

# RESTORING CONSTITUTIONAL EQUILIBRIUM<sup>1</sup>

*Adam Lamparello\**

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“The Constitution doesn't belong to a bunch of judges and lawyers. It belongs to you.”

–United States Supreme Court Justice Anthony Kennedy<sup>2</sup>

## I. INTRODUCTION

It is not enough to have a vote. Citizens need a meaningful voice.

The democratic process is broken. This article argues that our

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\* Assistant Professor of Law, Indiana Tech Law School; B.A., magna cum laude, University of Southern California; J.D., with honors, Ohio State University College of Law, LL.M, New York University School of Law.

<sup>1</sup> This Essay is part one in a two-part series, and a broad introduction that focuses on merging the written and unwritten Constitution into a unified theory that promotes an equal and participatory democracy.

<sup>2</sup> ACADEMY OF ACHIEVEMENT, INTERVIEW: ANTHONY KENNEDY JUSTICE OF THE U.S. SUPREME COURT (2010) [hereinafter *Justice Kennedy Interview*], <http://www.achievement.org/autodoc/print/member/ken0int-1>.

constitutional democracy is in disequilibrium, and plagued by inequality and unfairness. The current imbalance favors centralized governance, wealth, and courts that rely too often on subjective values rather than constitutional constraints.

The Supreme Court's opinions in *Citizens United v. Federal Election Commission*<sup>3</sup> and *McCutcheon v. Federal Election Commission*<sup>4</sup> more firmly entrenched inequality in democracy. Corporations and wealthy individuals can now contribute millions to political candidates and influence both the electoral and legislative process.<sup>5</sup> Second, the Court's individual rights jurisprudence has often removed divisive policy questions from public and legislative debate, resulting in a top-down federalism that undermines meaningful citizen participation in democracy.<sup>6</sup> Indeed, all but the wealthiest citizens lack political power, and their votes at the ballot box are more symbolic than real. Absent equal participation in and access to the political and democratic process, democracy is little more than a caricature of itself.

Solving the democracy problem transcends debates about constitutional interpretation. It suffices to say that, although the Constitution is written,<sup>7</sup> it certainly contains unwritten values such as liberty, privacy, and equality.<sup>8</sup> Some words in the text are “dead,”<sup>9</sup> in that they establish a decentralized structure of governance and enumerate inalienable rights, while others are “evolving”<sup>10</sup> because the words are ambiguous. For example, our understanding of whether bail is “excessive,” or punishment “cruel and unusual,” depends to some extent on contemporary standards and values, or on what the Court calls “evolving

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<sup>3</sup> 558 U.S. 310 (2010).

<sup>4</sup> 134 S. Ct. 1434 (2014).

<sup>5</sup> See, e.g., Sanford Levinson, *What Should Citizens (As Participants in a Republican Form of Government) Know About the Constitution*, 50 WM. & MARY L. REV. 1239, 1253 (2009) (quoting Senator John McCain during the 2008 general election, who told visitors to his website that “Washington’s broken”); see generally Richard H. Pildes, *Why the Center Does Not Hold: The Causes of Hyperpolarized Democracy in America*, 99 CAL. L. REV. 273 (2011); James A. Gardner, *Democracy Without a Net? Separation of Powers and the Idea of Self-Sustaining Constitutional Constraints on Undemocratic Behavior*, 79 ST. JOHN’S L. REV. 293, 295 (2005) (arguing that “the U.S. Constitution’s structural backup systems have never worked as originally contemplated, and a significant reason is that democratic institutional norms, and the associated modalities of democratic politics, have crowded out the behavior on which the stability of such structural systems by design depends”).

<sup>6</sup> STEPHEN BREYER, *ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION* 5 (2005); see also Michael W. McConnell, *Active Liberty: A Progressive Alternative to Textualism and Originalism?*, 119 HARV. L. REV. 2387, 2391 (2006).

<sup>7</sup> See, e.g., Bernadette Meyler, *Daniel Defoe and The Written Constitution*, 94 CORNELL L. REV. 73 (2008).

<sup>8</sup> See, e.g., AKHIL REED AMAR, *AMERICA’S UNWRITTEN CONSTITUTION: THE PRECEDENTS AND PRINCIPLES WE LIVE BY* (2012).

<sup>9</sup> See Michael C. Dorf, *The Constitution and the Political Community*, 27 CONST. COMMENT. 499, 505 (2011).

<sup>10</sup> See James E. Fleming, *Living Originalism and Living Constitutionalism as Moral Readings of the American Constitution*, 92 B.U. L. REV. 1171, 1172 (2012).

standards of decency.”<sup>11</sup>

Additionally, it does no good to label judges as activists,<sup>12</sup> or as “legislating from the bench,”<sup>13</sup> which is a phrase that Justice Anthony Kennedy aptly refers to as “a decision you don’t like.”<sup>14</sup> Indeed, after *Clinton v. City of New York*,<sup>15</sup> *Bush v. Gore*,<sup>16</sup> *Citizens United*, *McCutcheon*, and *Shelby County v. Holder*,<sup>17</sup> which, except for *Clinton*, were decided by five-member conservative majorities, it became apparent that the problem is not with particular justices or ideologies. In *Clinton*, for example, the Court thwarted Congress’s attempt to curb out-of-control spending at the federal level, and in *Bush* stopped the State of Florida from resolving its electoral dispute.<sup>18</sup> In *McCutcheon*, the Court relied on the First Amendment to invalidate aggregate limits on individual contributions without adequately addressing the concern that allowing wealthy individuals to contribute millions to political candidates effectively silences the speech of millions. In short, across the ideological spectrum, the Court’s decisions have undermined the coordinate branches’ attempts to equalize the democratic and political process, and given more power to nine unelected members of the federal judiciary.

Likewise, in its individual rights jurisprudence the Court has often manipulated the Constitution to achieve desired policy outcomes. For example, *Griswold v. Connecticut*<sup>19</sup> and *Roe v. Wade*<sup>20</sup> were predicated on implied guarantees and constitutional penumbras that represented an unprecedented expansion of judicial power. In these cases, the Court’s “undisciplined discretion”<sup>21</sup> removed issues concerning unenumerated rights

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<sup>11</sup> *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (“The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.”).

<sup>12</sup> See e.g., Robert Justin Lipkin, *We are all Judicial Activists now*, 77 U. CIN. L. REV. 181, 182 (2008).

<sup>13</sup> See Bruce G. Peabody, *Legislating from the Bench: A Definition and Defense*, 11 LEWIS & CLARK L. REV. 185, 188 (2007).

<sup>14</sup> Matt Sedensky, *Justice Questions way Court Nominees are Grilled*, ASSOCIATED PRESS ALERT (Cal.), May 14, 2010 (quoting Justice Anthony Kennedy).

<sup>15</sup> 524 U.S. 417 (1998).

<sup>16</sup> 531 U.S. 98 (2000).

<sup>17</sup> 133 S. Ct. 2612 (2013).

<sup>18</sup> Ezra Klein, *Will Be Hard*, BALLOON JUICE (June 22, 2012), <http://www.balloon-juice.com/2012/06/22/will-be-hard/> (interview with Professor Amar). Reflecting on this decision, Yale law professor Akhil Amar stated:

I’ve only mispredicted one big Supreme Court case in the last 20 years, . . . [t]hat was *Bush v. Gore*. And I was able to internalize that by saying they only had a few minutes to think about it and they leapt to the wrong conclusion. If they decide this by 5-4, then yes, it’s disheartening to me, because my life was a fraud. Here I was, in my silly little office, thinking law mattered, and it really didn’t. What mattered was politics, money, party, and party loyalty.

*Id.*

<sup>19</sup> 381 U.S. 479 (1965).

<sup>20</sup> 410 U.S. 113 (1973).

<sup>21</sup> Nelson Lund & John O. McGinnis, *Lawrence v. Texas and Judicial Hubris*, 102 MICH. L. REV. 1555, 1575–81 (2004) (discussing Justice Kennedy’s opinion in *Lawrence*, Lund states that “[i]t is hard to think of a more ad hoc and manipulable basis for interpreting the United States Constitution, and the

from public discourse, and prevented the people from resolving these issues through democratic means.<sup>22</sup> Unfortunately, without empowered citizens, democracy becomes as much a fiction as substantive due process.<sup>23</sup>

In both areas, the Court's reasoning is the product of inconsistent, dishonest, and undemocratic judging. In *Clinton*, the Court relied on the Constitution's "finely wrought procedures"<sup>24</sup> to invalidate the Line Item Veto Act and block the coordinate branches' attempt to curb excessive spending, but in *Planned Parenthood of Southeastern Pennsylvania v. Casey*<sup>25</sup> it affirmed *Roe*'s central holding based on the "right to define one's own concept of existence . . . and the mystery of human life."<sup>26</sup> In *Citizens United*, the Court relied on the First Amendment's protection of political speech to invalidate laws that limited corporate campaign contributions,<sup>27</sup> but in *Lawrence v. Texas*<sup>28</sup> embraced liberty "in its spatial and more transcendent dimensions"<sup>29</sup> to strike a Texas statute outlawing sodomy. Liberty, however, is an elusive term upon which "the ablest and purest men have differed."<sup>30</sup> That counsels for restraint and resolution of these issues through the democratic process. Ultimately, the outcomes in these cases did not enhance equal participation in democracy; they have enhanced judicial power at the expense of democracy.

Justice Kennedy correctly explains the "[t]he essence of democracy is that the right to make law rests in the people and flows to the government, not the other way around."<sup>31</sup> Currently, however, we are currently residing in an "other way around" world where the judiciary often imposes empyrean understandings of liberty and ventures into the jurisprudential world of make-believe otherwise known as substantive due process.<sup>32</sup> In *Roe* and

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use of foreign decisions to bolster substantive due process is yet another example of the way *Lawrence* maximizes and reflects the Court's now completely undisciplined discretion").

<sup>22</sup> See John Tuskey, *Do as We say and not (Necessarily) as We do: The Constitution, Federalism, and the Supreme Court's Exercise of Judicial Power*, 34 CAP. U. L. REV. 153, 176 (2005) ("[S]aying what the law is (as defined by the law's actual content) is not the same as saying what the law ought to be.").

<sup>23</sup> See generally Anthony B. Sanders, *The New "Judicial Federalism" Before Its Time: A Comprehensive Review of Economic Substantive Due Process Under State Constitutional Law Since 1940 and the Reasons for Its Recent Decline*, 55 AM. U. L. REV. 457 (discussing the early mid-twentieth century evolution of economic substantive due process).

<sup>24</sup> *Clinton v. City of New York*, 524 U.S. 417, 447 (1998) (citation omitted).

<sup>25</sup> 505 U.S. 833 (1992).

<sup>26</sup> *Id.* at 851.

