# Capitalism, Liberalism, and the Right to Privacy

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*The constitutional right to privacy is a doctrinal mess. The United States Supreme Court appears incapable of articulating a coherent underpinning to this important line of cases, or—more likely—is simply unwilling to do so. And yet there is an obvious candidate for that job: the philosophy of liberalism. But liberalism is a notoriously complicated and contested philosophy. Thus, this Article proposes a succinct and functional articulation of liberalism, which it then applies to Supreme Court cases dealing with the right to privacy. As we shall see, the Court's failure to follow liberal principles lies at the heart of its inconsistencies. Greater understanding of liberalism, and greater willingness to respect this political theory so deeply rooted in American history and tradition, could bring much needed coherence to this body of constitutional law.*



## INTRODUCTION

The philosophy of liberalism lies at the heart of America's political creed, from the time of its founding to the very present.[1] It is

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therefore only to be expected that the principles of liberalism find their manifestation in constitutional law. This Article examines this hypothesis in regard to the constitutional right to privacy—arguably the most prototypical liberal right.

Part I teases out the principles of liberalism by pursuing an analogy between capitalism and liberalism. There are two principal advantages to this methodology. First is the general familiarity of capitalism. Most of us are well acquainted with the principle of a free economic sphere and the debates surrounding government regulation of the economy. As we shall see, those principles—and the related debates—can be transported, virtually intact, in the elaboration of liberalism. A second advantage is the analogy's ability to distill the liberal tenets. Articulations of liberalism are numerous and are often complex. A successful condensation of the theory to a few broad principles, if successful, could greatly facilitate the use of liberalism in the elaboration of constitutional doctrine. That task is undertaken in Part II, where the Article applies the articulated principles to the right to privacy line of cases. As we shall see, the Supreme Court's failure to articulate a coherent vision of the right to privacy can be blamed on its failure to follow those liberal principles. Part III concludes with a case study that exemplifies that failure—the lengthy litigation surrounding Alabama's criminal ban on the distribution of sex toys.

## I. CAPITALISM AND LIBERALISM

### *A. Capitalism*

In a capitalist economy, the chief agents of ownership, production, and distribution of goods and services are private parties acting freely for profit. Such an arrangement, says the theory of capitalism, is the most efficient way with which to order an economy: a free and privately-run economic sphere maximizes overall economic prosperity. The basic unit in this private economic sphere is the individual (adult and competent).[2] It is the individual—and not, say, the family or the village or the State—that is the primary depository of property rights. And where property is held in common (as it often is,

1. On liberalism as a leading political theory of American political thought, see generally LOUIS HARTZ, THE LIBERAL TRADITION IN AMERICA: AN INTERPRETATION OF AMERICAN POLITICAL THOUGHT SINCE THE REVOLUTION (1955); ROGERS M. SMITH, LIBERALISM AND AMERICAN CONSTITUTIONAL LAW (1985); JAMES P. YOUNG, RECONSIDERING AMERICAN LIBERALISM: THE TROUBLED ODYSSEY OF THE LIBERAL IDEA (1996).

2. Karl Polanyi saw in the focus on the individual one of capitalism's greatest innovations. *See* KARL POLANYI, THE GREAT TRANSFORMATION 46 (1944).

in partnerships or corporations for example) legal mechanisms allow and facilitate individual opt out. Indeed many of the explanations as to why capitalism is the most efficient system of economic organization are based, as we shall see below, on the nature of individuals.

The precepts of a free and private economic sphere place substantial limitations on government regulation of the economy, though they do not entail complete freedom from it. On the contrary, the government must be deeply involved in creating and maintaining the free economic sphere, else there would be no economic freedom. Thus, the government must establish and enforce property rights, recognize the binding force of contracts, and criminalize fraud and extortion if a truly free market is ever to exist. A complete lack of state regulation is bound to result in the *absence* of freedom, as in those weak states where local strongmen or criminal gangs reign over the economy. Economic freedom means the exercise of genuine economic choice, and there can be no genuine choice where people are coerced or deceived in their economic dealings. The state must create and enforce the rules that keep the marketplace free from private fraud and coercion.

While extreme forms of capitalism may seek to restrict state regulation of the economy to those creating and maintaining a free economic sphere, in reality capitalism recognizes at least two additional bases for legitimate state regulations[3]: one in the pursuit of economic efficiency, the other a qualification to that pursuit.

First, modern capitalism recognizes the legitimacy of regulations aimed at correcting "market failures"—those instances where the unregulated operation of the free market produces economic inefficiencies. To give one obvious example, sometimes a free market will produce a monopoly—an economic actor having little or no competition which can then single-handedly control output and prices.[4]

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3. *But see id.* at 148 ("Theoretically, laissez-faire or freedom of contract implied the freedom of workers to withhold their labor either individually or jointly, if they so decided; it implied also the freedom of businessmen to concert on selling prices . . . . But in practice such freedom conflicted with the institution of a self-regulating market, and in such a conflict the self-regulating market was invariably accorded precedence. In other words, if the needs of a self-regulating market proved incompatible with the demands of laissez-faire, the economic liberal turned against laissez-faire and preferred . . . the so-called collectivist methods of regulation and restriction.").

4. One famous example from economic literature involves the failure of the private sector to provide water to many municipalities in nineteenth-century Britain. Lack of water and bad sanitary conditions finally forced municipal governments into action: they proceeded to raise money and invest in a public infrastructure that, at long last, managed to provide running water services throughout Britain. James Salzman, *Is It Safe To Drink the*

In such cases, the state may legitimately intervene so as to bring about the competition that failed to emerge on its own accord, and that is essential for economic efficiency. The forced breakup of AT&T's telephone monopoly in the 1970s was no doubt an extreme form of government intervention in the economic sphere, but a perfectly legitimate one.

The alleged causes of market failures are numerous and include, among other things, information costs and positive or negative externalities (that is, the beneficial or detrimental effects of economic transactions on third parties). Thus, when economic actors cannot be compensated for their products or services by the beneficiaries of positive externalities (for example, the car-driving beneficiaries of a railroad system that reduces pollution and traffic), or conversely, when actors are not forced to internalize costs to third parties (say, the costs of pollution), undersupply or overuse may ensue. In such instances the government may intervene so as to correct these distortions through subsidies or penalties, or even by assuming the role of an owner and distributor of goods and services (as in "public goods" and "common resource goods"—things like clean water or highways).[5] Although economists often disagree as to what is or is not a market failure, the validity of the concept as a basis for government regulation is, for the most part, beyond dispute.[6] Capitalism has come to recognize that a free economy is not always self-correcting and that the invisible hand of the market may sometimes itself need a guiding hand.

Unlike the creation and enforcement of a free economic sphere and the remedying of market failures, both of which are justified on the ground that they promote economic efficiency, the last category of legitimate state intervention has different concerns. It involves instances where the value of economic efficiency yields to more important purposes or values, including moral values. Examples include limitations on the number of working hours, minimum wage

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*Water?*, 19 DUKE ENVTL. L. & POL'Y F. 1, 4-30 (2008); James Salzman, *Thirst: A Short History of Drinking Water*, 18 YALE J.L. & HUMAN. 94, 112 (2006).

5. Thus, besides regulating the economy, the state also participates in it. Now given the state's enormous financial resources, excessive participation in the economy may undermine the private nature of that domain. Accordingly, capitalism also calls for limited state *participation* in the economy—though the modern capitalist state recognizes the legitimacy of many such practices, which include fiscal policies (lending money to private banks, or purchasing or selling the national currency), and even dramatic increases in public consumption of goods and services at times of economic crises.

6. Although, to be sure, some persist in denying its validity. *See, e.g.*, D.W. MacKenzie, *The Market Failure Myth*, MISES DAILY (Aug. 26, 2002), http://mises.org/daily/1035.

laws, prohibition on usurious interest rates, taxation and transfer payments, and the prohibition on trade in human organs or in children for adoption.[7] All these may arguably *reduce* economic efficiency, but even so are accepted for the sake of other, noneconomic ends. Put differently, nonintervention has its limits because the importance of economic efficiency does.

In short, state interventions in the economy need to be justified as (1) maintaining a free economic sphere where individuals can make free economic choices; (2) addressing market failures; or (3) serving moral, political, or social purposes that take priority (in specific contexts) over economic efficiency. In the absence of any such justification, capitalism dictates a default position of governmental noninterference in the economy.

### *B. Liberalism*

The logic of liberalism follows closely the logic of capitalism. While capitalism is concerned with the pursuit of *economic* well-being, liberalism is concerned with the pursuit of *personal* well-being. Thus, liberalism's fundamental precept is the creation of a free personal sphere (paralleling capitalism's economic sphere) within which actors freely pursue their personal welfare.[8] Such a free personal sphere, free from public or private coercion, is purported to maximize personal prosperity (just as a free economic sphere maximizes economic prosperity).[9] Accordingly, as with capitalism,

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7. As Polanyi puts it, the regulation of the market came in part to address the "weaknesses and perils inherent in a self-regulating market system." POLANYI, *supra* note 2, at 145. These included the "fact that the masses were being sweated and starved by the callous exploiters of their helplessness [and] the authenticated tragedies of the small children who were sometimes worked to death in mines and factories." *Id.* at 156.

8. A note on vocabulary: the literature often refers to a "private" sphere rather than a "personal" sphere. *See, e.g.*, JOHN STUART MILL, ON LIBERTY (David Bromwich & George Kateb eds., Yale Univ. Press 2003) (1859). This Article uses both terms and treats them as interchangeable. But I prefer the term "personal sphere" because to speak of a "private sphere" is to beg the question: after all, if a matter is "private," then obviously the state should stay out of it. But the political idea of a free personal sphere is, of course, far from obvious.

9. *See, e.g.*, JOHN LOCKE, A LETTER CONCERNING TOLERATION 16-19, 29, 48, 52 (Bobbs-Merrill 1955) (1689) [hereinafter LOCKE, TOLERATION]. Indeed, according to Locke liberty is such a precondition for human well-being that men can never truly abdicate it. JOHN LOCKE, TWO TREATISES OF GOVERNMENT 325 (Peter Laslett ed., Cambridge Univ. Press 2d ed. 1967) (1689) [hereinafter LOCKE, TWO TREATISES]. As Rogers M. Smith put it, "[F]or Locke liberty is essential to human happiness as both an end and a means." SMITH, *supra* note 1, at 29.

liberalism limits state intervention in the personal sphere to certain specified conditions which parallel those we saw with capitalism.[10]

First, as with the creation and maintenance of a free economic sphere, the state must create and maintain a free private sphere within which individuals can make free personal choices.[11] "[T]he end of law," wrote John Locke,

> [I]s not to abolish or restrain, but to preserve and enlarge freedom: for . . . where there is no law, there is no freedom; for liberty is to be free from restraint and violence from others; which cannot be where there is not law . . . (for who could be free, when every other man's humour might domineer over him?).[12]

Friedrich Hayek—a lawyer by training, a Nobel Prize-winning economist, and one of modern liberalism's greatest expositors—made a similar point when he wrote, "Free society has met this problem [of producing freedom] by conferring the monopoly of coercion on the state and by attempting to limit this power of the state to instances where it is required to prevent coercion by private persons."[13] Thus many of our criminal and tort laws, like scores of other regulations, are aimed at creating a social realm within which individuals may pursue their personal ends free from coercion by others.

Still, like capitalism, modern liberalism has come to recognize at least two additional grounds for legitimate state intervention in the personal sphere. First, liberal states recognize the legitimacy of some paternalistic regulations that restrict individuals' personal choices in order to advance these individuals' *own* well-being. Such regulations are justified on the ground that, as in the case of "market failures" in the economic sphere, the free personal sphere sometimes produces malfunctions and inefficiencies in individuals' pursuit of their own welfare. These failures usually relate to some cognitive deficiency: various forms of akrasia, a failure to evaluate risk properly, or even simple ignorance. Thus, the extensive regulation of minors, mandatory

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10. As with capitalism, our principal concern is with state *regulation* of the private sphere, for it is state regulation (rather than mere participation) that poses the principal threat to freedom. Nevertheless, given the state's enormous power and financial resources, excessive participation in the private sphere—through sponsorship of some private pursuits to the exclusion of others (favored charities, favored art, favored religion, etc.)—may undermine the free and private nature of that domain. Thus, liberalism also seeks to limit state participation in the private sphere insofar as controversial values and purposes are concerned.

