Limited Constitution*, 27 S. TEX. L. REV. 455 (1986).

review or the propriety of any of the particular decisions it has engendered.<sup>62</sup> But these theories do embody the strongest possible arguments for non-originalist review, and *if* the Court's nonoriginalist decisionmaking can be justified, such a justification would necessarily depend on one or more of these basic theoretical approaches. As a result, the Court's privacy decisions, if legitimate, must be explicable in these terms, and they therefore are properly subject to comparison on this basis. Such a comparative analysis, moreover, reveals that under any of the possible theoretical foundations for the Court's privacy cases, *Bowers* cannot be reconciled with the Court's prior decisions, including especially the Court's decision in *Roe v. Wade*.

### A. Policing the Democratic Process

Process-oriented theories of nonoriginalist judicial review focus on the appropriate occasions for judicial intervention. To a considerable extent, these theories build upon the famous *Carolene Products* footnote, in which the Supreme Court suggested that special judicial scrutiny might be appropriate for legislation that "restricts [the] political processes" or that reflects "prejudice against discrete and insular minorities . . . , which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities."<sup>63</sup> Dean John Hart Ely, for example, has argued that judicial review can serve a "representation-reinforcing" function by "clearing the channels of political change on the one hand, and . . . correcting certain kinds of discrimination against minorities on the other."<sup>64</sup>

One can argue that considerations of process support the Court's searching inquiry in at least some of its privacy decisions. Prior to *Bowers*, perhaps the best case for such an argument was *Roe v. Wade*. On this view, *Roe* can be seen as a women's rights case, protecting the interests of women in a political process that has been and remains dominated by men.<sup>65</sup> So understood, the Court's ruling in *Roe* was an effort to protect abortion rights that might well have been protected in the political process had the interests of women been fairly represented.

Such a process-based defense of *Roe*, however, is woefully inadequate. If judicial review is to police the political process for defects in fair representation, it must consider the political strength of all of the competing interests

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62. Elsewhere I have defended a common values theory of nonoriginalist judicial review. See *infra* notes 82-84 and accompanying text.

63. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938).

64. J. ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 74 (1980).

65. See, e.g., Karst, *Foreword: Equal Citizenship Under the Fourteenth Amendment*, 91 HARV. L. REV. 1, 57-59 (1977); Law, *Rethinking Sex and the Constitution*, 132 U. PA. L. REV. 955, 1016-28 (1984). Cf. Garfield, *Privacy, Abortion, and Judicial Review: Haunted by the Ghost of Lochner*, 61 WASH. L. REV. 293, 354 (1986) ("Of all the areas of protected privacy identified by the Court, the abortion decision may be the least susceptible to regulation by the political processes.").

affected by the issue in question. With respect to abortion, the interests most directly affected are those of women seeking abortions and of fetuses whose lives, or potential lives, would thereby be extinguished. Although women can be said to lack fair political representation on a wide variety of issues, it is difficult to argue that their interests are not fairly represented as against the interests of the unborn. Thus, as Dean Ely has observed, *Roe* is not "explainable in terms of the unusual political impotence of the group judicially protected vis-à-vis the interest that legislatively prevailed over it."<sup>66</sup>

Consider, by contrast, how an evaluation of the political process might affect the proper judicial stance in addressing the constitutionality of a prohibition on homosexual sodomy. The interests of homosexuals as a group clearly stand at a serious disadvantage in American politics. Because homosexuals are regarded by many as moral deviants and social misfits, their arguments in the political process are likely to be discounted, if not entirely ignored. Precisely because of this prejudice, moreover, homosexuals tend not to participate politically in advancing their own interests, and, indeed, frequently conceal their sexual orientation from public disclosure.<sup>67</sup> As a result, political arguments on behalf of homosexuals are not often advanced, and, when they are, those arguments tend to fall on deaf ears. The democratic process thus is severely distorted as it affects homosexuals, whose interests are not fairly represented.<sup>68</sup> On the issue of homosexual sodomy, moreover, unlike on the issue of abortion, there is no competing interest that bears any similar political disadvantage. To the contrary, the enforcement of prevailing moral sentiments against a "deviant" minority is the type of cause that, almost by definition, commands strong political support.<sup>69</sup>

This is not to suggest that considerations of process are sufficient to resolve the constitutionality of prohibitions on homosexual sodomy. Nonetheless, these considerations do suggest that the political process might well

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66. Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920, 936 (1973). See also *id.* at 933-35. Ely's conclusion is sound even if it is true that the abortion question is "also a feminist issue, an issue going to women's position in society in relation to men." See Karst, *supra* note 65, at 58. And one cannot avoid this conclusion by arguing that the interests of fetuses are not deserving of judicial consideration, for that obviously begs the question.

67. Cf. Ackerman, *Beyond Carolene Products*, 98 HARV. L. REV. 713, 728-31 (1985) (arguing that homosexuals and other "anonymous" groups stand at a special disadvantage in attempting to organize politically).

68. Cf. J. ELY, *supra* note 64, at 162-64 (arguing that legal classifications disadvantaging homosexuals should be considered suspicious for equal protection purposes because of the combined factors of prejudice against homosexuals and the tendency of homosexuals to hide their sexual orientation).

69. A criminal prohibition on sodomy, moreover, exacerbates the political process problem confronting homosexuals by increasing the likelihood that homosexuals will remain "in the closet" and avoid political participation, for with such a statute on the books, the very admission that one is a homosexual tends to be a self-incriminating statement. Cf. *Missouri v. Walsh*, 713 S.W.2d 508, 511 (Mo. 1986) ("If homosexual conduct is properly forbidden, any social stigma attaching to those who violate this proscription cannot be constitutionally suspect.").

be asked in its resolution of this issue and that the judiciary therefore should be especially solicitous of arguments urging the constitutional invalidity of such prohibitions. This argument of process, moreover, is far stronger than any argument of process that might support the Court's decision in *Roe*. If anything, a process-oriented theory of judicial review might accept the propriety of judicial intervention in *Bowers*, while at the same time rejecting the Court's intervention in *Roe*. Process theory thus provides no basis for reconciling the Court's decision in *Bowers* with its earlier decision in *Roe*.

### B. *Protecting National Societal Values*

Unlike process theory, common values theories of judicial review focus directly on the substantive content of nonoriginalist constitutional values. In particular, these theories would permit the judiciary to grant constitutional protection to values that have strong national support in the American society. Common values theories are of two broad types. One looks to the past in an attempt to protect traditional values from precipitant change, while the other looks more to the present and the future, eulogizing the judiciary in the cause of American societal development.

#### 1. Preserving Traditional Values

One mission of nonoriginalist judicial review in general, and of substantive due process in particular, might be to further the stability of the law and to protect societal expectations concerning individual freedom. Professor Ira C. Lupu, for instance, has argued that the Supreme Court properly may use substantive due process to protect traditional forms of liberty.<sup>70</sup> But the constitutional enshrinement of values merely because they are traditional could operate as a deadening force, giving constitutional weight to past political thought that might well be irrelevant, if not positively harmful, to the present society.<sup>71</sup> Accordingly, for this method of constitutional decisionmaking to be defensible, it must be limited to the protection of values that have strong support not only in the American past, but in the contemporary society as well.<sup>72</sup> Under Professor Lupu's formulation, the search must be for "values deeply embedded in the society, values treasured by

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70. See Lupu, *Untangling the Strands of the Fourteenth Amendment*, 77 MICH. L. REV. 981, 1032-54 (1979). Cf. G. LEEDES, *THE MEANING OF THE CONSTITUTION: AN INTERDISCIPLINARY STUDY OF LEGAL THEORY* 92-108 (1986) (defending substantive due process protection for society's "reasonable expectations").

