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I. INTRODUCTION

The transition from the Warren Court to the Burger Court not only changed the makeup of the Court itself, but also presaged a shift in the relationship between the Court and the academic community. Scholars had generally been critical of the Warren Court's willingness to use judicial power to advance the left-center political agenda of the majority of the Justices.[1] By contrast, commentators perceived the Burger Court as having a more conservative orientation and urged the Court to be more forceful in advancing the same left-center political agenda, even in areas such as discrimination on the basis of sex and alienage in which the Burger Court went far beyond Warren Court precedent.[2]

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1. *See infra* notes 11-15 and accompanying text.

2. Prior to the efforts of the Burger Court, the leading case on sex discrimination was Goesaert v. Cleary, 335 U.S. 464 (1948), in which the Court rejected a challenge to a state law sharply restricting the licensing of women as bartenders. *Goesaert* was overruled by Craig v. Boren, 429 U.S. 190, 210 n.23 (1976). Other illustrations of the Burger Court's activism on issues of sex discrimination include Caban v. Mohammed, 441 U.S. 380 (1979), and Weinberger v. Wiesenfeld, 420 U.S. 636 (1975). The development of the modern case law is analyzed in Maltz, *The Concept of the Doctrine of the Court in Constitutional Law*, 16 GA. L. REV. 357 (1982).

Prominent examples of the criticism of the Court for being insufficiently activist on the matter of sex discrimination include Freedman, *Sex Equality, Sex Differences, and the Supreme Court*, 92 YALE L.J. 913 (1983), and Law, *Rethinking Sex and the Constitution*, 132 U. PA. L. REV. 955 (1984).

The Burger Court's general approach to discrimination on the basis of alienage is exemplified by cases such as Bernal v. Fainter, 467 U.S. 216 (1984), and Graham v. Richardson, 403 U.S. 365 (1971), both of which applied strict judicial scrutiny to strike down state laws which discriminated against aliens. Much of the criticism of the Court's approach has been directed toward its refusal to apply strict scrutiny to discrimination against aliens by the federal government, Mathews v. Diaz, 426 U.S. 67 (1976), and its recognition of a political function exception to the strict scrutiny standard for state law classifications based on alienage. *E.g.*, Sugarman v. Dougall, 413 U.S. 634, 647 (1973). *See*

The commentators' reaction to *Bowers v. Hardwick*[3] is a particularly dramatic example of this phenomenon. *Bowers* was one of the most eagerly anticipated decisions of the last years of the Burger Court. There, the Court rejected a claim that a statute prohibiting private, consensual homosexual activity violated the constitutional right of privacy established by a number of earlier cases. The voluminous scholarly reaction to the decision has been almost universally negative.[4] Moreover, many commen-

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E. HULL, WITHOUT JUSTICE FOR ALL (1985); Rosberg, *Aliens and Equal Protection: Why Not the Right to Vote?*, 75 MICH. L. REV. 1092 (1977); Rosberg, *The Protection of Aliens from Discriminatory Treatment by the National Government*, 1977 SUP. CT. REV. 275.

3. 478 U.S. 186 (1986).

4. *See, e.g.*, L. TRIBE, AMERICAN CONSTITUTIONAL LAW 1425-29 (2d ed. 1988); Coleman, *Disordered Liberty: Judicial Restrictions on the Rights to Privacy and Equality in* Bowers v. Hardwick *and* Baker v. Wade, 12 T. MARSHALL L. REV. 81 (1986); Conkle, *The Second Death of Substantive Due Process*, 62 IND. L.J. 215 (1987); Khan, *The Invasion of Sexual Privacy*, 23 SAN DIEGO L. REV. 957 (1986); Law, *Homosexuality and the Social Meaning of Gender*, 1988 WIS. L. REV. 187; Michelman, *Law's Republic*, 97 YALE L.J. 1493 (1988); Richards, *Constitutional Legitimacy and Constitutional Privacy*, 61 N.Y.U. L. REV. 800 (1986); Rubenfeld, *The Right of Privacy*, 102 HARV. L. REV. 737, 799-802 (1989); Sheppard, *Private Passion, Public Outrage: Thoughts on* Bowers v. Hardwick, 40 RUTGERS L. REV. 521 (1988); Stoddard, Bowers v. Hardwick: *Precedent by Personal Predilection*, 54 U. CHI. L. REV. 648 (1987); Viera, Hardwick *and the Right of Privacy*, 55 U. CHI. L. REV. 1181 (1988); *The Supreme Court 1985 Term—Leading Cases*, 100 HARV. L. REV. 100, 210-20 (1986); Note, Bowers v. Hardwick: *Is There a Right to Privacy?*, 37 AM. U.L. REV. 487 (1988); Note, *Process, Privacy, and the Supreme Court*, 28 B.C L. REV. 691 (1987); Note, Bowers v. Hardwick—*Right of Privacy: Does it Extend to Homosexuals?*, CAP. U.L. REV. 301 (1986); Note, *The Right to Privacy: A Man's Home is No Longer His Castle*—Bowers v. Hardwick, 20 CREIGHTON L. REV. 325 (1986); Comment, Bowers v. Hardwick: *The Supreme Court Closes the Door on the Right to Privacy and Opens the Door to the Bedroom*, 64 DEN. U.L. REV. 599 (1988); Comment, Bowers v. Harwick: *The Right of Privacy and the Question of Intimate Relations*, 72 IOWA L. REV. 1443 (1987); Note, Bowers v. Hardwick: *The Right of Privacy—Only Within the Traditional Family?*, 26 J. FAM. L. 373 (1988); Comment, *Fourteenth Amendment--The Supreme Court Limits the Right of Privacy:* Bowers v. Hardwick, 106 S.Ct. 2841 (1986), 77 J. CRIM. L. & CRIMINOLOGY 894 (1986); Note, Bowers v. Hardwick: *"Now the Supreme Court Has Even Made the Closet Unsafe."*, 33 LOY. L. REV. 483 (1987); Note, Bowers v. Hardwick: *An Incomplete Constitutional Analysis*, 65 N.C.L. REV. 1100 (1987); Note, *The Supreme Court Refused to Expand the Right of Privacy to Include Homosexual Sodomy in* Bowers v. Hardwick, 14 PEPPERDINE L. REV. 313 (1987); Comment, *Thus Far and No Further: The Supreme Court Draws the Outer Boundary of the Right of Privacy*, 61 TUL. L. REV. 907 (1987); Comment, Bowers v. Hardwick: *The Invasion of Homosexuals' Right of Privacy*, 8 U. BRIDGEPORT L. REV. 229 (1987); Note, Bowers v. Hardwick: *The Supreme Court Redefines Fundamental Rights Analysis*, 32 VILL. L. REV. 221 (1987); Note, *Constitutional Law—The "Outer Limits" of the Right of Privacy*: Bowers v. Harwick, 22 WAKE FOREST L. REV. 629 (1987); Note, *An Imposition of the Justices' Own Moral Choices*—Bowers v. Hardwick, 9 WHITTIER L. REV. 115 (1987). *See also* Goldstein, *History, Homosexuality, and Political Values: Searching for the Hidden Determinants of* Bowers v. Hardwick, 97 YALE L.J. 1073, 1103 (1988) (*Bowers* decision "mischaracteriz[es] history and misunderstand[s] 'homosexuality.' "). *But see* Chang, *Conflict, Coherence and Constitutional Intent*, 72 IOWA L. REV. 753, 820-23 (1987) (supporting *Bowers* deci-

tators have phrased their criticism in unusually harsh terms, asserting that the Court based its judgment on blind prejudice rather than acceptable legal principle.[5] This reaction is particularly striking given the fact that a contrary decision in *Bowers* would have been unthinkable less than a quarter century ago.

These factors make the controversy over *Bowers* an unusually appropriate vehicle for studying the intellectual and political forces that have driven the Court and the academy in different directions in the debate over constitutional theory. This article will examine the historical development of the judicial approach to substantive constitutional privacy and the reaction of commentators to the Court's analysis. Part II discusses the seminal case of *Griswold v. Connecticut*.[6] Part III then examines the Court's decision in *Roe v. Wade*[7] and its aftermath. Finally, Part IV takes an in-depth look at the Court's decision in *Bowers* and the commentary that followed. This article concludes that the commentators' reaction to *Bowers* is largely attributable to an impression, created in substantial measure by the Court itself, that judicial activism will inevitably advance the left-center political agenda.

II. THE BEGINNING OF THE DISPUTE OVER CONSTITUTIONAL PRIVACY: *Griswold v. Connecticut*

The analysis of modern privacy jurisprudence logically begins with the 1967 decision in *Griswold v. Connecticut*. *Griswold* was a challenge to a Connecticut statute that barred the use of contraceptives. Four years earlier, the Court in *Poe v. Ullman*[8] had avoided a similar challenge on jurisdictional grounds. Since *Griswold* involved an actual conviction for violation of the statute, the Court had no plausible ground on which to avoid for the second time a decision on the merits.

The case was decided against the background of a constitutional scholarship which emphasized the need for judges to exer-

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sion); Comment, Bowers v. Hardwick: *Balancing the Interests of the Moral Order and Individual Liberty*, 16 CUMB. L. REV. 555 (1986) (same); Comment, Bowers v. Hardwick: *The Uneasy Interaction Between Legislative Intent and Judicial Restraint*, 10 HARV. J.L. & PUB. POL'Y 213 (1987) (same).

5. *See, e.g.*, Conkle, *supra* note 4, at 237 (decision is "deviant" and "perverse"); Stoddard, *supra* note 4, at 656 (decision is contrary to rule of law).

6. 381 U.S. 479 (1965).

7. 410 U.S. 113 (1973).