11. *See* LOCKE, TWO TREATISES, *supra* note 9, at 367, 373-74, 399.

12. JOHN LOCKE, TWO TREATISES OF GOVERNMENT AND A LETTER CONCERNING TOLERATION 123–24 (Ian Shapiro ed., Yale Univ. Press 2003) (1690) (internal quotation marks omitted).

13. F.A. HAYEK, THE CONSTITUTION OF LIBERTY 21 (1960) (footnote omitted).

contributions to pension funds, the outlawing of gambling and recreational drugs, and prescription and approval requirements for medical drugs are all instances where, due to some cognitive failure or malfunction, individuals allegedly fail to advance their well-being in accordance with their own understanding of it, and the state may legitimately intervene to correct the failure.

As with economic market failures, such state regulations are justified by their ability to improve on what a private sphere is supposed to do best—namely, maximize personal well-being. As such, market and cognitive failures are qualifications to the very precepts of capitalism and liberalism and they are accommodated as limited exceptions bearing a relatively heavy burden of justification.

Finally, as with capitalism, some state interventions in the personal sphere are justified by reference to values or purposes that compete with personal well-being in specific contexts. Just as moral reasons may sometimes take priority over economic efficiency, so can economic efficiency sometimes take priority over personal well-being. For example, mandatory seat belt or motorcycle helmet laws are often justified on the ground that personal freedom needs to yield to the interest in reduced medical and insurance costs.[14] More significantly, people may be forced to get vaccinated or undergo medical treatment so as to preserve the health of others.[15]

However, whereas interventions in the economy (like minimum wage laws or prohibitions on commerce in organs) can be justified by purely moral considerations (even without any allegation of private coercion or wrongdoing or market failure), interventions in the private sphere cannot be based *solely* on *moral* considerations (that is, absent any claim of coercion or wrongdoing toward others).[16] After all, the very idea of a free personal sphere (unlike the idea of a free economic sphere) comes to guarantee the freedom to make personal moral and ethical choices. Put differently, moral and ethical decisions (absent any coercive conduct or a cognitive failure) belong to the free personal

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14. *See, e.g.*, Nancy Hicks, *Lawmakers Debate Helmets: Safety vs. 'Air in the Hair*,*'* LINCOLN J. STAR (Jan. 13, 2008), http://journalstar.com/news/local/govt-and-politics/article_75974724-da8e-5f5d-8c41-b79803c23b29.html ("Omaha Sen. Steve Lathrop said the helmet law 'is a public health issue.' Without helmets, 'you know you are going to have more injuries and more deaths,' he said. Much of the cost will be borne by government and thus taxpayers, he noted. . . . Personal freedom is never absolute, said Lincoln Sen. Bill Avery. It needs to be balanced against the public good, he said. And in this case, he said, the public interest—holding down insurance and health care costs—are [sic] more important.").

15. *See, e.g.*, Jacobson v. Massachusetts, 197 U.S. 11, 19 (1905).

16. *See* LOCKE, TOLERATION, *supra* note 9, at 47-48; LOCKE, TWO TREATISES, *supra* note 9, at 309, 376.

sphere, so that state interventions justified solely by the wish to impose a contrary moral or ethical vision are the equivalents of economic interventions justified on the ground that individuals' economic choices are *economically* wrong (absent any market failure or coercion or fraud), which would clearly run counter to capitalism. Thus, as a Supreme Court Justice once put it:

> [T]he regulation of constitutionally protected decisions, such as where a person shall reside or whom he or she shall marry, must be predicated on legitimate state concerns other than disagreement with the choice the individual has made. . . . A State's value judgment [does not] provide adequate support for . . . substituting a state decision for an individual decision . . . .[17]

This, of course, has great implications for liberal discourse. For example, regulation of suicide in the modern liberal state is not justified on moral grounds—as it usually is in nonliberal states—but either on the ground of redressing a cognitive failure (mental illness, depression) or as thwarting private coercion (be it the pressure on the elderly to move out of the way or the wish to avoid the slippery slope toward euthanasia).[18] Similarly, the regulation of pornography is often defended either on the ground that pornography involves various forms of coercion by some individuals against others (the coercion involved in producing pornography, the coercion of sex crimes encouraged by exposure to pornography, or even the alleged coercion involved in exposing the unwilling to pornographic images), or by claiming that participation in either the consumption or the production of pornography constitutes a cognitive failure on the part of those who consume or participate in the production of such materials.[19] By

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17. Hodgson v. Minnesota, 497 U.S. 417, 435 (1990) (citations omitted); *see also* Lawrence v. Texas, 539 U.S. 558, 571 (2003) ("It must be acknowledged, of course, that . . . for centuries there have been powerful voices . . . condemn[ing] homosexual conduct as immoral. . . . These considerations do not answer the question before us, however. The issue is whether the majority may use the power of the State to enforce these views on the whole society through operation of the criminal law."). The Court in *Lawrence* proceeded to answer in the negative.

18. For Supreme Court decisions employing such arguments, see *Washington v. Glucksberg*, 521 U.S. 702 (1997), and *Cruzan v. Director, Missouri Department of Health*, 497 U.S. 261 (1990).

19. *See* New York v. Ferber, 458 U.S. 747 (1982); Miller v. California, 413 U.S. 15 (1973); Rowan v. U.S. Post Office Dep't, 397 U.S. 728 (1970); Stanley v. Georgia, 394 U.S. 557 (1969); Am. Booksellers Ass'n v. Hudnut, 771 F.2d 323 (7th Cir. 1985), *aff'd mem.*, 475 U.S. 1001 (1986); Catharine A. MacKinnon, *Pornography, Civil Rights, and Speech*, 20 HARV. C.R.-C.L. L. REV. 1 (1985).

contrast, the prohibition of pornography in nonliberal societies is simply defended by reference to pornography's alleged immorality.[20]

Finally, as with capitalism, the fundamental unit whose freedom is protected is the *individual*. The individual, not the marital unit or the family or one's ethnic group, is the bearer of privacy rights.[21] Liberal states prioritize the freedom and autonomy of individuals over the self-determination interests of any collective, including the family. This is an important point not only because it signals one of liberalism's greatest breaks from the past (manifested in such policies as the criminalization of marital rape or child abuse), but also because, as with capitalism, some of liberalism's philosophical justifications derive from it.

To sum up, paralleling capitalism, liberalism requires that any state regulation of the private sphere be justified either as (1) creating a free personal sphere where individuals pursue their personal well-being free from coercion by others, (2) correcting for a cognitive malfunction that distorts individuals' ability to pursue their own personal well-being, or (3) advancing an interest other than personal well-being—like economic efficiency or national security, but excluding mere ethics or morality—that takes priority in that particular context. The default position is one of noninterference by the state. As John Rawls put it, in the liberal state "There is . . . a general presumption against imposing legal and other restrictions on conduct without sufficient reason."[22]

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20. *See, e.g.*, *Sri Lanka's Moral Policing: Rajapaksa's Big Cover-Up*, ECONOMIST, Oct. 30-Nov. 5, 2010, at 41.

21. The focus on the individual has been a staple of liberalism since its inception. *See* SMITH, *supra* note 1, at 47. As Rogers Smith recounts, individualism is also a much-criticized aspect of liberalism. Smith himself alleges that, per liberalism, "Human fulfillment . . . seems to be regarded as ultimately an individual experience. [And thus] places little emphasis on the human need for satisfactions provided by common memberships and endeavors . . . ." *Id.* at 49. But liberalism's focus on individualism merely makes any membership in a group a matter of individual choice; it does not, of course, put obstacles in the way of such membership and its communal self-fulfillment (unless voluntary membership is considered such an obstacle). To that extent, individualism says nothing about the significance of communal self-fulfillment above the mere requirement that such fulfillment not be coerced.

22. *See* JOHN RAWLS, POLITICAL LIBERALISM 292 (1st ed. 1993).

### *C. Briefly on the Relation Between Capitalism and Liberalism*

It should not be surprising that capitalism and liberalism rose more or less simultaneously in the West.[23] First, the two theories enjoy substantive overlaps. Both call for limited state interventions in spheres of activity—the economic and the personal—that cannot be neatly separated. Thus, private property is not only a quintessential economic liberty, but also a precondition to many personal freedoms. ("[A] people averse to the institution of private property," proclaimed Lord Acton, "is without the first element of freedom.")[24] And the freedom to choose one's trade, to give another example, has obvious footings in both the economic and personal spheres.[25] Indeed, some of the seminal works of capitalism and liberalism, including those of Adam Smith and John Locke, often treated economic and personal freedoms as one and the same thing.[26]

Additionally, the philosophical underpinning of both theories is similar. As already mentioned, both theories regard the individual as the fundamental proprietor of economic and personal liberties. And both rely on a view of individuals as principally self-interested and rational:[27] on the whole, individuals do not pursue self-destructive ends through unintended impulses, but self-serving aims through effective means.[28] Individuals, for both theories, are natural welfare-maximizers.

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23. Rawls traced the roots of liberalism to the Protestant Reformation and the attendant rise of religious pluralism. Polanyi traced the "change from regulated to self-regulated markets" to the end of the eighteenth century. POLANYI, *supra* note 2, at 71.

24. JOHN EMERICH EDWARD DALBERG-ACTON, *Nationality*, *in* THE HISTORY OF FREEDOM AND OTHER ESSAYS 270, 297 (1919).

25. Nineteenth-century American courts declared certain monopolies unconstitutional on the ground that they interfered with people's freedom to ply their trades. For a discussion of those cases, see HAYEK, *supra* note 13, at 167–68.

26. *See generally* LOCKE, TWO TREATISES, *supra* note 9 (advocating both economic and personal liberty, including the right to have and use property, and freedom of conscience, on essentially similar grounds).

27. Hayek disagreed that an appreciation of man's rationality was an essential element of English liberalism, but acknowledged that at least John Stuart Mill relied on such rationality. HAYEK, *supra* note 13, at 60–61 (citing JOHN STUART MILL, *Essay V: On the Definition of Political Economy; and on the Method of Investigation Proper to It*, *in* ESSAYS ON SOME UNSETTLED QUESTIONS OF POLITICAL ECONOMY (London, Harrison & Co. 1844)). However, John Locke, for example, also relied on man's rationality.

28. "[E]veryone is the best and sole judge of his own private interest, and . . . society has no right to control a man's actions unless they are prejudicial to the common weal . . . ." 1 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 64-65 (Phillips Bradley ed., Vintage Books 1951) (1838). Hence the obvious link between liberalism and the Enlightenment. *See, e.g.*, Jeremy Waldron, *Theoretical Foundations of Liberalism*, 37 PHIL. Q. 127 (1987).

The state, on the other hand, has distinct disadvantages in its pursuit of economic and personal well-being. First, both economic transactions and the pursuit of happiness involve complex ordering of one's priorities: people need to choose between buying a new chair or a new bicycle, having children or luxurious weekend escapes, or going to church or to yoga classes. And while people—being self-interested and rational—generally know what they want and how to go about obtaining it, the task of determining, and then satisfying, the economic and personal preferences of millions of people is a near impossible one.[29] As importantly, the state suffers from serious agency problems—the interests of those making decisions on behalf of the state are often at odds with the interests of those on whose behalf the decisions are supposed to be made. Thus, the self-interest of those wielding the levers of power—which includes retaining that power—may often be served by privileging certain groups or institutions (through the bestowal of economic monopolies or subsidies or the privileging of a particular religion or philosophy) in ways that disserve overall economic or personal welfare. Both capitalism and liberalism minimize these structural difficulties by maximizing freedom from state regulation.

Although, the analogy between capitalism and liberalism is meant here primarily as a heuristic device, it makes sense both historically and philosophically.[30] Indeed the resulting description is consistent with some canonical articulations of liberal principles, including John Stuart Mill's harm principle ("[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"),[31] and Rawls's conception of liberalism as a political theory that shuns the use of comprehensive philosophical, religious, or moral theories as the basis for political action.[32]

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29. *See* F.A. HAYEK, THE COUNTER-REVOLUTION OF SCIENCE: STUDIES ON THE ABUSE OF REASON (Liberty Press 1952) (1899).

30. And yet, capitalism and liberalism are certainly distinct: a state can have a free economic sphere but maintain extensive regulation of various aspects of individuals' personal lives (today's China and Singapore come to mind)—and vice versa (say, Chad). And, of course, a state can be more or less capitalistic and more or less liberal. *See generally* TERRY MILLER ET AL., HERITAGE FOUND. & WALL ST. J., 2012 INDEX OF ECONOMIC FREEDOM (2012), *available at* http://www.heritage.org/index/DownloadForm.

