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## Privacy

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## PRIVACY

Jed Rubenfeld <sup>1/</sup>

This Article is about the constitutional right to privacy, a right that many believe has little to do with privacy and nothing to do with the Constitution. By all accounts, however, the right to privacy has everything to do with delineating the legitimate limits of governmental power. The right to privacy, like the natural law and substantive due process doctrines for which it is a late-blooming substitute, supposes that the very order of things in a free society may on certain occasions render intolerable a law that violates no express constitutional guarantee.

Privacy doctrine supposes too that the judiciary is an appropriate body to determine whether a law transgresses these implicit limits. This is a proposition that notoriously divides conservatives and liberals; the side on which one will find either group depends, of course, on the particular decade and the particular legal issue one chooses to study. I will try to escape that debate in what follows. The judiciary has always gone beyond the literal-constitutional text <sup>2/</sup> to strike down legislation and no doubt will continue to do so. Whether this "activism" is to be explained by

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<sup>1/</sup> This article is excerpted from Jed Rubenfeld, "The Right of Privacy," 102 Harvard Law Review 737 (February 1989), Copyright (c) 1989 by the Harvard Law Review Association, and is reprinted here with permission. Most footnotes are omitted, and those retained have been renumbered.

<sup>2/</sup> "Despite claims to the contrary, there has been a period of time wherein the Court did not actively enforce values which a majority of the justices felt were essential in our society even though they had no specific textual basis in the Constitution." 2 R. Rotunda, J. Nowak & J. Young, Treatise on Constitutional Law Section 15.7, at 79 (1986) [hereinafter Treatise]. The magnitude of "non-textuality" in established constitutional law--supposing that a "textual"/"non-textual" distinction could be made coherent--extends of course far beyond the right to privacy. Freedom of association, for example, is nowhere mentioned in the constitutional text; nor are the prohibitions of irrational legislation and state legislation that burdens or discriminates against interstate commerce. Moreover, the application

the irresistible urge of all officeholders to expand the power of their office, by the meaninglessness of the idea of a "literal" text, or by the Framers' original intent, we may leave the sociologists, the literary critics, and the Attorney General's office to determine. Moreover, rather than asking which political platform is most closely affiliated with the decisions of a particular time, we ought to ask another question: in its elaboration of implicit constitutional law, is the judiciary genuinely freeing the individual from overreaching state power? That is the self-conception with which the courts will justify their decisions; that is the political vision to which proponents of privacy law claim. Thus it is an apt criterion by which to evaluate their work.

The laws struck down under the rubric of privacy have had a peculiar tendency to gravitate around sexuality: the groundbreaking cases involved contraception, marriage, and abortion. The significance of this trend has been largely passed over in silence. Behind this silence may lie an intuition or tacit agreement that sexuality is an area of life into which the state has no business intruding. To those who imagined that the privacy doctrine could be explained by reference to some such intuition, Bowers v. Hardwick<sup>3/</sup> has startlingly revealed the inadequacy of their position.<sup>4/</sup>

Yet, even before Hardwick, few believed that the privacy doctrine could be interpreted solely by reference to a principle concerning sexuality. Instead the reigning explanatory concept has been "personhood." Our personhood must remain inviolate: that is

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(Footnote Continued)

of the Bill of Rights to state governments is nothing less than pure "substantive due process," and the bedrock of all constitutional law--the power of the Supreme Court to strike down a law deemed constitutional by a state's highest court or by Congress--had itself to be inferred. See Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803); infra note 13. This Article does not seek to defend non-textual constitutional interpretation in general. The Conclusion, however, suggests a constitutional basis for the right to privacy.

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

4/ In Hardwick, the Court upheld against a right-to-privacy challenge a state statute criminalizing homosexual sodomy. See id. at 195-96. The Court specifically rejected the position that the right to privacy protected all "private sexual conduct between consenting adults." See id. at 191.

what privacy protects; that is its principle. No serious critique of the personhood idea has yet appeared.

Three overlapping inquiries are thus presented. The first involves the validity of personhood as the principle by which to explain and articulate the privacy doctrine; the second, the relations among privacy doctrine, sexuality, and the limits of state power; and the third, the question of whether some principle other than personhood might underlie the constitutional right to privacy.

This Article will address these three inquiries as follows. Part I summarizes the development of the right-to-privacy case law. [Part II, which offers a critique of the personhood principle, and Part III, which purportedly advances a new way of conceiving, explaining, and applying the privacy doctrine, have not been reproduced.]

