How to Think About the Constitution

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As the Supreme Court trundles inexorably toward its encounter with same-sex marriage, we can expect another round in the never-ending battle over the meaning of our Constitution.

The 2013 Supreme Court term was more than usually contentious. The Justices decided, in each case by the slimmest of margins, that most of the Affordable Care Act (popularly, Obamacare) was constitutional but that key sections of the Voting Rights Act of 1965 and the Defense of Marriage Act were not. For most partisans, the results were all that mattered: Their claims that a law was or was not constitutional were really just assertions of the goodness or badness of the particular law, having little to do with the law’s relation to the antique document on display in the National Archives.

But for those concerned that Supreme Court decisions should be based on the law rather than shifting policy preferences, the results presented a confusing scene. Between the heated claims of the proponents and the density of the Justices’ opinions, an unbiased observer might wonder what was going on. What is the Constitution, and how can opinions about what it means be so opposed? As it turns out, the meaning of the Constitution is fairly clear, but it’s not the meaning that either the liberal or conservative faithful want. Advocates from both ends of the political spectrum must struggle to avoid some unpleasant truths about our fundamental law.

*Sacred and profane*

When I was in law school I used to joke that my fellow students considered constitutional law to be a substitute for theology. Liberals and conservatives sought to trace their differing policy views to the same hallowed document. Today, policy advocates less schooled in the Constitution than my Con Law co-religionists also try to perfume themselves with the odor of constitu-
tional sanctity. Advocates for gun control or Obamacare cast their positions as constitutional absolutes rather than outcomes of democratic political processes. When such quasi-religious fervor intersects an actual religious or ethical issue, as in the abortion or gay marriage debates, disagreements about constitutional interpretation can become combustible.

**How we got here**

The most important fact about our written Constitution is that it is an inadequate framework for the modern American polity: Few of us would want to live under the government it describes. That the Constitution still works at all is due to a long history of the courts reading that document in ways its authors never contemplated.

The Constitution arose out of a massive rewrite of Articles of Confederation that were adopted during the American Revolution. The Articles’ greatest failure was the weakness of the central government. The Constitution strengthened the powers of the national government but retained many features of the old confederation.

The Constitution was created by the states. The delegates to the Constitutional Convention were appointed by their states’ legislatures, and while their handiwork was eventually ratified by the people in special elections, the delegates for the most part were vigorous supporters of state prerogatives. They were only willing to grant the national government those powers, primarily for defense and foreign relations, that their experience told them had to be centralized; all other governmental powers were to remain with the states. The resulting system was in many respects more like the European Economic Community than the current US government. As befits a confederation of sovereign states, the Constitution gave each state equal representation in the Senate, and left it to the state legislatures to appoint the state’s Senators and presidential electors. (The power to appoint Senators and electors has long since passed from the legislatures to the people.)
Of course, other aspects of the original Constitution were less confederational; the House of Representatives is directly elected by the people in accordance with population, and presidential electors are allocated to the states in rough proportion to their populations. The constitutional system was a compromise between proponents of a strong and a weak central government.

To protect the states, the Constitution enumerates specific powers granted the national government. Most of these powers deal with military and defense matters and with finances, plus powers to regulate commerce between the states, establish uniform rules of naturalization and bankruptcy, build post offices and post roads, grant patents and copyrights, constitute lower courts, punish piracy and offences against the law of nations, and govern the District of Columbia. Finally, Congress can enact laws “necessary and proper” for executing the enumerated powers. All other governmental powers are reserved to the states.

Problems with such a limited national government soon became apparent. In 1803 President Thomas Jefferson engineered the purchase from France of the 828,000 square-mile Louisiana Territory, doubling the country’s size. However, the Constitution grants no such power to the national government, and Jefferson, on most points a strict constitutionalist, had to swallow hard. But the advantages of the purchase were so overwhelming that he went ahead, and Congress, not without some controversy, approved. The constitutional issue was kept out of the courts.