71. Witness the Supreme Court's protection of traditional economic liberty during the *Lochner* period. See *supra* Part 1.

72. Cf. THE FEDERALIST No. 14, at 88 (J. Madison) (J. Cooke ed. 1961) ("[T]he people of America, . . . whilst they have paid a decent regard to the opinions of former times and other nations, have not suffered a blind veneration for antiquity . . .").

both past and present, values behind which the society and its legal system have unmistakably thrown their weight."<sup>73</sup>

If we are to believe the Supreme Court in *Bowers*, this type of historically-oriented common values theory underlies all of its privacy decisions. Thus, we are told, substantive due process protects "those liberties that are 'deeply rooted in this Nation's history and tradition.'"<sup>74</sup> Applying this standard, the Court in *Bowers* had little difficulty concluding that homosexual sodomy does not warrant constitutional protection:

Sodomy was a criminal offense at common law and was forbidden by the laws of the original thirteen States when they ratified the Bill of Rights. In 1868, when the Fourteenth Amendment was ratified, all but 5 of the 37 States in the Union had criminal sodomy laws. In fact, until 1961, all 50 States outlawed sodomy . . . .<sup>75</sup>

As the Court's analysis suggests, the right to engage in homosexual sodomy cannot fairly be viewed as a matter of traditional American liberty. And if this were the governing theory of the Court's privacy cases, the Court's decision in *Bowers* would properly be regarded as correct.<sup>76</sup>

Despite the Court's suggestion to the contrary, however, this is not the governing theory of the Court's privacy cases. To be sure, this type of

73. Lupu, *supra* note 70, at 1040 (emphasis omitted).

74. *Bowers*, 106 S. Ct. at 2844 (quoting *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977) (plurality opinion)). In addition to this statement from *Moore*, the *Bowers* Court also cited the *Palko* formulation of "fundamental liberties that are 'implicit in the concept of ordered liberty,' such that 'neither liberty nor justice would exist if [they] were sacrificed.'" *Id.* at 2844 (quoting *Palko v. Connecticut*, 302 U.S. 319, 325, 326 (1937)). The Court characterized the tests stated in *Palko* and *Moore* as "different description[s] of fundamental liberties," *id.* at 2844, but its analysis suggested that it did not regard the *Palko* test as adding anything to the *Moore* formulation, for the Court found the constitutional claim in *Bowers* wanting under each test for precisely the same, exclusively historical reasons. *Id.* at 2844-46.

75. 106 S. Ct. at 2844-45 (footnotes omitted). *Cf. id.* at 2847 (Burger, C.J., concurring) ("To hold that the act of homosexual sodomy is somehow protected as a fundamental right would be to cast aside millennia of moral teaching.").

76. Professor Lawrence H. Tribe has argued otherwise:

It is crucial, in asking whether an alleged right forms part of a traditional liberty, to define the liberty at a high enough level of generality to permit unconventional variants to claim protection along with mainstream versions of protected conduct. The proper question, then, is whether the intimacy of private sexual acts reflects a traditionally revered liberty . . . . And, once that tradition is recognized as the point of reference, it provides an umbrella capacious enough to subsume homosexual as well as heterosexual variants.

L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 15-13, at 946 (1978). On this theory, Tribe would find homosexual sodomy to fall within a traditional liberty despite the fact that "the history of homosexuality has been largely a history of disapproval and disgrace." *Id.* at 944. *See also Developments in the Law—The Constitution and the Family*, *supra* note 50, at 1180-82. But for the Court to extend traditional liberties to "unconventional" behavior that has been the subject of societal "disapproval and disgrace" hardly can count as the enforcement of common societal values. *Cf. Lupu, supra* note 70, at 1046 ("[C]are must be taken to define 'preferred liberty' at a level general enough to capture all of its historical essence, yet specific enough to resist open-ended growth that is likely to outdistance the social commitment upon which the liberty rests.").

common values theory might explain certain decisions.<sup>77</sup> But it clearly does not explain the Court's preeminent privacy decision, *Roe v. Wade*. When the Court decided *Roe* in 1973, it could not plausibly be argued that the right to abortion was "deeply rooted in this Nation's history and tradition." Although the law governing abortion at common law, and therefore in the very early history of the United States, may have been relatively liberal,<sup>78</sup> by 1868 the legislatures of at least thirty-six states and territories had adopted abortion prohibitions.<sup>79</sup> Indeed, at the time of the Court's decision in *Roe*, a majority of the states had maintained significant restrictions on abortion for at least a century.<sup>80</sup> The Court's decision in *Roe* obviously failed both prongs of the traditional values inquiry: the right to abortion lacked the requisite historical support,<sup>81</sup> and it lacked the requisite contemporary support as well.

As *Roe* makes clear, the modern Court's substantive due process doctrine cannot be explained by reference to a historically-oriented common values theory of judicial review. As a result, the Court's reliance on this type of analysis in *Bowers* cannot provide a principled basis for the Court's decision in that case.

## 2. Furthering Societal Progress

A different type of common values theory sees nonoriginalist judicial review not as a backward-looking, preservative force, but rather as a forward-looking, progressive force.<sup>82</sup> If one believes that the American society, over

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77. Professor Lupu, for example, contends that this type of approach can justify the Court's decision in *Moore v. City of East Cleveland*, 431 U.S. 494 (1977). Lupu, *supra* note 70, at 1051-54. See generally *supra* note 50. Such a theory might also support the Court's decisions in cases like *Meyer*, *Pierce*, and *Griswold*, which protected parental discretion in the education of children and the use of contraceptives by married couples. See *supra* notes 23-36 and accompanying text.

78. See *Roe*, 410 U.S. at 132-36, 138-39.

79. See *id.* at 174-75 & n.1 (Rehnquist, J., dissenting). I use the year 1868 because it is a convenient benchmark and one to which the Supreme Court frequently refers. I do not mean to suggest that for purposes of this theoretical approach to substantive due process, the status of the American tradition in 1868 has special significance because the fourteenth amendment was ratified in that year.

80. See *id.* at 174 (Rehnquist, J., dissenting).

81. Any support that the common law might offer for the right to abortion is irrelevant in light of the American society's subsequent rejection of the common law's approach to abortion. As Professor Lupu has written, "The essence of the test of historical recognition is long-standing respect for the liberty, up to and including the time of decision (when it becomes the test of contemporary values). Long-abandoned traditions are inadequate, even if recently resurrected." Lupu, *supra* note 70, at 1045.

