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## AUTONOMY'S MAGIC WAND: ABORTION AND CONSTITUTIONAL INTERPRETATION

ANITA L. ALLEN\*

Constitutional law changes, even though the Constitution remains the same. American abortion law aptly illustrates this point. Although the text of the Fourteenth Amendment has remained constant since the United States Supreme Court decided *Roe v. Wade*<sup>1</sup> in 1973, the Court has altered its position on the constitutionality of restrictive abortion statutes. According to *Roe*, the Due Process Clause prohibits government from criminalizing early abortions. Yet, recent decisions permit government to restrict abortion throughout pregnancy in the interest of maternal well-being and unborn life. Moreover, four Justices favor overruling *Roe* outright.<sup>2</sup>

This essay comments on the changeability of constitutional law and its interpretation by the Supreme Court, emphasizing the deterioration of the Supreme Court doctrine that the Fourteenth Amendment encompasses a fundamental right of privacy broad enough to include abortion. Another closely related doctrinal shift is the Court's virtual "about face" on the constitutionality of abortion restrictions.

The "about face" began in 1989 with *Webster v. Reproductive Health Services*,<sup>3</sup> a decision upholding restrictive provisions of Missouri's abortion law,<sup>4</sup> and continued in 1992 with *Planned Parenthood v. Casey*.<sup>5</sup> *Casey* tested the constitutionality of provisions of the Pennsylvania Abortion Control Act that permitted abortion but subjected patients and their health care providers to controversial consent, notification, and public reporting requirements.<sup>6</sup> Specifically, the law required (1) that minors obtain parental consent or a court order; (2) that married women not meeting one of several exceptions notify their husbands; (3) that all women give "informed consent" after receiving information discouraging abortion and waiting twenty-four hours; and (4) that abortion facilities submit and disclose detailed public reports.<sup>7</sup>

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<sup>1</sup> 410 U.S. 113 (1973).

<sup>2</sup> They are Chief Justice Rehnquist, and Justices White, Scalia, and Thomas.

<sup>3</sup> 492 U.S. 490 (1989).

<sup>4</sup> See Anita L. Allen, *Webster Marks Time*, 2 BIOC.LAW 1531, 1533 (1989) (discussing *Webster*).

<sup>5</sup> 112 S. Ct. 2791 (1992).

<sup>6</sup> 18 PA. CONS. STAT. §§ 3203-3220 (1990).

<sup>7</sup> *Id.* Critics fear that this last requirement will compromise patient anonymity and drown abortion providers in paperwork.

In *Thornburgh v. American College of Obstetricians & Gynecologists*,<sup>8</sup> an earlier test of Pennsylvania law, the Court invalidated informed consent and record-keeping statutes similar to those revisited in *Casey*. *Thornburgh* was a resounding endorsement of *Roe*. Writing for the Court, Justice Blackmun condemned as unconstitutional state efforts to legislate time-consuming, expensive, and invasive preconditions to abortion services.<sup>9</sup> Under *Thornburgh*, a state may neither ban nor restrict abortion by encumbering the decision to abort.

In *Thornburgh*, as in *Roe*, a majority of the Court portrayed the right of abortion privacy as “fundamental.” In effect, *Roe* and *Thornburgh* declared legislative interference with free choice *prima facie* invalid. Most observers correctly predicted that a reconstituted panel of nine Justices would decide *Casey* differently from the Court’s *Thornburgh* decision just six years earlier. After *Thornburgh*, the number of Justices subscribing to the jurisprudence of fundamental abortion rights dwindled. Subjecting strikingly similar laws to strikingly dissimilar analysis, the *Casey* majority affirmed the “essential” holding of *Roe*,<sup>10</sup> but abandoned the presumption that most restrictions on abortion are unconstitutional. *Casey* portrayed legislated impediments that do not “unduly burden” the fundamental abortion right as *prima facie* valid, even if they make abortion inconvenient and expensive.<sup>11</sup> The Court stated that an anti-abortion statute imposes an “undue” burden if it places a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus.<sup>12</sup>

Reaffirming *Roe* in *Casey*, but abandoning its strict standard of constitutional validity, the Court labored to avoid the appearance of constitutional change. It elaborated its “obligation to follow precedent”<sup>13</sup> and the impropriety of “reexamining the prior law with[out] any justification beyond a present doctrinal disposition to come out differently from the Court of 1973.”<sup>14</sup> The majority opinion stressed *Roe*’s promise of female liberty. The Court’s feminist rhetorical flourishes linked a woman’s “unique” reproductive liberty to her ability “to participate equally in the economic and social

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<sup>8</sup> 476 U.S. 747 (1986).

<sup>9</sup> *Id.* at 772.

<sup>10</sup> *Casey*, 112 S. Ct. at 2804. The *Casey* Court referred to the “essential” holding of *Roe* as the recognition of:

the right of the woman to choose to have an abortion before viability and to obtain it without undue interference from the State . . . . the State’s power to restrict abortions after fetal viability, . . . [and] the principle that the State has legitimate interests from the outset of the pregnancy in protecting the health of the woman and the life of the fetus that may become a child.

*Id.*

<sup>11</sup> *Id.* at 2819.

<sup>12</sup> *Id.* at 2820.

<sup>13</sup> *Id.* at 2808-16.