<sup>27</sup> *Citizens United v. FEC*, 558 U.S. 310, 339 (2010).

<sup>28</sup> 539 U.S. 558 (2003).

<sup>29</sup> *Id.* at 562; see also Edward Whelan, *The Meta-Nonsense of Lawrence*, 115 YALE L.J. POCKET PART 133, 134 (2006) (criticizing *Lawrence* and stating, "[w]hy aren't nudists equally entitled to define the concept of their own existence, of meaning, of the universe, and of the mystery of human life?").

<sup>30</sup> Lund & McGinnis, *supra* note 21, at 1591 (explaining that, with respect to the term 'liberty,' "the ablest and purest men have differed on the subject; and all that the Court could properly say . . . would be, that the Legislature (possessed of an equal right of opinion) had passed an act which, in the opinion of the judges, was inconsistent with [certain] abstract principles . . .") (internal citation omitted).

<sup>31</sup> *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2675 (2013) (Kennedy, J., dissenting).

<sup>32</sup> U.S. Const. amend. XIV provides as follows:

*Citizens United*, the Court established uniform policies on the entire country instead of allowing each state to disagree—and to be different.

Citizens—not “a bunch of judges and lawyers,”<sup>33</sup>—have the constitutional right to “define [their] own concept of existence, of meaning, of the universe, and of the mystery of human life.”<sup>34</sup> The people—not Justices Antonin Scalia, Anthony Kennedy, Stephen Breyer, or Sonya Sotomayor—have the sole authority to unearth the heart of liberty “both in its spatial and in its more transcendent dimensions.”<sup>35</sup> Citizens, not the Supreme Court, have the freedom to “invoke [the Constitution’s] principles in their own search for greater freedom.”<sup>36</sup> Moreover, just as “beliefs about . . . the attributes of personhood”<sup>37</sup> should not be “formed under [the] compulsion of the State,”<sup>38</sup> they should not result from decisions that substitute subjective values for constitutional analysis.<sup>39</sup> Liberty and equality are not achieved merely through good policy outcomes; they require direct and meaningful participation in the processes by which those policies are adopted.<sup>40</sup> For most citizens the “political liberty to direct the governmental process to make decisions that might be wrong in the ideal sense, subject to correction in the ordinary political process,”<sup>41</sup> has been

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No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The Court has held, however, that the Fourteenth Amendment also guarantees substantive liberty interests, not merely procedural fairness. Scholars have criticized substantive due process as a non-sequitur that is akin to the phrase “green pastel redness” and fundamentally undemocratic). *See, e.g.*, JOHN HART ELY, *DEMOCRACY AND DISTRUST* 18 (1980); *see also* Amy McCampbell, Note, *More Bitter than Sweet: A Procedural Due Process Critique of Certification Periods*, 109 COLUM. L. REV. 138, 161 (2009); Randy E. Barnett, *Who’s Afraid of Unenumerated Rights?*, 9 U. PA. J. CONST. L. 1, 11–12 (2006) (judges “have no particular expertise to identify fundamental rights, the content of which is not provided to them by an authoritative source”).

<sup>33</sup> *Justice Kennedy Interview*, *supra* note 2.

<sup>34</sup> *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 851 (1992); *see also*, Whelan, *supra* note 29, at 133 (“Nowhere is there evident awareness that the Supreme Court’s decision-making cannot properly consist of unfettered moral philosophizing but must instead take account of the Court’s role within a governmental system of separated powers and federalism.”).

<sup>35</sup> *Lawrence v. Texas*, 539 U.S. 558, 562 (2003).

<sup>36</sup> *Id.* at 579.

<sup>37</sup> *Planned Parenthood*, 505 U.S. at 851.

<sup>38</sup> *Id.*

<sup>39</sup> *See* Laurence Tribe, *Toward a Model of Roles in the Due Process of Life and Law*, 87 HARV. L. REV. 1, 7 (1973).

<sup>40</sup> *See* Richard W. Murphy, *Separation of Powers and the Horizontal Force of Precedent*, 78 NOTRE DAME L. REV. 1075, 1081 n.29 (2003). Professor Murphy explains as follows:

Some contend that stare decisis is too fuzzy and easily manipulated by judges to carry much real force—especially at the Supreme Court level. It is certainly true that one cannot take judicial discussions of stare decisis at face value—for one thing, given the complexity of cognitive processes that occur in judicial (and other) brains, it is safe to hazard that judges themselves do not understand the full effects of stare decisis on their decisions.

*Id.*

<sup>41</sup> Anthony Kennedy, Address to the Canadian Institute for Advanced Legal Studies at Stanford University: Unenumerated Rights and the Dictates of Judicial Restraint 14 (July 24–Aug. 1, 1986)

compromised.

This brief essay argues that the establishment of a thriving democracy depends on: (1) deference to legislation that addresses inequality and inefficiency in governance; and (2) caution when resolving policy issues upon which the Constitution is silent or ambiguous. Indeed, in *United States v. Carolene Products*,<sup>42</sup> the Court suggested that “[t]here may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution . . . .”<sup>43</sup> That was a call for restraint, not activism, and for democracy, not oligarchy.

The Court has begun to shift in a more democratic direction. In *National Federation of Independent Business v. Sebelius*<sup>44</sup>, Chief Justice Roberts wrote in the majority opinion that “[p]roper respect for a coordinate branch of the government’ requires that we strike down an Act of Congress only if ‘the lack of constitutional authority to pass [the] act in question is clearly demonstrated.’”<sup>45</sup> Additionally, the Court’s pro-democracy decision in *Schuette v. Coalition to Defend Affirmative Action*,<sup>46</sup> which upheld a voter-enacted ban on race-conscious admissions policies at public universities, suggests that the Court is allowing bottom-up lawmaking to replace top-down governance.

As Justice Kennedy has stated, “we must never lose sight of the fact that the law has a moral foundation, and we must never fail to ask ourselves not only what the law is, but what the law should be.”<sup>47</sup> He is right. The “we” is the people, not the Court, and the “should” belongs to citizens and their elected representatives. The Constitution does have penumbras,<sup>48</sup> and they are vital to a free society, but it has words too, and they matter. The Court can enhance democracy by enforcing the “common mandate[s] rooted in the Constitution[,]”<sup>49</sup> not by frustrating the choices of citizens and institutions with whom they may disagree. To be clear, an evolving constitution has a place in constitutional jurisprudence. But evolution is different from creationism.

Part II analyzes recent precedent in the areas of governance and individual rights and argues that living constitutionalism and originalism can both enhance democracy depending on the constitutional issues to which

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(transcript available at <http://joshblackman.com/blog/wp-content/uploads/2013/09/Kennedy.-Unenumerated-Rights-speech-1986-1.pdf>).

<sup>42</sup> 304 U.S. 144 (1938).

<sup>43</sup> *Id.* at 152 n.4.

<sup>44</sup> 132 S. Ct. 2566, 2579 (2012).

<sup>45</sup> *Id.* at 2579 (citation omitted).

<sup>46</sup> 134 S. Ct. 1623 (2014).

<sup>47</sup> Richard C. Reuben, *Man in the Middle*, CAL. LAW., Oct. 1992, at 35.

<sup>48</sup> *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965).

<sup>49</sup> *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 867 (1992).

they are applied. Part III discusses the Court's recent decision regarding same-sex marriage and argues for a new approach when marriage equality next comes before the Court.

## II. CONSTITUTIONAL EQUILIBRIUM AND THE SUPREME COURT

Restoring constitutional equilibrium is not synonymous with the political process doctrine that the Court has developed in connection with its equal protection jurisprudence.<sup>50</sup> That doctrine prevents states from “alter[ing] the procedures of government to target racial minorities”<sup>51</sup> such that it places a “special burden on racial minorities [to affect change] within the governmental process.”<sup>52</sup> This article focuses more on allowing citizens the authority to decide issues policy issues where the Constitution is silent or its words are ambiguous. Giving courts that power may lead to good results, but it also centralizes power and federalizes democracy.

### *A. Get Over It: Marbury and the Ninth Amendment Do Not Empower the Judiciary to Create Extra-Constitutional Rights*

Neither the Ninth Amendment, nor *Marbury v. Madison*, justifies placing the Court at the top of the constitutional hierarchy. To begin with, “[r]ecently uncovered historical evidence . . . suggests that those who framed and ratified the Ninth Amendment understood it as a guardian of the retained right to local self-government.”<sup>53</sup> The Ninth Amendment is “a reminder that the people retain all their rights against the federal government—including the right to govern themselves as they see fit within their own states . . . .”<sup>54</sup> Professors Nelson Lund and John McGinnis explain as follows:

The Ninth Amendment by its terms is a rule of construction rather than a substantive guarantee of rights. It simply warns against misinterpreting the Constitution to mean that the enumeration of certain rights might authorize the federal government to infringe other rights. It is thus a reminder that the people retain all their rights . . . including the right to govern themselves as they see fit within their own

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<sup>50</sup> See, e.g., *Hunter v. Erickson*, 393 U.S. 385, 392 (1969) (invalidating a voter-approved amendment to the city charter requiring that all anti-discrimination laws be passed through the referendum process); *Reitman v. Mulkey*, 387 U.S. 369, 380–81 (1967) (invalidating an amendment to the California Constitution that prohibited the state from interfering with an owner's decision to refuse to sell residential property, regardless of the reason); *Washington v. Seattle School District No. 1*, 458 U.S. 457, 487 (1982) (invalidating a state initiative that prohibited busing as a means by which to desegregate schools).

<sup>51</sup> *Schuette v. Coalition to Defend Affirmative Action*, 134 S. Ct. 1623, 1632 (2014).

<sup>52</sup> *Id.*

<sup>53</sup> Kurt T. Lash, *The Inescapable Federalism of the Ninth Amendment*, 93 IOWA L. REV. 801, 801 (2008).

<sup>54</sup> Lund & McGinnis, *supra* note 21, at 1592.

states—except to the extent that the federal government is authorized to infringe those rights in the exercise of its enumerated powers.<sup>55</sup>

Furthermore, Professor Randy Barnett explains that “judges should do only what they are qualified to do and that is to enforce ‘the rule laid down.’ . . . The process of identifying the content of unenumerated rights appears to be indistinguishable as a practical matter from adopting a judge’s personal preferences.”<sup>56</sup>

Likewise, “the underlying intent of the [*Marbury*] opinion was to set forth a principled statement of the judiciary’s place in the American constitutional system that disavowed any political role for courts and judges.”<sup>57</sup> Judge William H. Pryor explains as follows:

*Marbury* is occasionally described as the event where allegedly Americans invented judicial review, but that notion is so untrue as to be laughable. *Marbury* is routinely cited as supporting judicial supremacy, but it does nothing of the sort. *Marbury* is also celebrated as a triumph of judicial activism, but that proposition too is false. In fact, *Marbury v. Madison* is an example of judicial restraint.<sup>58</sup>

In fact, “[m]odern scholarship establishes that *Marbury* is a victim of historical revisionism.”<sup>59</sup>

Of course, laws that facially violate the Constitution’s text, whether they strive to eviscerate fundamental rights,<sup>60</sup> draw arbitrary classifications, or create inequality in the democratic process, should be invalidated.<sup>61</sup> The Court should defer, however, to legislation that seeks to equalize the political process, address inefficiencies in the legislative process, or resolve divisive policy issues upon which the Constitution is silent or ambiguous. Some of the Court’s recent decisions, however, have done the opposite.