31. MILL, *supra* note 8, at 80.

32. *See* RAWLS, *supra* note 22.

### *D. Skepticism*

This Subpart is a detour aimed at addressing a famous challenge to the usefulness of capitalism and liberalism as guides for action.

People habitually disagree about the *application* of capitalist and liberal principles (for example, about whether regulations of financial instruments or gambling are justified as remedying market or cognitive failures). That is only to be expected. More troublesome are the claims that capitalism and liberalism simply fail to draw coherent distinctions between legitimate and illegitimate government regulations of the economic and personal spheres.[33] One important strain of such skepticism can be traced to the legal realists of the 1920s and their critique of the laissez-faire capitalism championed by American courts of the time. The realists challenged the idea that certain state regulations of the economy, principally rules governing property rights and contracts, were mere neutral corollaries of a free economic sphere. There was no such neutral framework of economic freedom, argued the realists. Instead, every regulation constituted a controversial value judgment that increased the freedom of some at the expense of the freedom of others. The state never acts neutrally in enforcing property and contract rights.[34]

This criticism took various forms. In his classic *Transcendental Nonsense and the Functional Approach*, Felix Cohen attacked the idea that certain property rights were necessitated by the precept of a free economy.[35] As Cohen put it, it was false to think that "courts are not *creating* property, but are merely *recognizing* a pre-existent Something."[36] He gave the example of the legal protection of trademarks. Trademarks, said Cohen, were recognized as protected property on the ground that their originators produced something of

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33. *See* Duncan Kennedy, *The Critique of Rights in Critical Legal Studies*, *in* LEFT LEGALISM/LEFT CRITIQUE 178 (Wendy Brown & Janet Halley eds., 2002); ROBERTO MANGABEIRA UNGER, KNOWLEDGE AND POLITICS (1975); Duncan Kennedy, *The Paradox of American Critical Legalism*, 3 EUR. L.J. 359 (1997); Roberto Mangabeira Unger, *The Critical Legal Studies Movement*, 96 HARV. L. REV. 561 (1983).

34. *See* HOWARD GILLMAN, THE CONSTITUTION BESIEGED: THE RISE AND DEMISE OF LOCHNER ERA POLICE POWERS JURISPRUDENCE (1993); MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW 1870-1960: THE CRISIS OF LEGAL ORTHODOXY (1992). As examples of such realist scholarship, in addition to the articles discussed below, see Ray A. Brown, *Due Process of Law, Police Power, and the Supreme Court*, 40 HARV. L. REV. 943 (1927); Thomas Reed Powell, *The Judiciality of Minimum-Wage Legislation*, 37 HARV. L. REV. 545 (1924).

35. Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809 (1935).

36. *Id.* at 815.

economic value, that a thing of economic value was property, and hence that the legal protection of trademarks was nothing but a necessary implication of a free economic sphere.[37] "The vicious circle inherent in this reasoning is plain," wrote Cohen: "It purports to base legal protection upon economic value, when, as a matter of actual fact, the economic value of a sales device [like trademarks] depends upon the extent to which it will be legally protected."[38] There were many valuable things for which the state offered no property protections (Cohen mentioned the highly valuable breathing air as an example).[39] In truth, claimed Cohen, every property right put the power of the state behind some economic interests and against others, and therefore required policy justifications going beyond the sterile appeal to a free economic sphere.

A similar argument has been made about contract law. In a series of classic articles spanning several decades, Robert Hale sought to debunk the idea that the state, in enforcing contractual agreements, was acting as a neutral enforcer of the freedom of contract.[40] Instead, said Hale, the state was always implicated in the substance of the contracts it enforced. After all, all contracts were shaped by the background rules of property rights, tort law, criminal law, and all other legal regulations that the state promulgated and enforced. "[E]ach party, in order to induce the other to enter into a transaction, may generally threaten to exercise any of his legal rights and privileges, no matter how disadvantageous that exercise may be to the other party."[41] Thus, "Bargaining power would be different were it not that the law endows some with rights that are more advantageous than those with which it endows others."[42] These background legal rights were therefore pivotal to the *substance* of contracts. But once again, all these background rules (like the one recognizing trademarks as protected property) were not mere neutral choices but substantive policy decisions favoring some interests and disfavoring others.

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37. *Id.* at 814-15.

38. *Id.* at 815.

39. "Language is socially useful apart from law, as air is socially useful, but neither language nor air is a source of economic wealth unless some people are prevented from using these resources in ways that are permitted to other people." *Id.* at 816.

40. *See* Robert L. Hale, *Bargaining, Duress, and Economic Liberty*, 43 COLUM. L. REV. 603 (1943) [hereinafter Hale, *Bargaining*]; Robert L. Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 POL. SCI. Q. 470 (1923); Robert L. Hale, *Law Making by Unofficial Minorities*, 20 COLUM. L. REV. 451 (1920).

41. Hale, *Bargaining*, *supra* note 40, at 606.

42. *Id.* at 627-28.

Change these background rules and you have changed the content of the ensuing agreements:

> It is with these unequal rights that men bargain and exert pressure on one another. These rights give birth to the unequal fruits of bargaining. There may be sound reasons of economic policy to justify all the economic inequalities that flow from unequal rights. If so, these reasons must be more specific than a broad policy of private property and freedom of contract. With different rules as to the assignment of property rights, particularly by way of inheritance or government grant, we could have just as strict a protection of each person's property rights, and just as little governmental interference with freedom of contract, but a very different pattern of economic relationships.[43]

To that extent, claimed Hale, both so-called free capitalist economies and planned economies involved equally extensive government regulation of the economic sphere. As Hale put it:

> Absolute freedom in economic matters is of course out of the question. The most we can attain is a relative degree of freedom, with the restrictions on each person's liberty as tolerable as we can make them. . . .
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> . . . .
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> . . . There is no *a priori* reason for regarding planned governmental intervention in the economic sphere as inimical to economic liberty . . . . We shall have governmental intervention anyway, even if unplanned . . . .[44]

In fact, said Hale, "It is this unplanned governmental intervention which restricts economic liberty so drastically and so unequally at present."[45]

Boiled to their essence, these claims assert that the government's primary justification for regulations of the economy—the erection of the free economic sphere—is a ruse, and that such regulations merely put the power of the state behind certain economic interests (and against others) under the guise of neutrality. And, of course, this criticism is equally applicable to liberalism and its attempt to delineate the distinction between legitimate and illegitimate state regulations of the personal sphere.

Nevertheless, there are several reasons why this critique does not vitiate the claims that capitalism is a useful guide for economic regulation, or that liberalism is a useful guide for constitutional

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43. *Id.* at 628.
44. *Id.* at 626-28.
45. *Id.* at 628.

doctrine. First, the best interpretation of the realist critique sees it as the claim that there is no neutral way with which to define economic (or personal) freedom, so that any version of such freedoms involves some controversial policy choice that needs to be recognized and defended as such. So read, the realist critique does not challenge the wish to maximize economic or personal freedoms. It only challenges the pretension that certain legal rules are the neutral and necessary embodiments of freedom. Not so, says the realist: property rights for trademarks or the enforcement of yellow dog contracts must be defended on substantive grounds by reference to the economic freedoms they generate, and in comparison to potentially equally free but different legal regimes.

Ultimately, not even as radical a critic as Robert Hale challenged the desirability of economic freedom. His argument was that a planned economy may in fact produce *more economic freedom* than the unplanned laissez-faire ideology of his day. ("[B]y judicious legal limitation on the bargaining power of the economically and legally stronger, it is conceivable that the economically weak would acquire greater freedom of contract than they now have—freedom to resist more effectively the bargaining power of the strong, and to obtain better terms.").[46] Thus, this Article's concern with *the proper form* of arguments regarding the legitimacy of state regulations retains its potential bite. Indeed its potential importance is affirmed.

Of course, it is possible to read the realist critique as more radical: as an assault on the very rationality of the capitalist and liberal discourses. Under this interpretation, there is no rational basis with which to decide among a number of competing and radically different visions of economic or personal freedom. No legal regime can avoid placing serious constraints on economic and personal freedom, and the only real question is whose freedom should be sacrificed and whose advanced. To that extent, capitalism and liberalism are vacuous ideologies that merely serve to mask the coercive power of the state and the service it renders to some interests at the expense of others.

I do not think that this deeply skeptical interpretation is an accurate reading of realists like Cohen or Hale; but in any event, even this criticism would not eliminate the value in our exegesis. That absolute freedom is a myth does not mean that different legal regimes do not afford different degrees of economic and personal freedoms. Sure they do. And similarly, that capitalism and liberalism may fail to

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46. *Id.*

provide a single superior choice from among the competing visions of economic and personal freedoms does not mean that there are not better and worse alternatives. In other words, even this radical reading of the realist critique does not challenge the value of economic and personal freedom, and hence does not undermine the importance of capitalist or liberal discourse.

### *E. Liberalism and Constitutional Doctrine*

But even if liberalism is practically useful, why should liberal principles guide constitutional interpretation? Why should constitutional doctrine seek congruence with a political theory (or a version of it)? John Hart Ely derided this idea as "We like Rawls, you like Nozick. We win, 6-3."[47] Liberalism seems like an inappropriate guide for those who hope to keep constitutional interpretation neutral and ideology-free. In *Lochner v. New York*, Justice Holmes quipped that "The Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics."[48] Why should it enact Mr. Rawls's Political Liberalism?

And yet, the same question can be asked about democracy—another political theory not explicitly named in the United States Constitution: why should constitutional doctrine seek congruence with democratic principles? After all, democracy and liberalism are equally foundational to the American polity: both lie at the heart of American political philosophy, and their principles, arguably, cannot *but* inform the answers to our most important social and political legal questions. It would be odd to decide the scope of the First Amendment without regard for democracy, and equally odd to decide the scope of the liberty prong of substantive due process doctrine without regard for liberalism. Indeed even a theory of constitutional interpretation as radical and (purportedly) restrictive as originalism must avail itself of democratic or liberal principles when applying abstract constitutional provisions whose historical public meaning and intent sprang from these philosophies. Herbert Spencer's Social Statics was, as Justice Holmes asserted, a "theory which a large part of the country does not entertain"; liberalism, by contrast, is a theory celebrated in one form or another by everyone in the country.[49] Ely's own example pertains to two versions of it (Rawls's and Nozick's).

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47. JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 58 (1980).

48. 198 U.S. 45, 75 (1905).

49. *Id.*

Of course, the specific applications of liberalism—like those of democracy—are often controversial: do unequal voting districts or closed party elections violate democratic principles? Do prohibitions on gambling or pornography violate the principles of liberalism? But surely controversy is not a sufficient reason to reject such guidance. Hardly any constitutional considerations and methodologies are beyond dispute. And in the end, all constitutional doctrines need be supported by *some* explanation (some more concrete, some more abstract). These explanations might well consist of appeals to the principles of democracy or liberalism, assuming those are coherent and intellectually defensible.

## II. THE RIGHT TO PRIVACY

The question before us concerns the liberal character of constitutional law. Does constitutional doctrine follow the logic of liberal theory? The most natural target of this examination is the constitutional right to privacy, whose concern is the establishment of a free personal sphere.[50]

The constitutional right to privacy is found in the Due Process Clauses of the Fifth and Fourteenth Amendments. It is one of the principal strands of substantive due process doctrine, and consists of a series of cases officially launched with *Griswold v. Connecticut* but with roots stretching back over four decades earlier.[51] Though the "right to privacy" title has recently fallen into disuse (not to say disrepute), and has even been pronounced dead by some commentators,[52] the cases grouped under that heading continue to be taught and discussed as one body of law. Indeed, call it what you want—this line of cases deals with a fundamental interest that is here to stay: "[T]he interest in independence in making certain kinds of

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50. Naturally, there are other substantive due process cases for which liberalism is highly relevant. One of those was *DeShaney v. Winnebago County Department of Social Services*, in which the Supreme Court held that the Due Process Clause does not require "the State to protect the life, liberty, and property of its citizens against invasion by private actors." 489 U.S. 189, 195 (1989). Liberalism, however, depends on such protections. Indeed, Steven Hayman has argued that this liberal duty, contra *DeShaney*, is in fact embedded in the Fourteenth Amendment to the Constitution. *See generally* Steven J. Heyman, *The First Duty of Government: Protection, Liberty and the Fourteenth Amendment*, 41 DUKE L.J. 507 (1991).