<sup>14</sup> *Id.* at 2813-14.

life of the Nation”<sup>15</sup> in roles she chooses. Declaring the importance of intimacy and personal life, the Court repudiated categorical abortion bans and rejected Pennsylvania’s regulation requiring spousal notification as unduly burdensome.<sup>16</sup>

In reality, however, the Court’s version of *stare decisis* openly announced a new, weaker standard of review for all abortion cases and employed that standard to uphold statutes virtually identical to those it declared unconstitutional just a few years ago. The Court upheld the stringent informed consent/twenty-four hour waiting period. Moreover, *Casey* jettisoned the defining “trimester” analytic framework of *Roe*, which prohibited states from regulating abortion for maternal and fetal well-being until the second and third trimesters of pregnancy, respectively. As originally interpreted, *Roe* may be cited as grounds for severely limiting until the third trimester state intervention premised on the interest of the unborn. Although *Casey* prohibited pre-viability blanket bans on abortion, the majority maintained that states have an assertible interest in the fetus at all stages of pregnancy.<sup>17</sup> As a result, *Casey* departed significantly enough from *Roe* to lessen its vaunted “legitimacy.”<sup>18</sup> *Casey* can be seen as just the kind of unprincipled politically opportune decision making made “unnecessarily and under pressure”<sup>19</sup> that the majority claimed it wanted to avoid.

Stressing that the *Roe* framework had not proven unworkable, the Court nevertheless significantly modified the constitutional law set forth in *Roe*. Justices Blackmun and Stevens voted in partial dissents in *Casey* to preserve the classic version of *Roe*. Although the conservative block, consisting of Justices Rehnquist, White, Scalia, and Thomas, decided it was time to rewrite constitutional abortion law, the moderate block, consisting of Justices O’Connor, Kennedy, and Souter, thought it was time to reread it.

How did the Court get from *Roe* and *Thornburgh* to *Casey*? How does constitutional law change even though the Constitution remains the same? In one sense the move from *Roe* and *Thornburgh* to *Casey* is easy to comprehend. With departures from and new appointments to the Court, the number of Justices willing to defend the right to choose abortion on fundamental privacy grounds shrank. The Court, viewed as a collective entity, simply changed its mind.

The Court, however, should not change its mind so freely. Although it can be explained as a political shift to the right in the Court’s composition, the transition from *Thornburgh* to *Casey* may nevertheless appear inexplicable to members of the general public predisposed to view the discipline of constitutional interpretation as exact, binding, and, once the judge dons the black robes, apolitical. If constitutional interpretation were an exact, bind-

<sup>15</sup> *Id.* at 2809.

<sup>16</sup> *Id.* at 2826-31.

<sup>17</sup> *Id.* at 2816.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.* at 2815.

ing, and apolitical discipline, the mere change in learned personnel would not change the meaning of fundamental law. We would not go from a *Thornburgh* to a *Webster* in only three years, or from a *Roe* to a *Casey* in a mere twenty.

The disempowered status of the fundamental right to privacy demonstrates that even rights formulated in the sweeping language of fundamentality and sanctity, rights that promise to function as magic wands for autonomous individuals, are vulnerable to repudiation if new Justices conclude that earlier ones committed egregious error. In varying degrees, the Justices who have joined the Court since *Roe*—Scalia, Thomas, Souter, Kennedy, and O'Connor—like Chief Justice Rehnquist and Justice White, believe that *Roe* contains improper reasoning and that its mistakes may not stand. There is, however, notorious disagreement about the extent to which *Roe* was erroneous. What I characterize below as “backward-looking” and “downward-looking” approaches to constitutional interpretation<sup>20</sup> contributed to the Court’s rapid reassessment of *Roe*.

Accounting for change in the jurisprudence of abortion rights is an occasion for reflecting on the implicit legal and interpretive philosophies of the federal judiciary in constitutional opinions. In the abortion field, constitutional law has changed because the composition of the Court has changed—Republican presidents have appointed more moderates and conservatives and fewer liberals. I suggest that, although conservative, liberal, and moderate Justices alike employ backward-looking, positivistic rhetoric to justify their decisions, the contingent of Justices with aggressively—and, arguably, heedlessly—backward-looking substantive approaches to constitutional interpretation has grown. Aggressively backward-looking substantive approaches have undercut the jurisprudence of fundamental privacy that once supported strict judicial protection of abortion rights. As a result, women seeking abortions face numerous new restrictions and the threat of ultimate prohibition.

### LIBERATING AUTONOMY

Nearly thirty years ago, the United States Supreme Court decided *Griswold v. Connecticut*.<sup>21</sup> The *Griswold* Court held that states may not criminalize a married woman’s use of birth control, as Connecticut and many other states had done since the Comstock Era of the late nineteenth century.<sup>22</sup> The *Griswold* Court based its holding on a general, fundamental constitutional right to privacy, announcing for the first time the existence of a discrete, general constitutional right of privacy. Previously, the Court had appealed to the concept of privacy occasionally to justify or reject legislative

<sup>20</sup> See *infra* text accompanying notes 57-71.

<sup>21</sup> 381 U.S. 479 (1965).