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<sup>55</sup> *Id.*

<sup>56</sup> Barnett, *supra* note 32, at 11–12.

<sup>57</sup> CHARLES F. HOBSON, THE GREAT CHIEF JUSTICE: JOHN MARSHALL AND THE RULE OF LAW 49 (1996).

<sup>58</sup> William H. Pryor, Jr., *The Unbearable Rightness of Marbury v. Madison: It’s Real Lessons and Irrepressible Myths*, 12 ENGAGE: J. FEDERALIST SOC’YS PRAC. GROUPS 94, 94 (2011).

<sup>59</sup> *Id.*

<sup>60</sup> In *Gideon v. Wainwright*, 372 U.S. 335 (1963), the Court held that indigent criminal defendants have a right to publicly funded counsel. In the post-*Gideon* years, however, many public defender systems at the state level remain underfunded, and fail to provide meaningful assistance to indigent criminal defendants. See generally Emily Chiang, *Indigent Defense Invigorated: A Uniform Standard for Adjudicating Pre-Conviction Sixth Amendment Claims*, 19 TEMP. POL. & CIV. RTS. L. REV. 443 (2010).

<sup>61</sup> See e.g., *Lawrence v. Texas*, 539 U.S. 558, 578–79 (2003) (properly invalidating a statute that invalidated sodomy only among same-sex couples).

*B Equilibrium in the Political-Legislative Sphere: Where A Living Constitution Facilitates a Robust Democracy*

If living constitutionalism has a place in the Court's jurisprudence, it is in those cases involving legislation that seeks to cure inefficiency and inequality in government processes. Indeed, it is difficult to believe that the Framers would have insisted on strict adherence to the Constitution's text if it would cause an epidemic of gridlock and partisan chicanery. As one commentator noted, "[w]hy should [the Founders] decisions prevent the people of today from governing ourselves as we see fit?"<sup>62</sup> The Framers might have expected that the coordinate branches should have the flexibility to address contemporary—and unforeseeable—problems relating to efficiency in the lawmaking process. The Court should, therefore, review statutes in this area by emphasizing the "unwritten"<sup>63</sup> rules of a "living"<sup>64</sup> Constitution, and deferring to legislation that helps to make the political process more efficient and fair.

1. *Clinton v. City of New York*

In *Clinton*, the Supreme Court held that 2 U.S.C.A. §692(a)(1), which authorized the line item veto (the "Act"), violated the Constitution's Presentment Clause.<sup>65</sup> The Act was passed by both houses of Congress—and signed by the President—to help balance the federal budget.<sup>66</sup> It gave the President authority to veto or "cancel" three discreet types of spending that were previously signed into law.<sup>67</sup> Before cancelling any duly-enacted spending provision, however, the President was required to consider legislative history, other relevant information, and determine that all cancellations had the effect of reducing the Federal Budget Deficit.<sup>68</sup> A "lockbox" provision in the statute provided that monies saved from a cancellation could not be spent elsewhere.<sup>69</sup> Congress also had the authority to issue a "disapproval bill"<sup>70</sup> that would render any veto "null and void."<sup>71</sup>

The Court found the Act unconstitutional under Article 1, section 7 (the Presentment Clause), with Justice Kennedy writing separately to argue

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<sup>62</sup> Michael W. McConnell, *Textualism and Democratic Legitimacy: Textualism and the Dead Hand of the Past*, 66 GEO. WASH. L. REV. 1127, 1127 (1998).

<sup>63</sup> See Akhil Reed Amar, *American Constitutionalism – Written, Unwritten, and Living*, 126 HARV. L. REV. F. 195, 203 (2013) ("Though holistic between-the-lines meaning is in some sense unwritten—it transcends the literal meaning of each word or clause read in isolation—it is a pervasive part of proper constitutionalism, I argue.").

<sup>64</sup> See Fleming, *supra* note 10, at 1171–74.

<sup>65</sup> *Clinton v. City of New York*, 524 U.S. 417, 448–49 (1998).

<sup>66</sup> *Id.* at 448.

<sup>67</sup> *Id.* at 436.

<sup>68</sup> *Id.*

<sup>69</sup> *Id.* at 440–41.

<sup>70</sup> *Id.* at 436 (citation omitted).

<sup>71</sup> *Id.* (citation omitted).

that the Act violated the non-delegation doctrine.<sup>72</sup> The majority expressed “no opinion about the wisdom of the Act’s procedures”<sup>73</sup> but did recognize that “both major political parties . . . in the Legislative and the Executive Branches have long advocated for the enactment of such procedures”<sup>74</sup> to ensure fiscal accountability. The Court nonetheless found the Act unconstitutional because, in its view, the line item veto empowered the President to create “a different law”<sup>75</sup> than the one he initially signed.<sup>76</sup> As a result, the line item veto did not comply with the “finely wrought” procedure commanded by the Constitution.<sup>77</sup>

Justice Kennedy concurred, explaining that “concentration of power in the hands of a single branch is a threat to liberty”<sup>78</sup> and therefore “transcends the convenience of the moment.”<sup>79</sup> In Justice Kennedy’s view, “[f]ailure of political will does not justify unconstitutional remedies[.]”<sup>80</sup> because “[t]he individual loses liberty in a real sense”<sup>81</sup> if one branch is “not subject to traditional constitutional constraints.”<sup>82</sup> That principle also applies to the Supreme Court, particularly since the Court’s members are not elected and largely unaccountable.

Justice Breyer dissented, and joined by Justices O’Connor and Scalia argued that “the Line Item Veto Act (Act) does not violate any specific textual constitutional command, nor does it violate any implicit separation-of-powers principle.”<sup>83</sup> Justice Breyer recognized that the Framers never intended to prohibit the executive and legislative branches from implementing solutions that addressed current problems:

To have prescribed the means by which government should, in all future time, execute its powers, would have been to change, entirely, the character of the instrument, and give it the properties of a legal code. It would have been an unwise attempt to provide, by immutable rules, for exigencies which, if foreseen at all, must have been seen dimly, and which can be best provided for as they occur.<sup>84</sup>

Justice Breyer emphasized the “genius of the Framers’ pragmatic vision, which this Court has long recognized in cases that find constitutional room

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<sup>72</sup> *Id.* at 447–48; *id.* at 450–51 (Kennedy, J., concurring).

<sup>73</sup> *Id.* at 447 (majority opinion).

<sup>74</sup> *Id.*

<sup>75</sup> *Id.* at 448.

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

<sup>77</sup> *Id.* at 447 (citation omitted).

<sup>78</sup> *Id.* at 450 (Kennedy, J., concurring).

<sup>79</sup> *Id.* at 449.

<sup>80</sup> *Id.*

<sup>81</sup> *Id.* at 451.

<sup>82</sup> *Id.*

<sup>83</sup> *Id.* at 469–70 (Breyer, J., dissenting).

<sup>84</sup> *Id.* at 472 (citation omitted).

for necessary institutional innovation.”<sup>85</sup>

*Clinton* is a perfect example of judging that hinders effective governance. The majority and Justice Kennedy thwarted an important compromise that the coordinate branches deemed necessary to combat excessive government spending. The line item veto made the government operate more efficiently, and a “[f]ailure of political will,”<sup>86</sup> is precisely why the Court should have deferred to the coordinate branches’ remedy. Put differently, if pervasive national problems cannot be fixed through conventional legislative processes, the coordinate branches should be allowed to experiment with innovative reforms.

Indeed, the line item veto reflected practical realities, including party polarization, which had for years made the spending problem worse. Both Congress and the President were uniquely suited to assess this problem, and it is highly unlikely that the founders would have denied them this flexibility. Furthermore, the failure to comply with a “finely wrought”<sup>87</sup> procedure, or satisfy Justice Kennedy’s theoretical notions of liberty, seemed bizarre considering that, five years later, his majority opinion in *Lawrence* had little regard for the Constitution’s finely worded text.

The majority also gave no credence to the inherent checks within the executive and legislative branches to protect against a “[c]oncentration of power.”<sup>88</sup> The line item veto did not vest the President with uncontrolled or unchecked power, because Congress retained the authority to disapprove all cancellations. Furthermore, it is implausible, if not absurd, that Congress would delegate powers to the executive branch if it believed that its lawmaking function would be compromised. One branch does not surrender power unless it provides a tangible benefit that, far from being inimical to either institution, provides a structure by which each one can operate more effectively. If anything, by finding a reasonable compromise, the Act served the political interests of each branch and the people to whom politicians must answer.

Democracy and liberty are enhanced when problems affecting the parties’ constituents are dealt with in ways that affect positive change. The majority’s decision, along with Justice Kennedy’s version of liberty, made our political institutions less functional and the people less free.

## 2. *Citizens United v. Federal Election Commission*

In *Citizens United*, the Court struck down section 441(b) of the Bipartisan Campaign Reform Act of 2002 (“BCRA”), which prohibited

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

<sup>86</sup> *Id.* at 449 (Kennedy, J., concurring).

<sup>87</sup> *Id.* at 447 (majority opinion) (citation omitted).

<sup>88</sup> *Id.* at 450 (Kennedy, J., concurring).

corporations and unions from using general treasury funds that “expressly advocates the election or defeat of a candidate . . . and is publicly distributed . . . within 30 days of a primary election.”<sup>89</sup> The BCRA was challenged on the grounds that the limitations on corporate and union contributions, which applied to direct or individual expenditures (electioneering communications), violated the First Amendment.<sup>90</sup>

The lower courts denied relief, based in part on the Court’s prior holding in *McConnell v. Federal Election Commission*,<sup>91</sup> which upheld against a facial challenge limits on electioneering communications.<sup>92</sup> The Court overruled *McConnell*, finding that section 441(b) constituted an “outright ban”<sup>93</sup> on corporate speech and fell within the “classic examples of censorship.”<sup>94</sup> In the majority’s view, section 441(b) “necessarily reduces the quantity of expression by restricting the number of issues discussed . . . and the size of the audience reached.”<sup>95</sup> This allowed the government to suppress speech by “silencing certain voices [that the government deems to be suspect] at any of the various points in the speech process.”<sup>96</sup> Thus, because the First Amendment applied to corporations,<sup>97</sup> section 441(b)’s limits on electioneering infringed upon core political speech, or what the Court called an “essential mechanism of democracy[.]”<sup>98</sup>

Justice Stevens dissented, arguing that the majority’s decision prevented lawmakers from enforcing “regulatory distinctions”<sup>99</sup> that have a “compelling constitutional basis[.]”<sup>100</sup> In Justice Stevens’ view, legislators have an obligation, “if not also a democratic duty, to take measures designed to guard against the potentially deleterious effects of corporate spending in local and national races.”<sup>101</sup> Justice Stevens explained that “[t]he financial resources, legal structure, and instrumental orientation”<sup>102</sup> of corporations differentiate them from human speakers and “may conflict in fundamental respects with the interests of eligible voters.”<sup>103</sup> Thus, despite “legitimate

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<sup>89</sup> 2 U.S.C. § 434(f)(3)(A) (2006) (the statute also prohibited expenditures within sixty days of a general election).