8. 367 U.S. 497 (1961).

cise judicial restraint in constitutional adjudication. The emphasis on judicial restraint was a reaction to the perceived excesses of the *Lochner*[9] era and reflected a general acceptance of the constitutional revolution of 1937, which saw the Supreme Court essentially abandon its scrutiny of economic regulation.[10] The scholarship of the late 1950s and early 1960s reflected the fear of a return to the *Lochner* era. Commentary was dominated by figures such as Herbert Wechsler and Alexander Bickel, who were primarily concerned with describing constraints to limit the power of the Court consistently with the basic premises of judicial review. Wechsler emphasized the need for judges to base their constitutional decisions on "neutral principles"[11] and contended that many of the more extreme decisions of the pre-1937 period could not be so justified.[12] Wechsler also suggested that the decision in *Brown v. Board of Education*[13] failed to satisfy his criteria for legitimacy.[14] Bickel championed the "passive virtues;" he argued both for restraint in the definition of substantive standards and also circumspection in the decision to reach the merits of cases brought before the Court.[15]

Griswold presented a classic "hard" case that challenged the premises of judicial restraint. The statute at issue was idiosyncratic and deeply distressing to virtually all of the "informed" intelligentsia, of which judges and academic commentators are an important segment. Faced with an analogous situation a quarter-century earlier, the Court in *Skinner v. Oklahoma*[16] had temporarily abandoned its restrained posture to strike down an Oklahoma statute that provided for the sterilization of certain classes of felons. The Connecticut statute in *Griswold* met a similar fate. By a 7-2 vote, the Court found unconstitutional a conviction for aiding and abetting a violation of the statute.

One of the most striking aspects of the *Griswold* decision was the sharp exchange between two giants of the Warren

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9. Lochner v. New York, 198 U.S. 45 (1905).

10. *See, e.g.*, United States v. Carolene Prods. Co., 304 U.S. 144 (1938); West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937).

11. Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 1 (1959).

12. *Id.* at 23-26.

13. 347 U.S. 483 (1954).

14. Wechsler, *supra* note 12, at 31-34.

15. A. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 111-98 (1962).

16. 316 U.S. 535 (1942).

Court, John Marshall Harlan and Hugo Black. Harlan's basic approach to constitutional analysis relied heavily on judges' own sense of self-restraint. He believed that the Court should develop a principled but flexible jurisprudence rooted in the history and traditions of American society. At the same time, however, he contended that judges should intervene only rarely, recognizing the importance of Bickel's passive virtues and in general leaving broad areas of discretion to other branches of government in formulating policy.[17]

This concern for judicial restraint often led Harlan to a less activist position than a majority of the Warren Court.[18] In *Griswold*, however, he concurred in the conclusion that the Connecticut statute was unconstitutional.[19] Harlan defended this position by referring to his dissenting opinion in *Poe*. In his view, the key point was that the statute applied to married couples and directly prohibited *use* of contraceptive devices.

> Adultery, homosexuality and the like are sexual intimacies which the State forbids altogether, but the intimacy of husband and wife is necessarily an essential and accepted feature of the institution of marriage, an institution which the State not only must allow, but which always and in every age it has fostered and protected. It is one thing when the State exerts its power either to forbid extra-marital sexuality altogether, or to say who may marry, but it is quite another when, having acknowledged a marriage and the intimacies inherent in it, it undertakes to regulate by means of the criminal law the details of that intimacy.[20]

In sharp contrast to Harlan, Black based his approach to constitutional law on a jurisprudence of rules. For example, he rejected Harlan's approach to procedural due process analysis, which would have tested state criminal procedures against the standard of "fundamental fairness." Instead, he argued that state courts were subject to precisely the same constraints as those imposed on the federal government by the Bill of Rights.[21]

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17. Harlan's judicial philosophy is analyzed in Bourguignon, *The Second Mr. Justice Harlan: His Principles of Judicial Decision Making*, 1979 SUP. CT. REV. 251.

18. *See, e.g.*, Reynolds v. Sims, 377 U.S. 533, 589-632 (1964) (Harlan, J., dissenting); Duncan v. Louisiana, 391 U.S. 145, 171-93 (1968) (Harlan, J., dissenting).

19. *Griswold*, 381 U.S. at 499-502 (Harlan, J., concurring in the judgment).

20. *Poe*, 367 U.S. at 553 (Harlan, J., dissenting), *cited in Griswold*, 381 U.S. at 500 (Harlan, J., concurring in the judgment).

21. *See, e.g.*, Adamson v. California, 332 U.S. 46, 68-123 (1947) (Black, J., dissenting).

Black's approach to the first amendment also differed sharply from that of Harlan. While Harlan advocated a balancing analysis to speech and speech-related problems, Black argued that all restraints on speech were impermissible,[22] but that regulations of activities other than speech itself should generally be immune from judicial scrutiny.[23]

Black's insistence on total incorporation of the Bill of Rights and an absolutist interpretation of the first amendment earned him a reputation as a judicial activist.[24] In fact, however, he viewed his approach to judging largely as a safeguard against the excesses of the *Lochner* era. This point emerges clearly in Black's dissent in *Adamson v. California*,[25] in which he complained that the fundamental fairness analysis of due process cases "subtly conveys to courts, at the expense of legislatures, ultimate power over public policies in fields where no specific provision of the Constitution limits legislative power."[26] Justice Black continued that

> this formula . . . has been used in the past, and can be used in the future, to license this Court, in considering regulatory legislation, to roam at large in the broad expanses of policy and morals and to trespass, all too freely, on the legislative domain of the States as well as the Federal Government.[27]

The consequences of Black's approach emerged clearly in his dissenting opinion in *Griswold*. The opinion expressed his views in typically straightforward fashion. Black began by asserting that "the law is every bit as offensive to me as it is to my Brethren of the majority"[28] and that "I like my privacy as well as the next one."[29] To Black, however, these points were irrelevant to the case unless the Connecticut statute was prohibited by some specific constitutional provision. Finding no provision that specifically dealt with contraception, Black concluded that the challenged statute was immune from constitutional attack.[30]

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22. *See, e.g.*, Roth v. United States, 354 U.S. 476, 508-14 (1957) (Black, J., joining dissent of Douglas, J.).

23. *See, e.g.*, Street v. New York, 394 U.S. 576, 610 (1969) (Black, J., dissenting).

24. *See* ONE MAN'S STAND FOR FREEDOM: MR. JUSTICE BLACK AND THE BILL OF RIGHTS 24-27 (I. Dilliard ed. 1963).

25. 332 U.S. 46 (1947).

26. *Id.* at 75 (Black, J., dissenting).

27. *Id.* at 90 (Black, J., dissenting).

28. *Griswold*, 381 U.S. at 507 (Black, J., dissenting).

29. *Id.* at 510.

30. *Id.* at 507-27.

In *Griswold*, Black and Harlan each sought to portray himself as the true champion of judicial restraint. Defending his view, Black argued:

> I cannot rely on the Due Process Clause or the Ninth Amendment or any mysterious and uncertain natural law concept as a reason for striking down this state law. The Due Process Clause with an "arbitrary and capricious" or "shocking to the conscience" formula was liberally used by this Court to strike down economic legislation in the early decades of this century, threatening, many people thought, the tranquility and stability of the Nation. That formula, based on subjective considerations of "natural justice," is no less dangerous when used to enforce this Court's views about personal rights than those about economic rights.[31]

Harlan responded:

> While I could not more heartily agree that judicial "self restraint" is an indispensable ingredient of sound constitutional adjudication, I do submit that [Black's] formula . . . for achieving it is more hollow than real. "Specific" provisions of the Constitution, no less than "due process," lend themselves as readily to "personal" interpretations by judges whose constitutional outlook is simply to keep the Constitution in supposed "tune with the times." Need one go further than to recall last Term's reapportionment cases [in which Black concurred]? . . . Judicial self-restraint will not, I suggest, be brought about in the "due process" area by the historically unfounded incorporation formula long advanced by my Brother Black . . . . It will be achieved in this area, as in other constitutional areas, only by continual insistence upon respect for the teachings of history, solid recognition of the basic values that underlie our society, and wise appreciation of the great roles that the doctrines of federalism and separation of powers have played in establishing and preserving American freedoms.[32]

Despite the support they drew from the literature, the concerns of Harlan and Black were not the central focus of the majority in *Griswold*. Harlan spoke only for himself, and Black was joined only by Justice Potter Stewart.[33] For men such as Chief Justice Earl Warren and Justices William O. Douglas, William

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31. *Id.* at 522 (citation omitted).

32. *Id.* at 501 (Harlan, J., concurring in the judgment) (citing *inter alia*, Reynolds v. Sims, 377 U.S. 533 (1964)).

33. *See id.* at 527-31 (Stewart, J., dissenting).

Brennan and Arthur Goldberg (hereinafter the left-center coalition), fear of *Lochner* and related cases had ceased to be the most important factor in their constitutional jurisprudence. Instead, their view of reality was dominated by cases such as *Brown v. Board of Education*[34] and *Reynolds v. Sims*.[35] These cases demonstrated the potential of the Court as an agent for the enforcement of what Warren's biographer has described as "ethical imperatives"[36]—typically, positions associated with the left-center of the American political spectrum. For these Justices, the most important element of constitutional analysis was not the need to provide constraints on the power of the Court. They strove instead to provide a framework for expanded judicial enforcement of these left-center values.

In constructing such a framework, however, the left-center coalition was forced to confront important preconceptions about the nature of the judicial process. Society in general expects the Court to derive its decisions from "legal" authorities which, in the context of constitutional adjudication, is the text of the Constitution and prior caselaw.[37] As trained lawyers and judges, the members of the Court have internalized these preconceptions and are powerfully influenced by them.[38] Thus, although the need for judicial deference was not the central feature of the left-center coalition member's constitutional analysis, the coalition remained substantially constrained nonetheless.

In *Griswold*, the tensions in the left-center approach were apparent in Justice Douglas' majority opinion. Douglas began by emphatically denying any intent to resurrect the *Lochner* philosophy, asserting that "[w]e do not sit as a super-legislature to determine the wisdom, need, and propriety of laws that touch economic problems, business affairs, or social conditions."[39] He distinguished *Griswold*, however, by arguing that the prohibition against contraceptive use involved matters which fell into the "penumbra" of privacy created by the specific provisions of the Bill of Rights.[40] Having associated the right to use contracep-

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34. 347 U.S. 483 (1954).

35. 377 U.S. 533 (1964).