<sup>22</sup> DEBORAH L. RHODE, JUSTICE AND GENDER 204, 264 (1989) (tracing the evolving relationship between gender and the law in the United States).

or law enforcement policy.<sup>23</sup> Furthermore, early in the century, state courts had begun recognizing privacy rights expressly in tort law, inspired by Samuel Warren and Louis Brandeis's famous 1890 *Harvard Law Review* article.<sup>24</sup> Warren and Brandeis, however, limited their argument to the state common law of torts. Moreover, Justice Brandeis's eloquent appeal to the value of privacy in a dissenting opinion in an early Supreme Court wiretapping case<sup>25</sup> fell short of recognizing an independent constitutional privacy right.

*Griswold* characterized the right of privacy as "fundamental." As later cases would explain, "fundamental" rights "qualify for heightened judicial protection."<sup>26</sup> Fundamental rights are those the Court deems to be either "deeply rooted in this Nation's history and tradition"<sup>27</sup> or "implicit in the concept of ordered liberty" so that "neither liberty nor justice would exist if they were sacrificed."<sup>28</sup> In enacting legislation affecting a nonfundamental constitutional right or liberty, state and federal lawmakers may impinge upon that constitutional right or liberty if the legislation is "rationally related" to the furtherance of a legitimate governmental interest. By contrast, designated "fundamental" rights are so strong that government must establish a "compelling" state interest in legislation that impairs them. Accordingly, the fundamental right to privacy requires courts to invalidate legislation involving public interference with private decisionmaking, unless strict judicial scrutiny uncovers a compelling state interest.<sup>29</sup>

The *Griswold* case appeared to signal that the courts would strictly protect against laws impinging upon privacy.<sup>30</sup> At first, Justice Douglas's majority opinion explaining the jurisprudence of constitutional privacy caused some confusion.<sup>31</sup> Douglas raised the notion of a totalitarian specter of police

<sup>23</sup> *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting) ("The makers of our Constitution . . . conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men.").

<sup>24</sup> Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

<sup>25</sup> *Olmstead*, 277 U.S. at 471-85.

<sup>26</sup> *Bowers v. Hardwick*, 478 U.S. 186, 191 (1985) (arguing that consensual sodomy between homosexuals is not a fundamental right).

<sup>27</sup> *Moore v. City of E. Cleveland*, 431 U.S. 494, 503 (1977).

<sup>28</sup> *Palko v. Connecticut*, 302 U.S. 319, 325, 326 (1937) (finding a state statute allowing the state to appeal criminal cases to be consistent with the Fourteenth Amendment).

<sup>29</sup> Recently, the Court has begun to inquire whether challenged legislation unduly burdens a constitutional right. When it is deemed not to, strict scrutiny yields to a weaker standard of review and state action is upheld. *See infra* text accompanying notes 55-56 (discussing parental notification cases).

<sup>30</sup> But they have not. *See, e.g., Cruzan v. Director, Mo. Dep't of Health*, 497 U.S. 261 (1990) (upholding a state requirement that evidence of an "incompetent's wishes as to the withdrawal of life-sustaining treatment" be clear and convincing).

<sup>31</sup> *See* Anita L. Allen, *Taking Liberties: Privacy, Private Choice, and Social Contract Theory*, 56 U. CIN. L. REV. 461, 467-68 (1987).

entering the “sacred” realm of the marital bedroom, checking for evidence of illegal birth control practices. Yet, he was less concerned about invasions into physical privacy—trespassing typical of Fourth Amendment search and seizure cases—than invasions into decisional privacy.<sup>32</sup> Douglas presented a vision of American life in which men and women, consulting medical professionals of their own choosing, would have the legal power to decide for themselves certain important matters touching family life, especially whether and when to have children.

In the ancient Western world, the Greeks and Romans understood social life to include separate public and private realms.<sup>33</sup> Matters relating to the household, women, children, and servants or slaves were deemed—and denigrated as—private affairs. Although the value placed on the private sphere has changed, the cultural assumption of an appropriately private sphere remains. *Griswold* reflects this value by holding that courts must interpret our Constitution to include broad protection of what is appropriately considered private life.<sup>34</sup>

The ultimate value of decisional privacy rights regarding procreation may be that such rights make us more fit for our social roles in group life.<sup>35</sup> Yet, the flourishing of communal life depends largely on the flourishing of individuals who are morally autonomous and free to act on their own judgments.<sup>36</sup> Moral autonomy connotes the capacity for rational, responsible self-regulation and self-determination.<sup>37</sup> A society’s laws can either promote or impair moral autonomy so conceived. In the nineteenth century, John Stuart Mill made the classic liberal defense of legal autonomy, arguing in favor of freedom from governmental interference in the broad domain of self-regarding conduct, which defense received support from the utilitarian belief that individuals know themselves and therefore their interests best.<sup>38</sup>

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<sup>32</sup> *Id.*

<sup>33</sup> See HANNAH ARENDT, THE HUMAN CONDITION 22-78 (1958) (discussing various pre-modern views of the public and private realms); see also JÜRGEN HABERMAS, THE STRUCTURAL TRANSFORMATION OF THE PUBLIC SPHERE: AN INQUIRY INTO A CATEGORY OF BOURGEOIS SOCIETY 3-5 (Thomas Burger trans.. The MIT Press 1989) (1962) (discussing the public and private spheres of the Greeks and Romans).

<sup>34</sup> *Griswold*, 381 U.S. at 484-86.

