

A 'LIVING CONSTITUTION': ROLLING DICE AND THE DEATH OF THE RIGHT TO LIFE

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From a room in Elsinore Castle ... Enter Justice Blackmun:

To be, or not to be,—that is the question:—

Whether 'tis nobler in the mind to suffer

The slings and arrows of outrageous fortune;

Or to take arms against a sea of troubles;

And by opposing end them?¹

I INTRODUCTION

In the months and weeks leading up to the 22nd of January 1973 the Supreme Court of the United States was tasked with settling arguably the most controversial decision in the history of the Court: *Roe v Wade*.² Writing for the majority, Blackmun J's opinion reads as if the Court faced, much like Shakespeare's Hamlet did, a vexing moral question. His judgment is all the more bewildering since the Court was actually tasked with a simple constitutional question: whether a Texas criminal abortion statute was constitutional, not whether abortion was moral.

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¹ William Shakespeare, *The Complete Works of William Shakespeare* (Gramercy Books, 1997) 1088.

² 410 U.S 113 (1973).

His reasoning was rooted in a ‘living constitution’ approach, which became apparent at the onset of his judgment when he nonsensically insisted that ‘the issue be resolved by constitutional measurement, free of emotion and predilection’, only to equate that measurement with what ‘history reveals about man’s attitudes toward the abortion procedure over the centuries’.³ Frankly, how pontificating on the attitudes of man over the centuries can sensibly be regarded as a legitimate constitutional measurement is startling since, in all honesty, there is no semblance of certainty, no semblance of objectivity, when an approach to interpretation disregards the text that it purports to interpret, instead advocating a philosophical survey of the attitudes of man; in such instances, every decision is an exercise in arbitrary, or better yet, ‘raw judicial power’.⁴

The consequence of this ‘living constitution’ approach is grave; in that, express constitutional rights such as the Fifth and Fourteenth Amendment’s rights not to deprive ‘persons’ of life without due process of law are no longer entrenched since fabricated rights such as the right to privacy and the right to abortion have extinguished them. But, owing to the protean morality and linguistic indeterminacy of the ‘living constitution’, not even the rights to privacy and abortion are entrenched since constitutional adjudication is as arbitrary as rolling dice.

³ Ibid 116, 117.

⁴ Ibid 221-2 (White J dissenting).

II LIVING CONSTITUTION: ON THE ORIGIN OF TEXTUAL UNCERTAINTY BY MEANS OF NATURAL SELECTION

In time, after 1859, after Charles Darwin published his influential text *On the Origin of Species by Means of Natural Selection*, American constitutional jurisprudence evolved to a point where the rights of the individual—namely, the rights to privacy and abortion—denied the people their democratic right to legislate a controversial moral issue, a moral issue where reasonable minds disagreed (and still disagree today). To understand how this undemocratic constitutional reality manifested, a brief account of Darwinism and postmodern philosophy is required, for it sheds light on the intellectual foundation of a growing legal absurdity: the ‘living constitution’.

A *Darwinism to Social Theory to Constitutional Law*

Darwin seeded a theory in which organisms evolve according to their environments and biology,⁵ advancing the theory of natural selection, which included the concept of the survival of the fittest (a phrase coined by Herbert Spencer); essentially, this phrase describes the processes whereby superior members of a species mutate, copulate and advance the species while the inferior, non-mutated members of the species die out along with their inferior genes. It was not long before this theory sprouted in a number of other intellectual disciplines.

That biological-evolutionary theory and natural selection was extended to social theory was a natural progression since Darwin, in *The Descent of*

⁵ C Darwin, *On the Origin of Species by Means of Natural Selection* (Project Gutenberg, 6th ed, 2009).

Man, wrote that '[a]t some future period ... the civilized races of man will almost certainly exterminate, and replace, the savage races throughout the world'.⁶ Building on this, Herbert Spencer, the influential British evolutionary social theorist, proffered the view that human societies evolve to a point of perfection 'through a science-based manipulation of the natural process',⁷ which included the assumption that individuals must be left alone to freely compete with each other; in fact, he believed that the freedom of exchange between individuals better maintained the equality of bargaining power between them, which, in turn, better promoted the evolution of society.⁸

Within a few decades, Darwin's theory, implicit in Spencer's social theory, soon found its way into the rhetoric of constitutional doctrine, influencing academic writers such as Roscoe Pound, the former Dean of Harvard Law School, to advocate a results-focused approach to judicial reasoning, believing that law must be judged 'by the results it achieves'.⁹ Moreover, Darwin's theory also influenced judicial reasoning, epitomised in the infamous *Lochner v New York*¹⁰ decision, which ushered in a new era of constitutional adjudication, the 'Lochner' era, wherein the court maintained that the protection of liberty in the Due Process Clause of the

⁶ C Darwin, *The Descent of Man* (A L Burt Co New York, 2nd ed, 1874) 178 quoted in Augusto Zimmermann, *Western Legal Theory: History, Concepts and Perspectives* (LexisNexis Butterworths Australia, 2013) 105.