82. Elsewhere I have defended such a theory of judicial review. See Conkle, *The Legitimacy of Judicial Review in Individual Rights Cases: Michael Perry's Constitutional Theory and Beyond*, 69 MINN. L. REV. 587 (1985) [hereinafter Conkle, *The Legitimacy of Judicial Review*]. See also Conkle, *Nonoriginalist Constitutional Rights and the Problem of Judicial Finality*, 13 HASTINGS CONST. L.Q. 9 (1985) [hereinafter Conkle, *Nonoriginalist Constitutional Rights*].

its history, gradually has developed answers to individual rights questions that are superior to the answers that formerly prevailed, one can envisage an evolutionary process of American societal development. On this view, our long-term national development with respect to any given issue of individual rights is likely to reflect positive societal growth. Our system of government, however, permits temporary and local majorities to take actions that may impede this gradual progress. Under this theory of judicial review, therefore, the Supreme Court's nonoriginalist mission is to look to America's long-term pattern of developing national values and to use those values to limit the power of transient and local majorities. As a result, the Court properly may invalidate governmental practices that lag behind the developing societal advance and conflict with what has become the contemporary national standard. The Court also may recognize constitutional rights not yet supported by contemporary values if those rights are supported by emerging societal values that are likely to prevail in the future.<sup>83</sup> At the same time, moreover, the recognition of constitutional rights can serve a nationalizing function by providing national answers to fundamental political-moral issues that should not be subject to disparate state and local resolution.<sup>84</sup>

The Supreme Court's decision in *Roe v. Wade* plausibly can be defended under a forward-looking common values theory.<sup>85</sup> When *Roe* was decided in 1973, there appeared to be a liberalizing trend in favor of the right to abortion. In particular, some fourteen states recently had adopted legislation patterned on section 230.3 of the Model Penal Code,<sup>86</sup> which permitted an abortion, under specified conditions, if a physician found that the pregnancy carried a substantial risk to the physical or mental health of either the woman or the developing child, or if the pregnancy had resulted from rape or incest.<sup>87</sup> Even in these fourteen states, however, abortion remained a criminal offense under most circumstances. Only four states had adopted a position even approaching the liberality of the Court's decision in *Roe*.<sup>88</sup> The evidence of a developing societal pattern in 1973 therefore offered only weak support for the Court's ruling.<sup>89</sup>

Viewed through this type of theoretical lens, the constitutional claim rejected by the Court in *Bowers* compares quite favorably with the claim

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83. For a more elaborate description and defense of this progressive vision of judicial review, see Conkle, *The Legitimacy of Judicial Review*, *supra* note 82, at 626-37.

84. See Conkle, *Nonoriginalist Constitutional Rights*, *supra* note 82, at 26-30.

85. Cf. Perry, *Abortion, the Public Morals, and the Police Power: The Ethical Function of Substantive Due Process*, 23 UCLA L. REV. 689, 735-36 (1976) ("In retrospect, it seems that the Court, in deciding *Roe* as it did, struck down laws that were contrary to the evolving, maturing conventions of the moral culture. No doubt these evolving conventions would eventually have generated a radical reform of the abortion laws invalidated in *Roe*.").

86. See *Roe*, 410 U.S. at 140 n.37.

87. Model Penal Code § 230.3 (2).

88. See *Roe*, 410 U.S. at 140 n.37.

89. See Conkle, *Nonoriginalist Constitutional Rights*, *supra* note 82, at 32-33.

that the Court accepted in *Roe*. Indeed, *Bowers* presented a far stronger case for the recognition of a constitutional right based on evolving national values. As the Court observed in *Bowers*, all fifty states outlawed homosexual sodomy prior to 1961.<sup>90</sup> In the last twenty-five years, however, some twenty-three state legislatures have acted to decriminalize homosexual sodomy conducted in private by consenting adults.<sup>91</sup> Thus, approximately half of the state legislatures in the United States have determined that contrary to past understandings, homosexual conduct, as such, is not properly a matter for governmental regulation. Especially in light of the serious political disadvantages faced by homosexuals,<sup>92</sup> this dramatic legislative trend provides substantial evidence that emerging national values support the legal right to engage in private and consensual homosexual conduct.<sup>93</sup>

A forward-looking common values theory might well be sufficient to justify the recognition of a constitutional right to engage in homosexual sodomy. In any event, this theoretical approach offers substantially greater support for that result than it does for the Court's protection of the right to abortion in *Roe v. Wade*. Within this type of theoretical framework, then, the Supreme Court's rejection of the constitutional claim presented in *Bowers* plainly cannot be squared with its acceptance of the claim presented in *Roe*.

### C. Applying Philosophical Principles

A final theoretical approach to nonoriginalist judicial review would permit the Supreme Court to seek out and apply political-moral principles that properly ought to control the relationship between government and individual. Under this approach, the Court need not adopt principles reflecting values strongly supported by the American society, either historically or otherwise. Instead, the Court is simply to engage in a process of reasoning that draws on considerations of political and moral philosophy.<sup>94</sup>

In the Supreme Court's modern substantive due process cases, it claims to be protecting a "right to privacy." At one level, the protection of "privacy" might require nothing more than a means-oriented principle limiting governmental inquiries into intimate matters. Such a principle would place no direct limits on the government's substantive policymaking; it rather would work to supplement the fourth amendment's prohibition on unreason-

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90. See *Bowers*, 106 S. Ct. at 2845.

91. See Rivera, *Our Straight-Laced Judges: The Legal Position of Homosexual Persons in the United States*, 30 HASTINGS L.J. 799, 950-51 (1979) (listing twenty-one states); see also 1978 N.J. LAWS, ch. 95, § 2C:98-2 (effective Sept. 1, 1979) (repealing N.J. STAT. ANN. § 2A:143-1 (West 1969)); 1983 WIS. LAWS, Act 17, § 5 (effective May 12, 1983) (amending WIS. STAT. ANN. § 944.17 (West 1982)).

92. See *supra* notes 67-69 and accompanying text.

93. See Conkle, *Nonoriginalist Constitutional Rights*, *supra* note 82, at 34-35.

94. Cf. R. DWORKIN, *TAKING RIGHTS SERIOUSLY* 149 (1977) (arguing for "a fusion of constitutional law and moral theory").



able searches and seizures<sup>95</sup> by requiring that the government enforce its substantive policies, when possible, through regulatory means that avoid an intrusive inquiry into intimate behavior. Such a limited principle, for example, might be sufficient to support the Court's result in *Griswold*, where the Court was confronted with an unnecessarily intrusive contraceptive regulation, one that directed itself to the *use* of contraceptives.<sup>96</sup>

*Eisenstadt v. Baird*, however, invalidated a prohibition on the *distribution* of contraceptives, a regulation that did not require an unnecessarily intrusive inquiry into the intimacies of sexual relations.<sup>97</sup> Likewise, *Roe v. Wade* cannot be explained in terms of the limited rationale that might have explained *Griswold* standing alone.<sup>98</sup> In light of *Eisenstadt* and *Roe*, it is clear that the right to privacy directly limits the government's power to make substantive policy by protecting individual freedom of choice concerning certain matters.

This individual freedom of choice can be seen to reflect a political-moral principle of personal autonomy.<sup>99</sup> Such a principle, however, obviously requires limits; a person cannot have the right to do as he pleases under any and all circumstances.<sup>100</sup> In determining appropriate limitations on this prin-

95. U.S. CONST. amend. IV.

96. As the Court observed in *Griswold*:

[I]n forbidding the *use* of contraceptives rather than regulating their manufacture or sale, [the law] seeks to achieve its goals by means having a maximum destructive impact upon [the marital] relationship. Such a law cannot stand in light of the familiar principle, so often applied by this Court, that a "governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms." Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives?

381 U.S. at 485-86 (emphasis in original) (citation omitted). *Cf.* *Whalen v. Roe*, 429 U.S. 589, 599 (1977) (suggesting that an "individual interest in avoiding disclosure of personal matters" may be part of the "right to privacy") (footnote omitted). *See generally* *Poe v. Ullman*, 367 U.S. 497, 547-48 (1961) (Harlan, J., dissenting) (suggesting that other means for expressing moral opposition to the use of contraceptives might be constitutional, but that "[here] the State is asserting the right to enforce its moral judgment by intruding upon the most intimate details of the marital relation with the full power of the criminal law").