51. 381 U.S. 479 (1965); *see infra* Part III.A.

52. *See, e.g.*, Jamal Greene, *The So-Called Right to Privacy*, 43 U.C. DAVIS L. REV. 715 (2010).

important decisions,"[53] and with a constitutional "guarantee of certain areas or zones of privacy."[54]

The question, then, is whether the Supreme Court's articulation of the right to privacy follows the precepts of liberalism. That question has little to do with the formal framework of substantive due process doctrine, with its well-known test for "fundamental rights" and the resulting levels of constitutional scrutiny. Rather, our inquiry concerns the *reasons* for determining whether the appropriate constitutional scrutiny, whatever its form, has been satisfied. As we shall soon see, although many of the rights recognized by the Supreme Court no doubt accord with liberal theory, the opinions in which they are found often do not. The following discussion groups the cases by subject matter.

### *A. Three Early Cases: Parents and Children*

One of the earliest cases associated with the right to privacy is *Meyer v. Nebraska*.[55] *Meyer* involved a Nebraska statute forbidding the teaching of foreign languages in private or public schools prior to the eighth grade.[56] The statute was passed in 1919, a time of high jingoism following the First World War, and was purportedly aimed at furthering the assimilation of immigrants.[57] The Court held that the statute violated the Due Process Clause:

> [Liberty] denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.[58]

Here was an explicit recognition of a constitutional right to pursue one's own vision of personal well-being. The Court contrasted this political ideal with systems of government that "submerged" the individual within the larger community:

> For the welfare of his Ideal Commonwealth, Plato suggested a law which should provide: "That the wives of our guardians are to be

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53. Whalen v. Roe, 429 U.S. 589, 599-600 (1977).
54. Roe v. Wade, 410 U.S. 113, 152 (1973).
55. 262 U.S. 390 (1923).
56. *Id.* at 397.
57. *Id.* at 397-98.
58. *Id.* at 399.

> common, and their children are to be common, and no parent is to know his own child, nor any child his parent. . . ." In order to submerge the individual and develop ideal citizens, Sparta assembled the males at seven into barracks and intrusted their subsequent education and training to official guardians. Although such measures have been deliberately approved by men of great genius, their ideas touching the relation between individual and State were wholly different from those upon which our institutions rest; and it hardly will be affirmed that any legislature could impose such restrictions upon the people of a State without doing violence to both letter and spirit of the Constitution.[59]

Because *Meyer* was about state intervention in *children*'s lives, the recognized constitutional right was granted to the parents, who were given the right to control the education of their children.[60] Two years later, in *Pierce v. Society of Sisters*, the Court relied on *Meyer* in recognizing parents' right to have their children educated in private—as opposed to public—schools.[61]

But in liberal societies, where the bearer of rights is ultimately the individual, parental rights must have their limits. That limit was recognized in *Prince v. Massachusetts*, where the Court affirmed the criminal conviction of a Jehovah's Witness who had her nine-year-old child help her sell religious literature in violation of child labor laws.[62]

The mother appealed her conviction, claiming a violation of her parental due process rights under *Meyer* and *Pierce*, but the Court held that the state could constitutionally interfere with parental prerogatives in order to safeguard children "from abuses and [give them] opportunities for growth into free and independent well-developed men and citizens."[63] Thus, in *Meyer* and *Pierce*, children received protection from coercive government action through a parental prerogative to control their upbringing. But that prerogative stopped when children needed protection from the coercive power of the parents themselves. This was a consummate manifestation of the liberal creed: the state could intervene in the personal sphere in order to protect individuals from private coercion, even if it entailed interfering with the child-parent relationship.

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59. *Id.* at 401-02.

60. *Id.* at 400.

61. 268 U.S. 510, 535 (1925) ("The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.").

62. 321 U.S. 158 (1944).

63. *Id.* at 165.

### *B. The Modern Cases*

#### 1. Contraception

*Griswold v. Connecticut*, a mere six-and-a-half-page opinion, officially launched the constitutional right to privacy when invalidating a Connecticut statute criminalizing the use of contraceptives.[64] Connecticut defended the statute by claiming it deterred extramarital affairs, which were criminally punishable under Connecticut law. (The absence of contraception was meant to give people pause before jumping into bed with someone other than their spouse.) Ironically, the Supreme Court invalidated the law for infringing upon the marital relationship because the prohibition on contraceptives was equally applicable to married couples. "Marriage," proclaimed the opinion, "is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred."[65] It was "a relationship lying within the [protected] zone of privacy."[66] The opinion said little else about the nature of that zone, except for noting that a number of constitutional provisions have its protection as their aim.[67]

The *Griswold* decision was certainly a liberal one: prohibiting the use of contraceptives was a gross interference in the personal sphere unsupported by any of liberalism's justifications for such interventions (prevention of personal coercion, the presence of a cognitive failure, or the pursuit of an important nonmoral purpose other than personal well-being). In fact, however, neither the majority opinion nor the four concurring and dissenting opinions accorded with liberal principles.

First, both the majority and the concurring opinions focused on the claim that the statute interfered with the *marital relationship*, which the majority, as we saw, described as "sacred."[68] The problem with prohibiting the use of contraceptives, suggested the opinion, was not so much its interference with individual liberty as its intrusion into that

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64. 381 U.S. 479 (1965).

65. *Id.* at 486.

66. *Id.* at 485.

67. *Id.* at 484-85 ("Various guarantees create zones of privacy. The right of association contained in the penumbra of the First Amendment . . . . The Third Amendment in its prohibition against the quartering of soldiers 'in any house' . . . . The Fourth Amendment['s] . . . 'right of the people to be secure in their persons, houses, papers, and effects' . . . . The Fifth Amendment in its Self-Incrimination Clause . . . . The present case, then, concerns a relationship lying within the zone of privacy created by several fundamental constitutional guarantees.").

68. *Id.* at 468 (majority opinion); *id.* at 502 (White, J. concurring).

sacred family unit.[69] Indeed Connecticut's asserted justification for the law—supporting the state's criminal prohibition on extramarital affairs—involved another intrusive measure into people's personal life choices, but neither the majority nor the three concurring opinions called into question the constitutionality of that criminal prohibition. On the contrary: three of the Justices of the majority joined a concurring opinion that explicitly endorsed the constitutionality of criminalizing adultery: "The State of Connecticut does have statutes, the constitutionality of which is beyond doubt, which prohibit adultery and fornication. . . . [T]he Court's holding today . . . in no way interferes with a State's proper regulation of sexual promiscuity or misconduct."[70] Unlike the criminal prohibition of contraceptives, the prohibition of adultery did not invade "'an institution which . . . always and in every age [the State] has fostered and protected.'"[71] The concurrence quoted approvingly a dissenting opinion from an earlier case that said:

> I would not suggest that adultery, homosexuality, fornication and incest are immune from criminal enquiry, however privately practiced. . . .
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> . . . .
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> [In contrast,] the intrusion of the whole machinery of the criminal law into the very heart of marital privacy, requiring husband and wife to render account before a criminal tribunal of their uses of that intimacy, is surely a very different thing indeed from punishing those who establish intimacies which the law has always forbidden and which can have no claim to social protection.[72]

As to be expected, the dissenting opinions in *Griswold* showed even less sensitivity to liberalism. The two dissents by Justices Black and Stewart proclaimed that because the constitutional text speaks of no "right to privacy," the protection of a sphere of personal privacy is, if anything, the business of democratic politics: courts should not "'substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws.'"[73] "If . . . the law before us does not reflect the standards of the people of Connecticut,

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69. One concurrence spoke of "a 'realm of family life which the state cannot enter' without substantial justification." *Id.* at 502 (White, J., concurring) (quoting Prince v. Massachusetts, 321 U.S. 158, 166 (1944)).

70. *Id.* at 498-99 (Goldberg, J., concurring).

71. *Id.* at 499 (quoting Poe v. Ullman, 367 U.S. 497, 553 (1961) (Harlan, J., dissenting)).

72. *Ullman*, 367 U.S. at 552-53 (Harlan, J., dissenting).

73. *Griswold*, 381 U.S. at 523 (Black, J., dissenting) (quoting Ferguson v. Skrupa, 372 U.S. 726, 730 (1963)).

the people of Connecticut can freely exercise their . . . rights to persuade their elected representatives to repeal it."[74] The position appeals to a crammed vision of constitutional interpretation that seems oblivious to liberalism. After all, in *liberal* democracies the power of democratic majorities is always limited: liberalism places limitations on the ability of democratic majorities to restrict personal freedoms. The claim that whatever is not explicitly named in the Constitution is up for majority vote assumes that democratic politics is in principle the proper arbiter of all policy questions. That view is obviously in direct contradiction of liberal principles.

Two years after *Griswold*, the Court decided *Loving v. Virginia*, which held that Virginia's prohibition of interracial marriages was in violation of the Equal Protection Clause and the Due Process Clause.[75] In the very short portion of the opinion explaining the due process violation, the Court declared that "[m]arriage is one of the 'basic civil rights of man,' fundamental to our very existence and survival."[76] Once again it was the marital institution, rather than individuals' life choices, that received constitutional protection.

Thus, it was not surprising that the Court was soon confronted with a statute criminalizing the distribution of contraceptives only to *unmarried* persons.[77] The United States Court of Appeals for the First Circuit found the statute in violation of the right to privacy, but the Supreme Court affirmed on equal protection grounds, finding that the statute differentiated unconstitutionally between married and unmarried persons.[78] "It is true," added the opinion, "that in *Griswold* the right of privacy in question inhered in the marital relationship," but that right "must be the same for the unmarried and the married alike."[79] Justice Brennan, who wrote the opinion, explained:

> [T]he marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup. If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.[80]

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74. *Id.* at 531 (Stewart, J., dissenting).
75. 388 U.S. 1 (1967).
76. *Id.* at 12 (quoting Skinner v. Oklahoma, 316 U.S. 535, 541 (1942)).
77. Eisenstadt v. Baird, 405 U.S. 438 (1972).
78. *Id.* at 443, 454-55; *see* Baird v. Eisenstadt, 429 F.2d 1398, 1400 (1st Cir. 1970).
79. *Eisenstadt*, 405 U.S. at 453.
80. *Id.*

The Court went on to cite *Stanley v. Georgia*, which reversed a conviction for possession of sexually obscene materials in the home on First Amendment grounds: "'The makers of our Constitution,'" read the cited portion of *Stanley*, "'undertook to secure conditions favorable to the pursuit of happiness. . . . They conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized man.'"[81] The Court also cited approvingly the court of appeals' position that if the basis for the law was mere *moral disapproval* of contraceptives, the law was "'beyond the competency of the state.'"[82]

These statements hit the nail on the head so far as liberal principles were concerned: the essence of liberalism is the free pursuit of personal happiness; mere moral disapproval is not a sufficient justification for state intervention in the personal sphere; and liberalism designates the individual—not the marital unit or the family—as the bearer of rights against interference in the private sphere. The right "to be let alone" includes the right to be let alone by one's family. This last point is of great importance. Understanding the right to privacy as, fundamentally, an individual right rather than a family right should lead to starkly different results in many cases, particularly if the notion of "family" is narrowly construed. Of course, the results would be the same whenever individuals claim their right to privacy in order to protect their family associations; but results may diverge, and even conflict, in cases involving non-family-related activities, or freedoms from the family itself. Indeed conceiving of the right to privacy as a family right is in tension with the many laws that pierce the family shield whenever it is necessary to protect individuals from the coercive force of family members—both in the case of minors, as in criminal prohibition on child abuse or child labor or the requirement that children receive medical care even in the face of opposition from their parents, and in the case of adults, as with the criminalization of domestic violence or the elimination of the marital exception to rape law.

And yet, *Eisenstadt*'s teachings were ignored repeatedly in subsequent opinions.

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81. Stanley v. Georgia, 394 U.S. 557, 564 (1969) (quoting Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting)).

82. *Eisenstadt*, 405 U.S. at 453 (quoting *Baird*, 429 F.2d at 1402).

2. Abortion

Ten months after *Eisenstadt*, the Court decided *Roe v. Wade*, which invalidated Texas's criminal prohibition of abortion.[83] As far as personal life choices go, there is hardly a more significant choice than to have or forgo having a child, a decision that ordinarily shapes one's entire life trajectory: "'Certainly the interests of a woman in giving of her physical and emotional self during pregnancy and the interests that will be affected throughout her life by the birth and raising of a child are of a [great] degree of significance and personal intimacy . . . .'"[84] It stands to reason, therefore, that there be a heavy burden on the government to justify restricting individual choice in this all-important personal decision.