<sup>35</sup> See ANITA L. ALLEN, UNEASY ACCESS: PRIVACY FOR WOMEN IN A FREE SOCIETY 51-52 (1988) (analyzing privacy as it relates to women in America).

<sup>36</sup> *Id.*

<sup>37</sup> See generally IMMANUEL KANT, FOUNDATIONS OF THE METAPHYSICS OF MORALS AND WHAT IS ENLIGHTENMENT (Lewis W. Beck trans., Bobbs-Merrill Educational Publishing 1981) (1785) (arguing that human beings possess moral autonomy and that rational and free beings are properly ascribed moral status and moral responsibility).

<sup>38</sup> JOHN STUART MILL, ON LIBERTY 10-11, 208, 239-46 PASSIM (David Spitz ed., Norton 1975) (1859) (asserting the principle that only self-protection warrants society’s control over the individual).

Liberal philosophers Joel Feinberg,<sup>39</sup> Gerald Dworkin,<sup>40</sup> and David A.J. Richards<sup>41</sup> maintain that the moral basis for constitutional privacy rights is that they protect the formation and exercise of moral autonomy.

Moral autonomy has not had an easy life in the hands of the law. As often as the law has empowered human beings by protecting their morally autonomous choices, it has subordinated, enslaved, and destroyed them. The *Griswold* case might have appeared to be the final legal liberation of moral autonomy in the United States. *Griswold* seemed to place a magic wand—the fundamental right to privacy—in eager hands. The right to privacy was autonomy's magic wand, a deft restraint on public regulation of decisions about health, sex, and procreation.<sup>42</sup> One of the first categories of oppressive law to go was a vestige of American racism and slavery: state laws prohibiting marriage between men and women of different races.<sup>43</sup> The ban on interracial marriage fell under the privacy doctrine, despite strong sentiments, then and now, that miscegenation is unnatural and ungodly.<sup>44</sup>

### IMPOTENCE AND DEMISE

When *Roe* was decided in 1973, the right to privacy must have seemed like a powerful tool indeed. Under *Roe*, women have a privacy right that allows them to terminate their pregnancies. They have this right, notwithstanding significant public disapproval.<sup>45</sup> That, however, is the nature of a

<sup>39</sup> JOEL FEINBERG, HARM TO SELF 47-97 (1986) (exploring the limits imposed on personal autonomy by the rivalry between criminal law and individual moral autonomy).

<sup>40</sup> See generally GERALD DWORKIN, THE THEORY AND PRACTICE OF AUTONOMY (1988) (developing and applying a new concept of autonomy).

<sup>41</sup> See generally DAVID A.J. RICHARDS, TOLERATION AND THE CONSTITUTION 231-81 (1986) (advocating and applying an alternative integrated interpretive approach to constitutional privacy).

<sup>42</sup> Anita L. Allen, *Court Disables Disputed Legacy of Privacy Right*, NAT'L L.J., Aug. 13, 1990, at S8 ("The Rehnquist Court is disabling a controversial jurisprudence of fundamental constitutional privacy that, for a time after [*Griswold*] and [*Roe*], promised to become autonomy's magic wand—a deft restraint on public regulation of decisions about public health.").

<sup>43</sup> *Loving v. Virginia*, 388 U.S. 1 (1967) (unanimous decision rendering unconstitutional statutes barring interracial marriages).

<sup>44</sup> David Margolick, *A Mixed Marriage's 25th Anniversary of Legality*, N.Y. TIMES, June 12, 1992, at B20 (relating that the sheriff who intruded into the Lovings' bedroom in 1958 and charged them with unlawful cohabitation still thinks the anti-miscegenation statute should exist and quoting him as saying: "'I don't think a white person should marry a black person. . . . The Lord made sparrows and robins, not to mix with one another.'").

<sup>45</sup> Of course, public support existed, too. See RHODE, *supra* note 22, at 208 (stating that in the decade before *Roe*, public approval of abortion for pregnancies resulting from rape or incest, or in cases of fetal abnormalities or threat to the mother's health, reached as high as 80% to 90%). Hundreds of thousands of women were already having abortions each year before *Roe*. In 1967, estimates of the number of abortions performed

magic wand. One can use it as one wishes, in the independent exercise of one's own judgment.

After *Roe*, some feared—and others hoped—that anything was possible, that *Roe* had generated momentum down a slippery slope. We must tolerate abortion. Consequently, we must also tolerate obscenity and pornography, prostitution between consenting adults, marijuana smoking, and homosexual sodomy. The right to privacy was a magic wand! If it were invoked, the courts would do one's bidding, ridiculous or sublime. "They" would declare long-haired minors immune from expulsion from public schools;<sup>46</sup> "they" would prevent doctors from forcibly sustaining the elderly and injured who persisted in a vegetative state in state hospitals, long after their meaningful lives had ended.<sup>47</sup>

The right to privacy, however, has proven less powerful than first appearances suggested. The right to privacy—the principle of public toleration of autonomous, self-regarding choice—was never a magic wand. The magic wand conception of the right to privacy was a mere illusion, a fantasy whose practical limitations became clear. Prostitution was never decriminalized on constitutional privacy grounds, even during the 1970's, when casual sex and "one-night stands" were commonplace and the risk of exposure to the AIDS virus did not poison every sexual encounter.<sup>48</sup> In addition, homosexual sodomy remained unprotected by the Constitution. The Court, arguing that the right to engage in homosexual acts was not fundamental, upheld a Georgia criminal statute under which police arrested a homosexual after they entered his home and discovered him engaging in sodomy.<sup>49</sup> *Bowers*

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ranged from as low as two hundred thousand to as high as two million. Harold Rosen, *A Case Study in Social Hypocrisy, in ABORTION IN AMERICA* 299, 299 (Harold Rosen ed., 1967) (arguing for the right of women to have abortions and finding hypocrisy in medical and legal approaches to the issue).