The country’s greatest constitutional crisis was also settled outside the courts, but the results were not as happy. In 1861, eleven Southern states attempted to secede from the Union, provoking the country’s bloodiest war. The question of secession is not dealt with in the Constitution. If you think of the government as being just a stronger form of confederation (and you don’t notice that the slave inhabitants of the seceding states were not consulted), then the Southern states may
The growth of federal power

The strength and weakness of a written constitution lies in its lack of flexibility. A majority swept up in the passions and felt necessities of the time moment quickly change a statute, but amending our Constitution was deliberately made arduous. We may rejoice that our legislators can’t easily override constitutional rights, but when a crisis requires swift action at the national level we may feel stymied by constitutional strictures and the snail-like pace of the amendment process. In the crisis of the Great Depression, federal legislation favored by nation-wide majorities ran headlong into the Constitution’s limits on federal power. After a tumultuous battle in which President Franklin D. Roosevelt threatened to pack the Supreme Court with more compliant Justices, the Court devised a pair of constitutional fudges. The result was a profound restructuring of the relationship between the states and the federal government.

The lever for this change was the Constitution’s “commerce clause,” which gives the federal government the power “to regulate commerce … among the several states.” Distinguishing commerce between states and commerce that is entirely within a state had always presented a line-drawing problem, but in the 1930s the Court, under the pressure of politics and events, moved the line: Interstate commerce was reinterpreted to include any economic activity that “substantially affected” interstate commerce. The New Deal was saved; the commerce clause now swept into the federal government’s regulatory embrace virtually all commercial activity, however local it might seem.

These developments reached an apogee of sorts in 2005 when the Court held that Diane Monson violated the federal Controlled Substances Act by growing marijuana at home for her
personal medical use. The Court held that Ms. Monson’s growing marijuana in her house and walking it across her living room was interstate commerce because “Congress can regulate purely intrastate activity … if it concludes that failure to regulate that class of activity would undercut the regulation of the interstate market in that commodity.” The holding neatly stood the commerce clause on its head: Instead of Congress only having the power to regulate an activity that involves interstate commerce, an activity automatically becomes interstate commerce if Congress decides to regulate it.

The second fudge involved Congress’s constitutional power “to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States.” The reference to “the common defense and general welfare” had generally been read as a limitation of the taxing power rather than a separate grant of power to the federal government, a point that would have been clearer if the framers had excised the comma after “excises.” (The Constitution’s punctuation, especially its whimsical profusion of commas, can be confusing.) But from the start there was a spirited debate about how far the power to spend “for the general welfare” extended. Alexander Hamilton was for a broad reading of the power, while James Madison thought the spending power was circumscribed by the specific powers enumerated in the rest of the section. In 1936 the Supreme Court opted for Hamilton’s interpretation: The federal government could spend tax revenue on any program that could be brought within the ambit of the general welfare. Since that day, the Supreme Court has never held a federal expenditure not to be “for the general welfare.”

The result of these constitutional rearrangements has been the federal government that we have and, for the most part, want—a government that can enact social welfare legislation and that can regulate almost all forms of commercial and economic activity. While the Supreme
Court has occasionally tried to reign in those broad federal powers, the limitations have been relatively minor.

**Did the Constitution grant such powers?**

Supreme Court precedents have now settled these matters, but it is still instructive to ask if the “substantially affects” test was a plausible reading of the commerce clause, and whether the power to spend for the general welfare went beyond the other enumerated powers. Just what did the framers intend?

For the commerce clause, it helps if you read the whole clause, which states that Congress has the power “To regulate commerce with foreign nations, and among the several states, and with the Indian tribes.” The wording carries a powerful implication: The power to regulate interstate commerce is akin to the power to regulate international commerce. Such power would of course not extend to regulating the intra-state growing and consumption of marijuana anymore than it would to such activities in Amsterdam or Bangkok.

As to the spending power, Madison’s narrower reading seems the more reasonable. On Hamilton’s interpretation, many of the other enumerated powers seem redundant: Does Congress really need the enumerated powers to raise armies, maintain a navy, or establish post offices if it has a separate power to “provide for the common defense and general welfare”? The power to spend for the general welfare seems like a grace note to limit the taxing power. Certainly, the reference to spending is squeezed between two phrases dealing with taxation, which is the primary subject of the clause.

So it seems that the basic structure of our government today was not sanctioned by our written Constitution. It was something the Court ginned up because there seemed no other way, but
which they justified with the flimsiest of reasons—reasons no court questions today because to do so would unhinge the entire structure.