97. *See* 405 U.S. 438, 440-42 (1972).

98. *Cf. Roe*, 410 U.S. at 172 (Rehnquist, J., dissenting) ("A transaction resulting in an operation such as [an abortion] is not 'private' in the ordinary usage of that word. Nor is the 'privacy' that the Court finds here even a distant relative of the freedom from searches and seizures protected by the Fourth Amendment to the Constitution . . .").

99. *Cf. Whalen v. Roe*, 429 U.S. 589, 599-600 (1977) (suggesting that the "right to privacy" protects "the interest in independence in making certain kinds of important decisions"). *See generally* Henkin, *Privacy and Autonomy*, 74 COLUM. L. REV. 1410 (1974).

Relying especially on the philosophies of Thomas Jefferson and Abraham Lincoln, Professor Gene R. Nichol has argued that constitutional protection of personal autonomy can be defended on the basis of an American commitment to "the progressive unfolding of individual sovereignty." Nichol, *Children of Distant Fathers: Sketching an Ethos of Constitutional Liberty*, 1985 Wts. L. REV. 1305, 1319.

100. *Cf. Adkins v. Children's Hosp.*, 261 U.S. 525, 568 (1923) (Holmes, J., dissenting) ("[P]retty much all law consists in forbidding men to do some things that they want to do . . .").

ciple, one must examine the interests both of the individual and of the government. Thus, in considering whether a particular type of individual conduct should be protected by the principle of personal autonomy, one must evaluate the importance of that conduct to the individual and the weight of the countervailing governmental interests in regulation. Using this type of analysis, one can evaluate the strength of the autonomy claim rejected in *Bowers* as compared to the autonomy claims that the Court had accepted in its earlier privacy decisions.

Looking first at the individual side of the ledger, let us consider the nature of the individual interest protected in *Eisenstadt* and *Roe*. Under these cases, an individual, whether married or single, has the right to acquire and use contraceptives and the right to obtain an abortion. This freedom of choice permits individuals to practice birth control through the use of contraceptives, or even through abortion.<sup>101</sup> As a result, *Eisenstadt* and *Roe* necessarily protect the right of heterosexual adults, married or single, to engage in consensual sexual intercourse for its own sake, and not for the purpose of procreation.<sup>102</sup> The right of personal autonomy protected by these cases therefore includes the right of heterosexuals to engage in nonprocreative sexual relations, even outside the traditional setting of marriage.<sup>103</sup>

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101. In many cases, of course, the right to abortion might be exercised for reasons going beyond the simple practice of birth control. For example, a woman might choose to have an abortion to protect her own physical or mental health or to avoid the birth of a child that would likely have mental or physical defects. An abortion also might be sought to terminate a pregnancy that had resulted from rape or incest. The fact remains, however, that *Roe* protects not only these types of abortion decisions, but *any* type of abortion decision made by a woman in early pregnancy. As a result, the protection of *Roe* extends to the use of abortion for the purpose of birth control. My focus here is on this aspect of *Roe*'s protection, not the protection that *Roe* provides to abortions undertaken for other reasons.

102. As Professor David A.J. Richards has written, an "understanding of *Griswold* and its progeny begins with repudiation of the procreational model of sexual love . . ." Richards, *Sexual Autonomy and the Constitutional Right to Privacy: A Case Study in Human Rights and the Unwritten Constitution*, 30 HASTINGS L.J. 957, 978 (1979).

103. One could argue that *Eisenstadt* and *Roe* provide no constitutional protection for sexual activity as such, but instead reflect the more narrow, means-oriented principle that the government may not use prohibitions on contraception or abortion as means of enforcing its vision of sexual morality. Under this reading of the cases, direct criminal prohibitions on consensual heterosexual intercourse, as, for example, under fornication laws, are not unconstitutional. See generally Grey, *Eros, Civilization and the Burger Court*, 43 LAW & CONTEMP. PROBS., Summer 1980, at 83, 83-90; Hafen, *The Constitutional Status of Marriage, Kinship, and Sexual Privacy—Balancing the Individual and Social Interests*, 81 MICH. L. REV. 463, 527-44 (1983). But such direct prohibitions, if enforced, would necessitate intrusive governmental inquiries of the type that the Court strongly disfavored in *Griswold*. See *supra* note 96 and accompanying text. More fundamentally, they would limit individual liberty to a greater extent than the laws that the Court has invalidated—sexual conduct would be prohibited even if procreation were intended—and the government's countervailing interest in protecting potential human life would no longer be implicated. This narrow reading of *Eisenstadt* and *Roe*, therefore, is not persuasive. Cf. Karst, *The Freedom of Intimate Association*, 89 YALE L.J. 624, 654 (1980) ("The most obvious practical consequence of *Griswold* and its successor decisions is to free couples—and especially women—to express themselves through sexual intimacy without the 'chilling effect' of the risk of unwanted pregnancy."); *id.* at 662 (noting that the reasoning of *Eisenstadt* "necessarily undermines the constitutionality of . . . fornication laws"). Indeed, it would appear

The right asserted in *Bowers* was also a right to engage in nonprocreative sexual relations, albeit homosexual in nature. Notwithstanding the difference in sexual orientation, however, it is difficult to imagine how the individual interest presented in *Bowers* was less important than the interest protected in the Supreme Court's earlier decisions. Because the Court has extended protection to the sexual relations of single persons, the absence of a marital bond cannot be controlling. Thus, in the case of heterosexuals, the Court is protecting the sexual expression of love and the human need for intimacy and sexual fulfillment. Surely we cannot say that these matters are of less significance to homosexuals. As Justice Stevens wrote in his dissenting opinion in *Bowers*, "From the standpoint of the individual, the homosexual and the heterosexual have the same interest in deciding how he will live his own life, and, more narrowly, how he will conduct himself in his personal and voluntary associations with his companions."<sup>104</sup>

Limitations on the principle of autonomy, however, might also be based on an evaluation of the other side of the balance. Even though the individual interest in *Bowers* was equivalent to the interest that the Court had protected in its earlier cases, the Court's decision could be defended if the countervailing governmental interests were found to be more substantial. The Court made no claim in *Bowers* that homosexual conduct causes physical harm either to the individuals in question or to the society at large,<sup>105</sup> nor did it contend that such conduct might cause other types of demonstrable injury.<sup>106</sup>

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that under any fair reading of *Griswold* and the cases that followed it, heterosexual sodomy, whether or not within marriage, is constitutionally protected. See *Bowers*, 106 S. Ct. at 2857-58 (Stevens, J., dissenting).

104. 106 S. Ct. at 2858 (Stevens, J., dissenting). As Professor Kenneth L. Karst has observed, "All the values of intimate association are potentially involved in homosexual relationships; all have been impaired, in various ways, by governmental restrictions on homosexual conduct . . ." Karst, *supra* note 103, at 682. See *id.* at 629-52 (discussing the values of intimate association). See also Richards, *supra* note 102, at 999-1009.

105. The role of homosexual conduct in the transmission of disease, including especially acquired immuno-deficiency syndrome (AIDS), might form the basis for an argument that homosexual conduct is the source of physical harm. See *Survey on the Constitutional Right to Privacy in the Context of Homosexual Activity*, 40 U. MIAMI L. REV. 521, 623-35 (1986). See generally *Law, Social Policy, and Contagious Disease: A Symposium on Acquired Immune Deficiency Syndrome (AIDS)*, 14 HOFSTRA L. REV. 1 (1985). The Court's decision in *Bowers*, however, did not depend on any such argument.