<sup>46</sup> *Holsapple v. Woods*, 500 F.2d 49 (7th Cir. 1974) (declaring unconstitutional that portion of a high school grooming code that related to boys' hair length). *But see New Rider v. Board of Educ.*, 480 F.2d 693 (10th Cir. 1973) (holding that a junior high school rule prohibiting hair length beyond shirt collar did not violate Pawnee Indian students' guarantees of freedom of speech, free exercise of religion, equal protection, or due process).

<sup>47</sup> *Cruzan v. Director, Mo. Dep't of Health*, 497 U.S. 261 (1990) (holding that a person's liberty interest under the Due Process Clause in refusing medical treatment may extend to life-sustaining treatment, but that a surrogate exercising this right for an incompetent person may be limited by the state's interest in protecting and preserving life); *In re Quinlan*, 355 A.2d 647 (N.J. 1976) (allowing father acting as comatose daughter's guardian to discontinue her life support provided her medical prognosis contained no chance of a cognitive recovery).

<sup>48</sup> *State v. Mueller*, 671 P.2d 1351 (Haw. 1983) (holding that engaging in sex for hire with consenting adults in the privacy of the home is not a fundamental right protected by the constitutional guarantees of privacy).

<sup>49</sup> *Bowers v. Hardwick*, 478 U.S. 186 (1986)

strongly suggests that the right to privacy is narrow in application, with the private sphere encompassing only traditional heterosexual family values.

The impotence and demise of the *Griswold* privacy doctrine was even clearer in *Cruzan*, in which the state court had begun with the premise that the right to die was a fundamental one. Implicitly eschewing fundamental rights analysis, the Supreme Court asked only whether Missouri violated *Cruzan*'s Fourteenth Amendment "liberty interest" when the Missouri Supreme Court required that *Cruzan*'s parents present "clear and convincing evidence" of their daughter's wish to terminate life-sustaining artificial nutrition and hydration. The Court's analysis suggests that the right to privacy is weaker in the contexts to which it is deemed to apply—i.e., it is a mere liberty interest, not a fundamental right requiring strict scrutiny.

Dissenting opinions in leading abortion cases have challenged both the right to privacy<sup>50</sup> and the notion that abortion rights are among our privacy rights.<sup>51</sup> Majority opinions in recent abortion cases now reflect the narrowing and weakening of the privacy doctrine. In *Webster v. Reproductive Health Services*,<sup>52</sup> the Court permitted legislation requiring viability testing and limits on publicly funded physician care,<sup>53</sup> and the opinion of the Chief Justice allowed states to assert an interest in the unborn at conception, an idea a majority of the Court now embraces.<sup>54</sup> In two recent cases involving teen access to abortion, parental notification statutes containing a judicial by-pass provision were upheld.<sup>55</sup> Writing for the Court, Justice Stevens, an abortion "liberal," applied Justice O'Connor's weaker "undue burden" test to rationalize the Court's decision that the Constitution permits states to treat minors differently from adults with respect to abortion. In *Rust v. Sullivan*, the Court used the line of cases upholding the right of government to refuse to fund indigent women's abortions to uphold the "gag rule," which prevented physicians in federally funded clinics from discussing abortion with their low income patients.<sup>56</sup> Neither privacy nor free speech values prevailed on behalf of the abortion right in *Rust*. *Casey* continues the process of disregarding the free speech and private choice implications of state abortion

<sup>50</sup> *Roe v. Wade*, 410 U.S. 113, 172 (1973) (Rehnquist, J., dissenting) ("I have difficulty in concluding . . . that the right of 'privacy' is involved in this case. . . . A transaction resulting in an operation such as this [i.e., a medical abortion] is not 'private' in the ordinary usage of that word.").

<sup>51</sup> See *Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747, 785-86 (1986) (White, J., joined by Rehnquist, J., dissenting) ("[T]he Court carries forward the 'difficult and continuing venture in substantive due process' . . . that began with . . . *Roe v. Wade* . . . and has lead the Court further and further afield in the thirteen years since the decision was handed down.").

<sup>52</sup> 492 U.S. 490 (1990).

<sup>53</sup> *Id.*

<sup>54</sup> See *Casey*, 112 S. Ct. at 2816.

<sup>55</sup> *Ohio v. Akron Ctr. for Reprod. Health*, 497 U.S. 502 (1990); *Hodgson v. Minnesota*, 497 U.S. 417 (1990).

<sup>56</sup> *Rust v. Sullivan*, 111 S. Ct. 1759 (1991).

laws; although it invalidated spousal notification and upheld *Roe, Casey* also upheld informed consent provisions that dictated what physicians must say to their patients.