Hardwick has exposed deep flaws in the prevailing jurisprudence and ideology of privacy. The constitutional ground has shifted; perhaps it is dissolving altogether. The changing membership of the High Court raises the possibility of a wholesale reconsideration of the privacy doctrine's propriety. Yet even when the doctrine was first ascendant, the Court never hazarded a definitive statement of what it was supposed to protect. At the heart of the right to privacy, there has always been a conceptual vacuum.

The reason for this, I will try to show, is that the operative analysis in privacy cases has invariably missed the real point. Past privacy analysis has taken the act proscribed by the law at issue--for example, abortion, interracial marriage, or homosexual sex--and asked whether there is a "fundamental right" to perform it. <sup>5/</sup> But the fundamentality of the right to privacy is not to be found in the supposed fundamentality of what the law proscribes. It is to be found in what the law imposes. The question, for example, of whether the state should be permitted to compel an individual to have a child--with all the pervasive, far-reaching, lifelong consequences that child-bearing ordinarily entails--need not be the same as the question of whether abortion or even child-bearing itself is a "fundamental" act within some normative framework. The distinguishing feature of the laws struck down by the privacy cases has been their profound capacity to direct and to occupy individuals' lives through their affirmative consequences. This affirmative power in the law,

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<sup>5/</sup> See, e.g., Hardwick, 478 U.S. at 190 ("The issue presented is whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy . . . ."); Griswold v. Connecticut, 381 U.S. 479, 493 (1965) (Goldberg, J., concurring).

lying just below its interdictive surface, must be privacy's focal point.

## I. A GENEALOGY OF PRIVACY

The right to privacy discussed here must not be confused with the expectations of privacy secured by the fourth amendment or with the right of privacy protected by tort law. In the latter two contexts, the concept of privacy is employed to govern the conduct of other individuals who intrude in various ways upon one's life. Privacy in these contexts can be generally understood in its familiar informational sense; it limits the ability of others to gain, disseminate, or use information about oneself. By contrast, the right to privacy that concerns us attaches to the rightholder's own actions. It is not informational but substantive, immunizing certain conduct--such as using contraceptives, marrying someone of a different color, or aborting a pregnancy--from state proscription or penalty.

The emergence of this substantive right to privacy, and hence the constitutional protection of the conduct to which it applies, is of very recent origin. The doctrine is only some twenty years old. <sup>6/</sup> Its genealogy, however, extends as far back as constitutional law reaches in this country. Indeed its most venerable ancestor is the decision that rendered constitutional law itself possible: Marbury v. Madison. <sup>7/</sup> Marbury is a progenitor of the right-to-privacy decisions because it too belongs to the diverse series of cases in which the Supreme Court has reached out beyond the express language of the Constitution and struck down on constitutional grounds some piece of federal or state legislation. A brief history of this family of cases follows.

### A. Pre-Privacy Case Law

The earliest and most authoritative articulation of the idea that fundamental rights exist unspecified in the Constitution is of course in the ninth amendment, which provides: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." The earliest judicial statement of this idea followed soon after the Constitution

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<sup>6/</sup> The right to privacy was first announced in Griswold v. Connecticut, 381 U.S. 479 (1965). See infra pp. 744-45.

<sup>7/</sup> 5 U.S. (1 Cranch) 137 (1803).

was ratified. In Calder v. Bull, <sup>8/</sup> Justice Chase advanced the proposition that legislation might be held invalid under natural law even if the legislation does not violate any specific constitutional principles or provisions. Justice Iredell, however, disagreed, and his views have, at least ostensibly, prevailed. From the early 1800's to the present, the Court has generally paid lip service to the idea that it should not use its constitutional power to invalidate legislation except where specific constitutional provisions supply the principle of invalidity.

Yet the Court has never practiced what it preached. Through one device or another, the Court has always managed to read into the Constitution limits on legislative power that can hardly be gathered from within that document's four corners. In the antebellum period, the Court accomplished this task principally through ingenious interpretations of the contract clause, one of the few constitutional provisions then applicable against the states. Thus, in Trustees of Dartmouth College v. Woodward, <sup>9/</sup> the Court struck down New Hampshire's attempt to gain legislative control over Dartmouth College; Dartmouth's corporate charter was a "contract" for constitutional purposes, the Court held, and the disputed law would have "impaired the obligations" thereof.