36. G.E. WHITE, EARL WARREN: A PUBLIC LIFE 219 n. 2 (1982).

37. *See* Maltz, *Foreword: The Appeal of Originalism*, 1987 UTAH L. REV. 773, 779-85.

38. *See* Fiss, *Objectivity and Interpretation*, 34 STAN. L. REV. 739 (1982).

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

40. *Id.* at 482-85.

tives with the text of the Constitution, Douglas had no trouble concluding that the Connecticut statute was unconstitutional.

The theory of penumbras obviously had great potential as a basis for expanding the scope of judicial activism. The reasoning of Justice Goldberg's concurrence, in which both the Chief Justice and Justice Brennan joined,[41] was even more open-ended. The concurrence relied heavily on the ninth amendment, which refers to rights not specifically named in the Constitution but which are nonetheless "retained by the people."[42] Goldberg did not argue that the ninth amendment itself controlled the case.[43] He did contend, however, that the ninth amendment demonstrated that the drafters of the Constitution embraced the concept of nontextual, "basic and fundamental" rights, and that those rights were judicially discoverable and enforceable.[44] He then argued that the right of privacy can be derived "from the totality of the constitutional scheme under which we live"[45] and had no trouble concluding that the prohibition on contraceptive use was inconsistent with that right.

Although *Griswold* stirred little disagreement among the general populace, the decision was controversial among academics. While Charles Black applauded the Court's conclusion,[46] a number of other commentators expressed concern about the potential scope of the Douglas and Goldberg analyses.[47] Robert Bork launched the strongest attack on the decision.[48] Adopting a neo-Blackian approach, Bork contended that the principles adopted by the Court to govern constitutional adjudication must be neutral not only in application, but also in "*definition* and . . . *derivation*." He claimed that only reliance on the intent of the framers—originalism—satisfied these criteria.[49] Since in Bork's view the framers did not intend to prohibit the regulation

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41. *Id.* at 486-99 (Goldberg, J., concurring). Justice White also concurred in the judgment, relying on a substantive due process theory. *Id.* at 502-07 (White, J., concurring in the judgment).

42. U.S. CONST., amend. IX.

43. *Griswold*, 381 U.S. at 492 (Goldberg, J., concurring).

44. *Id.* at 490-94 (Goldberg, J., concurring).

45. *Id.* at 494 (quoting Poe v. Ullman, 367 U.S. 497, 521 (1961) (Douglas, J., dissenting)).

46. Black, *The Unfinished Business of the Warren Court*, 46 WASH. L. REV. 3, 32 (1970).

47. *See Comments on the* Griswold *Case*, 64 MICH. L. REV. 197 (1965).

48. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 7-11 (1971).

49. *Id.* at 7 (emphasis in original).

of contraceptive use, he condemned the *Griswold* result as "unprincipled."[50]

III. From Contraception to Abortion: *Roe v. Wade* and its Aftermath

A. The Decision of the Court

Like *Skinner* before it, the decision in *Griswold* under other circumstances might simply have remained a discontinuity on the constitutional landscape. Despite the potentially sweeping implications of the focus on penumbras and the ninth amendment, both Douglas and Goldberg had limited their analysis to prohibitions dealing with married couples,[51] and Douglas had also emphasized the fact that the statute directly prohibited contraceptive *use*, rather than manufacture or sale.[52] Even *Eisenstadt v. Baird*,[53] in which four of the seven participating Justices extended *Griswold* to protect unmarried couples, was no particular cause for concern. Given the political climate of the United States, judicial protection for access to contraceptives was not of great practical significance at that time. Thus, in purely political terms, *Griswold* and *Eisenstadt* were most important as precursors to the Court's entrance into the abortion controversy.

Soon after *Griswold* was decided, the political dispute over liberalization of restrictive abortion statutes intensified dramatically. Between 1962 and 1967, only one state had changed its abortion laws. By contrast, between 1967 and 1972, sixteen states relaxed the requirements for obtaining legalized abortions.[54] In 1970, a state court for the first time found an abortion statute unconstitutional.[55]

Prior to 1973, however, the political ferment over abortion had been confined primarily to the state level. Neither national political party took a position on the question, and congressional legislation on related matters deferred to state judgments.[56]

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50. *Id.* at 9.

51. *Griswold*, 381 U.S. at 485-86; *id.* at 495-96 (Goldberg, J., concurring).

52. *Id.* at 485.

53. 405 U.S. 438 (1972).

54. *See* Comment, *A Survey of the Present Statutory and Case Law on Abortion: The Contradictions and the Problems*, 1972 U. Ill. L.F. 177, 179-80 & nn.27 & 29.

55. *Id.* at 178-179 (citing People v. Belous, 71 Cal. 2d 954, 458 P.2d 194, 80 Cal. Rptr. 354 (1969), *cert. denied*, 397 U.S. 915 (1970)).

56. *See* Roe v. Norton, 522 F.2d 928 (2d Cir. 1975) (availability of federal funds for

Thus, it is not surprising that in making four appointments to the Supreme Court, the conservative President Nixon apparently did not even consider the privacy issue. While purportedly seeking to appoint advocates of judicial restraint, he was primarily concerned with issues of criminal procedure.[57]

The decision in *Roe v. Wade*[58] changed the situation dramatically. In *Roe* and its companion case, *Doe v. Bolton*,[59] the Court held that all extant anti-abortion statutes in the United States violated the Constitution. Speaking for the majority, Justice Blackmun based his analysis on a differentiation between what he termed the three trimesters of pregnancy. In the first trimester, the state was required to allow all abortions performed by physicians. In the second trimester, the state could impose requirements reasonably related to the preservation of maternal health, and in the third trimester, the state could prohibit all abortions except those necessary for the preservation of the life or health of the mother.[60]

Obviously, the members of the *Roe* majority found the challenged statutes highly objectionable. Their problem was analogous to that faced by the left-center coalition in *Griswold*—to cast their views in an argument that satisfied the requirements of legal convention.

The concept of privacy developed by the different opinions in *Griswold* played a major role in the strategy devised by the various members of the *Roe* majority for dealing with the requirements of legal convention. For Justice Stewart—a dissenter in *Griswold* but a member of the *Roe* majority—the issue was straightforward. In his view *Griswold* stood for the revival of substantive due process, and *Eisenstadt* denominated the right to choose whether or not to bear a child as fundamental. Thus, the rights established by those cases "necessarily include[s] the right of a woman to decide whether or not to terminate her pregnancy."[61] In *Doe*, Justice Douglas went even further, suggesting that *Griswold* and other cases had established constitutional

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abortions depends on legality of operation under state law).

57. *See* N.Y. Times, May 22, 1969, at 46, col. 1; *id.* May 23, 1969, at 26, col. 4.

58. 410 U.S. 113 (1973).

59. 410 U.S. 179 (1973).

60. *Roe*, 410 U.S. at 164-65.

61. *Id.* at 170 (Stewart, J., concurring).

protection for a wide range of individual interests, including the right to stroll and loaf.[62]

Speaking for the Court in *Roe*, Justice Blackmun addressed these problems in greater detail. He first explicitly acknowledged the possibility that the majority would be accused of "Lochnering."

> Our task . . . is to resolve the issue by constitutional measurement, free of emotion and predilection. . . . We bear in mind . . . Mr. Justice Holmes' admonition in his now-vindicated dissent in Lochner v. New York.
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> [The Constitution] is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar or novel and even shocking ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States.[63]

Blackmun sought to defuse this issue by reference to the principles of *Griswold* and *Eisenstadt*.

> This right of privacy . . . is broad enough to encompass a woman's decision whether or not to terminate her pregnancy. The detriment that the state would impose upon the pregnant woman by denying this choice altogether is apparent. Specific and direct harm medically diagnosable even in early pregnancy may be involved. Maternity, or additional offspring, may force upon the woman a distressful life and future. Psychological harm may be imminent. Mental and physical health may be taxed by child care. There is also the distress . . . associated with the unwanted child, and there is the problem of bringing a child into a family already unable, psychologically and otherwise, to care for it. In other cases . . . the additional difficulties and continuing stigma of unwed motherhood may be involved. All these are factors the woman and her responsible physician necessarily will consider in consultation.
>
> On the basis of elements such as these, [some] argue that the woman's right is absolute and that she is entitled to terminate her pregnancy at whatever time, in whatever way, and for whatever reason she alone chooses. With this we do not agree. . . . [A] State may properly assert important interests

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62. *Doe*, 410 U.S. at 209-21 (Douglas, J., concurring). Chief Justice Burger also wrote a concurring opinion. *Id.* at 207-09 (Burger, C.J., concurring).

63. *Roe*, 410 U.S. at 116-17 (quoting Lochner v. New York, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting)) (citations omitted).

> in safeguarding health, in maintaining medical standards, and in protecting potential life.[64]

The remarkable characteristic of this passage is that Blackmun's justifications for including abortion within the privacy right have little to do with the concept of privacy. Indeed, Blackmun focuses explicitly on the relationship between the woman and her doctor—a relationship that historically has been highly regulated by the state. The explanation for this seeming dissonance is relatively clear and simple. Legal convention compelled Blackmun to attach the abortion decision to some already established constitutional right and/or decided cases. The most closely related cases were *Griswold* and *Eisenstadt*—the contraceptive cases that rested on the ill-defined right of privacy, a right left open-ended by the opinions of the left-center coalition in *Griswold*. Thus, strategically, Blackmun's most plausible option for avoiding the *Lochner* stigma was to couch his analysis in the language of privacy.

Justices Rehnquist and White dissented.[65] Rehnquist had not participated in either *Griswold* or *Eisenstadt* and was to become the most persistent judicial critic of the Court's privacy jurisprudence.[66] He saw no difference between the Court's approach to the abortion question and the earlier activism of the *Lochner* era.[67] By contrast, White had concurred in the Court's judgment in both *Griswold* and *Eisenstadt*.[68] However, he condemned the decisions in *Roe* and *Doe* as "an improvident and extravagant exercise of the power of judicial review . . . ."[69]

B. The Reaction to the Abortion Decisions

Roe and its progeny created a political firestorm. The dispute over abortion and the Court's role in dealing with that dispute became a major national issue. Beginning in 1980, the platforms of the Republican Party—one of the most significant

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64. *Id.* at 153-54.