### CONSTITUTIONAL DIRECTIONS

Directional metaphors are a useful device for distinguishing among differing approaches to legal interpretation and adjudication. Judges decide cases from perspectives that are to one degree or another backward-looking, forward-looking, upward-looking, downward-looking, and/or inward-looking. In my view, an important explanation for the demise of the fundamental right to privacy doctrine and the resultant constriction of abortion liberty is the Court's increasing commitment to backward-looking legal positivism and downward-looking moral positivism as its interpretive philosophy of constitutional, including fundamental, rights.

In adopting backward-looking perspectives, judges rely on established positive law, including statutes, case precedents, constitutions, and international treaties. In deciding a case, the backward-looking approach searches for the original intent of the framers (originalism, intentionalism) or references the plain meaning of the text (textualism). Judges with forward-looking perspectives reference optimal social or economic policies. Although the backward-looking judge would choose between consequence A and consequence B on the basis of existing positive legal norms, a forward-looking judge would feel unconstrained by established law that furthers no beneficial interest. Among the traditional legal philosophies, positivism is the legal philosophy of the backward-looking judge; realism is the philosophy of the forward-looking judge.<sup>57</sup>

Upward-looking perspectives base decisions on their conformity to normative ideals. Upward-looking perspectives consider appeals to ideal morality, natural law, or some other rationally or intuitively ascertainable norms. Like the forward-looking judge, the upward looker bases decisions on substantive values not necessarily embodied in existing law. However, the upward-looking judge may not hold strictly practical values. For example, the judge may view justice as a Kantian, adhering to categorical principles, would view it. Natural lawyers are upward lookers who believe that rules of reason are a substantive constraint on the law's legitimacy.<sup>58</sup>

Upward-looking jurisprudence relies upon supposedly higher ideals. By contrast, downward-looking jurisprudence appeals to the wishes, opinions,

<sup>57</sup> See H.L.A. HART, THE CONCEPT OF LAW (1961) (presenting what became an influential revival and critique of nineteenth century British positivism); Karl N. Llewellyn, *Some Realism About Realism—Responding to Dean Pound*, 44 HARV. L. REV. 1222 (1934) (detailing classic realist methods and positions). See generally Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 309 (1935) (describing a realist approach to jurisprudence).

<sup>58</sup> See generally JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS (1980) (reviving rational "natural law" philosophy).

and expectations of the community, whether or not they have been enacted into positive law or they satisfy higher normative principles or practical policies. The actual positive values of the community, or a majority within the community, are the basis of the downward looker's decisions. Downward lookers are to positive moral values what backward lookers are to positive legal values.

Finally, inward-looking perspectives eschew any attempt to ground judgment on a non-subjective or non-intersubjective foundation. Inward-looking considerations appeal directly to subjectivity, to what the decisionmaker believes is best, whether or not it conforms to popular will, ideal norms, practical policies, or "past political acts." The self-conscious inward looker may be a post-modernist who believes that the backward looker's judgments about past political acts, the forward looker's social or economic optimums, the upward looker's higher values, and the downward looker's community values are veiled judgments about socially constructed personal preferences.

I believe the opinions of modern American judges reflect all of the directional tendencies identified here.<sup>59</sup> Courts rarely completely ignore the forward-looking benefits to be gained or the highest ideals of upward-looking justice. However, the Supreme Court has embraced backward-looking positivism as its official legal philosophy. On the level of rhetoric, backward-looking perspectives dominate the pronouncements of the Supreme Court. As lawyers know, even in this post-realist, post-modernist world, the pervasive rhetorical approaches of the Justices of the Court, whether liberal or conservative, reflect a tendency to justify interpretations and decisions by considering backward-looking appeals to intent, text, and precedent. A favorite ancillary rhetorical approach of the Court is positivistic traditionalism—the downward-looking appeal to the nation's or Western world's normative traditions. The positivism of Justices Scalia and Thomas, to choose the Court's most conservative members, goes beyond rhetoric to substance. Positivism is a way of doing as well as speaking.

Based on the tenor of the Court's opinions, its conception of its interpretive and decisional role is that of an institution bound to serve the public as an independent, apolitical branch of government charged with interpreting and applying in a principled manner laws it did not author. The legislative and constitutional will of the sovereign people dictates the substance of judicial decisionmaking—this is the assurance offered by liberal and conservative Justices alike.

Fortunately, American law and ethical traditions appear to embody many good values, sensible policies, and ideals of justice. For this reason, positivism in constitutional adjudication is not wholly condemnable in practice. The virtual unity of law and justice renders legal and moral positivism's backward- and downward-looking directions palatable. However, the Court's resort to backward-looking and downward-looking adjudication

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<sup>59</sup> Richard Posner agrees. See RICHARD A. POSNER, *THE PROBLEMS OF JURISPRUDENCE* (1990) (defending a pragmatic, instrumental conception of law and adjudication).

ceases to be palatable in two problematic situations: when it seems phony and when it seems unjust.

Judicial positivism seems phony when the result reached in a case does not appear to be premised on the positive values stated, so that the Court's rhetoric of positivism appears unpersuasive. Judicial positivism seems unjust when, although it may succeed as positivistic rhetoric, the result reached in a case seems to violate important extra-legal or non-traditional norms. Although realist and critical legal studies opponents of positivism oppose it as a comprehensive legal philosophy because it seems phony, the proponents of traditional natural law reject positivism because it seems unjust. Phony positivism, critics say, conceals the multiplicity of factors involved in deciding a case; unjust positivism, naturalists say, impedes relief for victims of wrongdoing and progress for victims of oppression and discrimination.