The *Roe* opinion examined two principal justifications for this state intervention in the personal sphere: the state's interest in the health and safety of the mother,[85] and the state's interest in protecting *prenatal* and/or *potential* life (the Court seemed to treat the two interchangeably, though in fact they are quite distinct.)[86]

The first interest (concern for the health and safety of the pregnant woman) could, in theory, fit into the category of paternalistic legislation grounded in a perceived cognitive failure: left to their own devices, so the argument goes, women may fail to make the best choice for themselves in regard to abortion, as judged by their own understanding of their best interest.[87] The state often forbids medical procedures or products in order to guarantee the safety of consumers who lack the specialized knowledge required for evaluating complex and potentially dangerous medical undertakings. (Texas's brief before

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83. 410 U.S. 113 (1973).

84. *Id.* at 170 (Stewart, J., concurring) (quoting Abele v. Markle, 351 F. Supp. 224, 227 (D. Conn. 1972)).

85. "[I]t has been argued that a State's real concern in enacting a criminal abortion law was to protect the pregnant woman, that is, to restrain her from submitting to a procedure that placed her life in serious jeopardy." *Id.* at 149 (majority opinion).

86. The interest in protecting prenatal life is grounded in the idea that there exists at present some form of human life (albeit not a person) so worthy of protection that an adult individual's freedom of choice to control her bodily integrity and life's trajectory can be limited for the sake of protecting it. By contrast, the interest in protecting potential life appears to be of a different nature: here the concern is with a being not yet entitled to protection of itself, but only because it is about to become a living human being. These interests may play very differently in different contexts (stem cell research, for instance).

87. *See* Planned Parenthood of S.E. Pa. v. Casey, 505 U.S. 833, 946 (1992) (Rehnquist, C.J., concurring in part and dissenting in part) ("[A]fter *Roe*, many States have sought to protect their young citizens by requiring that a minor seeking an abortion involve her parents in the decision."). Minors, of course, implicate much weaker concerns insofar as their ability to advance their own interests is inherently suspect.

the Supreme Court argued that "The state may regulate the medical profession to protect the health and welfare of all its citizens.")[88] But as everyone knew, this was not what Texas's law was about. Moreover, as the *Roe* Court pointed out, most abortions involved a rather simple and safe procedure that could not justify the restrictive penalties of the Texas law (and indeed were safer, in the earlier stages of pregnancies, than giving birth).[89] Accordingly, the Court confined this justification to regulations of abortions in the second and third trimesters, given the heightened medical complexity and risk at these later stages.[90]

Ultimately, the prohibition of abortion stands or falls on the strength of the state's interest in protecting prenatal or potential life. So far as liberalism is concerned, these interests seek to fit abortion restrictions into the most common category of legitimate state interventions in the personal sphere—those aimed at protecting individuals from the coercive power of others. As the *Roe* opinion put it, "The pregnant woman cannot be isolated in her privacy."[91] This point was made in starker terms in a later Supreme Court dissenting opinion:

> The abortion decision must . . . be recognized as *sui generis*, different in kind from the others that the Court has protected under the rubric of personal or family privacy and autonomy. . . . To look at the act which is assertedly the subject of a liberty interest in isolation from its effect upon other people [is] like inquiring whether there is a liberty interest in firing a gun where the case at hand happens to involve its discharge into another person's body.[92]

And yet, even if we assume that fetuses and embryos may receive some protection from the coercive—indeed the lethal—force of the pregnant woman, the regulative question is more complicated than the above analogy implies. After all, unlike other forms of private coercion (including most uses of guns), the aborting woman cannot

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88. Brief for Appellee at 27-28, *Roe*, 410 U.S. 113 (No. 70-18), 1971 WL 134281, at *27-28.

89. 410 U.S. at 149.

90. *Id.* at 163.

91. *Id.* at 159. *Skinner v. Oklahoma* invalidated a statute allowing for the forced sterilization of certain habitual criminal offenders. 316 U.S. 535, 536, 538 (1942). As in *Eisenstadt*, the statute was invalidated on equal protection grounds but the case is often mentioned in conjunction with the right to privacy series of cases. *See* Eisenstadt v. Baird, 405 U.S. 438, 443 (1972); *Skinner*, 316 U.S. at 541.

92. *Casey*, 505 U.S. at 952 (Rehnquist, C.J., concurring in part and dissenting in part) (alteration in original) (quoting Thornburgh v. Am. Coll. of Obstetricians & Gynecologists, 476 U.S. 747, 792 (1986) (White, J., dissenting); Michael H. v. Gerald D., 491 U.S. 110, 124 n.4 (1989) (internal quotation marks omitted)).

*but* employ force against the fetus or the embryo in order to exercise her liberty over her own body and her life. Put differently, the question is not simply whether the state can forbid the firing of a gun into another individual, but whether the state can forbid the firing of a gun necessary for protecting one's liberty and autonomy. Thus, even if we grant that the preservation of prenatal or potential life can be considered as the protection of one human being from another, the question remains whose interest should give—the fetus's (whose interest at stake is greater but is entitled to less protection than a full human being) or the woman's.

The *Roe* decision unequivocally rejected the claim that an embryo or a fetus is a human person entitled to the full constitutional protections given a born individual.[93] But it was still left to decide whether the state may nevertheless restrict the pregnant woman's ability to abort for the sake of protecting embryos or fetuses. The Court answered in the affirmative: "[A]s long as at least potential life is involved, the State may assert interests beyond the protection of the pregnant woman alone."[94] However, those interests reached sufficient significance so as to override the pregnant woman's decision to abort only at the point of fetal viability: "This is so because the fetus then presumably has the capability of meaningful life outside the mother's womb."[95] Prior to viability, the fetus is inseparable from the pregnant woman, and its interests merge with hers. Moreover, even after viability, the pregnant woman has no obligation to risk her life or health for the sake of preserving the prenatal life she carries (and "health" is a concept read rather broadly by the Court).[96]

*Roe* is a decision that sits well with liberal principles, assuming that fetuses do not deserve the constitutional rights of full human beings (a determination that is arguably not itself the concern of liberal theory).[97] The opinion recognized a constitutional right against state interference in the personal decision to abort, rejected an appeal to paternalism (one devoid of any claim of cognitive failure) to justify such interference, rejected the idea that the state could forbid abortions solely for the sake of imposing its own moral vision, and refused to

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93. 410 U.S. at 158.

94. *Id.* at 150.

95. *Id.* at 163.

96. See the companion case to *Roe*, *Doe v. Bolton*, 410 U.S. 179 (1973).

97. But see, for example, John Rawls's argument that liberalism would exclude a contrary assumption as a basis for political action because the idea that life begins at conception derives from comprehensive religious beliefs that cannot constitute the basis for political action in a liberal state, *infra* note 139.

impose an obligation on pregnant women to risk their lives or health for the fetus's sake. (In principle, at least where there is no willful assumption of care-giving responsibilities, individuals have no obligation to risk their health in order to preserve the life of others—a recognition of the primacy and autonomy of the individual.)

Almost twenty years later the Court reaffirmed *Roe*—to the surprise and dismay of some. *Casey v. Planned Parenthood of Southeastern Pennsylvania*, a diffident opinion that spent more time explaining why *Roe* should not be overruled than why it should be reaffirmed, interpreted the right to privacy along strong liberal lines.[98] "At the heart of liberty," declared the opinion, "is the right to define one's own concept of existence."[99] The opinion read the right to privacy decisions as extending constitutional protection to "matters . . . involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy."[100] "It is a promise of the Constitution that there is a realm of personal liberty which the government may not enter."[101] That realm included the decision to abort.

The four disappointed dissenters appealed to democracy as the proper arbiter of the abortion issue, asserted the legitimacy of the government's imposition of its moral vision in the personal sphere, and went so far as to claim the primacy of the marital union over the autonomy of the individual.[102] That latter claim came in the context of a statutory provision mandating spousal notification before a married woman could procure an abortion: "In our view," pronounced one of the dissenting opinions, "the spousal notice requirement is a rational attempt by the State to improve truthful communication between spouses and encourage collaborative decisionmaking, and thereby fosters marital integrity."[103] The idea that a state may force individuals to be truthful to their spouses in order to encourage collaborative decisionmaking resonates oddly to liberal ears. The plurality countered that "Women do not lose their constitutionally protected liberty when they marry. The Constitution protects all individuals, male or female, married or unmarried . . . ."[104]

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98. 505 U.S. 833 (1992).
99. *Id.* at 851 (plurality opinion).
100. *Id.*
101. *Id.* at 847.
102. *See id.* at 1001 (Scalia, J., concurring in part and dissenting in part).
103. *Id.* at 975 (Rehnquist, C.J., concurring in part and dissenting in part).
104. *Id.* at 898 (plurality opinion).

The dissenting Justices also repeated the claim (raised earlier by the lone dissenter in *Roe*) that the abortion decisions amounted to a resurrection of the *Lochner* doctrine in that the Court illegitimately substitutes its own value judgments for those of elected officials.[105]

But the claim fails to recognize the important distinction between government regulations of the economy and the personal sphere. While both capitalism and liberalism demand analogous justifications for state interventions, these justifications are more easily met in the case of economic regulations. For one thing, as we saw, mere moral sentiment may limit economic but not personal freedom. Additionally, market failures may be far more common and more extensive than cognitive failures, given that they often arise from perfectly rational and self-interested decisions by individuals. Finally, the burden for interventions in the economy may be lower than the burden for interventions in the personal sphere simply because the latter usually implicates more substantial interests. Still, the allegation that the right to privacy harks back to the discredited *Lochner* is now a staple of substantive due process cases.[106]

The latest significant chapter in the Supreme Court's abortion decisions came in *Gonzales v. Carhart*, where liberal reasoning suffered something of a setback.[107] *Carhart* upheld a federal ban on an abortion procedure termed by its detractors "partial birth abortion," notwithstanding evidence suggesting that the procedure was safer than any of its late-term alternatives (because it removed all fetal material from the womb in one clean swoop). The Court upheld Congress's power to ban the procedure on what seemed to be sheer moral grounds ("Congress could . . . conclude that the type of abortion proscribed by the Act requires specific regulation because it implicates . . . ethical and moral concerns that justify a special prohibition.")[108] Additionally, the opinion contained the following argument:

> While we find no reliable data to measure the phenomenon, it seems unexceptionable to conclude some women come to regret their choice

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105. *Id.* at 957, 959-63 (Rehnquist, C.J., concurring in part and dissenting in part). *Lochner v. New York* recognized a substantive due process right to the freedom of contract, and came to stand for constitutional protections of economic freedoms. *See* 198 U.S. 45, 64 (1905). The *Lochner* doctrine was repudiated in the 1930s, when the Supreme Court changed course and began to uphold the constitutionality of extensive New Deal regulations of the economy. Since then, *Lochner* has come to symbolize judicial overreaching.

106. *See, e.g.*, Miller v. Rumsfeld, 647 F.2d 80, 80-81 (9th Cir. 1981) (Norris, J., dissenting).

107. 550 U.S. 124 (2007).

108. *Id.* at 158.