<sup>90</sup> *Citizens United v. FEC*, 558 U.S. 310, 318–19, 330 (2010).

<sup>91</sup> 540 U.S. 93 (2003), overruled by *Citizens United*, 558 U.S. at 365–66; see also *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 655 (1990) (holding that political speech may be banned based on a person’s corporate identity).

<sup>92</sup> See *McConnell*, 540 U.S. at 199–213.

<sup>93</sup> *Citizens United*, 558 U.S. at 337.

<sup>94</sup> *Id.* (Congress’s decision to exempt Political Action Committees from the statute did not, in the majority’s view, save the statute’s constitutionality).

<sup>95</sup> *Id.* at 339 (quoting *Buckley v. Valeo*, 424 U.S. 1, 19 (1976)) (per curiam)).

<sup>96</sup> *Id.*

<sup>97</sup> *Id.* at 342.

<sup>98</sup> *Id.* at 339.

<sup>99</sup> *Id.* at 394 (Stevens, J., dissenting).

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

concerns about their role in the electoral process[.]”<sup>104</sup> the majority’s decision permitted “corporations and unions . . . to spend as much general treasury money as they wish on ads that support or attack [political] candidates[.]”<sup>105</sup> This “dramatically enhances the role of corporations and unions—and the narrow interests they represent . . . in determining who will hold public office.”<sup>106</sup>

As in *Clinton*, the majority’s decision barred the legislative and executive branches from taking constructive steps to give individual citizens a more influential voice in the political process. The connection between money, access, and power is difficult to dispute, and section 404(b)’s limits commendably sought to fix pervasive inequalities in our political system. The Court’s decision stopped the coordinate branches from fixing a glaring weakness in the electoral process, and Justice Kennedy’s sweeping rhetoric about liberty ensured that money—not ideas—would retain primacy in our political system. *Citizens United* was an undemocratic decision and prohibited a more accessible system of democratic governance. Likewise, in *McCutcheon v. Federal Election Commission*,<sup>107</sup> the Court—by a 5-4 margin—invalidated a statute that set aggregate limits individual campaign contributions.<sup>108</sup> As a result, corporations and wealthy individuals will continue to enjoy access and influence in the political process, while ordinary individuals might stay at home on election day.

In both *Citizens United* and *McCutcheon*, nothing in the First Amendment categorically prohibited the legislative and executive branches from establishing these limits. Of course, while the First Amendment protects political speech, particularly speech that is unpopular or distasteful, it does not imply that money *is* speech, or that reasonable limits on corporate and individual contributions is impermissible. This is particularly true where the limits are designed to curb corruption and inequality in the electoral and democratic process. These decisions are particularly troubling because the Court has previously recognized that “[c]orporate wealth can unfairly influence elections[.]”<sup>109</sup>

The Court’s reluctance to do so is surprising given that it has been more than willing to divine “penumbras”<sup>110</sup> from the Constitution and to discover fundamental rights that have questionable, if not non-existent, support from either the written or unwritten text.<sup>111</sup> If the Court is willing to

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<sup>104</sup> *Id.* (citing *FEC v. Nat’l Right to Work Comm.*, 459 U.S. 197, 209 (1982)) (upholding prior restrictions on corporate campaign spending).

<sup>105</sup> *Id.* at 412.

<sup>106</sup> *Id.*

<sup>107</sup> 134 S. Ct. 1434 (2014).

<sup>108</sup> *Id.* at 1461–62.

<sup>109</sup> *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 660 (1990).

<sup>110</sup> *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965).

<sup>111</sup> *Id.*

embrace a “living constitution” in that context, then it should, at the very least, embrace a living constitution when our executive and legislative branches enact laws enhancing the efficiency and fairness of our political process. In two recent cases, however, it appears that the Court might be adopting such an approach.

### 3. National Federation of Independent Business v. Sebelius

The winds are beginning to blow in a more democratic direction. In *National Federation of Independent Business v. Sebelius*,<sup>112</sup> Chief Justice John Roberts’ majority opinion, upholding a critical provision of the Patient Protection and Affordable Health Care Act (the “Act”),<sup>113</sup> recognized that the Court’s role as a co-equal institution warranted a more restrained approach.<sup>114</sup> The Act was intended to increase the number of Americans covered by health care and decrease overall health care costs.<sup>115</sup> To accomplish this, Congress enacted a controversial “individual mandate[.]”<sup>116</sup> which required people (who were not exempt under the Act’s provisions), to purchase “minimum essential”<sup>117</sup> health coverage. Those who did not comply with the mandate were assessed a “shared responsibility”<sup>118</sup> payment, which the statute described as a “penalty[.]”<sup>119</sup> The penalty was calculated at two-and-a-half percent of an individual’s household income.<sup>120</sup>

Writing for the majority, Justice Roberts surprised many legal commentators when he declared the penalty to be a permissible tax under Article I, Section 8.<sup>121</sup> The Chief Justice’s opinion was based on the principle that, even where Congress uses a particular term in a statute, the Court can construe that term differently if an alternative interpretation is “fairly possible” to “save a statute from unconstitutionality.”<sup>122</sup> Although Justice Roberts’ opinion was supported by relevant precedent, it appears that he was rightly concerned about the Supreme Court’s institutional integrity. As one commentator explained, “Chief Justice Roberts invoked . . . the principle that questions of policy are for Congress and not the courts to determine.”<sup>123</sup>

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<sup>112</sup> 132 S. Ct. 2566 (2012).

<sup>113</sup> *Id.* at 2601.

<sup>114</sup> Wilson Huhn, *Realism Over Formalism and the Presumption of Constitutionality: Chief Justice Roberts’ Opinion Upholding the Individual Mandate*, 46 AKRON L. REV. 117, 133–134 (2013).

<sup>115</sup> *Sebelius*, 132 S. Ct. at 2580.

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

<sup>121</sup> See Randy E. Barnett, *No Small Feat: Who Won the Health Care Case (and why did so many Law Professors Miss the Boat)?*, 65 FLA. L. REV. 1331, 1336 (2013).

<sup>122</sup> *Sebelius*, 132 S. Ct. at 2566 (quoting *Crowell v. Benson*, 285 U.S. 22, 62 (1932); *Hooper v. California*, 155 U.S. 648, 657 (1895)).

<sup>123</sup> Huhn, *supra* note 114, at 131.

Tellingly, however, Chief Justice Roberts also held that the Act could not be supported by the Commerce Clause,<sup>124</sup> an area where the Court had traditionally accorded Congress substantial latitude.<sup>125</sup> The Chief Justice seemed to do what this Article is suggesting: restore equilibrium by deferring to the legislative and executive branches' decisions on issues of policy, but set boundaries on Congressional authority where it upsets the federalist balance.<sup>126</sup> In fact, the Chief Justice's opinion speaks to institutional restraint and a modest judicial temperament that seeks to facilitate effective democratic governance:

“Proper respect for a coordinate branch of the government” requires that we strike down an Act of Congress only if “the lack of constitutional authority to pass [the] act in question is clearly demonstrated.” Members of this Court are vested with the authority to interpret the law; we possess neither the expertise nor the prerogative to make policy judgments. Those decisions are entrusted to our Nation's elected leaders, who can be thrown out of office if the people disagree with them. It is not our job to protect the people from the consequences of their political choices.<sup>127</sup>

Unlike the Court's decisions in *Clinton* and *Citizens United*, Justice Roberts “rejected formalism and embraced realism in constitutional analysis[.]”<sup>128</sup> Justice Roberts may very well have thought the Affordable Health Care Act was unconstitutional, but his decision protected something more important than his own desires: the trappings of the Court's dishonest excesses. “Competitive federalism,”<sup>129</sup> not ethereal notions of liberty, is how meaningful change happens in a democratic society.

Likewise, in *Schuette v. Coalition to Defend Affirmative Action*, the Court upheld an amendment to the Michigan Constitution that banned public universities from considering race in the admissions process.<sup>130</sup>

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<sup>124</sup> *Sebelius*, 132 S. Ct. at 2590 (“The proposition that Congress may dictate the conduct of an individual today because of prophesied future activity finds no support in our precedent. . . . [W]e have never permitted Congress to anticipate that activity itself in order to regulate individuals not currently engaged in commerce.”).

<sup>125</sup> See, e.g., Craig L. Jackson, *The Limiting Principle Strategy and Challenges to the New Deal Commerce Clause*, 15 U. PA. J. CONST. L. 11, 40 (2012) (“[T]he cases coming after and during the Second New Deal established wide latitude for congressional action under the [Commerce] Clause.”).

<sup>126</sup> Tellingly, however, Justice Roberts also held that the Act could not be supported by the Commerce Clause, an area where the Court had traditionally accorded Congress substantial latitude. See *Sebelius*, 132 S. Ct. at 2590 (“The proposition that Congress may dictate the conduct of an individual today because of prophesied future activity finds no support in our precedent. . . . [W]e have never permitted Congress to anticipate that activity itself in order to regulate individuals not currently engaged in commerce.”); see also Jackson, *supra* note 125, at 40 (“[T]he cases coming after and during the Second New Deal established wide latitude for congressional action under the [Commerce] Clause.”).

<sup>127</sup> *Sebelius*, 132 S. Ct. at 2579 (citation omitted).

<sup>128</sup> Huhn, *supra* note 114, at 135.

<sup>129</sup> See *id.*

<sup>130</sup> 134 S. Ct. 1623, 1638 (2014).

Writing for a three-member plurality, Justice Kennedy noted that the decision was “not about how the debate about racial preferences should be resolved . . . [but] about *who* may resolve it.”<sup>131</sup> Kennedy also emphasized “the significance of a dialogue regarding this contested and complex policy question among and within states.”<sup>132</sup>

Of course, while reasonable people might disagree with the decision of Michigan’s voters, the Constitution does not authorize the judiciary to nullify the votes of millions based on a mere disagreement, just as it does not prohibit another state from adopting policies that incorporate race in the university admissions process. Allowing states to be different, and to experiment with different policies, is the essence of a democracy that values self-governance over centralized governance.