After the Civil War, the passage of the fourteenth amendment gave the Court a great deal more constitutional material to consider. Curiously, the provision of that amendment containing what appear to be the most explicit and potent substantive limitations on state legislative powers--the privileges and immunities clause--proved too much for the Court to swallow. In a series of early post-War cases, the Court gave an extremely narrow reading to that clause, <sup>10/</sup> and this reading remains in effect today. Instead, the Court seized on a much more unlikely provision--the due process clause--for the strength to take on the state legislatures.

Although the phrase "due process" might seem to pertain only to procedural interests, the Court began to read substantive guarantees into the clause as well. From the late 1870's to the turn of the century, the Court formulated an interpretation of due process in which the predominant figure was a fundamental, potentially

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<sup>8/</sup> 3 U.S. (3 Dall.) 386 (1798).

<sup>9/</sup> 17 U.S. (4 Wheat.) 518 (1819).

<sup>10/</sup> See The Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 79-80 (1873).

inviolate "liberty of contract" with which legislatures had no power to interfere. <sup>11/</sup> Armed with this "liberty of contract," guaranteed as a matter of substantive due process, the Court was prepared in this century to do considerable damage to state economic regulations. Thus, in Lochner v. New York, <sup>12/</sup> the Court invalidated a maximum-hours law for bakers on the ground that it interfered with "the freedom of master and employee to contract." On similar grounds the Court later condemned, for example, prohibitions of anti-union clauses in labor contracts, <sup>13/</sup> price-fixing regulations of employment agencies, <sup>14/</sup> and a fair-wage law for women. <sup>15/</sup>

In the same period, the Court also relied on the due process clause to invalidate two state laws regulating the education of children. In Meyer v. Nebraska, <sup>16/</sup> the Court held that a state could not prohibit the teaching of foreign languages in elementary school, and in Pierce v. Society of Sisters, <sup>17/</sup> the Court struck down a requirement that all children attend public school. Although Meyer and Pierce resemble the other Lochner-era cases in analytic form, in content they are closer to modern privacy case law. Indeed, for reasons that will emerge more clearly below, these two cases may be seen as the true parents of the privacy doctrine, and today they are frequently classified together with other privacy decisions.

The climax of the Lochner-era jurisprudence was President Franklin Roosevelt's retaliatory plan to increase the number of Justices on the Supreme Court. Although the plan did not succeed as designed, it apparently put sufficient pressure on the Court to change the course of constitutional law. In West Coast Hotel Co. v.

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<sup>11/</sup> See Allgeyer v. Louisiana, 165 U.S. 578, 589-91 (1897) (dicta); Mugler v. Kansas, 123 U.S. 623, 661 (1887); Munn v. Illinois, 94 U.S. 113, 134 (1877).

<sup>12/</sup> 198 U.S. 45 (1905).

<sup>13/</sup> See, e.g., Coppage v. Kansas, 236 U.S. 1 (1915); Adair v. United States, 208 U.S. 161 (1908).

<sup>14/</sup> See Ribnik v. McBride, 277 U.S. 350 (1928).

<sup>15/</sup> See Morehead v. New York ex rel. Tipaldo, 298 U.S. 587 (1936).

<sup>16/</sup> 262 U.S. 390 (1923).

<sup>17/</sup> 268 U.S. 510 (1925).

Parrish, <sup>18/</sup> the Court renounced its freedom of contract/substantive due process jurisprudence. A year later, in United States v. Carolene Products Co., <sup>19/</sup> the Court held that state economic regulations were entitled to a presumption of constitutionality. In the ensuing decades, the Court repeatedly held that states were free to regulate "their internal commercial and business affairs, so long as their laws do not run afoul of some <sup>20/</sup> specific constitutional prohibition, or of some valid federal law.

Even while repudiating its substantive due process jurisprudence, however, the Court expressly noted that its newfound self-restraint might not extend beyond the economic realm. <sup>21/</sup> Indeed, in an important line of cases involving individual liberties not overtly economic in nature, the Court has continued to strike down state laws found to violate fundamental rights nowhere specified in the Constitution. These cases elaborate the right-to-privacy doctrine.

#### B. The Privacy Cases

The great peculiarity of the privacy cases is their predominant, though not exclusive, focus on sexuality--not "sex" as such, of course, but sexuality in the broad sense of that term: the network of decisions and conduct relating to the conditions under which sex is permissible, the social institutions surrounding sexual relationships, and the procreative consequences of sex. Nothing in the privacy cases says that the doctrine must gravitate around sexuality. Nevertheless, it has.