What explains this 180-degree revolution in state-federal relations? As mentioned, there was a particular crisis that called for a national solution. But there was also a century-and-a-half of technological development and historical experience that altered the respective places of the national and state governments in the American consciousness. When the Constitution was enacted, people, goods, and communications moved at the speed of the fastest horse or sailing vessel. In the 150 years that followed, steamships, railroads, telegraph, automobiles, radio and airplanes knitted the country together. Events in the nation’s capitol were no more distant than events in the state capitol (and much better reported), and more and more people had lived in multiple states, with family and friends scattered across the country. Moreover, the experience of war made people think along national lines. Even the Civil War made the public, North and South, look to larger entities—the Union or the Confederacy. By the 1930s, the country was largely ready for a revolution in state-federal relations and not finicky about the constitutional warrant for the change.

*The rights revolution*

The reorientation of federal-state relations has been paralleled by a mugging of the Constitution to expand individual rights. The first ten amendments to the Constitution—the Bill of Rights—were adopted in 1791 as part of the ratification package. Today we see the Bill of Rights as a guarantee of individual liberties, but those first amendments only guaranteed rights against encroachment by the national government; the states were left free to encroach as they saw fit. For example, the First Amendment prevents Congress from establishing a state religion,
but ten of the states that ratified the Bill of Rights had such state establishments, which no one then thought unconstitutional.

The Constitution is a tersely written document, nowhere more so than in the Bill of Rights. Its wording often has to be stretched to apply to situations its authors never imagined. For example, the First Amendment prevents Congress from “abridging the freedom of speech, or of the press.” Freedom of speech allows you to say whatever you want to people face-to-face, while freedom of the press allows you to print it up and distribute it. The Constitution says nothing, however, about radio, television, or the internet. We understand, however, that the framers wanted to protect speech generally, not just speech that uses particular technologies.

How far are we allowed to go in expanding individual liberties? An instructive case is Griswold v. Connecticut, decided in 1965, where the Supreme Court held unconstitutional a state prohibition on the use or sale of contraceptive devices. The Constitution says nothing about contraception, and the Court struggled mightily to find a constitutional hook for its holding. The result was three different explanations of the decision’s constitutional underpinnings.

Justice William O. Douglas, writing for the Court, found a constitutional “right of privacy” implied by “emanations” from no less than five of the Bill of Rights’ ten amendments (none of which mentions contraception or privacy). Justice Arthur Goldberg argued that the Ninth Amendment alone (“The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people”) gave the Court all the room it needed to discover rights not mentioned in the Constitution, an interpretation that has found favor with few Constitutional scholars. Finally, Justice John Marshall Harlan II found constitutional warrant in the 14th Amendment’s “due process” clause. This last requires some explanation.
In the immediate aftermath of the Civil War, the Constitution was amended to abolish slavery and protect the rights of the former slaves. One of these amendments, the 14th, says that no state can “deprive any person of life, liberty, or property without due process of law.”

The most natural reading of the due process clause is that it is about appropriate procedure: A state can’t execute or jail you or seize your property without a fair proceeding. That reading is supported by consideration of the clause’s origin.

The Fifth Amendment—part of the original Bill of Rights—contains a nearly identical clause restricting the power of the federal government. The Fifth Amendment’s due process clause, however, is embedded in a list of procedural requirements—grand jury indictment for prosecution of capital and other infamous crimes, no double jeopardy, right not to be a witness against oneself, and just compensation for taking property for public use. The 14th Amendment simply lifted the “deprive of life, liberty, or property, without due process of law” phraseology, with no suggestion that the words would mean something different when torn from their procedural context.

But it wasn’t long before the Supreme Court took the view that the 14th Amendment’s due process clause wasn’t just about procedure. At first, “substantive due process” theories were used by conservative courts to declare various forms of economic regulation unconstitutional. Beginning with the New Deal, the shoe migrated to the other foot, with theories of substantive due process being used by courts to undo social restrictions repugnant to a more liberal sense of fundamental liberty.

A theory of substantive due process is nothing without some substance. For many constitutional theorists that substance is provided by the Bill of Rights itself. The theory grew that the 14th Amendment’s due process clause was meant to apply to the states some of the restrictions
on the federal government contained in the original Bill of Rights. Thus a state could not abridge freedom of speech because the 14th Amendment “incorporated” the First Amendment’s free speech guaranty. Gradually, the courts found more and more of the Bill of Rights to be so incorporated.