106. J. Harvie Wilkinson III and G. Edward White have contended that "[t]he most threatening aspect of homosexuality is its potential to become a viable alternative to heterosexual intimacy . . ., [thereby] undermin[ing] the value of heterosexuality and the institutions and practices—conventional marriage and childrearing—associated with it." Wilkinson & White, *Constitutional Protection for Personal Lifestyles*, 62 CORNELL L. REV. 563, 595 (1977). See also *id.* at 594-96. The Court in *Bowers*, however, made no attempt to rely on such an argument, whatever its persuasive appeal might be.

It is clear that certain types of consensual sexual conduct, whether heterosexual or homosexual, can cause demonstrable harms that might not be "physical," but that nonetheless go beyond the vague contours of "moral" injury. Adultery, for example, can inflict emotional harm on the participant's spouse and family. See *Bowers*, 106 S. Ct. at 2853 n.4 (Blackmun, J., dissenting). Likewise, sexual activity in public may offend the legitimate sensibilities of passersby. Cf. *id.* at 2855 ("Statutes banning public sexual activity are entirely consistent with protecting

Instead, the Court relied exclusively on a governmental interest in enforcing personal morality for its own sake,<sup>107</sup> an interest grounded on "the presumed belief of a majority of the electorate in Georgia that homosexual sodomy is immoral and unacceptable."<sup>108</sup> Such an interest in morality might embrace two different sorts of public purposes. First, the government might be acting to protect the moral health of the homosexuals themselves. Second, it might be acting to protect the sensibilities of its heterosexual citizens, who might be morally offended by the presence of "deviance" in their community, even if that "deviance" is practiced in private by consenting adults.<sup>109</sup>

I make no claim here that these moral arguments are insignificant.<sup>110</sup> But

the individual's liberty interest in decisions concerning sexual relations: the same recognition that those decisions are intensely private which justifies protecting them from governmental interference can justify protecting individuals from unwilling exposure to the sexual activities of others."). And the participation of a minor in "consensual" sexual activity, of course, also gives rise to special concerns. The propriety of governmental restrictions on consensual sexual relations in any of these circumstances, however, would not resolve the propriety of restrictions imposed in their absence, and no special circumstances of this sort were present in *Bowers*.

107. I am putting aside any establishment clause issue that might be presented by the conformity of this interest in morality to the tenets of various religious faiths. See generally *Bowers*, 106 S. Ct. at 2854-55 (Blackmun, J. dissenting) ("The legitimacy of secular legislation depends . . . on whether the State can advance some justification for its law beyond its conformity to religious doctrine.").

108. *Id.* at 2846 (opinion of the Court).

109. Cf. P. DEVLIN, *THE ENFORCEMENT OF MORALS* 16 (1965) ("[I]f we regard it as a vice so abominable that its mere presence is an offence, . . . I do not see how society can be denied the right to eradicate it."). But cf. *Bowers*, 106 S. Ct. at 2856 (Blackmun, J., dissenting) ("[T]he mere knowledge that other individuals do not adhere to one's value system cannot be a legally cognizable interest."); Dworkin, *Lord Devlin and the Enforcement of Morals*, 75 *YALE L.J.* 986, 1000-01 (1966) ("Even if it is true that most men think homosexuality an abominable vice and cannot tolerate its presence, it remains possible that this common opinion is a compound of prejudice . . . , rationalization . . . , and personal aversion . . ."); Saphire, *Gay Rights and the Constitution: An Essay on Constitutional Theory, Practice, and Dronenburg v. Zech*, 10 *U. DAYTON L. REV.* 767, 794 n.125 (1985) ("[A] recognition that the right to privacy applies to homosexual intimacy leads to the conclusion that the government cannot prohibit such conduct solely on the basis of its perception that society . . . despises or otherwise disapproves of it.").

110. For an elaborate argument that prohibitions on homosexual sodomy cannot be defended by reference to principles of morality, see Richards, *supra* note 102. See also Richards, *Homosexuality and the Constitutional Right to Privacy*, 8 *N.Y.U. REV. L. & SOC. CHANGE* 311 (1978-79); Richards, *Unnatural Acts and the Constitutional Right to Privacy: A Moral Theory*, 45 *FORDHAM L. REV.* 1281 (1977). See generally *Poe v. Ullman*, 367 U.S. 497, 545-46 (1961) (Harlan, J., dissenting) ("[S]ociety is not limited in its objects only to the physical well-being of the community, but has traditionally concerned itself with the moral soundness of its people as well."); J. MILL, *ON LIBERTY* 10-11 (D. Spitz ed. 1975) ("[T]he only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant.") (footnote omitted); J. FEINBERG, *HARM TO OTHERS: THE MORAL LIMITS OF THE CRIMINAL LAW* 245 (1984) ("[Mill's 'harm to others' principle] will . . . not suffice to legitimize prohibition of conduct on the grounds that it is offensive to others, harmful to the actor himself, or inherently immoral."); Hinds, *Morality Enforcement through the Criminal Law and the Modern Doctrine of Substantive Due Process*, 126 *U. PA. L. REV.* 344, 378 (1977) (suggesting an adaptation of Mill's principle that would ask whether "the conduct proscribed under this statute entail[s] a substantial risk of direct physical, emotional, or financial harm to individuals not consenting to the conduct in question").

consider how these arguments compare with the arguments that can be advanced in favor of a prohibition on abortion, arguments that the Court necessarily rejected in *Roe*. Precisely the same moral arguments that would support a prohibition on homosexual sodomy also would support a prohibition on abortion. Laws prohibiting abortion no doubt are based on a "presumed belief of the majority of the electorate" that abortion "is immoral and unacceptable." Prohibitions on abortion thus might be designed to protect the moral health of the women (and doctors) who would otherwise engage in this practice, and they might also be intended to protect the society at large from the existence of this morally "deviant" practice. Considered purely in terms of morality for its own sake, therefore, the Court's decision in *Bowers* cannot be reconciled with its prior decision in *Roe*.

This analysis, however, is incomplete, for in defending a prohibition on abortion the government is not limited to general arguments of morality that are unrelated to physical harms. Whether or not a fetus is a person, it represents at least a potential human life, and that potential life is extinguished by abortion. A prohibition on abortion thus does not merely protect the morality of the individuals involved and the moral sensibilities of the public. It protects the life or potential life of human beings. Regardless of whether this governmental interest should be considered sufficient to overcome the autonomy interests of women, it clearly is an interest of a much greater magnitude than the general interest in morality that underlies sodomy prohibitions.<sup>111</sup>

If we view the Supreme Court's substantive due process doctrine as a vehicle for protecting personal autonomy, the principled application of this doctrine requires a consideration of the interests of the individual and the competing governmental interests in regulation. As I have shown, the claim the Court rejected in *Bowers* presented an individual interest no less weighty than the individual interest the Court protected in *Roe*, and the countervailing governmental interests asserted in *Bowers* were far less substantial than the interests asserted in *Roe*. Viewed as applications of the political-moral principle of personal autonomy, therefore, *Roe* and *Bowers* are inconsistent and irreconcilable.