> to abort the infant life they once created and sustained. Severe depression and loss of esteem can follow.
>
> . . . .
>
> . . . It is self-evident that a mother who comes to regret her choice to abort must struggle with grief more anguished and sorrow more profound when she learns . . . that she allowed a doctor to pierce the skull and vacuum the fast-developing brain of her unborn child, a child assuming the human form.[109]

An indignant Justice Ginsburg, joined by three other Justices, denounced this reasoning as "an antiabortion shibboleth" that "reflects ancient notions about women's place in the family and under the Constitution—ideas that have long since been discredited."[110] The dissent also stressed—as the Court itself conceded—that the claim went entirely unsupported by evidence, and that the sensible solution for such a concern is requiring informed consent, not an outright ban on the procedure. Indeed the suggestion that the government could ban a medical procedure on the hypothetical ground that "some [people may] come to regret their choice" is, to say the least, rather exceptional.[111]

3. Cohabitation

The Court made two major decisions dealing with individuals' right to cohabit with people of their choice. A year after *Roe*, in *Village of Belle Terre v. Boraas*, the Court rejected a right to privacy challenge to a zoning ordinance that forbade more than two people unrelated by blood, adoption, or marriage to occupy the same house on penalty of criminal prosecution.[112] The opinion, written by Justice Douglas (who also wrote the *Griswold* opinion) summarily rejected the appeal to the right to privacy by saying the right was simply not involved.[113] The determination essentially terminated the case: the refusal to recognize the ordinance as burdening the right to privacy meant that the challenged statute was subjected to lenient constitutional scrutiny and upheld. Indeed the prohibition was constitutional, said the Court, because it was within the government's

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109. *Id.* at 159-60 (citation omitted).
110. *Id.* at 183, 185 (Ginsburg, J., dissenting).
111. *Id.* at 159-60 (majority opinion).
112. 416 U.S. 1, 2, 7 (1974).
113. *Id.* at 7-8.

power to designate zones that promote "family values" (to the detriment of family-free individuals).[114]

Justice Marshall's dissent claimed that the right to privacy was violated:

> The right to "establish a home" is an essential part of the liberty guaranteed by the Fourteenth Amendment. And the Constitution secures to an individual a freedom "to satisfy his intellectual and emotional needs in the privacy of his own home." . . . The choice of household companions—of whether a person's "intellectual and emotional needs" are best met by living with family, friends, professional associates, or others—involves deeply personal considerations as to the kind and quality of intimate relationships within the home. That decision surely falls within the ambit of the right to privacy protected by the Constitution.[115]

Three years later the Court declared a different zoning ordinance unconstitutional for violating the right to privacy. That ordinance made it a criminal offense for a grandmother to share her home with two grandsons who were not themselves siblings.[116] She was prosecuted and received a prison sentence.[117] The city defended the ordinance by relying on *Belle Terre*, but the Court's plurality opinion distinguished the earlier case:

> [O]ne overriding factor sets this case apart from *Belle Terre*. The ordinance there affected only unrelated individuals. It expressly allowed all who were related by "blood, adoption, or marriage" to live together, and . . . we were careful to note that it promoted "family needs" and "family values." East Cleveland, in contrast, has chosen to regulate the occupancy of its housing by slicing deeply into the family itself.[118]

Thus, East Cleveland's ordinance implicated the right to privacy because it burdened the family unit. The opinion described the right to privacy, and the *Griswold* opinion that inaugurated it, as protecting the family structure ("Our decisions establish that the Constitution protects the sanctity of the family . . . .").[119] Justice Brennan, the author of *Eisenstadt* ("If the right of privacy means anything, it is the right of the

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114. *Id.* at 9.

115. *Id.* at 15-16 (Marshall, J., dissenting) (citations omitted) (quoting Meyer v. Nebraska, 262 U.S. 390, 399 (1923); Stanley v. Georgia, 394 U.S. 557, 565 (1969)).

116. Moore v. City of East Cleveland, 431 U.S. 494, 495-96 (1977) (plurality opinion).

117. *Id.* at 506 n.1 (Brennan, J., concurring).

118. *Id.* at 498 (plurality opinion) (citation omitted) (quoting *Vill. of Belle Terre*, 416 U.S. at 2-3, 9).

119. *Id.* at 503.

individual, married or single, to be free from unwarranted governmental intrusion . . . ."),[120] wrote in a concurring opinion that the ordinance was unconstitutional because it abridged "the 'freedom of personal choice in matters of . . . family life.'"[121]

Two of the dissenting Justices agreed that the right to privacy protected "family life," only they thought its protection was restricted to the nuclear family. And because the ordinance "does not prevent parents from living together or living with their unemancipated offspring," they wrote, the right to privacy was not violated.[122]

Indeed, if the right to privacy protected "family life" rather than individuals, its scope depended on one's definition of a "family." And while Justice Brennan thought that "defin[ing] 'family' as essentially confined to parents and the parents' own children" was simply "arbitrary,"[123] from a liberal perspective it seemed equally arbitrary to privilege blood and marriage cohabitation over other forms of association.

Additionally, the plurality opinion engaged in some dubious reinterpretations of precedent: our cases, read the opinion, "have consistently acknowledged a 'private realm of family life which the state cannot enter.' *Prince* v *Massachusetts*, 321 U.S. 158, 166 (1944). See, *e.g.*, *Roe* v *Wade* . . . ."[124] But the references to *Prince* and *Roe* made little sense: *Prince*, as you recall, upheld the power of the state to interfere in the relation between parent and child by forbidding a mother to make her child work, while *Roe* had nothing to do with protecting the family. The dissent made the same absurd claim, and even added the bizarre assertion that *Eisenstadt* was also about the privacy of family life.[125]

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120. Eisenstadt v. Baird, 405 U.S. 438, 453 (1972).

121. *Moore*, 431 U.S. at 507 (Brennan, J., concurring) (quoting Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632, 639 (1974)).

122. *Id.* at 536 (Stewart, J., dissenting).

123. *Id.* at 507 (Brennan, J., concurring).

124. *Id.* at 499 (plurality opinion) (citations omitted) (quoting Prince v. Massachusetts, 321 U.S. 158, 166 (1944)).

125. *Id.* at 536 (Stewart, J., dissenting) ("Several decisions of the Court have identified specific aspects of what might broadly be termed 'private family life' that are constitutionally protected against state interference. See, e.g., *Roe* v *Wade* (woman's right to decide whether to terminate pregnancy); . . . *Eisenstadt* v *Baird* (right to use contraceptives) . . . ." (citations omitted)).

4. Sodomy

In the notorious *Bowers v. Hardwick*, the Supreme Court upheld the constitutionality of a statute making sodomy criminal.[126] Although the statute criminalized both homosexual and heterosexual sodomy, the majority simply ignored the heterosexual aspect and treated the matter as one involving only homosexuality. But the reasoning, as the dissenting Justices pointed out, was equally as applicable to both. The short and shallow opinion by Justice White rejected *tout court* the assertion that the right to privacy, as articulated in cases like *Pierce*, *Meyer*, *Griswold*, *Loving*, *Eisenstadt*, and *Roe*, was about an area of personal privacy that may encompass the conduct at issue. *Meyer* and *Pierce*, said the opinion, were about child rearing and education;[127] *Griswold*, *Eisenstadt*, and *Roe* were about a fundamental individual right to decide whether or not to have children;[128] and *Loving* was about marriage.[129] "[N]one of the rights announced in those cases bears any resemblance to the claimed constitutional right of homosexuals to engage in acts of sodomy," said the Court.[130] "No connection between family, marriage, or procreation on the one hand and homosexual activity on the other has been demonstrated . . . ."[131]

Once again, the refusal to recognize the asserted right as implicating the right to privacy meant that the statute was subjected to mere rational basis review. And the Court found that the statute was a rational means of advancing Georgia's legitimate concern for public morality: "The law . . . is constantly based on notions of morality," read the opinion, "and if all laws representing essentially moral choices are to be invalidated under the Due Process Clause, the courts will be very busy indeed."[132] Chief Justice Burger's concurrence stated that "[t]o hold that the act of homosexual sodomy is somehow protected . . . would be to cast aside millennia of moral teaching."[133]

Justice Blackmun, joined by three other Justices, took issue with the Court's conceptualization of the right to privacy:

> While it is true that [previous] cases may be characterized by their connection to protection of the family, the Court's conclusion that they

126. 478 U.S. 186 (1986), *overruled by* Lawrence v. Texas, 539 U.S. 558 (2003).
127. *Id.* at 190.
128. *Id.*
129. *Id.*
130. *Id.* at 190-91.
131. *Id.* at 191.
132. *Id.* at 196.
133. *Id.* at 197 (Burger, C.J., concurring).

> extend no further than this boundary ignores the warning . . . against "clos[ing] our eyes to the basic reasons why certain rights associated with the family have been accorded shelter under the Fourteenth Amendment's Due Process Clause." We protect those rights not because they contribute, in some direct and material way, to the general public welfare, but because they form so central a part of an individual's life. "[T]he concept of privacy embodies the 'moral fact that a person belongs to himself and not others nor to society as a whole.'" And so we protect the decision whether to marry precisely because marriage "is an association that promotes a way of life . . . ." We protect the decision whether to have a child because parenthood alters so dramatically an individual's self-definition, not because of demographic considerations or the Bible's command to be fruitful and multiply.[134]

"Our cases long have recognized," added Blackmun, "that the Constitution embodies a promise that a certain private sphere of individual liberty will be kept largely beyond the reach of government."[135] "[G]iving individuals freedom to choose how to conduct their lives is acceptance of the fact that different individuals will make different choices."[136] That, in turn, precluded the criminalization of "[v]ictimless" conduct[137] involving "no real interference with the rights of others"[138] on the mere ground that it is morally repugnant.[139]

This was a veritable liberal manifesto. But it was soon diluted by the dissent's own pitiable attempt to explain why, given those principles, the criminalization of adultery was perfectly constitutional. There were, said the opinion,

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134. *Id.* at 204-05 (Blackmun, J., dissenting) (citations omitted) (quoting Moore v. City of East Cleveland, 431 U.S. 494, 501 (1977) (plurality opinion); Thornburgh v. Am. Coll. of Obstetricians & Gynecologists, 476 U.S. 747, 777 n.5 (1986) (Stevens, J., concurring); Griswold v. Connecticut, 381 U.S. 479, 486 (1965)).

135. *Id.* at 203 (quoting *Thornburgh*, 476 U.S. at 772) (internal quotation marks omitted).

136. *Id.* at 205-06.

137. *Id.* at 209 (quoting *id.* at 195 (majority opinion)).

138. *Id.* at 213.

139. *Id.* at 211. John Rawls has famously argued that such religious beliefs could not constitute valid bases for constitutional arrangements because they are based on "comprehensive" doctrines about the good life rather than on "public reason." According to Rawls, the theory of liberalism not only delimits the proper justifications for government interventions in the personal sphere but also imposes substantive limitations on the philosophical content of such justifications. Specifically, liberal principles entail that any justification for government intrusion into the personal sphere be supported by reasons that are acceptable to a diverse, pluralistic public, whereas religious reasons are not. For an elaboration of this argument, see JOHN RAWLS, *The Content of Public Reason*, *in* POLITICAL LIBERALISM 223 (expanded ed. 2005).

> simple, analytically sound distinctions between certain private, consensual sexual conduct, on the one hand, and adultery . . . . For example, marriage, in addition to its spiritual aspects, is a civil contract that entitles the contracting parties to a variety of governmentally provided benefits. A State might define the contractual commitment necessary to become eligible for these benefits to include a commitment of fidelity and then punish individuals for breaching that contract. Moreover, a State might conclude that adultery is likely to injure third persons, in particular, spouses and children of persons who engage in extramarital affairs.[140]

But if the Due Process Clause "giv[es] individuals freedom to choose how to conduct their lives," it was difficult to see why the state could criminalize breaking the marriage contract.[141] Indeed the appeal to "injuries to third parties" was potentially astounding in breadth, rendering the notion of victimless conduct virtually meaningless.

In 2003 the Court overruled *Bowers*. Like the *Bowers* dissent, the majority in *Lawrence v. Texas* rejected the criminalization of conduct that concerned people's "own private lives" and that caused no "injury to [another] person."[142] Citing *Casey*, the Court reiterated:

> "These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life."[143]

The opinion also stated: "'[T]he fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice.'"[144] The decision concluded by announcing that prostitution was a different matter altogether (but failing to explain why), though unlike the *Bowers* dissent, it made no mention of the criminalization of fornication or adultery (perhaps by 2003 it became clear that these were similarly protected).

By contrast, a dissent by Justice Scalia, joined by two other Justices, explicitly opined that criminalizing adultery was perfectly constitutional. Mere moral disapproval, read the dissent, was a

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140. *Bowers*, 478 U.S. at 209 n.4 (Blackmun, J., dissenting).

141. *Id.* at 205-06.

142. 539 U.S. 558, 567 (2003).

143. *Id.* at 574 (quoting Planned Parenthood of S.E. Pa. v. Casey, 505 U.S. 833, 851 (1992)).