Incorporation theory, like substantive due process itself, seems flatly contrary to the Constitution’s text: If depriving someone of life, liberty, or property without due process under the 14th Amendment means something like “depriving someone of rights guaranteed by the Bill of Rights,” then what could those same words possibly mean in the Fifth Amendment? To interpret the Fifth Amendment as saying that the federal government can’t deny rights guaranteed by the Bill of Rights is just silly—the Bill of Rights itself guarantees those rights. Moreover, to read “life, liberty, or property” as referring solely to rights contained in the Bill of Rights would woefully restrict the sweep of the Fifth and 14th Amendments. Those Amendments don’t just say that the government can’t punish you for exercising constitutional rights without due process of law; they say that the government can’t punish you for anything without due process of law, a much broader statement.

Incorporation theory comes in two varieties, “total” and “selective.” The theory of total incorporation—that the Due Process Clause incorporated all of the Bill of Rights—has never been accepted by the Court. The theory that has come to dominate is selective incorporation, according to which only parts of the Bill of Rights are incorporated.

Total incorporation may be a misreading of the 14th Amendment, but it is a model of consistency compared to the theory of selective incorporation, which seems to require that the authors of the 14th Amendment knew which parts of the Bill of Rights were to be incorporated but neglected to tell anyone. Over time the courts have purported to tease out the meaning by asking
which parts of the Bill of Rights involve “fundamental liberties.” Which is why, 142 years after
the 14th Amendment’s ratification, the Supreme Court discovered that the Amendment incorpo-
rated the Second Amendment’s right to bear arms (a decision I’ll get to shortly.)

Which at last brings us back to Justice Harlan in Griswold. For Harlan, due process did not
require that all the provisions of the Bill of Rights apply to the states, but neither was due process
limited by the Bill of Rights. For Harlan, the due process clause implicates “a freedom from all
substantial arbitrary impositions and purposeless restraints."

The two dissenters in Griswold had nothing good to say about the anti-contraception statute
(Hugo Black: “offensive”; Potter Stewart: “uncommonly silly”), but they were quick to point out
the problems with Harlan’s approach. Nothing in the Constitution, they argued, allows the Court
to set aside laws because it believes that the policies are arbitrary or irrational. Such an uncon-
trolled standard would “amount to a great unconstitutional shift of power to the courts” that
would “be bad for the courts and worse for the country.”

Griswold is merely an instructive marker in a debate that had been going on for more than a
century. For most of us, it seems natural that the courts should strike down legislation as intru-
sive as Connecticut’s anti-contraception statute. It’s hard to deny, however, that such conduct is
not sanctioned by the Constitution, or to pretend that it is democratic for judges to overturn the
acts of elected legislatures because the judges believe themselves better able to determine which
restrictions on individual liberty are “arbitrary” or “purposeless.”

The Second Amendment gets a makeover

To see how far these tendencies—the reorientation of federal and state power and the consti-
tutionalizing of new liberties—can go, consider the 2010 McDonald case, where the Supreme
Court found that the due process clause of the 14th Amendment incorporated the Second
Amendment’s right to bear arms. (Most expansions of federal power or individual rights are championed by liberals, so it’s refreshing to find conservatives using the same tools.)

The Second Amendment, which states that “A well regulated militia, being necessary to the security of a free state, the right of the people to keep and bear arms shall not be infringed,” would appear a poor candidate for incorporation. As a restraint on the federal government, the intent is clear: To prevent the federal government undermining the states’ power to maintain militias, the framers insisted that the federal government could not limit individual ownership of firearms, but the Second Amendment (like the Bill of Rights generally) placed no limits on the states’ powers in this regard.

The Second Amendment has not proved to be one of the framers’ happier ideas. Opinions may differ as to whether the Second Amendment provides for an individual right to bear arms, but one point seems undeniable: The Second Amendment allows states to set up militias—that is, non-stationary military forces. For the late 18th century citizen militias were the preferred alternative to a peacetime standing army, which was seen as a potential instrument of despotism. Subsequent experience with militias was not encouraging, however, and it has been some time since any state has maintained one. Instead, the states have relied on professional police forces to maintain public order. With the exception of small specialized units, such as SWAT teams, these forces are not equipped with military-type weapons.