#### D. *Constitutional Theory and Bowers v. Hardwick*

In addressing "deviant" sexual practices, the Supreme Court in *Bowers v. Hardwick* rendered a deviant judicial decision. The Court's decision is deviant because it is blatantly inconsistent with the Court's own precedents,

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111. An abortion regulation might also protect another interest that goes beyond a general interest in morality—the interest of the woman's sexual partner in the birth of his putative child. *But cf.* *Planned Parenthood v. Danforth*, 428 U.S. 52, 67-72 (1976) (holding that a married woman's right to abortion cannot be conditioned on the consent of her husband).

including especially *Roe v. Wade*, the Court's most prominent privacy decision and a decision that the Court reaffirmed almost contemporaneously with the announcement of its ruling in *Bowers*.<sup>112</sup> The *Bowers* decision, moreover, is worse than deviant. It is also perverse, because the constitutional claim rejected in *Bowers* was not merely of the same strength as the claim the Court accepted in *Roe*; it was substantially stronger.

I have canvassed the most plausible theories of nonoriginalist judicial review and discussed their application to the Court's modern substantive due process doctrine. One of those theories calls for the Court to protect traditional societal values. Under that theoretical approach, the constitutional claims presented in *Roe* and *Bowers* were equally without merit, and therefore the Court's decisions cannot be reconciled on that basis.<sup>113</sup> Under each of three other approaches, however, the claim that the Court rejected in *Bowers* was considerably *more* powerful than the claim that the Court accepted in *Roe*. Thus, the *Bowers* claim was stronger based on political process theory,<sup>114</sup> based on an identification of evolving national values,<sup>115</sup> and based on philosophical considerations.<sup>116</sup>

These three approaches to nonoriginalist judicial review, moreover, need not operate in isolation. To the contrary, a nonoriginalist inquiry might look to all three theories and consider the guidance that they provide, taken together, in evaluating the merit of a constitutional claim. If the identification of sound political-moral principles is the ultimate goal of nonoriginalist judicial review, for example, the pattern of evolving societal thought might nonetheless be relevant, providing as it does at least some evidence of what those principles might be. Conversely, if the pattern of evolving societal thought is itself the ultimate source of nonoriginalist constitutional values, one might properly suppose that the society is likely to move toward sound political-moral principles; as a result, the inherent strength of a political-moral principle provides support for a conclusion that the principle represents an emerging societal standard. And defects in the political process are relevant to either type of analysis, for such defects make it less likely that governmental policies will reflect the actual sentiments of the contemporary society, let alone political-moral principles that are sound.

If one applies an aggregated theoretical approach of this nature, the constitutional claim rejected in *Bowers* gains even more strength vis-à-vis the claim that the Court accepted in *Roe*. Thus, the pattern of legislative action decriminalizing homosexual sodomy not only provides evidence of evolving national values, it also helps confirm the validity of the political-

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112. See *Thornburgh v. American College of Obstetricians*, 106 S. Ct. 2169 (1986). See also *supra* notes 48-49 and accompanying text.

113. See *supra* Part III.B.1.

114. See *supra* Part III.A.

115. See *supra* Part III.B.2.

116. See *supra* Part III.C.

moral principle that such conduct should not be criminal. Working in the opposite direction, the inherent strength of the political-moral argument against criminalization tends to support a conclusion that evolving societal values would accept that proposition. The political process difficulties faced by homosexuals, moreover, make their legislative successes all the more significant.

Under any plausible theory of judicial review, then, the Supreme Court's decision in *Bowers* is deviant, and under most theoretical approaches, taken individually or in the aggregate, the Court's decision is perverse in light of its contrary ruling in *Roe*. The question that remains is whether *Bowers* is but the first step in an eventual repudiation of the precedents that it refused to honor.

#### IV. WILL THE SECOND SHOE FOLLOW?

Whether *Bowers* portends the second death of substantive due process is a matter of speculation. But history can repeat itself, and the parallel to the 1930's is striking.<sup>117</sup>

In the 1980's, as in the 1930's, the Supreme Court's substantive due process decisions are under strenuous political attack, an attack that has been aided by dramatic changes in the prevailing political climate. For present purposes, Ronald Reagan is the Roosevelt of the 1980's, having been elected and re-elected, like Roosevelt, by landslide margins.<sup>118</sup> From the perspective of Reagan's social revolution, moreover, *Roe v. Wade* is the *Lochner* of the 1980's. With the prospect of constitutional amendment seeming unlikely, the initial challenge to *Roe* primarily took the form of legislation designed to limit the effect of the decision.<sup>119</sup> More recently, the Reagan revolution has pressed more pointedly for a renunciation of *Roe*. Legislation has been introduced in Congress, for instance, that would directly challenge the validity of the Court's decision.<sup>120</sup> And the Reagan administration itself, through

117. See generally *supra* Part I (discussing the first life and death of substantive due process).

118. To be sure, Reagan suffered political defeats in the 1986 congressional elections, and he recently has come under serious attack in connection with foreign policy matters. It appears that these developments will have a significant impact on Reagan's personal popularity and political power throughout the remainder of his presidency, and they may have broader political implications as well. Nonetheless, I doubt that we are witnessing the end of the political revolution that Reagan has personified, at least not as it relates to social issues of the sort that implicate modern substantive due process.

119. See J. AGRESTO, *THE SUPREME COURT AND CONSTITUTIONAL DEMOCRACY* 130-31 (1984).

120. Under a proposed "Human Life Statute," introduced in 1981, Congress would have declared that "for the purpose of enforcing the obligation of the States under the fourteenth amendment not to deprive persons of life without due process of law, human life shall be deemed to exist from conception . . ." S. 158 & H.R. 900, 97th Cong., 1st Sess. § 1 (1981). Other proposed legislation, also introduced in the early 1980's, would have eliminated or restricted federal court jurisdiction in abortion cases. See Baucus & Kay, *The Court Stripping*

an amicus brief, has specifically requested the Supreme Court to overrule its decision, arguing that "the textual, doctrinal and historical basis for *Roe v. Wade* is so far flawed and . . . is such a source of instability in the law that this Court should reconsider that decision and on reconsideration abandon it."<sup>121</sup> Although the administration's request was rejected by the Court in its 1986 decision in *Thornburgh v. American College of Obstetricians*,<sup>122</sup> the Court's reaffirmation of *Roe*, which was originally joined by seven justices,<sup>123</sup> could garner only a bare majority of five.<sup>124</sup>

The political attack on *Roe* is narrower in focus than the 1930's assault on the Supreme Court's constitutional decisionmaking, and the methods of attack do not rival Roosevelt's Court-packing plan. Nonetheless, the political offensive of the 1980's is fervent, and it has led to increasingly blunt efforts to undermine the Court's protection of the right to abortion.<sup>125</sup> The same political movement, moreover, would have strongly opposed an extension of the right to privacy to homosexual conduct. Although the Court reaffirmed *Roe* in *Thornburgh*, its ruling in *Bowers* came only three weeks later,<sup>126</sup> thereby bringing the Court at least partially in line with the political forces that support the social agenda of the Reagan revolution.<sup>127</sup> Indeed, there may even be a 1980's analogue to the case of Justice Roberts.<sup>128</sup> Thus, Justice Powell joined the Court's reaffirmation of *Roe* in *Thornburgh*,<sup>129</sup> but he also joined the four *Thornburgh* dissenters to create a five-justice majority for rejecting the constitutional claim in *Bowers*.<sup>130</sup> According to a newspaper account, moreover, Powell had originally voted to find Georgia's sodomy ban unconstitutional, but he switched his vote in *Bowers* at some point after the justices' initial conference.<sup>131</sup> And perhaps in recognition of its political

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*Bills: Their Impact on the Constitution, the Courts, and Congress*, 27 VILL. L. REV. 988, 992 n.18 (1981-82).