144. *Id.* at 577 (quoting *Bowers*, 478 U.S. at 216 (Stevens, J., dissenting)).

sufficient basis, so far as the Due Process Clause was concerned, for criminalizing intimate conduct undertaken in the privacy of the home by consenting adults. Indeed moral disapproval was the basis for many such criminal sanctions, including "bigamy, same-sex marriage, adult incest, prostitution, masturbation, adultery, fornication, bestiality, and obscenity."[145] So according to these Justices criminalizing masturbation was, apparently, also constitutional. The dissenters also appealed to the familiar argument from democracy.[146]

One commentator comparing the majority opinion and the dissent wrote:

> The legal analysis in *Lawrence* was impeccable: Drawing on cases from *Griswold* to *Casey*, Justice Kennedy's majority opinion demonstrated that the Court's precedents carved out a sphere of liberty and autonomy in intimate personal choices that necessarily encompasses the freedom to define one's personal relationships, including the sexual aspect of those relationships. Unlike the dissenters—and unlike the Court in *Bowers*—the majority thus read the precedents as creating a coherent body of doctrine rather than [a] list of unrelated rights.[147]

As we shall see below, reading the right to privacy cases as a "list of unrelated rights" is a persistent problem that is still with us today.

5. Assisted Suicide

In 1990 the Supreme Court reviewed a case involving the parents of a woman in a permanent vegetative state, who had sued to have their daughter disconnected from artificial hydration and nutrition.[148] The Court "assume[d] that the United States Constitution would grant a competent person a constitutionally protected right to refuse lifesaving hydration and nutrition," but refused to ground that right in the right to privacy.[149] "Although many state courts have held that a right to refuse treatment is encompassed by a generalized constitutional right of privacy," read the opinion, "[w]e believe this issue is more properly analyzed in terms of a Fourteenth Amendment liberty interest."[150]

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145. *Id.* at 590 (Scalia, J., dissenting).

146. *Id.* at 602 ("[T]he Court has taken sides in the culture war, departing from its role of assuring, as neutral observer, that the democratic rules of engagement are observed.").

147. Suzanna Sherry, *The Four Pillars of Constitutional Doctrine*, 32 CARDOZO L. REV. 969, 1000-01 (2011) (footnotes omitted).

148. Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261, 265 (1990).

149. *Id.* at 279.

150. *Id.* at 279 n.7.

The right to privacy *is*, of course, "a Fourteenth Amendment liberty interest," and its subject matter—a free personal sphere—was precisely the issue in the case. So the Court's refusal to discuss the claim in terms of the right to privacy was one more step in the deliberate emasculation of that doctrine. By contrast, another opinion filed in the case referred to "the domain of private life protected by the Due Process Clause," and mentioned the Declaration of Independence's guarantee of the "right of every person to '. . . the pursuit of Happiness.'"[151]

Seven years later, the Court reviewed a lawsuit by terminally ill patients who claimed a constitutional right to be assisted in their imminent death by their physicians. The claim was based on the assertion that the Due Process Clause protects a measure of "self-sovereignty" and "basic and intimate exercises of personal autonomy."[152] That personal autonomy, read the complaint, included the "'liberty of competent, terminally ill adults to make end-of-life decisions free of undue government interference.'"[153] Both the district court and the court of appeals agreed: "[T]he decision how and when to die," declared the United States Court of Appeals for the Ninth Circuit, "is one of 'the most intimate and personal choices a person may make in a lifetime,' a choice 'central to personal dignity and autonomy.'"[154] But the Supreme Court reversed in a unanimous decision—a surprising unanimity for a claim so well grounded in liberal principles:[155] "That many of the rights and liberties protected by the Due Process Clause sound in personal autonomy does not warrant

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151. *Id.* at 330, 340 n.12 (Stevens, J., dissenting) (quoting THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776)).

152. Washington v. Glucksberg, 521 U.S. 702, 724 (1997) (quoting Brief of Respondents at 10, 12, *Washington*, 521 U.S. 702 (No. 96-110), 1996 WL 708925 (internal quotation marks omitted)).

153. *Id.* (quoting Brief of Respondents, *supra* note 152, at 10).

154. Compassion in Dying v. Washington, 79 F.3d 790, 813-14 (9th Cir. 1996) (quoting Planned Parenthood of S.E. Pa. v. Casey, 505 U.S. 833, 851 (1992)), *rev'd sub nom. Glucksberg*, 521 U.S. 702.

155. Among those favoring recognition of the asserted right were some of the most renowned living expositors of liberal theory—Ronald Dworkin, Thomas Nagel, Robert Nozick, John Rawls, Thomas Scanlon, and Judith Jarvis Thomson—who filed an amicus brief with the Supreme Court. Their brief was couched in Rawls's widely accepted conceptualization of liberalism as precluding government reliance on "comprehensive" philosophical, religious, or moral theories as the basis for political action. *See* Brief for Ronald Dworkin, Thomas Nagel, Robert Nozick, John Rawls, Thomas Scanlon & Judith Jarvis Thomson as Amici Curiae in Support of Respondents, *Glucksberg*, 521 U.S. 702 (No. 96-110), 1996 WL 708956.

the sweeping conclusion that any and all important, intimate, and personal decisions are so protected."[156]

In fact, said the Court, the principle underlying all fundamental substantive due process rights, including those recognized in the right to privacy cases, is that they are "'deeply rooted in this Nation's history and tradition.'"[157] Thus *Meyer* protected liberties "long recognized at common law as essential to the orderly pursuit of happiness by free men";[158] *Griswold* protected an institution (marriage) "older than the Bill of Rights";[159] *Roe* was based on the claim that "at the founding and throughout the 19th century, 'a woman enjoyed a substantially broader right to terminate a pregnancy'";[160] and *Moore* protected "the sanctity of the family."[161] In short, whether a right is considered "fundamental" and thus receives rigorous constitutional protections is a question that should not be "deduced from abstract concepts of personal autonomy"[162] but, first and foremost, from an examination of the historical record. The Constitution is not violated when the government intrudes into an intimate personal sphere if the intrusion is not historically forbidden.

Employing this analysis, the Court rejected the claimed right of the terminally ill to receive assistance in dying on the ground that "[t]he history of the law's treatment of assisted suicide in this country has been and continues to be one of the rejection of nearly all efforts to permit it."[163]

Having concluded that the asserted right implicates neither the right to privacy nor another fundamental right, and therefore that a rational basis review would suffice, the Court moved to elaborate the state's interests in forbidding the practice.

> First, Washington has an "unqualified interest in the preservation of human life." . . . This interest is symbolic and aspirational as well as practical: "[T]he ban against assisted suicide . . . reflects the gravity

156. *Glucksberg*, 521 U.S. at 727.

157. *Id.* at 721 (quoting Moore v. City of East Cleveland, 431 U.S. 494, 503 (1977) (plurality opinion)).

158. *Id.* at 727 n.19 (quoting Meyer v. Nebraska, 262 U.S. 390, 399 (1923) (internal quotation marks omitted)).

159. *Id.* (quoting Griswold v. Connecticut, 381 U.S. 479, 485-86 (1965) (internal quotation marks omitted)).

160. *Id.* (quoting Roe v. Wade, 410 U.S. 113, 140 (1973)).

161. *Id.* (quoting *Moore*, 431 U.S. at 503) (internal quotation marks omitted)).

162. *Id.* at 725.

163. *Id.* at 728.

> with which we view the decision to take one's own life or the life of another, and our reluctance to encourage or promote these decisions."[164]

And the state also had an "interest in protecting the integrity and ethics of the medical profession."[165] In other words, the state (or "we," as the Court put it) may forbid the terminally ill assistance in dying on the basis of mere moral disapproval.

This moral interest was joined by others that fit better into the liberal framework: "Those who attempt suicide," wrote the Court, "often suffer from depression or other mental disorders. . . . [M]any people who request physician-assisted suicide withdraw that request if their depression and pain are treated."[166] That was an appeal to cognitive failures. The Court also said that "[T]he State has an interest in protecting vulnerable groups—including the poor, the elderly, and disabled persons—from abuse, neglect, and mistakes."[167] This was a direct reference to state protection from coercion by others. One concurring Justice agreed solely with these latter justifications, noting that they "oppose[] [respondent's] claim not with a moral judgment contrary to respondents', but with a recognized state interest in . . . protecting patients from mistakenly and involuntarily deciding to end their lives."[168] A second concurring opinion, joined by three Justices, also relied exclusively on the "State's interests in protecting those who are not truly competent or facing imminent death, or those whose decisions to hasten death would not truly be voluntary."[169] This was also the argument made by the U.S. Solicitor General, who claimed that no regulative regime could guarantee that assisted suicide decisions were truly well-informed and voluntary.[170]

Still, one of those concurring opinions advanced a patently illiberal argument of its own:

> Much more [is at stake] than the State's paternalistic interest in protecting the individual from the irrevocable consequences of an ill-advised decision . . . . There is truth in John Donne's observation that "No man is an island." The State has an interest in preserving and

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164. *Id.* at 728-29 (quoting Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261, 282 (1990); NEW YORK TASK FORCE ON LIFE AND THE LAW, WHEN DEATH IS SOUGHT: ASSISTED SUICIDE AND EUTHANASIA IN THE MEDICAL CONTEXT (1994)).

165. *Id.* at 731.

166. *Id.* at 730.

167. *Id.* at 731.

168. *Id.* at 782 (Souter, J., concurring).

169. *Id.* at 737 (O'Connor, J., concurring).

170. Brief for the United States as Amicus Curiae Supporting Petitioners, *Glucksberg*, 521 U.S. 702 (No. 96-110), 1996 WL 663185.

> fostering the benefits that every human being may provide to the community—a community that thrives on the exchange of ideas, expressions of affection, shared memories, and humorous incidents, as well as on the material contributions that its members create and support. The value to others of a person's life is far too precious to allow the individual to claim a constitutional entitlement to complete autonomy in making a decision to end that life.[171]

Could there be a less liberal argument?

## III. CONCLUSION WITH SEX TOYS

The constitutional right to privacy is a mess. The Supreme Court is incapable of articulating a coherent underpinning to this important line of cases, or—more likely—is unwilling to do so. Instead, shifting majorities appeal to different and at times contradictory conceptions of this important constitutional guarantee. Some opinions describe it as protecting one or another family structure (*Griswold*, *Moore*), others as protecting individual autonomy (*Prince*, *Eisenstadt*, *Casey*). Mere moral disapproval sometimes suffices (*Bell Terre*, *Bowers*, *Glucksberg*, *Carhart*), and sometimes does not (*Roe*, *Casey*, *Lawrence*). And the same holds for considerations of paternalism, history and tradition, or concern with the general welfare. All are thrown in—or kept out—with little regard for a theory that could reconcile the cases.

The situation is not simply the result of a failure to understand liberalism, or to commit to this deeply rooted philosophy. It is also the result of an ideological rift within the Supreme Court over the proper role of the courts, and the appropriate method of constitutional interpretation. Substantive due process doctrine has long been the *bête noir* of conservatives, who regard its revival under the liberal Warren Court as a judicial perversion to be rolled back and quashed. Their objections to substantive due process are numerous: its alleged textual infidelity (turning a procedural constitutional guarantee into a substantive one),[172] the lack of clear judicial guidance in the

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171. *Glucksberg*, 521 U.S. at 740-41 (Stevens, J., concurring) (quoting JOHN DONNE, *Meditation No. 17*, *in* DEVOTIONS UPON EMERGENT OCCASIONS (London, Thomas Jones 1624) (footnote omitted), *available at* http://www.luminarium.org/sevenlit/donne/meditation17.php).

172. *See, e.g.*, NASA v. Nelson, 131 S. Ct. 746, 764-65 (2011) (Scalia & Thomas, JJ., concurring) ("[T]he Due Process Clause does not 'guarante[e] certain (unspecified) liberties'; rather, it 'merely guarantees certain procedures as a prerequisite to deprivation of liberty.' Respondents make no claim that the State has deprived them of liberty without the requisite procedures, and their due process claim therefore must fail. Even under the formula we have adopted for identifying liberties entitled to protection under the faux 'substantive' component of the Due Process Clause—that 'the Due Process Clause specially protects those

interpretation of such open-ended language,[173] the perception of a double standard—denying protection to economic liberties while extending protection to social ones—and last but not least, deep resentment toward the substance of the recognized rights, including the rights to abort and engage in homosexual sodomy. The result is an ever-present cohort of Supreme Court Justices bent on undermining the very idea of substantive due process rights, and particularly the right to privacy. Unsurprisingly, these Justices refuse to recognize any underlying principle that may give a coherent shape to this constitutional doctrine thus making it more durable and defensible.