65. *See id.* at 171-78 (Rehnquist, J., dissenting); *Doe*, 410 U.S. at 221-23 (White, J., dissenting).

66. *See, e.g.*, Zablocki v. Redhail, 434 U.S. 374, 407-11 (1978) (Rehnquist, J., dissenting); Carey v. Population Servs. Int'l, 431 U.S. 678, 717-19 (1977) (Rehnquist, J., dissenting).

67. *Roe*, 410 U.S. at 174 (Rehnquist, J., dissenting).

68. *Eisenstadt*, 405 U.S. at 460-65 (White, J., concurring in the result); *Griswold*, 381 U.S. at 502-07 (White, J., concurring in the judgment).

69. *Doe*, 410 U.S. at 222 (White, J., dissenting).

reflections of the position of the right-center of the political spectrum—consistently called for overruling *Roe* by constitutional amendment.[70] Conversely, in 1980 and 1984 the Democratic platforms, reflecting the left-center position, forthrightly declared the party's support for *Roe*.[71] It thus became highly probable that the issue of constitutional privacy would figure prominently in judicial appointments by whichever party was in control of the White House and Congress.

The academic reaction to *Roe* was no less intense, with prominent constitutional scholars lining up on both sides of the issue. While all agreed that Justice Blackmun's opinion did not satisfactorily defend his position, commentators such as John Hart Ely, Richard Epstein and Harry Wellington attacked the result as well.[72] By contrast, Michael John Perry, Donald Regan, Laurence H. Tribe and others sought to justify the Court's conclusion more convincingly.[73] The desirability of loosening restrictions on abortions was not the major source of controversy. Wellington and Ely, for example, expressly indicated that they might well favor legislative proposals which achieved that result, and Epstein declined to express an opinion on the issue. The commentators differed sharply, however, in their perceptions of the appropriate judicial function in dealing with the issue. Writing very much in the Bickel/Wechsler tradition, Wellington, Epstein and Ely attacked *Roe* as an unprincipled usurpation of legislative prerogatives. The defenders of the decision, by contrast,

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70. 1980 Republican Platform at 5, *reprinted in* 1980 *Cong. Quarterly Almanac* at 62-B; 1984 Republican Platform at 15, *reprinted in* 1984 *Congressional Quarterly Almanac* at 55-B.

71. 1980 Democratic Platform at 16, *reprinted in* 1980 *Congressional Quarterly Almanac* at 106-B; 1984 Democratic Platform at 21, *reprinted in* 1984 *Congressional Quarterly Almanac* at 93-B.

72. Ely, *The Wages of Crying Wolf: A Comment on* Roe v. Wade, 82 YALE L.J. 920 (1973); Epstein, *Substantive Due Process by Any Other Name: The Abortion Cases*, 1973 SUP. CT. REV. 159; Wellington, *Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication*, 83 YALE L.J. 221, 297-311 (1973). *See also, e.g.*, Dixon, *The "New" Substantive Due Process and the Democratic Ethic: A Prolegomenon*, 1976 B.Y.U. L. REV. 43; Lupu, *Untangling the Strands of the Fourteenth Amendment*, 77 MICH. L. REV. 981, 998-99 (1979).

73. Perry, *Abortion, the Public Morals, and the Police Power: The Ethical Function of Substantive Due Process*, 23 U.C.L.A. 689 (1976); Regan, *Rewriting* Roe v. Wade, 77 MICH. L. REV. 1569 (1979); Tribe, *Foreword: Toward a Model of Roles in the Due Process of Life and Law*, 87 HARV. L. REV. 1 (1973). *See also, e.g.*, Heymann & Barzelay, *The Forest and the Trees:* Roe v. Wade *and its Critics*, 53 B.U.L. REV. 765 (1973); Karst, *Foreword: Equal Citizenship Under the Fourteenth Amendment*, 91 HARV. L. REV. 1, 57-59 (1977).

posited a much broader role for the Court. For example, Regan contended that the Court should enforce values of "non-subordination" and "freedom from physical invasion,"[74] and Perry argued that the courts have an "obligation . . . to give effect to the *public* morals (and, where necessary, to defeat a legislative scheme which fails to do so)."[75]

The strategy of *Roe*'s defenders reflects the difficulty in defending the result in the terms of traditional legal argument. The most nearly analogous supporting precedents—*Griswold* and *Eisenstadt*—were of little assistance. The various opinions from the members of the *Griswold* majority were carefully limited,[76] and the *Eisenstadt* Court had purported to rely on the deferential rational basis test in striking down a restriction on contraceptive distribution.[77] Thus, to plausibly justify *Roe*, scholars were forced to move away from the standard modes of constitutional argument.

Of course, *Roe* itself dramatically changed that situation for later cases dealing directly with abortion. However controversial its reasoning and conclusion, *Roe* provided a clearly established anchor for traditional legal arguments attacking future abortion-related government activities. The reaction to the abortion funding decision illustrates the impact of *Roe* in this regard.

The prominence of the abortion funding controversy was a tribute to the political impact of the Court's entrance into the abortion debate. The pro-life forces won many victories in the legislative arena, with state legislatures attempting to impose a variety of restrictions on access to abortions. In most cases these restrictions were overturned by the Supreme Court as inconsistent with *Roe*.[78] By contrast, in *Maher v. Roe*[79] and *Harris v. McRae*,[80] the Court rejected challenges to state and federal statutes that denied public funding for abortions for poor women, while providing such funding for childbirth-related expenses. The majority opinions in both cases noted that *Roe* had explic-

74. Regan, *supra* note 73, at 1630.

75. Perry, *supra* note 73, at 731.

76. *See supra* notes 28-33 and accompanying text.

77. *Eisenstadt*, 405 U.S. at 446-47.

78. *See, e.g.*, City of Akron v. Akron Center for Reproductive Health Inc., 462 U.S. 416 (1983); Planned Parenthood v. Danforth, 428 U.S. 52 (1976). *But see* H.L. v. Matheson, 450 U.S. 398 (1981) (rejecting attack on statute imposing special restrictions on minors seeking abortion).

79. 432 U.S. 464 (1977).

80. 448 U.S. 297 (1980).

itly recognized a governmental interest in the protection of potential life.[81] Thus, the Court concluded that so long as government did not place obstacles in the path of women seeking abortions, funding programs could favor childbirth over the termination of pregnancy.[82] In each case, dissenting Justices argued that *Roe* had established the right to choose an abortion as a fundamental right, and that the denial of public funding constituted a penalty on the exercise of that right.[83]

Not surprisingly, *Maher* and *Harris* were quite controversial. Commentators such as Perry, Tribe, and Robert Bennett disagreed with the Court's conclusion.[84] While Tribe and Bennett saw the cases as presenting difficult issues, Perry made a stronger negative comment. Applying the standard tools of case analysis, he concluded that the result in *Harris* "borders on the shameful"[85] and was inconsistent with the "narrowest coherent principle of *Roe v. Wade*."[86] Perry suggested that the decision was best understood as a concession to the political forces that had attacked *Roe* itself.[87]

Perry's argument is rather clearly overstated. As commentators such as Peter Westin and Mark Tushnet have noted, while the majority opinions in *Maher* and *Harris* took a narrower view of the abortion right than Perry, that view can be fit comfortably within the *Roe* analysis.[88] Further, the overall voting patterns of the Justices on the abortion issue in the relevant time period do not suggest a surrender to pro-life political pressure. Both Justices Powell and Stewart—the authors of the majority

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81. *Harris*, 448 U.S. at 313; *Maher*, 432 U.S. at 478.

82. *Harris*, 448 U.S. at 313; *Maher*, 432 U.S. at 473-74.

83. *Harris*, 448 U.S. at 349-57 (Stevens, J., dissenting); *id.* at 329-37 (Brennan, J., dissenting); *id.* at 337-48 (Marshall, J., dissenting); *id.* at 348-49 (Blackmun, J., dissenting); *Beal v. Doe*, 432 U.S. at 462-63 (Blackmun, J., dissenting); *id.* at 454-62 (Marshall, J., dissenting); *Maher*, 432 U.S. at 482-90 (Brennan, J., dissenting).

84. Bennett, *Abortion and Judicial Review: Of Burdens and Benefits, Hard Cases and Some Bad Law*, 75 NW. U.L. REV. 978 (1981); Perry, *Why the Supreme Court Was Plainly Wrong in the Hyde Amendment Case: A Brief Comment on* Harris v. McRae, 32 STAN. L. REV. 1113 (1980); Tribe, *The Abortion Funding Conundrum: Inalienable Rights, Affirmative Duties, and the Dilemma of Dependence*, 99 HARV. L. REV. 330 (1985).

85. Perry, *supra* note 85, at 1128.

86. *Id.* at 1127.

87. *Id.*

88. Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781, 811-14 (1983); Westen, *Regarding Perry, Why the Supreme Court was Plainly Wrong in the Hyde Amendment Case: A Brief Comment on* Harris v. McRae, 33 STAN. L. REV. 1187 (1981).

opinions in *Maher* and *Harris*, respectively—strongly supported the pro-choice position in most other contexts.[89] Thus they must have at least *believed* that the funding cases presented significantly different issues.

The flaws in Perry's analysis should not obscure a fundamental point which emerges from his argument. The simple existence of *Roe* made available to pro-choice advocates traditional legal arguments which enabled them to defend more advanced positions within the Bickel/Wechsler tradition. In the abortion context itself, the pressure to abandon that tradition in order to advance the left-center political agenda was substantially reduced.

At the same time, however, the abortion decisions contributed substantially to the more general demise of the Bickel/Wechsler approach as the dominant ideology among constitutional theorists. Even before *Roe*, some scholars had attempted to provide theoretical justification for the actions of the Warren Court's left-center coalition.[90] The aftermath of the abortion decisions provided an indication that fears of the results of judicial activism were unfounded. In *Roe*, the Justices had done precisely what the Bickel/Wechsler analysis had warned against, injecting themselves with little clear legal support on one side of a controversial, emotionally-charged political issue. From the perspective of the Court as an institution, the results were far from catastrophic. The sky had not fallen, *Lochner* had not returned from the dead, and while the Court was criticized from some quarters, its authority remained unchallenged. None of the fears of the Bickel/Wechsler school had been realized.