*C. Equilibrium in the Democratic Sphere: The Penumbra Problem and Why a Text-Based Justification is Necessary*

Unlike its decisions relating to the political process, the Court has not hesitated to view the Constitution as a living document where matters of individual rights are concerned. In *Griswold*, the Court invalidated a Connecticut law that prohibited the use of contraceptives.<sup>133</sup> Justice Douglas’ majority opinion did not hold that the statute violated a specific provision in the Bill of Rights. Instead, he delved “between the lines”<sup>134</sup> to suggest that “specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance.”<sup>135</sup> One aspect of these penumbras was a “zone of privacy”<sup>136</sup> within “the marriage relationship[.]”<sup>137</sup> which rendered the law unconstitutional.

In his dissenting opinion, Justice Black expressed doubts about the wisdom of Connecticut’s statute. His opinion, however, expressed grave concerns over what he believed was the majority’s brazen use of judicial power. As Justice Black explained, “I feel constrained to add that the law is every bit as offensive to me as it my Brethren of the majority . . . who, reciting reasons why it is *offensive to them*, hold it unconstitutional.”<sup>138</sup> Furthermore, the majority’s reliance on the Due Process Clause and the Ninth Amendment, “turn out to be the same thing—merely using different words to claim for this Court and the federal judiciary power to invalidate any legislative act which the judges find irrational, unreasonable or

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<sup>131</sup> *Id.* (emphasis added).

<sup>132</sup> *Id.* at 1630.

<sup>133</sup> *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965).

<sup>134</sup> Amar, *supra* note 63, at 203 (discussing the Constitution’s “holistic between-the-lines meaning”).

<sup>135</sup> *Griswold*, 381 U.S. at 484 (citation omitted).

<sup>136</sup> *Id.*

<sup>137</sup> *Id.* at 486.

<sup>138</sup> *Id.* at 507 (Black, J., dissenting) (emphasis added).

offensive.”<sup>139</sup> This “formula or doctrine or whatnot . . . takes away from Congress and States the power to make laws based on their own judgment of fairness and wisdom[,] . . . a power which was specifically denied federal courts by the convention that framed the Constitution.”<sup>140</sup> As Justice Black stated, “I like my privacy as much as the next one, but I am nevertheless compelled to admit that government has a right to invade it unless prohibited by some specific constitutional provision.”<sup>141</sup> The Constitution does not give “blanket power to courts to exercise such a supervisory veto over the wisdom and value of legislative policies and to hold unconstitutional those laws which they believe unwise or dangerous.”<sup>142</sup>

Nowhere in the Bill of Rights—viewing each clause independently or as a unified whole—was there a textual basis to strike the Connecticut statute. Admittedly, the statute was unwise, even foolish, but it was not *unconstitutional*. As such, the Court invented penumbras to provide a source from which it could create the right itself, and therefore justify the outcome. In doing so, however, the Court implicitly acknowledged that no reasonable interpretation of the Constitution’s text could support its decision. It also marked a new era of normative jurisprudence where the ends justified the means, and the Constitution, in some cases, was viewed as an obstacle to, not a constraint on, the Court’s power.

To be clear, the Constitution does have unwritten purposes, and the meaning of ambiguous words like “cruel and unusual punishment” certainly evolve over time. Of those unwritten guarantees, liberty, equality, and autonomy evidence a constitutional vision of de-centralization, from which emanates an individual and collective right to resolve constitutional ambiguities through reasoned discourse.<sup>143</sup> When the people cannot define for themselves the laws to which they must adhere, then self-governance is replaced by top-down governance that conflates what the law *is*<sup>144</sup> and *should* be,<sup>145</sup> and leads to dishonest decisions that replace democracy with oligarchy. Dishonest decisions make any constitutional theory—liberal or conservative—vulnerable to judicial impulse, and provide no sanctuary to those who think the winds of judicial favor will always blow in their direction. In short, *Griswold* made the “should” mistake, as did Justice Kennedy when he declared that the Court must ask itself “what the law

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<sup>139</sup> *Id.* at 511.

<sup>140</sup> *Id.* at 513.

<sup>141</sup> *Id.* at 510.

<sup>142</sup> *Id.* at 512.

<sup>143</sup> See generally Cass. R. Sunstein, *Liberal Constitutionalism and Liberal Justice*, 72 TEX. L. REV. 305, 12 (1993) (explaining that any “theory of constitutional interpretation that amounted to a full-blown theory of just outcomes would offer inadequate room for democratic rule, at least if that theory did not allow judges to permit participants in democracy to make some errors”).

<sup>144</sup> *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

<sup>145</sup> See Reuben, *supra* note 47, at 35 (emphasis added).

*should be.*<sup>146</sup>

Without a reasonable textual hook, nine unelected and life-tenured judges can decide issues based on little more than subjective values and individual policy preferences, and manipulate the Constitution to give a decision the appearance of legitimacy. Nowhere was dishonesty more evident than in *Roe*, where the Court made, at best, a perfunctory to ground its decision in the Constitution.

### 1. *Roe v. Wade*

In *Roe*, the Court held that two statutes prohibiting abortion except to save the mother's life violated the Constitution's unwritten mandates.<sup>147</sup> Despite acknowledging that "[t]he Constitution does not explicitly mention any right of privacy,"<sup>148</sup> the majority noted that "the Court has recognized that a right of personal privacy . . . or zones of privacy, does exist under the Constitution."<sup>149</sup> As Justice Blackmun stated, "[i]n varying contexts, the Court or individual Justices have . . . found at least the roots of that right . . . in the penumbras of the Bill of Rights[.]"<sup>150</sup> Relying solely on its own inventions, that Court summarily declared that "[t]his right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty . . . [or] in the Ninth Amendment's reservation of right to the people, is broad enough to encompass a woman's decision to terminate her pregnancy."<sup>151</sup> The Court was apparently unconcerned with, even dismissive of, finding a legitimate textual hook in the Constitution.

Its sweeping conclusion failed to mention that "liberty is not guaranteed absolutely against deprivation, only against deprivation without due process of law."<sup>152</sup> Even supporters of abortion rights acknowledge that *Roe* was not grounded in any defensible part of the Constitution. Harvard law professor Lawrence Tribe states, "[o]ne of the most curious things about *Roe* is that, behind its own verbal smokescreen, the substantive judgment on which it rests is nowhere to be found."<sup>153</sup> Likewise, John Hart Ely explains that *Roe* is "bad constitutional law, or rather . . . it is not constitutional law and gives almost no sense of an obligation to try to be."<sup>154</sup>

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<sup>146</sup> *Id.*

<sup>147</sup> *Roe v. Wade*, 410 U.S. at 164-166 (1973) (outlining a three-tiered approach to a woman's right to terminate a pregnancy, which was free from state regulation prior to viability).

<sup>148</sup> *Id.* at 152.

<sup>149</sup> *Id.*

<sup>150</sup> *Id.*

<sup>151</sup> *Id.* at 153.

<sup>152</sup> *Id.* at 173 (Rehnquist, J., dissenting).

<sup>153</sup> Tribe, *supra* note 39, at 7; *see also* John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920, 947 (1973) ("[*Roe v. Wade*] is bad because it is bad constitutional law, or rather because it is *not* constitutional law and gives almost no sense of an obligation to try to be.") (emphasis in original).

<sup>154</sup> Ely, *supra* note 153, at 947.

According to Archibald Cox, former U.S. Solicitor General, “[n]either historian, layman, nor lawyer will be persuaded that all the details prescribed in *Roe v. Wade* [by Justice Blackmun] are part of . . . the Constitution.”<sup>155</sup> As Justice Ruth Bader Ginsberg explained, “[h]eavy-handed judicial intervention (in the context of *Roe*) was difficult to justify and appears to have provoked, not resolved, conflict.”<sup>156</sup>

It is not surprising that scholars continue to search for a textual basis to justify *Roe* as a matter of constitutional law.<sup>157</sup> If the Court made the correct decision in either *Roe* or *Griswold*, individual citizens would have properly directed their vitriol at state legislatures for enacting such improvident laws. Democracy allows you to correct dumb laws, but you cannot fix bad decisions by a Court that answers to no one. That is why *Roe*’s creation of an abortion right actually made that right less secure. Almost twenty years later, in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, the Court had an opportunity to rectify this mistake. Their decision, however, only re-enforced the belief that the Justices were acting outside of their constitutional authority.

## 2. *Planned Parenthood of Southeastern Pennsylvania v. Casey*

In *Planned Parenthood*,<sup>158</sup> the Court was squarely presented with the decision of whether to overrule or affirm *Roe*. It did neither. Instead, the Court applied *stare decisis* to uphold some aspects of *Roe*, while simultaneously abandoning *stare decisis* to reject others. The statute in question required, among other things, that a woman get informed consent<sup>159</sup> prior to having an abortion<sup>160</sup> and the Court re-affirmed *Roe*’s central holding that gave women the choice to terminate a pregnancy. The majority rejected *Roe*’s trimester framework, however, in favor of a test prohibiting all state laws that unduly burdened a woman’s right to seek an abortion.<sup>161</sup>

Writing for the majority, Justice Kennedy stated that statutes prohibiting abortion infringed on the “the heart of liberty[.]”<sup>162</sup> as contained in the Fourteenth Amendment, which it defined as “the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life.”<sup>163</sup>

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<sup>155</sup> ARCHIBALD COX, *THE ROLE OF THE SUPREME COURT IN AMERICAN GOVERNMENT* 114 (1976).

<sup>156</sup> Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade*, 63 N.C. L. REV. 375, 385–86 (1985).

<sup>157</sup> See Reva B. Siegel, *Siegel, J., Concurring*, in *WHAT ROE V. WADE SHOULD HAVE SAID* 63–85 (Jack M. Balkin ed., 2005) (arguing that the Equal Protection Clause provides a basis upon which to justify *Roe*).

<sup>158</sup> 505 U.S. 833 (1992).

<sup>159</sup> *Id.* at 844.

<sup>160</sup> *Id.*

<sup>161</sup> *Id.* at 851.