The Court first announced the new privacy doctrine twenty-four years ago in Griswold v. Connecticut. <sup>22/</sup> In Griswold the Court invalidated statutes prohibiting the use and distribution of contraceptive devices. Eschewing an approach explicitly grounded in Lochnerian substantive due process, the Court stated that a "right to

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<sup>18/</sup> 300 U.S. 379 (1937).

<sup>19/</sup> 304 U.S. 144 (1938).

<sup>20/</sup> Lincoln Fed. Labor Union v. Northwestern Iron & Metal Co., 335 U.S. 525, 536 (1949); . . .

<sup>21/</sup> See e.g., Carolene Products, 304 U.S. at 152 n.4.

<sup>22/</sup> 381 U.S. 479 (1965).

privacy" could be discerned in the "penumbras" of the first, third, fourth, fifth, and ninth amendments. This right included the freedom of married couples to decide for themselves what to do in the "privacy" of their bedrooms.

Two years later, in Loving v. Virginia, <sup>23/</sup> the Court struck down a law criminalizing interracial marriage. The Court ruled that states could not interfere in that manner with an individual's choice of whom to marry. On similar grounds, the Court also invalidated laws restricting the ability of poor persons to marry or to divorce. <sup>24/</sup>

Although it remained possible after Loving to understand the new privacy doctrine as limited (for some unelaborated reason) to marital decisions, in Eisenstadt v. Baird <sup>25/</sup> the Court extended its Griswold holding to protect the distribution of contraceptives to unmarried persons as well. "If the right to privacy means anything," the Court stated, "it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."

The next year, the Court took a further step from the confines of marriage and delivered its most controversial opinion since Brown v. Board of Education. <sup>26/</sup> Justice Blackmun, with only two Justices dissenting, wrote in Roe v. Wade <sup>27/</sup> that the right to privacy was "broad enough to encompass a woman's decision whether or not to terminate her pregnancy." Subsequent cases have reaffirmed Roe in the context of state efforts to "regulate" abortions <sup>28/</sup> but the Court's support of Roe appears to be rapidly diminishing.

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<sup>23/</sup> 388 U.S. 1 (1967).

<sup>24/</sup> See Zablocki v. Redhail, 434 U.S. 374 (1978); Boddie v. Connecticut, 401 U.S. 371 (1971).

<sup>25/</sup> 405 U.S. 438 (1972).

<sup>26/</sup> 347 U.S. 483 (1954).

<sup>27/</sup> 410 U.S. 113 (1973).

<sup>28/</sup> [See Webster v. Reproductive Health Services, 109 S.Ct. (1989); decided after the original article was published.--Ed.]

The right to privacy was further expanded in the 1977 case of Moore v. City of East Cleveland, <sup>29/</sup> in which the Court struck down a zoning ordinance that limited occupancy of dwelling units to members of a nuclear family--the "nominal head of a household," his or her spouse, and their parents and children. Although there was no majority opinion, the four-Justice plurality expressly relied on the Griswold line of cases, as well as Meyer and Pierce, emphasizing the "private realm of family life which the state cannot enter."

The Court's most important recent privacy decision was Bowers v. Hardwick, <sup>30/</sup> in which a 5-4 majority held that a state could make homosexual sodomy a criminal offense without violating the right to privacy. The Hardwick decision deserves a more detailed treatment for two reasons. First, it may foretoken a considerable narrowing of the privacy doctrine. Second, it vividly illustrates the doctrine's current analytic difficulties.

#### C. Bowers v. Hardwick

Justice White, writing for the Court, began by announcing that the issue presented was "whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy." So stated, the issue was for the majority literally a foregone conclusion. Justice White's formulation was an expression of the majority's constitutional instincts, and it served in this capacity as a premise or interpretive canon in the ensuing discussion. The Bill of Rights cannot be referring to that, after all, and therefore we must interpret its provisions and our precedents accordingly. In this way the Court's conclusion logically preceded its analysis.

The majority's first line of attack could portend dark days for the privacy doctrine. Calls for extension of the doctrine, Justice White stated, should be treated with great caution in order to avoid the mere "imposition of the Justices' own choice of values on the States." Indeed, the majority suggested, in its past privacy decisions the Court had made fundamental normative decisions unmoored from any constitutional anchoring. Justice White's clear intimation was that such an injudicious and unjudicial practice would not be continued here.