Unfortunately, their persistent efforts bore fruit: the term "right to privacy" has fallen into disuse and (as already noted) has even been pronounced obsolete.[174] This is no mere semantic quibble: because the right to privacy is a fundamental right, the refusal to refer to it means that invasions of the personal sphere are often subjected to lenient, rather than strict, constitutional scrutiny. What's more, nowhere in our constitutional law has the idea of a free personal sphere been explicitly discussed and defended as it has in the right to privacy line of cases. The stagnation of that doctrine is a setback to the most explicit presence of liberalism in our constitutional discourse.

This sorry situation is reflected in the decisions of lower courts. One case in point involved a constitutional challenge to Alabama's statute criminalizing the distribution of "any device designed or marketed as useful primarily for the stimulation of human genital organs."[175] In 1998, the distribution of sex toys in Alabama became a criminal offense punishable by a fine and imprisonment for up to one year, with a subsequent violation elevated to the status of a felony. Amazingly, Alabama was not alone in enacting such a statute: seven other states also banned the sale, distribution, or promotion of these dangerous instruments.[176]

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fundamental rights and liberties which are, objectively, deeply rooted in this Nation's history and tradition'—respondents' claim would fail." (alteration in original) (quoting Albright v. Oliver, 510 U.S. 266, 275 (1994) (Scalia, J., concurring); Washington v. Glucksberg, 521 U.S. 702, 720-21 (1997))).

173. "[T]he Court has always been reluctant to expand the concept of substantive due process because guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended." Collins v. City of Harker Heights, 503 U.S. 115, 125 (1992).

174. *See* Greene, *supra* note 52, at 731.

175. ALA. CODE § 13A-12-200.2(a)(1) (LexisNexis 2005).

176. *See* COLO. REV. STAT. ANN. § 18-7-102 (West 2004); GA. CODE ANN. § 16-12-80 (2011); KAN. STAT. ANN. § 21-4301 (1995) (repealed 2011); LA. REV. STAT. ANN. § 14:106(A)(2) (2004); MISS. CODE ANN. § 97-29-105 (2006); TEX. PENAL CODE ANN.

Alabama's statute was challenged by plaintiffs that included sex toy manufacturers, physicians, and individual consumers ("Plaintiff . . . is a 43 year-old married woman who uses the devices with her husband of twenty-five years, both to enhance their intimate relationship and to assist her in over-coming [sic] orgasmic difficulties." Other over-coming plaintiffs were single.)[177] The United States District Court for the Northern District of Alabama described the complaint as follows:

> [P]laintiffs seek extension of the recognized right to privacy, so that it covers individuals who desire to engage in lawful, private, sexual conduct . . . . Plaintiffs seek protection behind that line of cases guarding "the personal intimacies of the home, the family, marriage, motherhood, procreation, and child rearing."[178]

But the district court rejected the right to privacy claim "based on the Supreme Court's . . . express reluctance to extend the protection of the Due Process Clause, [and] its narrow readings of cases recognizing [such] liberty interests."[179] To be sure, this was no principled legal argument but more like the placing of an ear to the ground of the Supreme Court. But it meant that the statute would be subjected to the lenient rational basis review: the statute could stand if it were a rational means to advance a legitimate end.

Alabama advanced a number of reasons for the prohibition on the sale of sex toys, including the belief that "[t]he commerce of sexual stimulation and auto-eroticism, for its own sake, unrelated to marriage, procreation or familial relationships is an evil . . . detrimental to the health and morality of the state."[180] The court thought it a perfectly proper justification: "Statutes aimed at effecting a sense of public morality address legitimate state objectives."[181] The court explained:

> [I]mplicit state condonation of certain conduct, which is created by the absence of state proscription, is likely to give some semblance of approval by the general public. Without question, social approval or disapproval, or the appearance of either, will affect the mores of a

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§§ 43.21, .23 (West 2011), *declared unconstitutional by* Reliable Consultants, Inc. v. Earle, 517 F.3d 738 (5th Cir. 2008); VA. CODE ANN. § 18.2-373 to -374 (2009).

177. Williams v. Pryor (*Williams I*), 41 F. Supp. 2d 1257, 1264 (N.D. Ala. 1999), *rev'd*, 240 F.3d 944 (11th Cir. 2001) (alteration in original).

178. *Id.* at 1276 (quoting Paris Adult Theatre I v. Slaton, 413 U.S. 49, 65 (1973)).

179. *Id.* at 1284.

180. *Id.* at 1286 (internal quotation marks omitted).

181. *Id.*

> particular society. Thus, Alabama's interest in public morality is directly connected to what is sold with the State's tacit approval.[182]

Needless to say, the idea that the government implicitly embraces the morality of practices it does not forbid is utterly outlandish in a liberal state.

And yet, the court went on to hold that the statute was unconstitutional because, among other things, the means it employed were not rationally related to the state's interest in suppressing "auto-eroticism . . . unrelated to marriage, procreation[,] or familial relationships."[183] After all, said the court, sex toys were also used to stimulate interpersonal sex, including marital sex aimed at procreation. The court then issued an injunction prohibiting the enforcement of the statute.

The decision was appealed to the United States Court of Appeals for the Eleventh Circuit, which reversed.[184] The Eleventh Circuit agreed with the district court that "[t]he crafting and safeguarding of public morality has long been an established part of the States' plenary police power to legislate and indisputably is a legitimate government interest."[185] And it also agreed that the statute rationally served that interest, thereby accepting Alabama's argument that "a ban on the sale of . . . orgasm stimulating paraphernalia is rationally related to a legitimate legislative interest in discouraging prurient interests in autonomous sex."[186] But, the Eleventh Circuit faulted the district court for failing to consider an as-applied challenge to the statute under the right to privacy, and it therefore remanded for a reexamination of that question.[187]

On remand, the district court concluded that the statute did in fact violate the right to privacy. Its conclusion was based on the claim that the right to sexual privacy was historically protected in America. The opinion offered a historical survey of American sexual mores and regulations from colonial times to the present, including the rather surprising observation that:

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182. *Id.* at 1287.

183. *Id.* at 1289 (alteration in original) (internal quotation marks omitted).

184. Williams v. Pryor (*Williams II*), 240 F.3d 944 (11th Cir. 2001).

185. *Id.* at 949.

186. *Id.* (internal quotation marks omitted).

187. *Id.* at 955 ("The district court correctly rejected the plaintiffs' facial challenge to the statute. [However, we] conclude the district court did not adequately consider the as-applied fundamental rights challenges raised by the plaintiffs.").

> Massage to orgasm of female patients was a staple of medical practice among . . . Western physicians from the time of Hippocrates until the 1920s . . . .
>
> . . . .
>
> The electromechanical vibrator, invented in the 1880s by a British physician, [allowed] effective therapeutic massage that neither fatigued the therapist nor demanded skills that were difficult and time-consuming to acquire.[188]

Having concluded that the right to privacy was involved, and that strict constitutional scrutiny was therefore in order, the district court found the statute, once again, unconstitutional.[189]

The decision was again appealed to the Eleventh Circuit (to a different panel this time), which reversed.[190] The right to use sexual devices, said the panel, was neither encompassed by right to privacy precedents nor part of the nation's history and traditions: the district court incorrectly analyzed the question in terms of sexual privacy instead of focusing narrowly on "*sexual devices* within that history and tradition."[191] Apparently, the history of *sexual devices* was altogether different. But instead of concluding that the statute was therefore constitutional, the panel remanded the case once again for a determination of whether *Lawrence*, decided while the case was pending, repudiated public morality as a sufficient constitutional justification for the statute.[192] As noted above, *Lawrence* proclaimed that "the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice."[193]

On remand, the district court at long last found the statute constitutional. As he began his lengthy opinion, reversing himself yet again, Judge Lynwood Smith turned philosophical (who wouldn't?), quoting Oliver Wendell Holmes's proclamations that "'the logical method and form flatter that longing for certainty and repose which is

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188. Williams v. Pryor (*Williams III*) , 220 F. Supp. 2d 1257, 1284 (N.D. Ala. 2002), *rev'd sub nom.* Williams v. Att'y Gen. of Ala. (*Williams IV*) , 378 F.3d 1232 (11th Cir. 2004).

189. *Id.* at 1259-60.

190. *Williams IV*, 378 F.3d 1232.

191. *Id.* at 1243 ("The inquiry should have been focused not broadly on the vast topic of sex in American cultural and legal history, but narrowly and more precisely on the treatment of *sexual devices* within that history and tradition.").

192. The district court "may examine 'whether our holding . . . that Alabama's law has a rational basis (e.g., public morality) remains good law now that *Bowers* has been overruled [by *Lawrence*].'" *Id.* at 1238 n.9 (quoting *id.* at 1259 n.25 (Barkett, J., dissenting)).

193. Lawrence v. Texas, 539 U.S. 558, 577 (2003) (quoting Bowers v. Hardwick, 478 U.S. 186, 216 (1986) (Stevens, J., dissenting)).

in every human mind. But certainty generally is illusion, and repose is not the destiny of man,'"[194] and also that "'[i]t is the merit of the common law that it decides the case first and determines the principle afterwards.'"[195] Having offered these nihilistic sound bites, the court moved to explain why Alabama's interest in imposing its version of public morality suffices to justify the statute, *Lawrence* notwithstanding.

Although *Lawrence* declared moral disapproval an insufficient reason to uphold the criminalization of homosexual sodomy, such a principle, if taken seriously, "would cause a 'massive disruption of the current social order.'"[196] "Indeed, if the effects of *Lawrence* are to be construed as broadly," added Judge Smith, "virtually our entire criminal code would be invalidated, because it is based on social conceptions of 'right' and 'wrong' behavior."[197] That was, of course, complete nonsense: as *Lawrence* itself made clear, the constitutional insufficiency of mere moral disapproval applied solely to laws that were based *only* on "social conceptions of 'right' and 'wrong'"[198] without any "persons who might be injured or coerced."[199] Unlike most of our criminal laws, laws penalizing homosexual sodomy and the sale of sex toys are thankfully unique in this regard.

The decision upholding the statute was appealed, but this time the Eleventh Circuit affirmed, holding that concern with public morality is indeed a proper constitutional justification for the statute, but for a different reason than the one offered by the district court: "To the extent *Lawrence* rejects public morality as a legitimate government interest, it invalidates only those laws that target conduct that is both private and non-commercial."[200] Public morality justified the statute because it prohibited the *sale* of sex toys, not their use. As the Eleventh Circuit must have known, a similar formalistic distinction between distribution and use, in regard to contraceptives, was rejected

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194. Williams v. King (*Williams V*), 420 F. Supp. 2d 1224, 1226 n.9 (N.D. Ala. 2006) (quoting Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 466 (1897)), *aff'd sub nom.* Williams v. Morgan (*Williams VI*), 478 F.3d 1316 (11th Cir. 2007).

195. *Id.* at 1227 n.10 (quoting Oliver Wendell Holmes Jr., *Codes, and the Arrangement of the Law*, 5 AM. L. REV. 1, 1 (1870), *reprinted in* 1 THE COLLECTED WORKS OF JUSTICE HOLMES 212, 212 (Sheldan M. Novick ed., 1995)).

196. *Id.* at 1248-50 (quoting *Lawrence*, 539 U.S. at 591 (Scalia, J., dissenting)).

197. *Id.* at 1248.

198. *Id.*

199. *Lawrence*, 539 U.S. at 560.

200. Williams v. Morgan (*Williams VI*), 478 F.3d 1316, 1322 (11th Cir. 2007).

by the Supreme Court in *Eisenstadt*. But that was a different Supreme Court; this Supreme Court denied certiorari.[201]

This drawn out litigation over a petty statute may have been amusing had it not consumed such prodigious amounts of public resources. And the fact that it did was a sign of the chaotic shape of the right to privacy. The third and last opinion of the district court put it this way: "There simply is no . . . consistent concept of either the constitutional basis for or content of plaintiffs' asserted 'rights of privacy and personal autonomy.' Rather, the doctrinal underpinnings of those allegedly 'fundamental rights' have been cobbled together from a diverse collection of cases, resulting in a rickety structure."[202] A rickety structure indeed—but not for lack of possible support. Liberalism is an obvious and excellent choice for that job. But the Supreme Court has refused to commit to liberalism; and so one of the two foundational theories of the American polity enjoys no serious constitutional consideration. This unfortunate situation needs to be remedied. And while the current Supreme Court is not likely to do so, *all* courts have the right and the duty to develop intellectually defensible constitutional doctrine. This Article aspires to help them do so.

201. *Id.*, *cert. denied*, 552 U.S. 814 (2007).
202. *Williams V*, 420 F. Supp. 2d at 1226.