Indeed, from the perspective of the left-center political forces that dominated the fraternity of constitutional scholars, the intense controversy over *Roe* actually reduced the political risk associated with the advocacy of judicial activism. Beginning with the Warren Court era, more conservative elements in American political culture had been associated with the philosophy of judicial restraint. In context, this position is entirely understandable, since all of the activist innovations of the Warren

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89. *See, e.g.*, City of Akron v. Akron Center for Reproductive Health, Inc., 462 U.S. 416 (1983) (Powell, J.); Colautti v. Franklin, 439 U.S. 379 (1979) (Powell, J., and Stewart, J., joining majority opinion); Planned Parenthood v. Danforth, 428 U.S. 52 (1976) (Stewart, J., and Powell, J., joining majority opinion).

90. *See* Michelman, *Forward: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7 (1969).

Court had favored the left-center. Moreover, given the composition of the Court in the late 1950s and 1960s, judicial activism that favored the conservative program was unlikely in any event. Thus it is not surprising that condemnations of judicial activism became an intrinsic element of conservative ideology.[91]

The decision in *Roe* intensified conservative distrust of an activist judiciary. Led in the academy by Bork and on the Court by Justice Rehnquist, conservatives advocated an analysis that combined the most deferential elements of the philosophies of Black and Harlan. Like Black, Bork and Rehnquist argued for originalism—the theory that the Court should intervene only to protect those values that the framers of the Constitution specifically intended to protect.[92] But, like Harlan, they contended as a historical matter that the fourteenth amendment was not intended to incorporate the Bill of Rights.[93] This framework provided little scope for judicial activism. In a much-cited law review article, Rehnquist captured the essence of the conservative argument.

> [T]o the extent that it makes possible an individual's persuading one or more appointed federal judges to impose on other individuals a rule of conduct that the popularly elected branches of government would not have enacted and the voters have not and would not have embodied in the Constitution, [nonoriginalist review] is genuinely corrosive of the fundamental values of our democratic society.[94]

In the furor over *Roe*, conservatives intensified their critique of judicial activism. Moreover, while there have been some notable exceptions,[95] the more conservative Justices appointed by Richard Nixon in the late 1960s and early 1970s generally have been unwilling to use the power of the Supreme Court to

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91. *See, e.g.*, THE NATIONAL ELECTION OF 1964 55, 81, 87 (M. Cummings ed. 1966).

92. *See, e.g.*, Sugarman v. Dougall, 413 U.S. 634, 649-64 (1973) (Rehnquist, J., dissenting); Bork, *The Impossibility of Finding Welfare Rights in the Constitution*, 1979 WASH. U.L.Q. 695.

93. Buckley v. Valeo, 424 U.S. 1, 291 (1976) (opinion of Rehnquist, J.).

94. Rehnquist, *The Notion of a Living Constitution*, 54 TEX. L. REV. 693, 706 (1976). *See also* Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 2-4 (1971); Monaghan, *Our Perfect Constitution*, 56 N.Y.U. L. REV. 353, 371-372 (1981).

95. *See, e.g.*, Wygant v. Jackson Bd. of Educ., 476 U.S. 267 (1986); National League of Cities v. Usery, 426 U.S. 833 (1976), *rev'd*, Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985).

thwart left-center initiatives from other governmental bodies.[96] Thus there seemed little risk of the emergence of a judiciary actively involved in promoting a conservative program by striking down legislation favored by left-center interests. From a left-center perspective, the worst possible scenario seemed to be that the Court would leave both conservative and left-center initiatives untouched.

Given this background, it is not surprising that left-center scholars began to praise judicial activism rather than emphasizing the virtues of judicial restraint. Perry, for example, argued that non-originalist activism leads to "a more mature political morality . . . a morality that is moving (inching?) toward, even though it has not always and everywhere arrived at, right answers, rather than a stagnant or even regressive morality."[97] Similarly, Owen Fiss contended that unlike legislatures, which "see their primary function in terms of registering the actual, occurrent preferences of the people," courts are "ideologically committed [and] institutionally suited to search for the meaning of constitutional values . . . ."[98] Fiss concluded that because of this difference, judges are uniquely qualified to be the final arbiters on issues involving fundamental social values. Ronald Dworkin sounded a similar note, asserting that:

> [J]udicial review insures that the most fundamental issues of political morality will finally be set out and debated as issues of principle and not simply as issues of political power, a transformation that cannot succeed, in any case not fully, within the legislature itself. . . .
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> . . . It calls some issues from the battleground of power politics to the forum of principle. It holds out the promise that the deepest, most fundamental conflicts between individual and society will once, someplace, finally, become questions of justice.[99]

From the perspective of scholars such as these, the major flaw in

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96. *See, e.g.*, Hawaii Hous. Auth. v. Midkiff, 467 U.S. 229 (1984); Hodel v. Virginia Surface Mining and Reclamation Ass'n, 452 U.S. 264 (1981); Pruneyard Shopping Center v. Robins, 447 U.S. 74 (1980).

97. M. PERRY, THE CONSTITUTION, THE COURTS, AND HUMAN RIGHTS 113 (1982).

98. Fiss, *Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 10 (1979).

99. Dworkin, *The Forum of Principle*, 56 N.Y.U. L. REV. 469, 517-518 (1981).

cases such as *Lochner* is simply that the Court intervened to protect the wrong substantive values.[100]

The commentators' affirmative defenses of judicial activism were coupled with aggressive attacks on approaches that advocated a more restrained judicial role. The two major competing theories suggesting a restrained role were Ely's representation-reinforcement analysis and Borkian originalism. Both of these approaches have evoked strong responses from the academic community.

In *Democracy and Distrust*,[101] Ely sought to build on the Bickel/Wechsler tradition[102] while at the same time defending much of the Warren Court legacy.[103] Ely derived his approach to constitutional theory from his view of the overall structure of the Constitution itself and his impression of an appropriately defined judicial role in a democratic society. He argued that the Court should concern itself with safeguarding the structure of the governmental decision-making process rather than the substantive judgments that emerged from that process. He would have the courts intervene to ensure that legislatures are elected "democratically"—consistently with the principle of one person, one vote[104]—and to protect those groups who are "fenced out" of the legislative process.[105] In all other cases, he would have the courts defer to legislative judgment.

The academic response to Ely's theory reflected the basic political orientation that dominated constitutional scholarship. Although condemning *Roe v. Wade*,[106] the specific program that Ely prescribed for the Court would place the judiciary rather clearly on the left side of the American political spectrum. For example, he concluded that discrimination against women[107] should be unconstitutional and that capital punishment should probably suffer the same fate.[108] Most critics did not dispute these claims. Instead, they contended that Ely's theory did not allow the courts to go far enough in requiring the government to adopt the left-center program. The two major symposia dealing

100. TRIBE, *supra* note 4, at 1374.
101. J. ELY, DEMOCRACY AND DISTRUST (1980).
102. *Id.* at 54-55, 103-104.
103. *Id.* at 73-75.
104. *Id.* ch. 5.
105. *Id.* ch. 6.
106. *See id.* at 248 n.52, *citing* Ely, *supra* note 72.
107. *Id.* at 164-170.
108. *Id.* at 173-76.

with *Democracy and Distrust* illustrate this point.[109] Thirteen of the articles in the symposia argue that the Court should go further than Ely suggests in protecting the left-center political program.[110] Only three contend that Ely's theory goes too far.[111] None argues that the Court should intervene to advance positions typically associated with the conservative movement in America.

The critics' harshest attacks, however, were reserved for originalism. Prominent scholars such as Tushnet, Dworkin, Paul Brest, and Robert Bennett contended that originalism was not only an unwise approach to constitutional adjudication, but totally incoherent and intellectually bankrupt.[112] For the left-center scholars who dominate the academy, these attacks were widely viewed as decisive. By 1982, Sanford Levinson could declare with confidence that originalism was "increasingly without defenders, at least in the academic legal community."[113]

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109. *Symposium: Constitutional Adjudication and Democratic Theory*, 56 N.Y.U. L. REV. 259 (1981); *Symposium: Judicial Review versus Democracy*, 42 OHIO ST. L.J. 1 (1981).

110. Benedict, *To Secure These Rights: Rights, Democracy, and Judicial Review in the Anglo-American Constitutional Heritage*, 42 OHIO ST. L.J. 69 (1981); Brest, *The Substance of Process*, 42 OHIO ST. L.J. 131 (1981); Dworkin, *The Forum of Principle*, 56 N.Y.U. L. REV. 469 (1981); Estreicher, *Platonic Guardians of Democracy: John Hart Ely's Role for the Supreme Court in the Constitution's Open Texture*, 56 N.Y.U. L. REV. 547 (1981); Gerety, *Doing Without Privacy*, 42 OHIO ST. L.J. 143 (1981); Michelman, *Constancy to an Ideal Object*, 56 N.Y.U. L. REV. 406 (1981); Parker, *The Past of Constitutional Theory—and Its Future*, 42 OHIO ST. L.J. 223 (1981); Perry, *Interpretivism, Freedom of Expression, and Equal Protection*, 42 OHIO ST. L.J. 261 (1981); Perry, *Noninterpretive Review in Human Rights Cases: A Functional Justification*, 56 N.Y.U. L. REV. 278 (1981); Richards, *Moral Philosophy and the Search for Fundamental Values in Constitutional Law*, 42 OHIO ST. L.J. 319 (1981); Sager, *Rights Skepticism and Process-Based Responses*, 56 N.Y.U. L. REV. 417 (1981); Saphire, *The Search for Legitimacy in Constitutional Theory: What Price Purity?*, 42 OHIO ST. L.J. 335 (1981); Tushnet, *The Dilemmas of Liberal Constitutionalism*, 42 OHIO ST. L.J. 411 (1981).

Two of the cited articles actually go further, arguing that the Court should advance values associated with the extreme left wing of American politics. Parker, *supra*; Tushnet, *supra*.