<sup>162</sup> *Id.*

<sup>163</sup> *Id.*

As the Court stated, “[t]he controlling word . . . before us is ‘liberty.’”<sup>164</sup> The Due Process Clause, however, declares that no State shall “deprive any person of life, liberty, or property, *without due process of law*.”<sup>165</sup> The majority conceded that “a literal reading of the Clause might suggest that it governs only the procedures by which a State may deprive persons of liberty,”<sup>166</sup> but it evaded this textual hurdle by stating that “the Clause has been understood to contain a substantive component[.]”<sup>167</sup> Andrew T. Hyman explains as follows:

The Court now regularly uses the Due Process Clause to override laws enacted by elected representatives, thereby eliminating various liberties of some people if those liberties conflict with unenumerated “fundamental” rights of other people. The Court accomplishes this deprivation without relying upon any applicable law, except the Due Process Clause itself. This subjectivistic doctrine of due process has turned John Jay’s “cornerstone” into wax.<sup>168</sup>

In his dissent, Justice Scalia properly recognized that the Court’s desire to effectuate a “‘settlement’ of a divisive issue, a jurisprudential Peace of Westphalia that is worth preserving, is nothing less than Orwellian[.]”<sup>169</sup> and proof that “[t]he Imperial Judiciary lives.”<sup>170</sup>

In *Lawrence*, Justice Kennedy again wrote for the majority and invoked sweeping rhetoric about liberty, and conspicuously omitted a principled discussion of the equal protection clause, leaving the rights of same-sex couples suspended in a cloud of uncertainty.

### 3. *Lawrence v. Texas*

In *Lawrence v. Texas*, the Court properly invalidated a Texas statute that prohibited “deviate sexual intercourse with another individual of the same sex.”<sup>171</sup> Apart from the fact that this law was “uncommonly silly[.]”<sup>172</sup> its application only to same-sex conduct, by any reasonable construction, violated the Equal Protection Clause.<sup>173</sup> Relying on *Griswold* and *Planned*

<sup>164</sup> *Id.* at 846.

<sup>165</sup> *Id.* (emphasis added).

<sup>166</sup> *Id.*

<sup>167</sup> *Id.*; see also Brian Boynton, Note, *Democracy and Distrust After Twenty Years: Ely’s Process Theory and Constitutional Law from 1990 to 2000*, 53 STAN. L. REV. 397, 398–99 (2000) (discussing Ely’s criticism of substantive due process).

<sup>168</sup> Andrew T. Hyman, *The Little Word “Due,”* 38 AKRON L. REV. 1, 8 (2005).

<sup>169</sup> *Id.* at 995 (Scalia, J., dissenting).

<sup>170</sup> *Id.* at 996.

<sup>171</sup> *Lawrence v. Texas*, 539 U.S. 558, 581 (2003).

<sup>172</sup> *Id.* at 605 (Thomas, J., dissenting) (quoting *Griswold v. Connecticut*, 381 U.S. 479, 527 (1965) (Stewart, J., dissenting)).

<sup>173</sup> *Id.* at 579 (O’Connor, J., concurring) (“Rather than relying on the substantive component of the Fourteenth Amendment’s Due Process Clause, as the Court does, I base my conclusion on the Fourteenth Amendment’s Equal Protection Clause.”).

*Parenthood*, however, Justice Kennedy based the majority's opinion on a violation of the Appellants' "liberty" interests.<sup>174</sup> As in *Griswold*, the majority opinion was uninterested in finding a textual hook to anchor its decision, which was surprising given that the Equal Protection Clause provided ample authority to strike the statute.<sup>175</sup> Instead, Justice Kennedy discussed liberty "both in its spatial and in its more transcendent dimensions."<sup>176</sup>

The majority eschewed reliance on history and tradition,<sup>177</sup> except for precedent in the past half century which, according to Justice Kennedy, showed an "emerging awareness that liberty gives substantial protection"<sup>178</sup> to adults in matters of private sexual conduct. Justice Kennedy also relied on foreign law to support his reasoning, claiming that the Constitution's drafters "knew times can blind us to certain truths . . . ."<sup>179</sup> In Justice Kennedy's view, "[a]s the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom."<sup>180</sup> Justice Kennedy's reasoning was not surprising given his view that, although "one can assume that any certain or fundamental rights should exist in any just society[.]"<sup>181</sup> it does not mean that "each of those essential rights is one that we, as judges, can enforce under the *written* Constitution."<sup>182</sup>

The majority opinion ignored *Washington v. Glucksberg*,<sup>183</sup> which held that the Fourteenth Amendment protects fundamental rights only to the extent that they are "deeply rooted in this nation's history and tradition[.]"<sup>184</sup> Such rights are "'implicit in the concept of ordered liberty' such that 'neither liberty nor justice would exist if [it] were sacrificed.'"<sup>185</sup> This standard was intended to guard against judicial overreaching:

We "have always been reluctant to expand the concept of substantive due process because guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended." By extending constitutional protection to an

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<sup>174</sup> *Id.* at 562–79 (majority opinion).

<sup>175</sup> *See id.* at 579.

<sup>176</sup> *Id.* at 562.

<sup>177</sup> *Id.* at 571–72 ("[H]istory and tradition are the starting point but not in all cases the ending point of the substantive due process inquiry." (quoting *County of Sacramento v. Lewis*, 523 U.S. 833, 857 (1998) (Kennedy, J., concurring))). This statement was inconsistent with the Court's ruling in *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997), holding that fundamental rights are only those "deeply rooted in this Nation's history and tradition," and "implicit in the concept of ordered liberty . . . [so] that 'neither liberty nor justice would exist if [it] were sacrificed.'" (citations omitted).

<sup>178</sup> *Lawrence*, 539 U.S. at 572.

<sup>179</sup> *Id.* at 579.

<sup>180</sup> *Id.*

<sup>181</sup> *The Nomination of Anthony M. Kennedy to Be Assoc. Justice of the Supreme Court of the United States: Hearings Before the S. Comm. on the Judiciary*, 100th Cong. 173 (1987).

<sup>182</sup> *Id.* at 122 (emphasis added).

<sup>183</sup> *Washington v. Glucksberg*, 521 U.S. 702 (1997).

<sup>184</sup> *Id.* at 720–21 (citation omitted).

<sup>185</sup> *Id.* at 721 (citation omitted).

asserted right or liberty interest, we, to a great extent, place the matter outside the arena of public debate and legislative action. We must therefore “exercise the utmost care whenever we are asked to break new ground in this field,” lest the liberty protected by the Due Process Clause be subtly transformed into the policy preferences of the Members of this Court.<sup>186</sup>

A “‘careful description’ of the asserted fundamental liberty interest”<sup>187</sup> is required because it “tends to rein in the subjective elements that are necessarily present in due-process judicial review.”<sup>188</sup> The modest view adopted by the *Glucksberg* Court allows legislative bodies to debate moral and social issues, “as it should in a democratic society.”<sup>189</sup>

Thus, while *Lawrence* reached the correct result—any law prohibiting a particular group from engaging in particular sexual conduct is inexcusably discriminatory—its rationale epitomized judicial arrogance. In both style and substance, *Lawrence* provided judges with an unchecked license to interpret constitutional questions based on the vagaries of modern ethos, which turned the Constitution’s text—and its democratic governance structure—into a necessary evil that could be discarded at the judiciary’s whim.

Justice Kennedy has, at times, been at the vanguard of this disturbing trend. As law professor and commentator Jeffrey Rosen explains, “[h]e thinks that great judges, like great literary figures, have both the power and the duty to [in Kennedy’s own words] ‘impose order on a disordered reality[.]’”<sup>190</sup> During a speech to the Kennedy Center in Washington, D.C., Justice Kennedy stated as follows:

“You know, in any given year, we may make more important decisions than the legislative branch does—precluding foreign affairs, perhaps,” he said. “Important in the sense that it will control the direction of society.” When asked to name the most important qualities for achievement in his field, he replied: “To have an understanding that you have an opportunity to shape the destiny of the country.”<sup>191</sup>

This passage supports one scholar’s view that Kennedy is “the

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<sup>186</sup> *Id.* at 720 (quoting *Collins v. City of Harker Heights*, 503 U.S. 115, 125 (1992)) (citing *Moore v. City of East Cleveland*, 431 U.S. 494, 502 (1977)).

<sup>187</sup> *Glucksberg*, 521 U.S. at 721 (quoting *Reno v. Flores*, 507 U.S. 292, 302 (1993)).

<sup>188</sup> *Id.* at 721–22 (the “guideposts for responsible decisionmaking” were intended to “direct and restrain our exposition of the Due Process Clause”).

<sup>189</sup> *Id.* at 735.

<sup>190</sup> Jeffrey Rosen, *Supreme Leader: The Arrogance of Anthony Kennedy*, *NEW REPUBLIC* (June 16, 2007), <http://www.newrepublic.com/article/politics/supreme-leader-the-arrogance-anthony-kennedy>.

<sup>191</sup> *Id.*

Court's most vocal defender of judicial power."<sup>192</sup> It also explains Justice Kennedy's adherence to the Constitution's text in *Clinton*, and his unanchored language in *Lawrence*. Professor Lund explains that, "it should be no surprise that some Justices have simply assumed that the Constitution must include a provision that gives them the discretionary power to impose their personal visions of justice and what they think of as the more transcendent dementions of liberty."<sup>193</sup>

As Professor Rosen explains, Justice Kennedy's "self-dramatizing utopianism"<sup>194</sup> reflects the view that "it is the role of the Court in general and himself in particular to align the messy reality of American life with an inspiring and highly abstracted set of ideals."<sup>195</sup> By forcing legislatures and citizens "to respect a series of moralistic abstractions about liberty, equality, and dignity, judges, he believes, can create a national consensus about American values that will usher in what he calls 'the golden age of peace.'"<sup>196</sup>

The glaring problem with Justice Kennedy's opinions, which "are full of Manichean platitudes about liberty and equality that acknowledge no uncertainty[.]"<sup>197</sup> is that his version of liberty is hauntingly anti-democratic, and thus is not liberty at all. The words of Oliver Wendell Holmes bear particular relevance:

I think that the word liberty in the Fourteenth Amendment is perverted when it is held to prevent the natural outcome of a dominant opinion, unless it can be said that a rational and fair man necessarily would admit that the statute proposed would infringe fundamental principles as they have been understood by the traditions of our people and our law.<sup>198</sup>

Justice Kennedy's "liberty" might be palatable to those who agree with the outcomes he reaches, but the real—and lasting—legacy of Justice Kennedy is that he is singlehandedly concentrating power in a set of unelected judges. This judiciary's role will be troubling if the next president nominates someone like Alabama Supreme Court Justice Roy Moore, who erected a monument of the Ten Commandments inside a courthouse lobby and defied a federal court's order demanding its removal.

Simply stated, living constitutionalism allows judges to drift into the sea of unaccountable oligarchy.

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<sup>192</sup> Jeffrey Rosen, *An Enigmatic Court? Examining the Roberts Court as it Begins Year Three: The Roberts Court & Executive Power*, 35 PEPP. L. REV. 503, 508 (2008).

<sup>193</sup> Lund & McGinnis, *supra* note 21, at 1603.

<sup>194</sup> Rosen, *supra* note 190.

<sup>195</sup> *Id.*

<sup>196</sup> *Id.*

<sup>197</sup> *Id.*

<sup>198</sup> *Lochner v. New York*, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting).