⁷ J M Kelly, *A Short History of Western Legal Theory* (Oxford University Press, 1992) 332 cited in Augusto Zimmermann, *Western Legal Theory: History, Concepts and Perspectives* (LexisNexis Butterworths Australia, 2013) 111.

⁸ Augusto Zimmermann, *Western Legal Theory: History, Concepts and Perspectives* (LexisNexis Butterworths Australia, 2013) 111.

⁹ R Pound 'Mechanical Jurisprudence' (1908) 8 *Columbia Law Review* 614; see also, R Pound, 'Liberty of Contract' (1909) 18 *Yale Law Journal* 454.

¹⁰ *Lochner v New York* 198 U.S. 45 (1905). The Court invalidated a New York statute that attempted to limit the number of hours that bakers could work to 60 hours per week.

Fourteenth Amendment meant that individuals could contract freely in the labour market. But

[t]he Fourteenth Amendment, of course, said nothing about any freedom to make contracts upon terms that one thought best, but there was a very substantial body of opinion outside the Constitution at the time of *Lochner* that subscribed to the general philosophy of social Darwinism as embodied in the writing of Herbert Spencer ... and William Graham Sumner.¹¹

To the court, a legislative effort to control the distribution of an individual's resources—such as the hours that bakers in New York could work per week—was an illegitimate exercise of legislative power.¹² Essentially, the right to liberty in the Fourteenth Amendment's Due Process Clause granted the justices the power to 'superimpose its own view of wise social policy on those of the legislatures'.¹³ 'Lochnerizing', in the sense that the court imposed its moral view upon the people of New York, a moral view rooted in Darwin's theory of survival of the fittest, did not last for too long with the court's *volt-face* in *West Coast Hotel v Parrish*¹⁴ thirty-two years later.

But this was not the death of the 'living constitution' in Fourteenth Amendment jurisprudence. Justice Blackmun stressed that the court in *Roe* was not 'Lochnerizing',¹⁵ ironically citing Justice Holmes' dissent in *Lochner*. But how can a court that decided the moral issue of abortion—

¹¹ W Rehnquist 'The Notion of a Living Constitution' (1976) 54 *Texas Law Review* 4, 703.

¹² L Tribe, *American Constitutional Law* (New York Foundation Press, 3rd ed, 2000) 1348.

¹³ J Ely, 'The Wages of Crying Wolf: A Comment on *Roe v Wade*' (1973) 82 *Yale Law Journal* 920, 937.

¹⁴ *West Coast Hotel v Parrish* 300 U.S. 379 (1937). Overturning the *Lochner* approach to substantive due process.

¹⁵ *Roe v Wade* 410 US 113 (1973) 117.

which struck down a democratically created State legislative instrument that purported to decide this moral issue for the people of Texas—be squared with the following dissent:

[The Constitution] is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar, or novel, and even shocking, ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States.¹⁶

B *Moral Relativism and Linguistic Indeterminacy*

While Darwin's theory of natural selection engendered a belief that societies and constitutions evolve like organisms, the 'living constitution' needed another philosophy to buttress its belief that judges must interpret written constitutions in light of pressing social needs. Soon postmodern philosophy provided that buttress.

Reflecting on the horror of the western world reduced to rubble and barbarity during the First and Second World Wars, a new, sceptical philosophy began to influence the intelligentsia of the west. This new philosophy, loosely defined, advanced 'a range of theoretical challenges to objectivity of truth and knowledge'; this approach was in stark contrast to the Enlightenment's belief in the power of reason to discover objective facts about human nature and nature in a universal sense,¹⁷ which was instrumental in developing western constitutionalism.

Individualism—as in, the paramountcy of the individual—is at the very heart of this postmodern belief that truth is relative to each person. Extrapolating this belief, law must be socially constructed since it is

¹⁶ *Lochner v New York* 198 US. 45 (1905) 76.

¹⁷ Zimmermann, above n 7, 254.

‘entirely dependent on social and political circumstances’.¹⁸ Bearing this in mind, this belief in individual supremacy and the relativeness of everything, moral questions, too, are no longer answerable by objective standards, but only through each particular social context.