I join other constitutional scholars who detect pernicious forms of positivism in many areas of Supreme Court jurisprudence.<sup>60</sup> Both liberal and conservative judges tend to issue opinions that are positivist. In *Bowers*, for example, the liberal dissenters relied on two positivistic sources of law: the text of the Fourteenth Amendment and the precedent of previous right of privacy cases.<sup>61</sup> Frank Michelman argues that the *Bowers* majority likewise "wears its positivistic constitutional theory on its sleeve."<sup>62</sup> Putting aside the relevance of judgments about whether laws against sodomy between consenting adults are "wise or desirable," Justice White framed the issue in *Bowers* as "whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy."<sup>63</sup> He then looked to the very kind of bigoted state laws against homosexuality as those under review for normative guidance on whether the Fourteenth Amendment ought to protect consenting adult homosexuals.

Why is the right to privacy unpopular with the current Court? Some unpopularity may have to do with the kinds of controversial behavior—such as homosexuality and abortion—that are protected under the right of privacy rubric. Judicial critics publicly oppose the doctrine on other grounds, chiefly the backward-looking positivist ground that the right to privacy is not a textually based or enumerated right, but an undemocratic invention. Justice Scalia, for example, attacked the abortion privacy doctrine in his

<sup>60</sup> Silas J. Wasserstrom & Louis M. Seidman, *The Fourth Amendment as Constitutional Theory*, 77 GEO. L.J. 19, 67-68 (1988) ("Since the demise of *Lochner v. New York*, 198 U.S. 45 (1905), and the discrediting of the natural law ideology that supported it, positivism has played a dominant role in certain corners of constitutional theory [including challenges to social and economic legislation on equal protection grounds, judicial enforcement of due process, and the contracts and takings clauses].").

<sup>61</sup> *Bowers*, 478 U.S. at 199-214 (Blackmun, J., joined by Brennan, Marshall, & Stevens, JJ., dissenting).

<sup>62</sup> Frank Michelman, *Law's Republic*, 97 YALE L.J. 1493, 1497 (1988).

<sup>63</sup> *Bowers*, 478 U.S. at 190.

*Casey* dissent because of what he called "two simple facts."<sup>64</sup> They were that "(1) the Constitution says absolutely nothing about [abortion], and (2) the longstanding traditions of American society have permitted [abortion] to be legally proscribed."<sup>65</sup> Similarly, scholarly critics maintain that the framers did not enumerate a right to privacy for a good reason: it is too broad and vague to function as a constitutional principle. Moreover, by virtue of its breadth and vagueness, the right to privacy grants the federal judiciary powers that approach those of the legislature, which powers properly belong to Congress and state lawmakers.

Justice Scalia adheres to what Professor Mark Tushnet labels "interpretivism."<sup>66</sup> Interpretivism holds that judges should limit themselves to norms that are stated or clearly implied in the written Constitution and to the framers' normative intent. According to Tushnet, textualism, intentionalism, originalism, and other forms of interpretivism have popular appeal. They appeal to many who believe that they respond to the problem "that judges no less than legislators were political actors, motivated primarily by their own interests and values."<sup>67</sup> Tushnet contrasts interpretivism with another liberal ideology of which he is equally critical: "neutral principles." Neutral principles maintains that judicial process must be based on general impartial neutral principles. Although textualist interpretivists view the written document as a non-arbitrary foundation for legal reasoning, neutral principles theorists view their own rationally derived principles as foundations.

*Casey* pitted Justice Scalia's interpretivism against the model of neutral principles followed by Justices O'Connor, Kennedy, and Souter. Justice Scalia's "two simple facts"<sup>68</sup> reflect his positivistic interpretivism. The moderate Justices' joint opinion is a paradigm of neutral principlism, upward-looking to right reason, but justified by appeal to the backward-looking norm of legal tradition:

The inescapable fact is that adjudication of substantive due process claims may call upon the Court in interpreting the Constitution to exercise the same capacity which courts have always exercised: reasoned judgment. Its boundaries are not susceptible of expression in a simple rule. That does not mean we are free to invalidate state policy choices with which we disagree; yet neither does it permit us to shrink from the duties of our office. . . .<sup>69</sup>

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<sup>64</sup> *Casey*, 112 S. Ct. at 2874.

<sup>65</sup> *Id.*

<sup>66</sup> Mark V. Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781 (1983) (detailing and critiquing interpretivism and neutral principles, two leading theories of modern constitutional law that attempt to limit judicial discretion).

<sup>67</sup> *Id.* at 784.

<sup>68</sup> See *supra* text accompanying note 64.

<sup>69</sup> *Casey*, 112 S. Ct. at 2806.

. . . The Court must take care to speak and act in ways that allow people to accept its decision on the terms the Court claims for them, as grounded truly in principle . . . .<sup>70</sup>

I would criticize the Court for attempting to elevate reason to a level of objectivity and neutrality beyond its fallibly human scale, but praise it for refusing to limit constitutional interpretation to text and tradition. Yet, the majority in *Casey* engaged in a good deal of backward-looking argumentation, insisting on stare decisis on behalf of *Roe* and reaffirming *Roe* by appealing to the cases that support it. The majority opinion, which appears to be an attempt to strike a workable compromise between the political extremes of the pro-choice and pro-life positions, is weak in its downward focused re-reading of *Roe*.