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<sup>29/</sup> 431 U.S. 494 (1977).

<sup>30/</sup> 478 U.S. 186 (1986).

The difficulty with Justice White's way of putting matters is that the Court in Hardwick necessarily drew a line: the right to privacy stops here. That act of line-drawing was a quintessentially normative judgment. Unless and until the Court repudiates the privacy doctrine altogether, which it did not do in Hardwick, a decision to draw the line here is nothing more than a judgment that this particular activity is either less fundamental or more unsavory than the activities protected in prior cases. Moreover, the expression of this normative judgment in Hardwick is easy to find: it was the first thing uttered--in Justice White's statement of the issue presented, which so plainly expressed what I called his constitutional instincts. Thus the Court's opening salvo, a formulation of the issue calculated to shock the judicial conscience, directly compromised its first line of attack--the argument that the judicial conscience should be irrelevant.

Yet the majority knew very well that the case turned ultimately on value judgments. For this reason, despite briefly waving the standard of judicial objectivity, the majority proceeded to give two arguments concerning the normative status of homosexuality. First, cataloguing American criminal sodomy statutes from the eighteenth to the twentieth century, the majority argued that homosexual sodomy is not supported by the country's historical and traditional values. Second, Justice White suggested, homosexual sodomy cannot be distinguished for doctrinal purposes from other forms of sexual activity--adultery, incest, and so on--that no member of the Court is yet prepared to constitutionalize. . . .

The final aspect of the majority opinion to be noted here, and the most important for present purposes, is its treatment of the privacy precedents. Justice White stated that the Court's prior cases have recognized three categories of activity protected by the right to privacy: marriage, procreation, and family relationships. According to Justice White, "homosexual activity" has "no connection" to any of these three categories, and is therefore presumptively outside the scope of the doctrine. For our purposes, the significance of this argument lies in its evisceration of privacy's principle.

Justice White neither sought nor found any unifying principle underlying his three categories. It was as if the Court had said, "We in the majority barely understand why even these three areas are constitutionally protected; we simply acknowledge them and note that they are not involved here." There is thus no test derived from the precedents with which the Court need evaluate the case of homosexuality. There is no principle to be applied. In this sense, critics of Justice White's opinion have been correct to call it "unprincipled."

The device of compartmentalizing precedent is an old jurisprudential strategy for limiting unruly doctrines. The effect

here is that, after Hardwick, we know that the right to privacy protects some aspects of marriage, procreation, and child-rearing, but we do not know why. By identifying three disparate applications ungrounded by any unifying principle, the majority effectively severed the roots of the privacy doctrine, leaving only the branches, which will presumably in short order dry up and wither away.

The dissenting opinions, unhappily, provided little reply to the majority's systematic assault. Justice Blackmun, writing for all four dissenters, first attempted to brush the majority's constitutional instincts aside. "This case is no more about a 'fundamental right to engage in homosexual sodomy,'" the dissent began, "than . . . Katz v. United States was about a fundamental right to place interstate bets from a telephone booth." Justice Blackmun's intuition--that the majority's formulation of the issue somehow prejudged the outcome--was correct. His statement, however, was plainly wrong.

Katz involved fourth amendment privacy. <sup>31/</sup> That sort of privacy does make the claimant's substantive conduct irrelevant; at issue is the government's manner of discovering the conduct. The new right to privacy, as observed earlier, is not at heart informational. It immunizes certain conduct regardless of whether or how it comes to be discovered. To be sure, Justice Blackmun attempted to weave the two kinds of privacy--substantive and informational--together in his analysis of Georgia's sodomy statute. His opening formulation, however, overlooked the critical point: in fourth amendment cases, a court must resist the temptation to steal a glance at the claimant's substantive conduct when deciding the constitutional issue; in privacy cases, a court must resist the temptation to avert its eye. The court has no choice but to look the conduct in its face--even if society as a whole is content to react with hypocritical denial or "instinctive" aversion--and take its measure. Griswold proved to be very much about a right to use contraceptives rather than a right to keep secret what one does in the bedroom, just as Roe is about the right to have an abortion and Loving is about the right to marry interracially. Justice Blackmun's initial hesitation is fatal; a court prepared to strike down laws against homosexual sodomy must first be prepared to look homosexuality in the eye.