Following on from this belief in individualism and the nonexistence of objective truth, Jacques Derrida postulated a new interpretative method, ‘deconstructionism’, arguing that universal objective truth—and, logically, universal meaning for words and sentences—did not exist; accordingly, written texts had meaning insofar as it extended exclusively to the perception of the individual interpreting the text.¹⁹ To Derrida, the meaning of law, the meaning of words that compose constitutions, was in a constant state of flux, varying with each reading according to the different predilections of the successive readers.

III BIRTH OF THE RIGHT TO ABORT AND THE DEATH OF THE RIGHT TO LIFE: DISTORTING THE 14TH AMENDMENT

*The truth is that the judge who looks outside the historic Constitution always
looks inside himself and nowhere else.*²⁰

In tune with the theories of Darwin and postmodern philosophers such as Derrida, the Supreme Court, by what can only be described as judicial fiat, elevated the morality of the individual above the collective morality of the people, which is astounding since almost all law is the collective expression of the people drawing a line in the sand on moral questions. By implementing this fiat, the Court utterly rejected the actual intention

¹⁸ Ibid 258.

¹⁹ Ibid 257.

²⁰ R Bork, *The Tempting of America* (Simon and Schuster Publisher, 1st ed, 1991) 242.

of the 39th Congress, the intention of Congressman Bingham, the principal framer of the 14th Amendment:

Careful research of the history of these two amendments [the Fifth and Fourteenth] will demonstrate to any impartial investigator that there is overwhelming evidence supporting the proposition that the principal, actual purpose of their framers was to prevent any court, and especially the Supreme Court of the United States ... from ever again defining the concept of person so as to exclude any class of human beings from the protection of the Constitution and the safeguards it established for the fundamental rights of human beings, including slaves ... and the unborn from the time of their conception.²¹

But in light of the evolving constitution and the inherent indeterminacy of written words, the Supreme Court of the United States again rolled their dice in 1965. Without any express constitutional provision mandating a general right to privacy, the court in *Griswold v Connecticut*²² invalidated a state law that attempted to prohibit the use of contraceptives because enforcement would inevitably violate the marital privacy of the bedroom; Justice Goldberg and Justice Harlan II based their concurrence with the majority's decision on the 'liberty' protected by the Due Process Clause of the Fourteenth Amendment.²³

Undoubtedly, the menace of moral relativism lurked in the 'Court's creation of the "right to privacy", which has little to do with privacy but a great deal to do with the freedom of the individual from moral

²¹ Joseph P Witherspoon, cited in A Zimmermann, 'Feminazis' *Quadrant Magazine*.

²² 381 US 479 (1965).

²³ 381 US 479 (1965). But see Douglas J at 486 also proclaiming that the right to 'privacy'—founded in the 'zones of privacy' created by the penumbras of the first, third, fourth and fifth amendments in the Bill of Rights—was older than the political parties and the school system of the United States, remarkably, even the Bill of Rights itself.

regulation’.²⁴ And so, the precedent was planted, the precedent that soon grew to reveal a ‘fundamental’ right to abortion in *Roe* when Justice Blackmun unconvincingly reasoned for a seven to two majority that ‘this right to privacy ... founded in the Fourteenth Amendment’s concept of personal liberty and restrictions upon state action ... is broad enough to encompass a women’s decision whether or not to terminate her pregnancy’.²⁵ Yet, without doubt, only a ‘living constitution’ can justify the reasoning of the majority in *Griswold* and *Roe* simply because neither the broad right to privacy nor the right to abort a pregnancy exist in the American Constitution. That the court arbitrarily created them shows how a textually unfettered interpretation can result in the arbitrary death of the democratic right of the people to decide pressing moral questions—questions such as when life begins. So despite Justice Blackmun insisting that the Court was not ‘Lochnerizing’, no other conclusion can be drawn from his reasoning. As John Hart Ely, one of the most widely cited intellectuals in United States history, penned: ‘[*Roe*] is ... a very bad decision ... 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’.²⁶

IV CONCLUSION

So long as justices embrace the ‘living constitution’, rights such as the democratic right to decide moral issues and constitutional rights such as the Fourteenth Amendment’s right not to be deprived of life without due process of law are never entrenched, always at the mercy of an unelected judiciary that believes it is their duty to ‘Lochnerize’ for us, to override

²⁴ Bork, above n 18, 246.

²⁵ 410 US 113 (1973) 153.

²⁶ Ely, above n 12, 947.

our legislated decisions when those decisions differ from what they believe it should be.

But advocates of the Warren Court and the Burger Court's decisions in *Griswold* and *Roe* should heed their footloose judicial philosophy because—as was shown in *Planned Parenthood v Casey*²⁷ when four justices for the minority ruled to overturn *Roe*—not even 'fundamental' rights are protected since every right is subject to justices arbitrarily rolling dice.

²⁷

505 US 833 (1992).