The *Casey* majority does not directly address the familiar arguments for narrowly limiting interpretation to text and tradition. Briefly, the arguments in favor of interpretivism are that it is democratic, objective, and safe, and it is at least safer for oppressed minorities than the alternative of unrestrained judicial law-making. Counter-arguments include (1) that originalism must be rejected because it mandates doing injustice if the law is unjust; (2) that interpretivism is impossible, and therefore illusory or phony;<sup>71</sup> (3) that attempts to discover what the framers intended will lead to ambiguous and indeterminate results; (4) that our efforts to look backward are limited by our own normative horizons; and (5) that originalism's majoritarian and democratic pretensions are just that: pretensions.

I view philosophical arguments against interpretivism as more compelling than the arguments for it. Unjust old law and its interpretation should not—and cannot—govern new times. Neither backward-looking originalism and textualism nor downward-looking traditionalism can survive the observation that dramatic changes have occurred since the Constitution was enacted. The Constitution is an imperfect eighteenth century document. It is imperfect because the notorious Three-fifths Compromise marred it. More generally, it is imperfect because it has failed to protect fully African Americans, Native Americans, white women, and poor people. Even after the addition of the Bill of Rights, the Constitution remained imperfect. It took the post-Civil War Amendments to deconstitutionalize involuntary servitude, the disenfranchisement of women, and the poll tax.

I can offer no full-fledged alternative to interpretivism in the place of backward-looking and downward-looking positivism. One has to be willing to call a rotten egg rotten, however, even if there is nothing else to eat. Fortunately, there is a bit of bread in the cupboard once textualism and originalism are rejected. I believe that, at a minimum, courts should seek to bring about their own substantive justice, unfettered, if the occasion demands, by failed efforts of previous generations to do the same. The great practical

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<sup>70</sup> *Id.* at 2814.

<sup>71</sup> See *supra* text accompanying notes 59-60.

value of the American Constitution is that its inspirational general language allows, invites, and requires hard judicial thinking about the ideal terms and conditions of social and economic life.

Legal theorists often debate whether courts should limit their vision to established law and tradition. Theorists, however, seldom voice a related and equally important concern: prospective positivism. The problem of prospective positivism exists because human beings "make" as well as "interpret" law, and because the reasonability of positivist expectations at the moment of legislation is as questionable as the reasonability of these expectations at the moment of adjudication. Can legislators reasonably expect future generations to yield to their expressions of legislative will? The case for interpretivism is weakened to the extent that one cannot reasonably expect one's will to be done indefinitely into the future. The concern I am raising can be illuminated by an analogy.

The famous British utilitarian legal philosopher Jeremy Bentham wanted to retain influence over his followers after his death. At his request when he died, his remains were dissected and preserved. Dressed in his clothes and seated in a chair, his preserved body was placed in a glass display case as an auto-icon.<sup>72</sup> When Bentham's actual head became unattractively desiccated, it was removed, placed at his feet, and replaced with a wax likeness.

Bentham thought physical preservation would ensure the longevity of his philosophic influence more effectively than his many books and articles. Yet, it is unlikely that the utilitarian sect or the board of the University of London was especially faithful to Bentham's wishes. The expectation of one generation that its law will continue to have the same meaning for the next generation is as vain as Bentham's pathetic expectation. For law to stick, it must appear to conform to the perceived interests and values of succeeding generations.

The American Constitution is durable precisely because it meets the appearance-of-conformity requirement. Constitutional interpretations change because of the rhetorical and practical failures of judges to predict future wants and values. It was more important to Bentham's survivors to have an attractive head on his auto-icon, than Bentham's actual head. It may be more important to the American people to have a Fourteenth Amendment that protects women as equals, than to have an Amendment that conforms to authentic nineteenth century expectations.

#### CONCLUSION

Abortion jurisprudence demonstrates that, in practice, constitutional interpretation is neither especially precise nor especially binding. *Stare deci-*

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<sup>72</sup> See ROSS HARRISON, BENTHAM 22-23 (1983) (describing how ideas about "use of the dead to the living" and "representation" created Bentham's desire to be dissected and turned into an icon-relic for his eponymous utilitarian sect). Notably, Bentham's auto-icon was produced at gatherings of Benthamites for 150 years. *Id.*

sis is not an “inexorable”<sup>73</sup> principle. Egregious judicial errors must be corrected; outdated, unworkable policies replaced; and substantive injustice cured. To put it so starkly is to suggest a kind of instability in Supreme Court practice. Yet, overall, the practice of the Court does not seem unstable. This may be because changes in given interpretations of text typically follow changes in social life that mandate new doctrine. The Supreme Court survived *Casey* because it offered something to those who favor women’s rights *and* to those who favor fetal protection. The next doctrinal shift may be the overturning of *Roe*. However, the popular support for such a dramatic departure from existing law is doubtful, and therefore the public reaction to it is potentially explosive.

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<sup>73</sup> *Casey*, 112 S. Ct. at 2808.