Perhaps this hesitation accounts for the weakness of Justice Blackmun's dissent when it finally comes round to articulating a substantive privacy principle that would include the protection of

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<sup>31/</sup> See Katz v. United States, 389 U.S. 347 (1967) (holding that the wiretapping of a public pay phone without a warrant violated the caller's fourth amendment rights).

homosexual sodomy. The opinion suggests that the state cannot bar any form of "sexual intimacy." Such a holding would be obliged to distinguish cases such as adultery and incest, which Justice Blackmun tried gamely--but rather unsatisfactorily--to do. More importantly, however, such a holding would have to explain why sexual intimacy in its various forms rises to constitutional stature. What produces the "fundamental" nature of homosexual or any other kind of sex?

On this point the dissent is disturbingly cursory and vague. Justice Blackmun relied primarily on the role of sexual relations in a person's "self-definition." Although the dissent gives this concept scant elaboration, "self-definition" offers, in the view of many, privacy's most promising principle. It is the "personhood" principle and the subject of Part II of [the original] Article.

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What, then, is the right to privacy? What does it protect? A number of commentators seem to think that they have it when they add the word "autonomy" to the privacy vocabulary. But to call an individual "autonomous" is simply another way of saying that he is morally free, and to say that the right to privacy protects freedom adds little to our understanding of the doctrine. To be sure, the privacy doctrine involves the "right to make choices and decisions," which, it is said, forms the "kernel" of autonomy. The question, however, is which choices and decisions are protected.

On this point the Court has offered little guidance. We are told that privacy encompasses only those "personal rights that can be deemed "fundamental" or "implicit in the concept of ordered liberty," <sup>32/</sup> that it insulates decisions "important" to a person's destiny, <sup>33/</sup> and that it applies to "matters . . . fundamentally affecting a person." <sup>34/</sup> Perhaps the best interpretation of these formulations is that privacy is like obscenity: the Justices might not be able to say what privacy is, but they know it when they see

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<sup>32/</sup> Roe v. Wade, 410 U.S. 113, 152 (1973) (quoting Palko v. Connecticut, 302 U.S. 319, 325 (1937)); see also Paris Adult Theatre 1, 413 U.S. at 65 (quoting Roe).

<sup>33/</sup> See Whalen v. Roe, 429 U.S. 589, 600 (1977) (holding that no privacy right invalidates a law requiring establishment of a computerized prescription registration system).

<sup>34/</sup> Eisenstadt v. Baird, 405 U.S. 438, 453 (1972).

it. <sup>35/</sup> How else can one explain the Court's astonishing introduction of its pivotal holding in Eisenstadt v. Baird <sup>36/</sup> with the phrase, "If the right to privacy means anything, it means . . ."?

That a doctrine might have to wait for a principle to "catch up" with it is nothing new to common-lawmaking in general or to constitutional lawmaking in particular. Yet a complete absence of conceptualization cannot be maintained. To define "fundamental" rights as those that cover matters "fundamentally affecting persons" is less than entirely satisfactory. Can no more be said?

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[Here follow Parts II and III devoted to Rubenfeld's analysis of personhood and privacy.]

#### IV. CONCLUSION: THE CONSTITUTIONAL GROUNDING OF THE RIGHT TO PRIVACY

##### A. Privacy and Lochner

The right to privacy, in its constitutional incarnation, was discovered in the "penumbras" and "emanations" of other constitutional guarantees. The liberty of contract, in its day, was invoked as a matter of "substantive due process." A devious irony is at work in these phrases, as if a consciousness of the charade had inadvertently crept into the judicial language itself, announcing the one doctrine as mystification and the other as oxymoron. Yet what drove privacy into the penumbras, it should be recalled, was a perceived need to differentiate the privacy doctrine from the language of substantive due process. Unfortunately, this insecurity on privacy's part--an identity complex no doubt--resulted in the very thing feared; by resorting to shadows, the right to privacy has simply invited critics to expose it--and to brand it, of course, with the scarlet letter of Lochnerism.

A guilty conscience, however, is not necessarily proof of the crime. To mock Justice Douglas' conjuring--as easy as that may be--is plainly insufficient if the goal is to prove that, beneath the

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<sup>35/</sup> Cf. Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

<sup>36/</sup> 405 U.S. 438 (1972).

magic words, privacy is Lochner all over again. There is too much implicit constitutional law for that. The freedom of association, the requirement that legislation be rational, the application of much of the Bill of Rights to the states, and most fundamentally, the disability of the political branches to be the final arbiters of the scope of their own powers are all principles of implicit constitutional law, but they are not all Lochner.