Dissatisfaction with the performance of state militias led to the passage of the federal Militia Act of 1903, which established the National Guard to function as a reserve for the national armed forces. State units of the National Guard are subject to Defense Department direction and control.
State militias have proved so unnecessary that the federal government has not hesitated to infringe the right to bear arms where military-type weapons are involved. The National Firearms Act (1934) effectively prevents private citizens from owning automatic weapons such as machine and submachine guns that would be appropriate for a military force. The Supreme Court has never ruled on the constitutionality of these limits, though in 1939 the Court upheld the Act as applied to sawed-off shotguns on the ground that such weapons had no military use, which suggests that the Act’s application to machine guns might not have passed constitutional muster.

Regardless of the Second Amendment, few today question the federal government’s ability to limit private ownership of tanks, artillery, machine guns, and other implements of military violence. And, indeed, McDonald does not question that ability. While McDonald supposedly establishes a general “right to bear arms,” the discussion is almost entirely devoted to a more limited right—the right to keep a firearm at home for self-defense. Unfortunately, incorporation is an all-or-nothing business, so the Justices found themselves propounding a sweeping individual right to bear arms, which they then tried to rein in by an ad hoc bit of rationalizing: The right to keep and bear arms is not “a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose.” In particular, the Court stated that its holding would not overturn state laws outlawing the possession of firearms by felons and the mentally ill, or the carrying of firearms in sensitive places such as schools and government buildings, or that imposed conditions and qualifications on commercial arms sales.

The Court’s backing and filling carries a kicker: The Court reaffirmed earlier holdings that “incorporated Bill of Rights protections are all to be enforced against the states under the 14th Amendment according to the same standards that protect those personal rights against federal encroachment.” It follows that any reasonable state limit on the right to bear arms can also be
imposed by the federal government. For example, if it is reasonable for a state to ban certain types of firearms, then the federal government can enact such a ban, which would then apply to all the states.

Notice what’s happened here: The Second Amendment’s shield against federal limits on the right to bear arms, which was not intended to operate against the states, has been transmogrified into a constitutional prohibition on state limits that aren’t “reasonable,” combined with an increased federal power to impose reasonable limitations nationally. The Second Amendment has been turned upside down, with the Court casting aside a constitutional limit on federal power while limiting the power of the states to regulate arms. To see the difference, suppose a state decided to organize a militia by requiring every able-bodied citizen to keep a fully-automatic assault rifle and ammunition at home. Scary perhaps, but clearly consonant with the original intention of the Second Amendment though not with the Court’s current holdings.

My point is not that current readings of the Second Amendment distort the Constitution’s meaning. They do, but that’s less important. The main lesson is that most people, on both sides of the gun control issue, can only live with the Second Amendment if it’s taken to mean something that it clearly does not mean. Most of us don’t want military weapons in the hands of private citizens, even if a state says it’s alright. By the same token, a majority of Americans want to be able to keep a weapon at home, even if their state prohibits it. But reaching these results, and lots of others, requires wrenching the Constitution into a form that none of its drafters intended.

Theories of constitutional interpretation

This may be an appropriate point to consider the two main schools of constitutional interpretation: “originalism,” much favored by conservative thinkers, which holds that the Constitution can only mean what those who drafted and ratified it understood it to mean, and the liberal “liv-
ing Constitution” school, which holds that the Constitution’s meaning can change over time to reflect contemporary necessities.

In determining the original understanding of the Constitution, originalists allow that we are not wedded to the precise words; for example, they interpret “freedom of the press” to encompass freedom for movies, TV, the internet, and other modes of communication unknown to the founding fathers. They would not, however, give the Bill of Rights and the 14th Amendment the expansive reading given them in Griswold, nor would they be likely to find rights to abortion or gay marriage lurking in constitutional dark corners.

The problem with originalism is that we can’t live with it. As a practical matter, originalists accept that prior judicial decisions have vastly altered the constitutional landscape and that there is probably no going back. So judicial originalists generally hold only that there should be no new judicial doctrines that go beyond the original understanding, as currently interpreted.

Living Constitution theory, in contrast, encourages constitutional evolution. It seems natural that the Constitution should be reinterpreted in light of present conditions and concerns. But it’s easy to convince yourself that the 14th Amendment provides an open door to import into the Constitution your own particular policy predilections. So if you believe that the right to contraceptive devices is a “fundamental liberty,” then it is a constitutional right, even if the Constitution says nothing expressly about contraception, and even if the 14th Amendment’s drafters would not have understood that to be the Amendment’s meaning.