121. Brief for the United States as Amicus Curiae in Support of Appellants at 2, filed jointly in *Thornburgh v. American College of Obstetricians*, 106 S. Ct. 2169 (1986), and *Diamond v. Charles*, 106 S. Ct. 1697 (1986). See also Greenhouse, *U.S. Brief Asks Court to Reverse Abortion Ruling*, N.Y. Times, July 16, 1985, at A8, col. 1.

122. 106 S. Ct. 2169 (1986).

123. See *Roe*, 410 U.S. 113.

124. See *Thornburgh*, 106 S. Ct. 2169. Several months after the Court's decision in *Thornburgh*, the same five-justice majority summarily affirmed a lower court decision that had invalidated an Arizona law relating to abortion. *Babbitt v. Planned Parenthood*, 107 S. Ct. 391 (1986), *aff'g* *Planned Parenthood v. Arizona*, 789 F.2d 1348 (9th Cir. 1986).

125. Sweeping new anti-abortion legislation may be in the drafting stage. See *Anti-Abortion Bill*, N.Y. Times, July 24, 1986, at B8, col. 1.

126. See *supra* note 49.

127. The Rev. Jerry Falwell, head of the "Moral Majority," applauded the Court's decision in *Bowers* because it "recognized the right of a state to determine its own moral guidelines" and "issued a clear statement that perverted moral behavior is not accepted practice in this country." Quoted in Rohter, *Friend and Foe See Homosexual Defeat*, N.Y. Times, July 1, 1986, at A16, col. 1.

128. See generally *supra* notes 15-19 and accompanying text.

129. See *Thornburgh*, 106 S. Ct. 2169.

130. See *Bowers*, 106 S. Ct. 2841. See also *id.* at 2847-48 (Powell, J., concurring).

131. See Kamen, *Powell Changed Vote in Sodomy Case*, Wash. Post, July 13, 1986, at 1, col. 4. According to the newspaper account, Justice Powell had originally agreed to provide a



vulnerability, the Court in *Bowers* thought it important to mention "the face-off between the Executive and the Court in the 1930's, which resulted in the repudiation of much of the substantive gloss that the Court had placed on the Due Process Clause of the Fifth and Fourteenth Amendments."<sup>132</sup>

Whatever the role of Justice Roberts,<sup>133</sup> the first death of substantive due process might not have been complete absent a significant turnover in the Supreme Court's membership.<sup>134</sup> Likewise, the second death of substantive due process, if it is to occur in a similar fashion, is likely to involve a change in judicial personnel. Such a change already has begun. President Reagan has replaced Justice Stewart, who had joined the Court's decision in *Roe*,<sup>135</sup> with Justice O'Connor, who has launched significant attacks on the Court's abortion doctrine.<sup>136</sup> On the retirement of Chief Justice Burger, who at least initially had supported the basic thrust of *Roe*,<sup>137</sup> Reagan has appointed Justice Rehnquist to be Chief Justice and Circuit Judge Antonin Scalia to take Rehnquist's place as Associate Justice. Rehnquist, along with Justice White, has opposed the Court's decision in *Roe* from the beginning,<sup>138</sup> and Scalia appears likely to adopt a similar judicial stance.<sup>139</sup> With one additional

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fifth vote for invalidating the Georgia sodomy statute, although he would have relied on the eighth amendment instead of substantive due process. As it was, Powell joined the majority opinion in *Bowers*, but filed a brief concurring opinion suggesting that although the criminalization of sodomy does not violate substantive due process, "a prison sentence for such conduct—certainly a sentence of long duration—would create a serious Eighth Amendment issue." *Bowers*, 106 S. Ct. at 2847 (Powell, J., concurring). *Cf. id.* at 2850 n.2 (Blackmun, J., dissenting) (discussing the possible relevance of the Court's eighth amendment decisions in *Robinson v. California*, 370 U.S. 660 (1962), and *Powell v. Texas*, 392 U.S. 514 (1968)). *See generally* Baude, *The Limits of Liberalism: Wrong to Others* (Book Review), 1986 AM. B. FOUND. RES. J. 153, 156 (suggesting that there may be a "distinctive limit on the *criminal* law's ability to reach harmless-to-others acts") (emphasis in original).

132. 106 S. Ct. at 2846.

133. *See supra* note 19 and accompanying text.

134. *See supra* notes 20-21 and accompanying text.

135. *See Roe*, 410 U.S. 113. *See also id.* at 167-71 (Stewart, J., concurring).

136. *See Thornburgh*, 106 S. Ct. at 2206-16 (O'Connor, J., dissenting); *Akron v. Akron Center for Reproductive Health*, 462 U.S. 416, 452-75 (1983) (O'Connor, J., dissenting).

137. *See Roe*, 410 U.S. 113. *See also id.* at 207-08 (Burger, C.J., concurring). In *Thornburgh*, Chief Justice Burger suggested that in light of what he considered an excessive judicial protection of the right to abortion in the years following *Roe*, it might be time to reconsider *Roe* itself. *Thornburgh*, 106 S. Ct. at 2190-92 (Burger, C.J., dissenting).

138. *See Roe*, 410 U.S. at 171-78 (Rehnquist, J., dissenting); *id.* at 221-23 (White, J., dissenting). In *Thornburgh*, Justice Rehnquist joined the dissenting opinion of Justice White, who explicitly argued that *Roe* should be overruled. 106 S. Ct. at 2192-2206 (White, J., joined by Rehnquist, J., dissenting).

139. As a Circuit Judge, Scalia joined an opinion authored by Judge Robert H. Bork that not only rejected an extension of the right to privacy to homosexual conduct, but that also contained unusually open criticism of the Supreme Court's privacy cases in general. *See Dronenburg v. Zech*, 741 F.2d 1388, 1392-97 (D.C. Cir. 1984). *Cf. Dronenburg v. Zech*, 746 F.2d 1579, 1581 (D.C. Cir. 1984) (Robinson, J., dissenting from denial of rehearing en banc) (lamenting Bork's "twelve-page attack on the right of privacy"). *See generally* Saphire, *supra* note 109. As a law professor, Scalia had criticized the Supreme Court's recognition of a right to abortion. *See AMERICAN ENTERPRISE INSTITUTE FOR PUBLIC POLICY RESEARCH, AN IMPERIAL JUDICIARY: FACT OR MYTH?* 7, 21, 35 (1979) (forum held on December 12, 1978) (remarks of Professor Scalia).

appointment, it might be possible for Reagan—or a like-minded presidential successor—to provide the Court with a majority that would be prepared to overrule *Roe v. Wade*. If any member of the five-justice *Thornburgh* majority were to retire and be replaced by Circuit Judge Robert H. Bork, for example, the continuing vitality of *Roe* would be in serious doubt.<sup>140</sup>

If the Supreme Court ultimately does renounce *Roe v. Wade*, one can readily envision how the Court's opinion might read. The Court might first point out that its "considered practice [is] not to apply *stare decisis* as rigidly in constitutional as in nonconstitutional cases."<sup>141</sup> The Court might even rely on its recent pronouncement of the second death of federalism in *Garcia v. San Antonio Metropolitan Transit Authority*.<sup>142</sup> In *Garcia*, the Court overruled a precedent more recent than *Roe*,<sup>143</sup> finding that the precedent had proven "unsound in principle and unworkable in practice" and had "[led] to inconsistent results at the same time that it disserve[d] principles of democratic self-governance."<sup>144</sup> Surely the Court could say the same of *Roe* and the substantive due process doctrine of which it is a part. And it could cite the patent inconsistency between *Roe* and *Bowers* as "Exhibit A."