111. Berger, *Ely's "Theory of Judicial Review"*, 42 OHIO ST. L.J. 87 (1981); Maltz, *Federalism and the Fourteenth Amendment: A Comment on* Democracy and Distrust, 42 OHIO ST. L.J. 209 (1981); Monaghan, *Our Perfect Constitution*, 56 N.Y.U. L. REV. 353 (1981).

112. Bennett, *Objectivity in Constitutional Law*, 132 U. PA. L. REV. 445 (1984); Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U.L. REV. 204 (1980); Dworkin, *supra* note 110, at 471-500; Tushnet, *supra* note 88, at 786-804. *See also, e.g.*, D. RICHARDS, TOLERATION AND THE CONSTITUTION 1-64 (1986); Simon, *The Authority of the Framers of the Constitution: Can Originalist Interpretation Be Justified?*, 73 CALIF. L. REV. 1482 (1985).

113. Levinson, *Law as Literature*, 60 TEX. L. REV. 373, 378 (1982). My own view is

C. *The Court and the Right of Privacy after* Roe v. Wade

Despite the new academic enthusiasm for judicial activism, the Court itself gave little indication that it was preparing a broad-based expansion of the constitutional right of privacy beyond the areas of marriage, contraception and abortion. For example, in *Paul v. Davis*,[114] the Court rejected the theory that the public dissemination of arrest records implicated a constitutionally cognizable privacy interest. Similarly, in *Kelley v. Johnson*,[115] a majority of the Justices seemed unsympathetic to the idea that matters of "personal lifestyle" generally were deserving of special constitutional protection.[116] *Kelley* was a challenge to the imposition of strict limitations on the hairstyles of members of a local police force. Much of the majority opinion rejecting this challenge emphasized the special characteristics of the police as an organization.[117] The opinion also suggested, however, that such a limitation on *all* government employees would only be subject to the rational basis test.[118]

The cases most commonly cited as post-*Roe* expansions of constitutional privacy are *Zablocki v. Redhail*[119] and *Moore v. City of East Cleveland*.[120] With only Justice Rehnquist dissenting,[121] the Court in *Zablocki* struck down a Wisconsin law forbidding marriage by any resident under court order to support minor children not in his custody, unless he proved compliance with the support obligation and that the children were "not then and [were] not likely thereafter to become public charges."[122] The majority opinion relied on an equal protection argument, contending that as an aspect of constitutionally-protected privacy the right to marry was fundamental, and that the statutory exclusion failed the compelling state interest test.[123]

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that the attacks on originalism are less than conclusive. *See* Maltz, *supra* note 37; Maltz, *The Failure of Attacks on Constitutional Originalism*, 4 CONST. COMMENTARY 43 (1987). *See also* Kay, *Adherence to the Original Intentions in Constitutional Adjudication: Three Objections and Responses*, 82 NW. U.L. REV. 226 (1988).

114. 424 U.S. 693 (1976).

115. 425 U.S. 238 (1976).

116. *See* Wilkinson & White, *Constitutional Protection for Personal Life-styles*, 62 CORNELL L. REV. 563 (1977).

117. *Kelley*, 425 U.S. at 245-48.

118. *Id.* at 248.

119. 434 U.S. 374 (1978).

120. 431 U.S. 494 (1977).

121. *Zablocki*, 434 U.S. at 407-11 (Rehnquist, J., dissenting).

122. *Id.* at 375 (quoting WIS. STAT. §§ 245.10(1), (4), (5) (1973)).

123. *Id.* at 383-91. Three members of the majority adopted different rationales for

Despite this holding, *Zablocki* did not necessarily presage a broad-based expansion of constitutional privacy generally. First, the invocation of a fundamental right to marry was not new. The same concept had been cited in *Griswold* and other cases.[124] Moreover, the majority was careful to limit the scope of its decision, explicitly noting the authority of government to distinguish between married and unmarried couples in the distribution of benefits.[125] Further, it is difficult to imagine that the Court would seize on the fundamental right to marry to scrutinize closely most other state requirements for marriage.[126] Thus, the implications of *Zablocki* are far from clear.

Moore's significance as an expansion of constitutional privacy is also substantially reduced by a number of factors. There the Justices invalidated an ordinance preventing a grandmother from living with two of her grandchildren who were first cousins rather than siblings. Perhaps most importantly, a majority of the Court did *not* concur in the view that the application of the East Cleveland ordinance to the grandmother violated her constitutional right of privacy. The critical fifth vote for reversal of her conviction was cast by Justice Stevens, who relied entirely on the theory that the ordinance arbitrarily denied her right as a property owner to determine who should occupy the property.[127]

Further, Justice Powell's plurality opinion was careful to note the dangers of expansive substantive due process analysis, noting that "[s]ubstantive due process has at times been a treacherous field for this Court,"[128] that "there is reason for concern lest the only limits to . . . judicial intervention become the predilections of those who happen at the time to be Members of this Court,"[129] and that "history counsels caution and restraint."[130] Finally, the plurality did not challenge the right of the city to require that only related individuals occupy single family dwellings. Indeed, the opinion noted with apparent ap-

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striking down the Wisconsin statute. *Id.* at 403-07 (Stevens, J., concurring in the judgment); *id.* at 396-403 (Powell, J., concurring in the judgment); *id.* at 391-96 (Stewart, J., concurring in the judgment).

124. *E.g.*, Loving v. Virginia, 388 U.S. 1 (1967); *Griswold*, 381 U.S. at 485-86.

125. *Zablocki*, 434 U.S. at 386-87 (citing Califano v. Jobst, 434 U.S. 47 (1977)).

126. For further commentary on *Zablocki*, *see* Lupu, *supra* note 72, at 1023-26.

127. *Moore*, 431 U.S. at 513-21 (Stevens, J., concurring in the judgment).

128. *Id.* at 502 (plurality opinion).

129. *Id.*

130. *Id.*

proval the decision in *Village of Belle Terre v. Boraas*,[131] in which the Court had rejected a constitutional attack on such a restriction. Powell's only complaint in *Moore* was that the ordinance's definition of "family" was unduly narrow.[132]

In short, neither *Zablocki* nor *Moore* was terribly significant in practical terms. Like *Griswold*, both cases involved unusually difficult factual situations dealing with restrictions well outside the mainstream of normal governmental regulation in America. Aside from these cases, the Court's invocation of substantive constitutional privacy in the late 1970s and early 1980s was generally limited to issues of contraception and abortion.[133]

Even in the seemingly well-established areas of contraception and abortion, the future of the right to privacy was not entirely certain. The right to contraception seemed secure; the right to abortion, however, was under unceasing attack. Justices Rehnquist and White remained steadfast in opposition. Moreover, they were often joined by Chief Justice Burger, who concurred in *Roe* itself but showed only limited enthusiasm for expanding its holding to other regulations of abortion.[134] Further, events in the political arena threatened to change the balance of power on the Court against *Roe*.

The most important of these events was the election of Ronald Reagan as President in 1980 and his reelection in 1984. Reagan was a committed conservative. Moreover, despite being in disfavor among academics, originalism was the official constitutional philosophy of his administration.[135] As already noted, *Roe* was a particular bone of contention. The platforms on which Reagan ran specifically attacked the decision.[136] It is therefore not surprising that when Potter Stewart retired from the Court in 1981, his replacement—Sandra Day O'Connor—proved an implacable enemy of the Court's abortion jurisprudence.[137] In addi-

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131. *See id.* at 498-99 (citing Village of Belle Terre v. Boraas, 416 U.S. 1 (1974)).

132. *Id.* at 504-05.

133. *See, e.g.*, Planned Parenthood Ass'n v. Ashcroft, 462 U.S. 476 (1983); Carey v. Population Servs. Int'l, 431 U.S. 678 (1977).

134. *See, e.g.*, Colautti v. Franklin, 439 U.S. 379, 401-409 (1979) (Burger, C.J., joining dissent of White, J.); Planned Parenthood v. Danforth, 428 U.S. 52, 92-101 (1976) (Burger, C.J., joining dissenting opinion of White, J.).

135. *See, e.g.*, Meese, *Construing the Constitution*, 19 U.C. DAVIS L. REV. 22, 26-27 (1985).

136. *See supra* note 70.

137. Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747, 814-33 (1986) (O'Connor, J., dissenting); City of Akron v. Akron Center for Reproductive Health, Inc., 462 U.S. 416, 452-75 (1983) (O'Connor, J., dissenting).

tion, Chief Justice Burger apparently resolved his ambivalence in favor of the opponents of the abortion decision.[138] Thus, by 1986, *Roe* retained the support of only the narrowest majority on the Court.[139]

IV. POINT OF CONFLICT: *Bowers v. Hardwick*

A. The Context of the Decision

The political context in which *Bowers v. Hardwick* came to the Court was remarkably similar to that surrounding *Roe v. Wade*. Like the abortion issue prior to *Roe*, the question of homosexual rights had become an increasingly divisive issue in American politics. With the rise of the gay rights movement, in the 1970s and 1980s a number of states and municipalities adopted laws prohibiting discrimination on the basis of sexual preference.[140]

By 1984, gay rights had become an article of faith with the left-center of the American political spectrum. A plank attacking discrimination based on "sexual orientation" was inserted into the Democratic platform in that year.[141] At the same time, however, the whole idea of gay rights was vigorously opposed by some powerful conservative political groups.[142]

Not surprisingly, gay rights advocates sought to circumvent the political process and use the courts to repeat the left-center triumph in the abortion controversy. The issue first came before the Supreme Court in 1975 in *Doe v. Commonwealth's Attorney*.[143] In *Doe*, a three-judge district court had denied declaratory relief to homosexual males challenging the constitutionality of Virginia's sodomy law as applied to homosexual acts performed by consenting adults in private.[144] Over three dissents,[145]

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138. *Thornburgh*, 476 U.S. at 782-85 (Burger, C.J., dissenting).

139. *See id.* at 814-33 (O'Connor, J., dissenting); *id.* at 785-814 (White, J., dissenting); *id.* at 782-85 (Burger, C.J., dissenting).

140. *See* Rivera, *Our Straight-Laced Judges: The Legal Position of Homosexual Persons in the United States*, 30 HASTINGS L.J. 799, 810 (1979).