### III. WHERE DOES THE COURT GO FROM HERE? BACK TO FOOTNOTE FOUR

In *Hollingsworth v. Perry*,<sup>199</sup> the Court's approach to cases in both of these categories thrust it into an irreconcilable conundrum. The Court confronted the question of whether California's Proposition 8, which restricted marriage to opposite sex couples, violated the Constitution's Due Process and Equal Protection Clauses.<sup>200</sup> It also granted *certiorari* to consider whether the Petitioners, who were Proposition 8's proponents, had standing.<sup>201</sup> The district court and Ninth Circuit had answered the latter question in the affirmative.<sup>202</sup>

In a 5-4 decision, the Court reversed the Ninth Circuit. Writing for the majority, Chief Justice Roberts held that the Petitioners' only interest in having the district court's order reversed was to vindicate the constitutional validity of a "generally applicable California law."<sup>203</sup> Such a "generalized grievance,"<sup>204</sup> which only alleged "harm . . . to every citizen's interest in proper application of the Constitution and laws,"<sup>205</sup> failed to differentiate the Petitioners from the "public at large[.]"<sup>206</sup> As Justice Roberts explained, a litigant must suffer an injury in a "personal and individual way[.]"<sup>207</sup> such that he has a "direct stake"<sup>208</sup> in the outcome. Since the "petitioners have . . . not suffered an injury in fact,"<sup>209</sup> their claim did not qualify as an Article III case or controversy.

As with *Sebelius*, the Court's decision may have been motivated by other considerations. During oral argument, the Justices had deep concerns about judicial overreaching. Justice Sonya Sotomayor asked Theodore Olsen, the Respondent's attorney, "[i]s there any way to decide this case in a principled manner that is limited to California only?"<sup>210</sup> Even Justice Kennedy had reservations, stating that, "the problem with the case is that you're really asking, particularly because of the sociological evidence you cite, for us to go into uncharted waters, and you can play with that metaphor, there's a wonderful destination, it is a cliff."<sup>211</sup> Justice Kennedy went so far

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<sup>199</sup> 133 S. Ct. 2652 (2013). *Hollingsworth* was heard together with *United States v. Windsor*, 133 S. Ct. 2675 (2013), which challenged the constitutionality of the Defense of Marriage Act (DOMA). In a 5-4 decision, the Court, per Justice Kennedy, ruled that DOMA was unconstitutional. *Id.* at 2682.

<sup>200</sup> *Hollingsworth*, 133 S. Ct. at 2659-60.

<sup>201</sup> *Id.* at 2661. State officials had refused to defend Proposition 8, prompting the proponents of Proposition 8 to intervene and defend its constitutionality. *Id.* at 2660.

<sup>202</sup> *Id.* at 2660-2661.

<sup>203</sup> *Id.* at 2662.

<sup>204</sup> *Id.*

<sup>205</sup> *Id.*

<sup>206</sup> *Id.* (citations omitted).

<sup>207</sup> *Id.* (citation omitted).

<sup>208</sup> *Id.* (citation omitted).

<sup>209</sup> *Id.* at 2664.

<sup>210</sup> Transcript of Oral Argument at 47, *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013) (No. 12-144), [http://supremecourt.gov/oral\\_arguments/argument\\_transcripts/12-144a.pdf](http://supremecourt.gov/oral_arguments/argument_transcripts/12-144a.pdf).

<sup>211</sup> *Id.*

as to say, “I just wonder if—if the case was properly granted.”<sup>212</sup> Justice Samuel Alito noted that “[s]ame-sex marriage is very new[,]”<sup>213</sup> and “[o]n a question like that, of such fundamental importance, why should it not be left for the people, either acting through initiatives and referendums or through their elected public officials?”<sup>214</sup>

The Court had another problem, however, and it stemmed from its own precedent. Since same-sex couples are not considered a “suspect class,”<sup>215</sup> laws differentiating on the basis of sexual orientation are subject to the highly deferential rational basis review. As one commentator explains, “courts applying traditional rational basis presume legislative legitimacy and require only a superficial nexus between the state’s regulatory means and ends[.]”<sup>216</sup> Thus, “[t]he assumptions underlying [a particular law] may be erroneous, but the very fact that they are ‘arguable’ is sufficient . . . to ‘immunize’ the congressional choice from constitutional challenge.”<sup>217</sup> It is possible, although not certain, that restricting marriage to heterosexual couples might have survived a constitutional attack.<sup>218</sup>

Things get more complicated, though, because in recent years, the Court has applied the rational basis “with bite” which “renders courts less deferential to the legislature, less tolerant of over- or under-inclusive classifications, and less open to state experimentation.”<sup>219</sup> One commentator characterized this test as “a muddled level of review where the Supreme Court claims to be applying the rational basis [test] . . . but the reasoning and results resemble the more exacting standard required by intermediate scrutiny.”<sup>220</sup> In addition, some lower courts have departed from the rational

<sup>212</sup> *Id.* at 48.

<sup>213</sup> *Id.* at 55.

<sup>214</sup> *Id.* at 56.

<sup>215</sup> Race, national origin, religion, and alienage are the only suspect classes. *See, e.g.*, *Hirabayashi v. United States*, 320 U.S. 81, 100–01 (1943), and *Korematsu v. United States*, 323 U.S. 214, 216 (1944), which means that discrimination on these grounds is subject to strict scrutiny, the most exacting form of judicial scrutiny. Factors for deciding suspect-class status include: (1) prejudice against a discrete and insular minority; (2) history of discrimination against the group; (3) the ability of the group to seek political redress (i.e., political powerlessness); (4) the immutability of the group’s defining trait; and (5) the relevancy of that trait. *See* Marcy Strauss, *Reevaluating Suspect Classifications*, 35 SEATTLE U. L. REV. 135, 146 (2011).

<sup>216</sup> Emma Freeman, Note, *Giving Casey Its Bite Back: The Role of Rational Basis in Undue Burden Analysis*, 48 HARV. C.R.-C.L. L. REV. 279, 285 (2013).

<sup>217</sup> *FCC v. Beach Commc’ns, Inc.*, 508 U.S. 307, 320 (1993).

<sup>218</sup> *See e.g.*, *Hernandez v. Robles*, 855 N.E.2d 1, 5–6 (N.Y. 2006); *see also* Joseph W. Mintz, Note, *Same-Sex Marriage: New York Court of Appeals Denies Individuals the Ability to Marry Their Same-Sex Partners*, 38 RUTGERS L.J. 1431, 1437 (2007). Using rational basis review, the New York Court of Appeals held that bans of same-sex marriage did not violate the state constitution’s due process and equal protection clause. Mintz, *supra*, at 1435. The Court of Appeals found that “stability in the parenting relationships” and “favor[ing] opposite-sex parents over same-sex parents,” were sufficient reasons to justify the ban. *Id. But see* *Perry v. Brown*, 671 F.3d 1052, 1096 (9th Cir. 2012) (holding that the law did not withstand even the highly-deferential rational basis review).

<sup>219</sup> Freeman, *supra* note 216, at 285.

<sup>220</sup> Julie A. Greenberg & Marybeth Herald, *You Can’t Take It With You: Constitutional Consequences of Interstate Gender-Identity Rulings*, 80 WASH. L. REV. 819, 977 (2005). Intermediate scrutiny applies to gender-based discrimination, and requires that a law: (1) advance important or

basis test in any form and, where a law discriminates on the basis of sexual orientation, applied “strict scrutiny.”<sup>221</sup> A few courts have held that laws against same-sex marriage are unconstitutional regardless of the scrutiny level.<sup>222</sup>

Deciding *Hollingsworth* on the merits would have required the Court’s to disentangle itself from this complex web. Whichever way it ruled, however, the Court would likely have been accused of an unprecedented act of judicial overreaching. Should the Court have held that same-sex marriage bans withstood rational basis scrutiny, it would have compromised the ongoing efforts of same-sex couples to effectuate legislative change in the thirty-seven states that limit marriage to opposite-sex couples. It would also have implicitly held that same-sex couples are not a suspect class, which is a topic of dispute among several lower courts. Invalidating same-sex marriage bans under the rational basis test, however, would have left the Court vulnerable to claims that it was invading an area traditionally reserved to the states, and acting with the same *ad hoc* reasoning characteristic of *Roe* and *Lawrence*.

The Court could have declared homosexuals a suspect or quasi-suspect class, but relevant precedent would have required it to deem homosexuality, among other things, “an immutable characteristic.”<sup>223</sup> Alternatively, the Court could have viewed same-sex marriage bans as discrimination on the basis of gender, an issue which Justice Kennedy claimed he was “trying to wrestle with[,]”<sup>224</sup> and applied an intermediate level of scrutiny.<sup>225</sup> While this perspective is gaining some momentum among courts and scholars, it pales in comparison to claims that these laws violate the Equal Protection Clause.<sup>226</sup> Ultimately, whichever way the Court decided the merits of same-sex marriage, it would have faced precisely the

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substantial government interests; (2) be substantially related to advancing those interests; and (3) not be substantially more burdensome than necessary to advance those interests. See R. Randall Kelso, *Standards of Review Under the Equal Protection Clause and Related Constitutional Doctrines Protecting Individual Rights: The “Base Plus Six” Model and Modern Supreme Court Practice*, 4 U. PA. J. CONST. L. 225, 234 (2012).

<sup>221</sup> To pass constitutional muster under strict scrutiny, the state must demonstrate that a particular law: (1) serves a compelling state interest; (2) is narrowly tailored to achieve that objective; and (3) is the least restrictive means of achieving the asserted interest. See Matthew D. Bunker, Clay Calvert, & William C. Nevin, *Strict in Theory, but Feeble in Fact? First Amendment Strict Scrutiny and the Protection of Speech*, 16 COMM. L. & POL’Y 349, 356–57 (2011).

<sup>222</sup> See e.g., *Perry*, 671 F.3d at 1096 (holding that Proposition 8 did not satisfy the rational basis test); *Baehr v. Lewin*, 852 P.2d 44, 59–60 (1993) (holding that laws against same-sex marriage discriminated on the basis of gender).

<sup>223</sup> Emily K. Baxter, Note, *Rationalizing Away Political Powerlessness: Equal Protection Analysis of Laws Classifying Gays and Lesbians*, 72 MO. L. REV. 891, 895–86 (2007).

<sup>224</sup> Transcript of Oral Argument, *supra* note 210, at 13.

<sup>225</sup> See, e.g., *Baehr*, 852 P.2d at 68.

<sup>226</sup> Susan Frelich Appleton, *Missing In Action? Searching for Gender Talk in the Same-Sex Marriage Debate*, 16 STAN. L. & POL’Y REV. 97, 105 (2005) (“[W]hile most scholars commenting on Bowers considered its implications for substantive due process or the level of scrutiny that gays and lesbians can invoke under the Equal Protection Clause,” some scholars “revisited and revived the sex discrimination argument that activists had made in the 1970s.”).

type of criticism that, from his questions at oral argument, even Justice Kennedy wanted to avoid.