If the Court were to overrule *Roe*, that would not necessarily mean a complete abandonment of the "right to privacy."<sup>145</sup> *Roe* is clearly the Court's

140. Judge Bork frequently has been mentioned as a likely candidate for the Supreme Court. See, e.g., *Next in Line for the Nine*, TIME, Oct. 8, 1984, at 32. As a Circuit Judge, Bork has openly criticized the Supreme Court's privacy decisions. See *supra* note 139. Likewise, during his academic career, Bork expressed the belief that "substantive due process, revived by the *Griswold* case, is and always has been an improper doctrine." Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 11 (1971).

I should note that even with a Court that included Rehnquist, White, O'Connor, Scalia, and Bork, an overturning of *Roe* would not be inevitable. Although each of them has joined in criticizing *Roe* or its doctrinal predicate, only Rehnquist and White have directly stated that they stand ready to "return the issue [of abortion] to the people by overruling *Roe v. Wade*." *Thornburgh*, 106 S. Ct. at 2198 (White, J., joined by Rehnquist, J., dissenting). Cf. *id.* at 2213 (O'Connor, J., dissenting) ("[B]ecause Pennsylvania has not asked the Court to reconsider or overrule *Roe v. Wade*, I do not address that question.") (citation omitted).

141. *Glidden Co. v. Zdanok*, 370 U.S. 530, 543 (1962) (plurality opinion). See also *Smith v. Allwright*, 321 U.S. 649, 665 (1944) ("In constitutional questions, where correction depends upon amendment and not upon legislative action this Court throughout its history has freely exercised its power to reexamine the basis of its constitutional decisions."). See generally Maltz, *Some Thoughts on the Death of Stare Decisis in Constitutional Law*, 1980 WIS. L. REV. 467; Monaghan, *Taking Supreme Court Opinions Seriously*, 39 MD. L. REV. 1 (1979).

142. 105 S. Ct. 1005 (1985). See Van Alstyne, *The Second Death of Federalism*, 83 MICH. L. REV. 1709 (1985).

143. *National League of Cities v. Usery*, 426 U.S. 833 (1976).

144. *Garcia*, 105 S. Ct. at 1016. See generally Frickey, *Stare Decisis in Constitutional Cases: Reconsidering National League of Cities*, 2 CONST. COMMENTARY 123 (1985); Frickey, *A Further Comment on Stare Decisis and the Overruling of National League of Cities*, 2 CONST. COMMENTARY 341 (1985). Additional judicial commentary on the role of *stare decisis* in constitutional cases is found in the various opinions in *Vasquez v. Hillery*, 106 S. Ct. 617 (1986).

145. Under a historically-oriented common values approach, for example, an internally consistent doctrine of substantive due process might protect neither the right to abortion nor the right to engage in homosexual sodomy while at the same time continuing to honor decisions such as *Meyer*, *Pierce*, *Griswold*, and *Moore v. City of East Cleveland*. See *supra* note 77 and accompanying text. See generally *supra* Part III.B.1.

most prominent privacy decision, however, and its repudiation therefore would call into question the validity of the Court's other privacy decisions as well. Thus, if a repudiation of *Roe* were to follow on the heels of *Bowers*, it would not be at all remarkable for the Court to renounce the use of substantive due process generally as a vehicle for protecting the right to privacy. Although this would represent a radical shift in constitutional doctrine, it would be no more radical than the shift of the 1930's. Indeed, under this scenario, the second death of substantive due process would look very much like the first, and *Bowers* might come to be viewed as the *Nebbia* of the 1980's.<sup>146</sup>

### CONCLUSION

I have speculated that *Bowers v. Hardwick* may represent the beginning of the second death of substantive due process. Needless to say, there are other possibilities. The Supreme Court conceivably could reverse the position that it took in *Bowers*,<sup>147</sup> although that seems highly unlikely, at least for the present.<sup>148</sup> Or *Bowers* could remain an aberrational precedent, with the Court continuing to reaffirm *Roe v. Wade* and continuing to protect selected privacy claims despite the lack of any principled basis for preferring those claims to the one rejected in *Bowers*.<sup>149</sup>

Regardless of whether *Bowers* leads to an overruling of *Roe* and the Supreme Court's other privacy rulings, it stands as a decision that severely undermines the doctrinal integrity of substantive due process, and therefore the legitimacy of the Court's decisionmaking in this area. As the Court noted in *Bowers*, "The Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution."<sup>150</sup> In dismissing the claim in *Bowers* as "facetious,"<sup>151</sup> however, the Court violated the first precept of legitimacy, the requirement of thoughtful and principled judicial decisionmaking.<sup>152</sup> Not only did the Court reject a constitutional

146. See generally *supra* notes 11-12 and accompanying text (discussing *Nebbia v. New York*, 291 U.S. 502 (1934), the decision that foreshadowed the end of the *Lochner* era).

My focus here is predictive, not prescriptive. In particular, I mean to predict what the Supreme Court may do, not to advocate or praise that possible outcome.

147. Cf. *Bowers*, 106 S. Ct. at 2856 (Blackmun, J., dissenting) ("I can only hope that . . . the Court soon will reconsider its analysis . . .").

148. Cf. *Gay Rights Leaders Say Court Decision Won't Stop Efforts*, Bloomington (Indiana) Herald-Telephone, July 1, 1986, at 3, col. 5 ("Thirty years hence, this will be viewed as the *Dred Scott* decision of gay rights.") (quoting Thomas B. Stoddard, executive director of the Lambda Legal Defense and Education Fund, a homosexual rights organization).

149. If the Court were to take this course, *Bowers* might come to be grouped with the abortion funding cases. See *supra* note 45.

150. 106 S. Ct. at 2846.

151. *Id.*

152. The Court's dismissive treatment of the constitutional claim in *Bowers* might also encourage legislative and executive officials to be equally dismissive of arguments that homo-

claim that precedent required it to accept, it issued an opinion that did not even attempt to confront the doctrinal and theoretical problems that the Court's decision obviously would raise. Indeed, if *Bowers* were our only example, it would be difficult to defend the ability of the judiciary to engage in a process of reasoned decisionmaking. Time will tell the validity of my conjecture concerning the eventual demise of the Court's other privacy rulings. In a sense, however, *Bowers* itself represents the death of substantive due process as a principled doctrine of law.

Death is a seasonal concept, at least in the life of constitutional law. And for this season, to my mind, substantive due process now stands lifeless as a constitutional doctrine—lifeless because *Bowers* cannot plausibly be reconciled with precedents that the Supreme Court continues to affirm; lifeless because the Court has fallen into the chasm of unprincipled judicial policymaking; lifeless because the Court has shown its willingness to give only cursory attention to a constitutional issue of profound importance, not only for its own sake, but for the sake of substantive due process generally. One can only hope that this season, too, will pass away.

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sexuals might present in the political process. See Gewirtz, *The Court Was 'Superficial' in the Homosexuality Case*, N.Y. Times, July 8, 1986, at A21, col. 1. See generally A. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 29-31 (1962) (discussing the "legitimizing" effect of Supreme Court rulings that uphold the constitutionality of challenged governmental practices).