141. 1984 Democratic Platform at 22, *reprinted in Congressional Quarterly Almanac* at 94-B.

142. *See* Richards, *supra* note 112, at 998 (noting opposition to gay rights ordinances).

143. 425 U.S. 901 (1976), *aff'g mem.*, 403 F. Supp. 1199 (E.D. Va. 1975) (three-judge court).

144. 403 F. Supp. 1199 (E.D. Va. 1975) (three-judge court), *aff'd mem.*, 425 U.S. 901 (1976).

145. *Doe*, 425 U.S. at 901 (Brennan, Marshall and Stevens, J., dissenting).

the Court summarily affirmed the lower court's holding, in theory rejecting the constitutional challenge on its merits.[146]

Left-center constitutional theorists such as Laurence Tribe, David A. J. Richards, Tom Gerety, and Rhonda Rivera vigorously attacked the *Doe* Court's conclusion, arguing that a proper understanding of constitutional privacy required protection for the right to engage in homosexual activity.[147] Even Ely reached the same conclusion on the basic constitutional issue, contending that as a "discrete and insular minority," homosexuals were entitled to special judicial solicitude.[148] In any event, *Doe* was only the initial skirmish in the judicial struggle over the rights of homosexuals. While the summary affirmance bound the lower courts on the question of homosexual activity, its precedential significance in the Supreme Court itself was very limited.[149]

B. The Decision of the Court

Eleven years after *Doe* was decided, the Court gave the issue of homosexual rights plenary consideration in *Bowers*. The plaintiff had been charged with violating Georgia's criminal sodomy statute by performing a homosexual act with another adult male in the plaintiff's bedroom. Although the charges were dropped, the plaintiff brought suit in federal district court, challenging the constitutionality of the statute by asserting that he was a practicing homosexual and that the statute placed him in imminent danger of arrest.

From its inception, the case seemed likely to generate a closely-divided Court. The three dissenting Justices in *Doe*—Justices Brennan, Marshall and Stevens—remained on the Court, and a fourth—Justice Blackmun—had shown both an increasingly leftward drift and a strong commitment to the jurisprudence of privacy.[150] By contrast, four other justices—Chief

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146. *See* Hicks v. Miranda, 422 U.S. 332 (1975).

147. *See* L. TRIBE, AMERICAN CONSTITUTIONAL LAW 943-44 (1st ed. 1978); Gerety, *Redefining Privacy*, 12 HARV. C.R.-C.L. L. REV. 233, 279-281 (1977); Richards, *supra* note 112; Rivera, *supra* note 140, at 944-47. *See also* Perry, *Substantive Due Process Revisited: Reflections on (and Beyond) Recent Cases*, 71 NW. U.L. REV. 417, 437-43 (1976).

148. Ely, *supra* note 101, at 162-64. *See also* Note, *The Constitutional Status of Sexual Orientation: Homosexuality as a Suspect Classification*, 98 HARV. L. REV. 1285 (1985).

149. *See* Edelman v. Jordan, 415 U.S. 651, 670-71 (1974).

150. *See, e.g.*, Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747 (1986) (Blackmun, J.); *Moore*, 431 U.S. at 494-506 (Blackmun, J., joining plurality opinion).

Justice Burger and Justices White, Rehnquist and O'Connor—had demonstrated an aversion to expansive readings of the entire concept of constitutional privacy. As with many Burger Court decisions, the balance of power was likely to rest with Justice Powell[151]—by nature a temporizer, given to drawing distinctions between cases based on narrow factual distinctions.[152]

Although rumored to have initially favored the plaintiff's claim,[153] Powell ultimately sided with the state,[154] and the challenge was rejected by a 5-4 margin. Justice White's majority opinion was explicitly limited to the application of the statute to homosexual activity.[155] His reasoning was straightforward. While noting that the Court had recognized some rights as fundamental even when not readily identifiable from the constitutional text, White asserted that all such rights were either "implicit in the concept of ordered liberty"[156] or "deeply rooted in this Nation's history and tradition."[157] After reviewing the long history of prohibitions against consensual sodomy, as well as the fact that twenty-five states and the District of Columbia continued to provide penalties for such activity, White concluded that homosexual activity could not plausibly claim that characterization.[158] The majority thus adopted the rational basis test and found that "notions of morality" provided a sufficient basis to find the challenged statute constitutional.[159]

Chief Justice Burger filed a brief concurrence in which he contended that "[t]o hold that the act of homosexual sodomy is somehow protected as a fundamental right would be to cast aside millennia of moral teaching."[160] Powell also concurred, but he suggested that imprisonment for homosexual activity might

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151. *See* Maltz, *Portrait of a Man in the Middle—Mr. Justice Powell, Equal Protection, and the Pure Classification Problem*, 40 OHIO ST. L.J. 941 (1979).

152. For an extensive analysis and critique of Justice Powell's jurisprudence, see Kahn, *The Court, the Community and the Judicial Balance: The Jurisprudence of Justice Powell*, 97 YALE L.J. 1 (1987).

153. *Washington Post*, July 13, 1986, at A1, col. 4.

154. *Bowers*, 478 U.S. at 197-98 (Powell, J., concurring).

155. *Id.* at 188 n.2.

156. *Id.* at 191-92 (quoting Palko v. Connecticut, 302 U.S. 319, 325 (1937)).

157. *Id.* at 192 (quoting *Moore*, 431 U.S. at 503 (opinion of Powell, J.)).

158. *Id.* at 192-94.

159. *Id.* at 196.

160. *Id.* at 196-97 (Burger, C.J., concurring).

constitute cruel and unusual punishment in violation of the eighth amendment.[161]

The holding drew sharp dissents from both Justice Blackmun[162] and Justice Stevens.[163] Citing *Olmstead v. United States*, Blackmun argued that the case was not about a fundamental right to engage in homosexual sodomy, but rather "the right to be let alone" in one's own home.[164] Nonetheless, cognizant of the fact that the state can regulate most activities taking place in the home, he implicitly recognized that the plaintiff's claim could only succeed if private homosexual activity had special constitutional status.[165] Blackmun derived this status from the fact that the choice of a sexual partner is "a sensitive, key relationship of human existence, central to family life, community welfare, and the development of human personality,"[166] and concluded that all persons have a fundamental interest in "controlling the nature of their intimate associations with others."[167] He also attacked the majority's reliance on the widespread condemnation of homosexual behavior, citing *Roe* and other cases for the proposition that "[n]either the length of time a majority has held its convictions or the passions with which it defends them can withdraw legislation from this Court's scrutiny."[168]

Stevens' dissent took a different tack. Recognizing that the Georgia law on its face applied to both heterosexual and homosexual behavior, he argued that the state had not met the burden of justifying "selective application" of the law to homosexual activity.[169]

C. The Response of the Commentators

The widespread criticism of the holding in *Bowers* has taken a variety of different forms. Most commonly, commentators have argued that the Court violated basic principles of legal reasoning.[170] Others have suggested that the decision is inconsis-

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161. *Id.* at 197-98 (Powell, J., concurring).

162. *Id.* at 199-214 (Blackmun, J., dissenting).

163. *Id.* at 214-20 (Stevens, J., dissenting).

164. *Id.* at 199 (Blackmun, J., dissenting) (quoting Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandies, J., dissenting)).

165. *See id.* at 203-04.

166. *Id.* at 205 (quoting Paris Adult Theatre I v. Slaton, 413 U.S. 49, 63 (1973)).

167. *Id.* at 206.

168. *Id.* at 210.

169. *Id.* at 218 (Stevens, J., dissenting).

170. *See, e.g.*, Conkle, *supra* note 4; Stoddard, *supra* note 4.

tent with some general theory of constitutional law.[171] Finally, some have taken direct issue with the political philosophy that generates restrictions on homosexual behavior.[172] Ultimately, each of these approaches must be viewed as reflecting the left-center political philosophy underlying the constitutional challenge in *Bowers*.

1. Criticisms of the legal reasoning of the Court

The analysis of Daniel O. Conkle[173] typifies the attack of the critics on the legal reasoning of the majority in *Bowers*. Conkle describes the decision as "deviant" and "perverse,"[174] and "blatantly inconsistent with . . . *Roe v. Wade*,"[175] because "[u]nder any plausible theory of judicial review"[176] the claim of the plaintiff in *Bowers* was stronger than that of the plaintiffs in *Roe*.[177] Thomas B. Stoddard takes a similar tack, concluding that the decision in *Bowers* was the product of "personal predilection" rather than principle.[178]

In essence, commentators such as Conkle seek to turn Wechsler's insistence on the use of neutral principles against itself. Wechsler saw the requirement as a device to restrain the Court's activism. Conkle, by contrast, argues that the Court should extend its activism to maintain neutrality. The general utility of the concept of neutral principles has been questioned by a number of commentators;[179] but in any event, Conkle's argument from neutral principles cannot be effectively used against the *Bowers* Court.

The majority opinion in the case clearly reflects an appeal to established principles of judicial restraint possessing the requisite generality. White's argument rests on the fundamental principle generally accepted by the Court in substantive due process and equal protection cases: that the judgment of the state will not be disturbed so long as it rests on any plausible

171. RICHARDS, *supra* note 112.
172. Law, *supra* note 4.
173. Conkle, *supra* note 4.
174. *Id.* at 237.
175. *Id.* at 235-36.
176. *Id.* at 237.
177. *Id.* at 236.
178. Stoddard, *supra* note 4, at 656.
179. *See, e.g.*, Tushnet, *supra* note 88, at 804-24; Arnold, *Professor Hart's Theology*, 73 HARV. L. REV. 1298, 1311-12 (1960); *but see* Greenawalt, *The Enduring Significance of Neutral Principles*, 78 COLUM. L. REV. 982 (1978).

justification. Admittedly, cases such as *Griswold*, *Eisenstadt*, and *Roe* establish exceptions to that principle. All of those cases, however, rest on very specific analyses of the particular interests invaded, and none suggests general principles on which to base an extension of enhanced scrutiny. Indeed, in both *Griswold* and *Roe*, the majority opinions were careful to disclaim any suggestion that the Court should intervene broadly to overturn the substantive judgments of other branches of government.[180] Moreover, in *Eisenstadt*, the majority carefully considered a suggestion that the challenged statute could be justified by a state interest in preventing illicit fornication without ever suggesting that effectuation of such an interest was constitutionally impermissible.[181] Finally, in *Carey v. Population Services International*,[182] the majority explicitly noted that "the Court has not definitively answered the . . . question whether and to what extent the Constitution prohibits state statutes regulating [private consensual sexual] behavior among adults."[183] Given these circumstances, the decision in *Bowers* can hardly be viewed as necessarily inconsistent with prior precedent.