The will of the people

One way of understanding these developments is that the judiciary is simply responding to the popular will. As a general feeling grows that a particular liberty—to use a contraceptive de-
vice, for example—is desirable, the courts effectively legislate that liberty by devising constitutional arguments for its being “fundamental.”

This expansion of constitutional rights is another example of the shift of constitutional power from the states to the national government. Whereas originally the states legislated about individual liberties, with different states permitted to go different ways, now the Supreme Court can enact uniform national rules.

The problem with this development is not that the judiciary has hijacked the Constitution; generally, the courts have followed the public’s lead by mandating liberties the majority has come to expect. Most non-lawyer Americans reasonably expect that a law will be declared constitutional if it comports with the fundamental principles that should govern the country; they may believe those principles to be in the written document, properly interpreted, but they’re not fussy about the interpretations. They want the courts to bless their expectations, and they don’t care if that blessing defies logic or history.

The problem is that no one is allowed to say what is going on. The Supreme Court, certainly, refuses to admit that it is functioning as a national legislature, for such a confession would raise obvious questions about the Court’s democratic bona fides. Instead, the Court indulges in a variety of legally and philosophically suspect reasonings on the nature of fundamental liberties and their relation to the Constitution.

One can complain about the intellectual defects in the process, but all this mummery does have a point: The veneration of our Constitution serves a real function in furthering national unity in the face of political and social controversy. On any mildly controversial point our Constitution is totally inflexible because it is virtually impossible to amend. The process of Constitutional
reordering masked by Constitutional idolatry provides the flexibility to take the nation in the direction it mostly wants to go.

To see how it works, let’s return to *Griswold*: By 1965 contraception was legal almost everywhere, and even in Connecticut the law (enacted in 1879) was virtually a dead letter; Connecticut authorities were not searching homes for contraceptive devices. *Griswold* involved a $100 fine levied against two officials of the Planned Parenthood League of Connecticut. If you looked at the laws of other states, you could only conclude that the statute at issue in *Griswold* was outside the bounds of what most Americans believed a proper exercise of legislative power.

*McDonald* may also be an exercise in giving voice to the popular will. While most Americans may be in favor of some control over firearms—background checks, for example—a majority seems to want the right to keep a handgun at home for self defense. Underneath all the Second Amendment posturing, that’s all the Court decided in *McDonald*.

**Going too far**

But where no one can speak the truth, judges can come to think that they are divining deep legal and ethical principles rather than simply acting as the agents of majority opinion. This can lead to trouble when well-intentioned judges indulge in speculations that take them beyond the popular will—when they imagine that beyond the written Constitution with its inconvenient wording there is a cloudy Platonic Constitution with more congenial meanings that they are uniquely qualified to divine. Which brings us to *Roe v. Wade*, where a liberal Court found prohibitions on first-trimester abortions to be unconstitutional, thus getting itself somewhat ahead of the American public, with unpleasant repercussions.

Any discussion of *Roe v. Wade* is likely to look like special pleading, so I’ll get my own views on the record: I’m pro-choice, if you like that way of putting it. Nonetheless, I regard *Roe*
as a judicial disaster, not for its slack reasoning—if you’ve been following you’ll know that was thoroughly predictable—but because of its political consequences.

The early history of abortion under U.S. law is murky, but by the first decades of the 20th century abortion was a crime in every state. Beginning in 1967, however, states enacted exceptions to the ban. By 1973, when Roe was decided, 16 states permitted abortion in limited circumstances, such as rape, incest, or harm to the mother, but only four states permitted early-stage abortion on demand. There was a clear trend toward greater access to abortion, though it is hard to argue that in 1973 most Americans considered abortion a fundamental right.

By taking abortion out of the political process, Roe may have been an instigator of today’s highly fractious politics. It’s one thing to have abortion legalized by your elected representatives, quite another to have it forced upon you by five unelected Justices on the basis of cloudy theories of rights. (The Court based Roe on the constitutional right of privacy invented in Griswold.) It’s possible that Roe actually strengthened the opposition to abortion among social conservatives, who slotted the decision into a wider narrative of oppression by unelected liberal judges. The opposition to legalized abortion took on a symbolic importance for conservative politics that it might not otherwise have had.