Thus privacy's critics are obliged to argue that within the entire field of implicit constitutional law, the privacy doctrine and Lochner share some common flaw. For privacy's proponents, on the other hand, the point is to show what distinguishes privacy jurisprudence from the Lochner line of cases, and to show in the process, without resort to penumbras or emanations, what gives privacy its constitutional status.

One way to distinguish privacy from Lochner is to say that the overruled Lochner era cases involved economic regulations. The Lochner error, it might be said, was the failure to recognize that the Constitution does not enact any particular economic theory; thus, the repudiation of Lochner means only that courts cannot sit as superlegislatures overseeing state or federal economic regulation. In the privacy cases, the courts do no such thing.

This distinction betrays a superficial understanding of both Lochner and privacy. The Lochner Court almost certainly did not understand itself to be sitting as a superlegislature for economic regulation, protecting American commerce or prosperity. In its own eyes, the Lochner Court was not regulating economics; it was protecting liberty--the liberty of contract. That a man was free to do as he pleased with his own property--that is, property in which he had a "vested right"--was axiomatic in the thinking of many at that time. From this point of view, Lochner did not involve mere "economics" but rather the most fundamental liberties of man against the state.

Some will reply, I suppose, that the Lochner Court's conception of liberty or of its own decisionmaking is irrelevant. The fact is, they will say, that the Lochner decisions did involve economic matters. Even if liberty was at issue as well, the lesson remains that liberty in the economic realm is simply not to be the subject of implicit constitutional law.

Here, however, privacy's would-be proponents are revealing a parallel misunderstanding of privacy doctrine itself. They are perhaps imagining that privacy doctrine is limited to purely "private"--perhaps simply sexual--matters. In fact, the right to privacy is fully applicable to the economic realm. Suppose, for example, that a law were passed for the purpose of rationalizing the economy, with unimpeachable empirical evidence backing up its intended efficiencies,

that subjected persons at an early age to a complex battery of exams, the results of which were used to assign each individual to the most appropriate educational track and the most productive occupation. It seems certain to me that the right to privacy--clearly on an anti-totalitarian principle, but even on a personhood principle--would not permit the state to dictate its citizens' economic occupations. Our unsophisticated privacy proponents, conceding this result, might now wish to say: "But that's not economic regulation; it's a matter of protecting liberty." We have just seen, however, that the very same could have been said on behalf of Lochner. Thus the distinction between economic and non-economic matters cannot serve us here.

Instead consider the following: the rights protected by the Lochner doctrine were pre-political. Vested property rights and the liberty of contract did not have to be explicitly protected by the Constitution because, in the Lochnerian view, they existed outside the Constitution. They pre-existed the Constitution. Indeed, these rights antedated the formation of society itself. Property was the reason why men instituted government, and contract was the means by which they did so. <sup>37/</sup>

There is nothing pre-political in the right to privacy. If the kind of creeping totalitarianism that I have described is a danger to us, it is so solely because of our commitment to democracy--to a set of political values. The right to privacy, as I have sought to elucidate it, became a right only at the moment when we constituted ourselves as a democratic polity. For this reason the right to privacy is not, like the rights protected under Lochner, extraneous to the Constitution. It does not purport to antedate the Constitution or to arise from a source, such as the "social contract," superior in authority to the Constitution. The right to privacy is a constitutional right because the Constitution is the document that establishes democracy in this country.

The right to privacy is a political doctrine. It does not exist because individuals have a sphere of "private" life with which the state has nothing to do. The state has everything to do with our private life; and the freedom that privacy protects equally extends, as we have seen, into "public" as well as "private" matters. The right to privacy exists because democracy must impose limits on the

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<sup>37/</sup> This formulation refers to the classical liberal description of the emergence of civil society out of the state of nature. See T. Hobbes, Leviathan ch. XVII, at 173-77 (J. Plamenatz ed. 1963) (1st ed. 1651); J. Locke, The Second Treatise of Government chs. VIII-IX, at 49-66 (J. Gough rev. ed. 1976) (3d ed. 1698); . . .

extent of control and direction that the state exercises over the day-to-day conduct of individual lives.

## B. Totalitarianism and Constitutional Interpretation

A "transcendental" doctrine of constitutional law, in the Kantian sense of that word, would be a doctrine necessary to the very possibility of the particular form of government constituted in a given society. Under our form of government, constitutional democracy, there are, I believe, two such doctrines.