Conkle's argument from neutral principles is probably more plausibly understood as an effort to rationalize the contraception and abortion cases themselves. Despite increasing acceptance of *Griswold*, *Roe*, and their progeny by the commentators, the cases taken alone create something of a discontinuity in the overall fabric of constitutional law. This discontinuity is extremely uncomfortable for a scholarly community that in general remains strongly committed to the concept of neutral principles or some similar construct. By providing strong constitutional protection for other arguably private decisions, commentators can argue that the decisions in *Griswold* and *Roe* rest on principles that meet the standards of widely-accepted conventions of legal analysis.

This strategy, of course, rests on the judgment that the contraception and abortion decisions should be preserved. The discontinuity in legal doctrine could be eliminated at least as well by overruling *Griswold* and *Roe*.[184] As already noted, four of the

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180. *Roe*, 410 U.S. at 117; *Griswold*, 381 U.S. at 481-82.

181. *Eisenstadt*, 405 U.S. at 447-50. *See generally* Grey, *Eros, Civilization and the Burger Court*, 43 LAW & CONTEMP. PROBS. 83 (1980).

182. 431 U.S. 678 (1977).

183. *Id.* at 688 n.5 (quoting *id.* at 694 n.17 (opinion of Brennan, J.)).

184. Conkle recognizes this point. Conkle, *supra* note 4, at 237-40.

five members of the *Bowers* majority appear willing to jettison *Roe*.[185] Clearly, the choice between these two approaches cannot be made by reference to the concept of neutral principles itself. Instead, it must rest on more general political judgments about the desirability of government regulation of matters such as contraception, abortion and homosexual behavior, as well as the role of the Court in determining government policy in these areas. In short, Conkle's argument rests on an acceptance of the left-center values embodied in *Roe*, together with a desire to reconcile the decision with conventional legal norms.

2. *The appeal to the structure of the Constitution*

David A. J. Richards develops a different strategy for attacking the *Bowers* decision. He seeks to tie the right to engage in homosexual activity to the political philosophy of the framers of the Constitution. Richards argues that the Constitution not only protects the rights specifically enumerated, but also "enshrines a larger conception of the egalitarian accountability and justifiability of state power to a self-governing people."[186] In his view, this conception necessarily includes a right to intimate association that protects the choice to engage in homosexual activity.[187]

This type of structural argument has a respectable pedigree in the development of constitutional theory. Variations on the argument underlay not only the majority opinion in *Griswold*, but also Ely's representation/reinforcement analysis. The difficulty with all of these arguments is that the structure of the Constitution does not reflect any single, easily described value. Some elements of the Constitution do indeed suggest that toleration was important to the framers. Others, however, indicate a preference for representative government (the basis for Ely's theory); an emphasis on the importance of property rights (which would provide support for the decisions of the *Lochner* era);[188] and a recognition of the importance of state autonomy[189] (which would suggest that the states should be free to regulate matters such as contraception, abortion and homosexual activ-

185. *See supra* notes 136-38 and accompanying text.

186. Richards, *supra* note 4, at 843.

187. *Id.* at 853-62.

188. B. SIEGAN, THE SUPREME COURT'S CONSTITUTION (1987).

189. *See* R. BERGER, FEDERALISM: THE FOUNDERS DESIGN (1987); Maltz, *Individual Rights and State Autonomy*, (forthcoming) (HARV. J.L. PUB. POL'Y).

ity). The decision to emphasize one aspect of the constitutional structure over another cannot be attributed to the framers themselves but can only reflect a contemporary political judgment on the importance of certain values.

3. Direct appeals to political theory

In directly invoking political theory, opponents of *Bowers* use two distinct strategies. Some argue that the decision itself is a product of homophobia. Others contend that the Court should affirmatively adopt and enforce a political philosophy that would prohibit states from imposing penalties on homosexual activity.

a. The claim that the decision is a product of homophobia. The contention that the *Bowers* majority acted from a deep-seated homophobia is often linked to attacks on the Court's legal reasoning. Stoddard's analysis is typical. In Stoddard's view, the decision was inconsistent with earlier privacy cases, and the majority opinion was devoid of legal reasoning. Thus from his perspective the only explanation for the Court's action is that "Justice White and his four colleagues . . . simply do not like homosexuality."[190] Similarly, Anne B. Goldstein claims that the majority decision embraces a conservative paradigm of moral theory.[191]

Homophobia obviously was an issue in *Bowers*. Prohibitions on homosexual activity can only be viewed as a product of a distaste for homosexuals. Moreover, Chief Justice Burger's concurrence clearly reflects such distaste.[192] The issue in the case was not, however, whether prohibitions on homosexual activity were desirable or distasteful; the question was whether the Supreme Court should displace the decision of the Georgia legislature on this point. The choice not to displace that decision can be viewed simply as a reflection of the Bickel/Wechsler tradition of judicial deference embraced by both Harlan and Black in *Griswold*.

Justice Powell's concurrence in *Bowers*[193] demonstrates this point clearly. His suggestion that imprisonment for homosexual activity would constitute cruel and unusual punishment is hardly a view that would be associated with homophobia. Pow-

190. Stoddard, *supra* note 4, at 655.
191. Goldstein, *supra* note 4, at 1098-1103.
192. *Bowers*, 478 U.S. at 196-97 (Burger, C.J., concurring).
193. *Id.* at 197-98 (Powell, J.).

ell's position is thus best understood as reflecting a belief that whatever his personal views on the subject, the question of whether homosexual activity should be outlawed is one that is best left to the other agencies of government.

The majority opinion is admittedly more equivocal. While Justice White speaks in the language of judicial deference, that language could easily hide a distaste for homosexuals. The point is that the *Bowers* decision can be justified by reference to principles that are totally independent of one's view of homosexuality generally.

b. The argument that the Court should adopt an antihomophobic stance. Sylvia A. Law criticizes *Bowers* from a different perspective.[194] Arguing from an avowedly feminist viewpoint, she contends that "contemporary legal and cultural contempt for [homosexuals] serves primarily to preserve and reinforce the social meaning attached to gender."[195] Building on this perception, Law concludes that the *Bowers* result is inconsistent with appropriate notions of gender equality.

Law makes some effort to tie her argument to traditional legal sources. For example, she notes that in other contexts the Court has demonstrated a commitment to the basic notion of gender equality.[196] Moreover, like Richards, Law argues that "[c]oncepts of privacy and individual autonomy are at the heart of the liberal theories upon which our Constitution rests."[197] The basic thrust of her argument, however, is somewhat different.

Most of Law's discussion is directed toward demonstrating that discrimination on the basis of sexual orientation is not justified under the best-reasoned contemporary views of the nature of homosexuality.[198] In essence she contends that the Court should strike down such discrimination simply because the discrimination is profoundly wrong. In her own words, "it is precisely in protecting the central human identity and equality of people who are most vulnerable that our Constitution is most needed and potentially most noble."[199]

This conclusion is consistent with Law's general claim that in constitutional adjudication the Court should respond to

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194. Law, *supra* note 4.
195. *Id.* at 187.
196. *Id.* at 221-24.
197. *Id.* at 224.
198. *Id.* at 187-221.
199. *Id.* at 235.

"evolving concepts of justice and equality."[200] Such an approach requires the Court to openly employ contemporary values to make explicitly political judgments regarding the appropriateness of actions by other branches of government. As an attack on *Bowers*, the analysis has the virtue of candor; at the same time, however, it raises the theoretical possibility that judges who do not share Law's value system will find that "evolving concepts of fairness and equality" require the judicial invocation of values quite foreign to her morality. An extreme example might be a strongly pro-life judge who believed that advances in medical technology demonstrated beyond doubt that fetuses were in fact people. Using Law's general approach, that judge might conclude that states are required to provide "equal protection" to fetuses by prohibiting abortions.[201]

Of course, given the current prominence of the concept of judicial deference in right-center political ideology, the possibility that a theory such as Law's might be deployed by the Court to attack left-center values is rather remote. Nonetheless, the theoretical possibility that explicitly political theories might be used to promote right-center values is critical to an understanding of the relationship between those theories and the privacy decisions. Clearly, the simple adoption of a general theory justifying judicial activism is not enough to generate judicial decisions promoting left-center values. In order to achieve the desired results, those theories must be implemented by judges who share those basic values.

V. Conclusion

The attacks on the *Bowers* decision reflect two themes that have become widespread in academic commentary on constitutional law. The first is a general commitment to left-center political values. The second is the belief that increased judicial activism will inevitably result in the advancement of those values.

Ironically, the accuracy of the second assumption is largely dependent on the acquiescence of the political adversaries of left-center values. So long as right-center political ideology is generally committed to the concept of judicial deference, the political risk involved in advocacy of judicial activism is, from a

200. Law, *The Founders on Families*, 39 U. Fla. L. Rev. 583, 610 (1987).

201. The West German courts have adopted such an analysis. *See* Tribe, *supra* note 4, at 1352 & n.99.

left-center perspective, generally minimal. If more conservative elements were to develop an extensive positive program for judicial activism, the dangers inherent in such activism might be more apparent.[202] In that situation, one might well see a quite different response to decisions such as *Bowers*.

202. Some conservative commentators have begun the process. *See, e.g.*, B. SIEGAN, *supra* note 188; Barnett, *Foreword: Judicial Conservatism v. A Principled Judicial Activism*, 10 HARV. J.L. & PUB. POL'Y 273 (1987); Epstein, *The Proper Scope of the Commerce Power*, 73 VA. L. REV. 1387 (1987).