Of course, if Roe was wrongly decided, it was wrongly decided over four decades ago. Times have changed, and a majority of Americans might now consider abortion on demand to be a fundamental right. The view that the Court in Roe may simply have been premature has gained an unlikely ally: In a 1985 law review article, and more recently at programs marking Roe’s 40th anniversary, Justice Ruth Bader Ginsburg said that the Court went “too far, too fast,” and in doing so short-circuited the democratic process. According to Justice Ginsburg, Roe “became a
symbol to the right to life movement,” stopping the momentum that was building for wider access to abortion.

**The question of the day**

How does all this bear on the Court’s looming decision on same-sex marriage? I’ve been suggesting that the Supreme Court should only act if there is a “fundamental liberty” involved, and that fundamental liberties are determined by the popular will, especially as it is expressed in legislation at the state level.

Since 2008, 12 states, mainly in the Northeast, have permitted same-sex marriage as the result of legislative action or popular referenda. It seems fair to say that gay marriage is acceptable to most of those states’ citizens. Unfortunately, developments in some 34 other states have left it difficult to discern what the majority believes.

The saga starts in 2003 with a decision of Massachusetts’s Supreme Judicial Court declaring bans on same-sex marriage to be unconstitutional under the Massachusetts constitution. The reaction in at least 27 other states was to amend the state constitution to ban same-sex marriages.

The passage of such amendments clearly indicates that most people in those states did not regard same-sex marriage as involving a fundamental liberty. But constitutionalizing the ban blocked further legislative activity on a question where popular opinion has been shifting fast. In 1996 perhaps a quarter of Americans thought same-sex marriages should be recognized; today it is the majority view. It’s likely that many of those amendments would not be adopted today. But even as support for same-sex marriage grows, legislative activity is blocked by the constitutionalizing of the issue in some 34 states—the 27 that passed constitutional amendments and seven others where the courts have declared the ban unconstitutional. The Supreme Court thus faces a difficult task in trying to divine the popular will.
It’s difficult to amend a state constitutions, so proponents of same-sex marriage have been attracted to the quicker path of judicial challenge. It’s tempting to constitutionalize policy issues. If the Supreme Court decides in your favor, there’s no need for messy and prolonged politicking. Especially since the American people and their elected representatives may not share your advanced views on policy matters.

The problem is traceable to our schizoid views on democracy. In the abstract, we’re all for it, but on many particulars we distrust our countrymen. Almost everyone who cares about public policy believes that there are things that should be changed. But these Things-That-Should-Be-Changed were enacted by democratically elected legislatures. Recasting a policy preference as a constitutional issue offers a tempting short-cut around the difficulty of getting an uninvolved or hostile electorate to accept your view. Do you want to legalize marijuana? Then say we have a fundamental right to smoke cannabis in the privacy of our own homes. Ban abortion? Just talk about the fundamental right of the fetus to life.

What’s more, policy proponents may find it comforting that their preferences, restyled as fundamental liberties, will be decided by people like themselves, the kind of people who attended the finer sorts of schools. On most measures, the Supreme Court is as unrepresentative of the American legal community, not to mention ordinary Americans, as possible. Of the current Justices, all but one graduated from Harvard’s or Yale’s law school (the lone exception, Justice Ginsburg, started at Harvard but finished at Columbia). Their undergraduate educations, while more diverse, are scarcely hardscrabble: Princeton (three Justices), Stanford (two), Harvard, Cornell, Georgetown, and Holy Cross. They may be liberal, they may be conservative, but in many important respects they are more like you and I than they are like most Americans. Even for someone like myself, who has wandered through several precincts of the Ivy League, there is
much that is disturbing about a group so disconnected from normal American life having so much power.

A more realistic view of our constitutional history should convince us that most “constitutional” questions are just policy issues, for which legislative rather than judicial action is most appropriate. Such a view would be better for our society and for our individual peace of mind; it might lead us away from the poisoned quasi-religious rhetoric of constitutional absolutes and toward the gentler arts of political persuasion.

It seems likely that the shifting tides of public opinion will eventually condone same-sex marriage in most states. At that point, the Supreme Court may declare it a fundamental liberty without provoking the backlash that followed *Roe v. Wade*. But for the moment, with the popular will so obscured, the wiser course would be to delay any sweeping decision.