The first derives from the principle that the meaning of constitutional protections may not be finally established by those governmental actors against whom those protections are chiefly directed. If it were, the Constitution would in reality be without meaning. Its protections, in form unchanged, would in fact be wholly illusory. This is the principle on which the doctrine of Marbury v. Madison rests.

Accountability to the constitutional text, however, is but one of two necessary modes by which the state's power is ultimately limited in our form of government. The other is accountability to the people. Yet just as the political branches, in the absence of Marbury, could bend the Constitution into a serviceable and pliant shape, so government, in the absence of a privacy doctrine, could similarly shape the lives of its citizens. The very possibility of accountability to a people presupposes that the bodies and minds of the citizenry are not to be too totally conditioned by the state that the citizenry is meant to be governing. If they were, self-government, although it might continue to exist in form, would in fact be wholly illusory.

People do not meaningfully govern themselves if their lives are subtly but pervasively molded into standard, rigid, normalized roles. They simply reproduce themselves and their social institutions. A people may of course choose to reproduce their state; but they must be free in order to choose to do so. At a certain point, state control over the quotidian, material aspects of individuals' lives--even where the people have democratically imposed such control themselves--deprives them of this freedom. Thus, the second transcendental doctrine of our constitutional law is given by the anti-totalitarian principle with which I have tried to explain the right to privacy.

It will likely be replied that the laws invalidated by the right to privacy, as I have developed it, have no such thoroughgoing conditioning effects that would deprive people of the ability to exercise their democratic freedom. Laws against abortion, it will be

said, in no way impede women from exercising their suffrage; nor do laws against homosexual sex impede homosexuals from doing the same.

To put things this way is similar to criticizing applications of the first amendment on the ground that proscribing a particular bit of speech will not genuinely threaten the democratic process or that permitting a particular governmental expression of faith will not genuinely establish religion. More than this, however, the laws implicated by the right to privacy do indeed have a discernible conditioning effect that should not be overlooked. The centuries-long prohibitions of contraception and abortion, precisely by assuring that women's lives would be substantially taken up with the functions of child-bearing, must have made it difficult, if not impossible, for many women to discover or to assert their political will and for men and women alike to reconceive women's societal role. Similarly, the prohibition of homosexual sex has contributed to our evolution into a society that looks upon "homosexuals" as a distinct species of person, as opposed to a society in which individuals have a less rigid sexual orientation. Hence, saying that homosexuals remain free to exercise their suffrage in an attempt to overturn anti-homosexual laws begs the question. A similar point could be made with respect to laws forbidding interracial marriage.

The same cannot be said, however, of the laws struck down in the Lochner era, because these laws did not involve the forced, affirmative occupation and direction of individuals' lives. Modern Lochnerians may feel that minimum wage or maximum rent laws are an illegitimate taking of property; they may even feel that such laws represent an outrageous deprivation of individual liberty. But these laws do not positively take over and redirect lives. They do not threaten forcibly to condition the totality of an individual's existence.

Finally, consider again our hypothetical law by which government would dictate the vocation of each individual. Imagine, for a moment, the unlikely but conceivable successes of such a law: the order it might produce, the sense of satisfaction each individual might obtain by knowing his place in society, the decrease in crime, and the nationwide gains in productivity. Despite all this, is there anyone who doubts that the Constitution must forbid such a law? The source of this "must," however, is far from clear. Perhaps one might invoke the thirteenth amendment or a right of "self-expression" embodied in the first amendment. But these gropings in the constitutional text would be disingenuous. It is the possibility of democracy itself that requires an anti-totalitarian principle.

In the eighteenth century, the Constitution applied almost exclusively to the federal government, and it was quite unclear to what extent the federal government would be able to operate directly

on the daily lives of the citizenry. State governments were thought to be the chief holders of that power. It was, moreover, probably unthinkable at that time that governmental power could develop technologies and institutions of potentially total control over the shape and purposes of citizens' lives. Now the scope of federal legislative power has become clear; now the Constitution has come to be the protector of fundamental liberties against state governments as well; and now governmental power has so expanded that it affirmatively shapes our lives with the potential for total control. The effect of these developments has been to compel a new articulation--in the form of the right to privacy--of what is the most abecedarian tenet of self-government: that government must exist for the people, and the people must not become mere instruments of the state. This tenet necessitates, I have tried to show, a right to be let alone, if by "let alone" we understand the right not to have the course of one's life dictated by the state.