That problem is traceable to *Lawrence*, where Justice Kennedy spoke in vague generalities about liberty and did not confront the question of whether homosexuals, as a class, warranted heightened scrutiny, or whether the anti-sodomy law failed the rational basis test itself. In addition, by relying on penumbra-like language and subjective definitions of liberty, Justice Kennedy failed to ground same-sex couples' undeniable right to equality in the Constitution's text. Thus, as in *Roe*, the *Lawrence* opinion made the constitutional rights of same-sex couples uncertain and less secure.<sup>227</sup> This is precisely the type of "stealth constitutionalism"<sup>228</sup> that leads to confusion and, often, legislative stagnation. After *Lawrence*, few except Justice Scalia, who assured us that the Court was laying the foundation for a future ruling invalidating same-sex marriage bans,<sup>229</sup> knew what *Lawrence* actually stood for, and what state legislatures could expect from future rulings. That not only leads to inertia in the democratic process; it also ensures that the Court retains the authority to decide how—and when—same-sex couples' "liberty" will be defined. This is not fair to those on either side of this divisive issue.

This doctrinal confusion may have been part of the reason that the Court dismissed *Hollingsworth* on the basis of standing. Resolving the issues that *Lawrence* avoided would have forced the Court to decide whether same-sex couples constituted a suspect class, whether same-sex marriage bans violated the applicable level of scrutiny, and whether the three-tiered paradigm reviewing legislative classifications itself made sense. Regardless of how the Court resolved these issues, it would have likely resulted in the perception that the Court was overstepping its authority and prematurely removing yet another issue from democratic debate. Indeed, although Chief Justice Roberts' opinion for the *Hollingsworth* majority had a legitimate constitutional foundation, it may have been fueled in part by these concerns and, ultimately, the Court's institutional legitimacy. The opinion may have also reflected a concern that marriage equality, for the moment, should be resolved through the democratic process. Moreover, given the recent decisions in *Sebelius* and *Schuette*, it appears that the Court is placing more emphasis on institutional restraint. Critically, however, decisions such as *Citizens United* and *McCutcheon* make it difficult to believe that the results from democratic debate will be based on equal and

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<sup>227</sup> See Eric Berger, *Lawrence's Stealth Constitutionalism and Same-Sex Marriage Litigation*, 21 WM. & MARY BILL RTS. J. 765, 790–92 (2013).

<sup>228</sup> *Id.* at 765.

<sup>229</sup> Lisa K. Parshall, *Redefining Due Process Analysis: Justice Anthony M. Kennedy and the Concept of Emergent Rights*, 69 Alb. L. Rev. 237, 264 (2006) (“[T]he suggestion that Justice Kennedy’s *Romer* and *Lawrence* opinions lay the groundwork for the recognition of same-sex marriage was most compellingly presented by the dissenters . . .”).

open decision-making processes.

The Court's cautious approach, however, was slightly misguided. Lost in both *Windsor* and *Hollingsworth* was the opportunity to reach democratic equilibrium through the equal protection clause. In *Carolene Products*' famous footnote four, Justice Stone suggested that there may be a narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution."<sup>230</sup> In *Windsor*, proponents of DOMA could not provide the Court with a rational reason justifying same-sex marriage bans. Justice Kagan, for example, dismantled the procreation argument by pointing out that the state did not prohibit sterile couples from marrying.<sup>231</sup> As evidenced, in part, by DOMA's legislative history and the lack of any logical justifications, the true basis was moral disapproval of homosexual couples.

Justice Kennedy called it animus,<sup>232</sup> but one need not go that far. Enshrining inequality into the law on the basis on moral disapproval facially violates the equal protection (and establishment) clause because it permits the state to base unequal treatment on wholly subjective values. That is a recipe for arbitrariness, and the *sine qua non* of a discrimination that no constitution should tolerate. Unfortunately, Justice Kennedy's failure to rely more directly on equal protection principles in *Planned Parenthood* and *Lawrence* left the Court with little more than high-handed dicta about liberty and a swath of muddled precedent. It should come as no surprise, therefore, that *Windsor* was authored by Justice Kennedy and again based on undefinable generalities, while *Hollingsworth* was decided on standing.

In *Windsor*, Kennedy wrote that the "Constitution protects . . . moral and sexual choices"<sup>233</sup> and that DOMA was intended "disparage," and "injure," same-sex couples.<sup>234</sup> Chief Justice Roberts properly scolded Kennedy for this language, stating that he would not "tar the political branches with the brush of bigotry."<sup>235</sup> In *Hollingsworth*, however, the Court could not nationalize same-sex marriage based on unanchored pronouncements about liberty without risking permanent damage to its institutional legitimacy—and democracy itself. But the Court could not uphold DOMA without also appearing that it was, in fact, upholding the constitutionality of *state* same-sex marriage bans.

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<sup>230</sup> United States v. *Carolene Products*, 304 U.S. 144, 152 n.4 (1938).

<sup>231</sup> See Robin Abcarian, *Prop. 8: Justice Kagan cuts to the Injustice of Gay Marriage Ban*, L.A. TIMES (March 26, 2013), <http://articles.latimes.com/2013/mar/26/local/la-me-ln-prop-8-justice-kagan-cuts-to-the-injustice-of-gay-marriage-ban-20130326>.

<sup>232</sup> United States v. *Windsor*, 133 S. Ct. 2675, 2694 (2013) (stating that the Defense of Marriage Act's "principal purpose is to impose inequality").

<sup>233</sup> *Id.*

<sup>234</sup> *Id.* at 2696.

<sup>235</sup> *Id.* (Roberts, C.J., dissenting).

This underscores the problem with normative judging. It creates a doctrinal hole that “liberty” and substantive due process can only go so far in filling. Eventually, no matter how desirable the outcome, the people will demand that decisions removing an issue from democratic debate be grounded in something more than personal predilection. In *Windsor* and *Hollingsworth*, the Court had nothing to fall back on because the textual hook that *actually* prohibits marriage inequality—the equal protection clause—had been underused in *Lawrence*. The real failure of *Roe*, *Planned Parenthood*, and *Lawrence*, therefore, is that it forces the Court to exercise institutional restraint where none is necessary (as in *Hollingsworth*), while also allowing the Court to manipulate the Constitution to achieve desirable outcomes where restraint is *unquestionably* necessary. In the end, both approaches leave people, whether it is women in *Roe* or same-sex couples in *Hollingsworth*, wondering whether their rights are fundamental or political. Put differently, invalidating same-sex marriage bans is *consistent* with institutional restraint. Had the Court reached the same result in *Lawrence* but, as Justice O’Connor suggested, based its decision on equal protection principles, it would have had the doctrinal basis to invalidate same-sex marriage bans in *Hollingsworth*.

And she was right. Absent a logical justification, discrimination is unconstitutional. The Court’s three scrutiny levels, which adjust the scrutiny level based on the legislative classification, is unnecessary. A law is no less unconstitutional simply because it discriminates based on gender rather than race, or on age rather than ethnicity. Any law that discriminates without a logical justification should be struck down. The equal protection clause does not necessarily guarantee equal outcomes for all citizens, but it promises equal treatment. Furthermore, equal treatment enhances procedural and democratic equality because it empowers disenfranchised groups and prevents majorities from enacting arbitrary legislation.

Equal protection is, therefore, a path to substantive rights protection and institutional restraint. Substantive due process and penumbras, however, are a license for judges to centralize democracy among nine unelected lawyers. What the Court cannot do through the Constitution it should never do through legal fictions and ad hoc rationalizations. Thus, the Court should not invalidate laws where: (1) the Constitution is silent or its terms are ambiguous; and (2) reasonable people can differ regarding desirable policy outcomes. As discussed in Part II of this series, to restore democratic equilibrium the Court should be more circumspect about granting *certiorari*, expand the political question and justiciability doctrines, and apply a single level of scrutiny in discrimination cases. Some “cases” are not “controversies” at all, and should be left to the democratic process at

the state and local levels.<sup>236</sup>

In his dissent, Justice Scalia, who has also authored some questionable opinions,<sup>237</sup> didn't mince words:

In the majority's telling, this story is black-and-white: Hate your neighbor or come along with us. The truth is more complicated. It is hard to admit that one's political opponents are not monsters, especially in a struggle like this one, and the challenge in the end proves more than today's Court can handle. Too bad. A reminder that disagreement over something so fundamental as marriage can still be politically legitimate would have been a fit task for what in earlier times was called the judicial temperament. We might have covered ourselves with honor today, by promising all sides of this debate that it was theirs to settle and that we would respect their resolution. We might have let the People decide.

But that the majority will not do. Some will rejoice in today's decision, and some will despair at it; that is the nature of a controversy that matters so much to so many. But the Court has cheated both sides, *robbing the winners of an honest victory, and the losers of the peace that comes from a fair defeat. We owed both of them better.* I dissent.<sup>238</sup>

Justice Kennedy's ends-justify-the-means ends rationale reflects noble intentions, but yields undemocratic results. It also makes the presidential election, not law, more important than written, unwritten, or invisible constitutions. Same and opposite-sex couples, conservatives and liberals, whatever those two words mean, have a social contract with the government that gives them the power to define its unenumerated rights. The Court should take heed from the relentless legislative attempts to gut *Roe*: the people have opinions too, and they also act "with bite."

#### IV. CONCLUSION

Judges matter, but citizens matter more. The penumbras are important, but they're not designed to replace words. The unwritten Constitution is not supposed to clash, or stand alone, from the written one. Liberty is neither secured nor vindicated when its commands come from the

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<sup>236</sup> *Id.* ("[T]his Court lacks jurisdiction to review the decisions of the courts below.").

<sup>237</sup> See e.g., Erwin Chemerinsky, *The Jurisprudence of Justice Scalia: A Critical Appraisal*, 22 HAWAII L. REV. 385, 391–95 (2000) (arguing that several decisions by Justice Scalia constitute value judgments that, in Professor Chemerinsky's view, coincide with his personal beliefs).

<sup>238</sup> *Windsor*, 133 S. Ct. at 2711 (Scalia, J., dissenting) (emphasis added).

top down. If Justice Kennedy honestly believes that “[t]he essence of democracy is that the right to make law rests in the people and flows to the government, not the other way around[,]”<sup>239</sup> then his opinions should better reflect that belief. Citizens deserve honest judges who believe in their right to create the laws under which they are governed. Nothing is more free—or equal—than a society where democracy expresses itself from the roots, not from the skies.

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<sup>239</sup> Hollingsworth v. Perry, 133 S. Ct. 2652, 2675 (2013) (Kennedy, J., dissenting).

