

Dangerous Liaisons: the Left's New Love Affair with Article I.
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Introduction

2006 brings the dawn of a new age- the Left is now enamored by Article I.¹ In fact legislative acts are now all encompassing, powerful enough to overrule the judicial branch, the executive, and even the United States Constitution. The recent revelations concerning National Security Agency surveillance have single-handedly turned the Left into a new bastion of legislative zealots. This article examines through the lens of privacy and rights jurisprudence the dogmatic shift of the Left as it doctrinally abandons the judicial branch as a forum for policy-making.

Section I analyzes the history of the Left's attack on undesirable legislation via Rights' arguments.²

Section II analyzes the current controversy over the lawfulness of the National Security Agency's intelligence gathering program involving wiretaps and electronic surveillance conducted without Foreign Intelligence Surveillance Act warrant.³ Particularly, Section II analyzes the Constitutionality of the surveillance program under the President's inherent war powers authority granted by Article II of the United States Constitution.

Section III concludes the Left's recent attempts to subordinate the President's Article II war powers constitute not only an attempt to co-opt powers expressly granted to the Executive Branch under the U.S. Constitution, but also mark a shift away from the legal orthodoxy in which constitutional rights serve to invalidate undesirable state or federal legislation. The article concludes that the Left is doctrinally stumbling into an evisceration of its own chief instrument of public policy implementation. Such overreaching will likely have rebounding unintended consequences.

Section I: Spearing Legislation: The Constitution as a Sword

A. Categorizing Radical Individualism

This article examines the history of the Left's Constitutional jurisprudence as a mechanism for political and social change. It is helpful, first, to accurately describe the movement with which this article is concerned. Principally, "the Left" is not a pejorative.

¹ The label "Left" or the Left" is not a pejorative. See discussion, *infra*.

² "Rights" or "rights" refers to the Bill of Rights through and including the Fourteenth Amendment.

³ The National Security Agency (NSA) program was disclosed by a New York Times article which reported that President Bush had authorized the NSA to monitor the international telephone calls and emails of U.S. citizens and residents without court-approved warrants. See, Dan Eggen, "Justice Dept. Investigating Leak of NSA Wiretapping," WASHINGTON POST, December 31, 2005, at A01.

Likewise, this author does not presume to corral all persons who may share elements of particular theories and ideologies in a broadly defined class.⁴

The Left as used herein describes the political/legal intellectual class devoted to radical individualism and radical egalitarianism, and dedicated to imposition of those philosophies through the courts.⁵ Such thinking is exemplified by the American Civil Liberties Union, an organization whose myopic doctrine of the maximization of individual rights through the judicial process is limited only by its twin devotion to group equality.⁶

B. *Understanding the Constitutional Framework of Shared and Exclusive Powers.*

A brief history lesson is appropriate in understanding the remarkable revolution now sweeping the Left like a wildfire. The United States Constitution was at its founding and is today, a magnificent political system: a doctrine of balanced powers among branches and shared between the national and state governments.⁷ Simply, Article I established the Congress, Article II the presidency, Article III produced the judicial branch, and so forth.⁸ Recognizing the conflicts implicit in a federal republic, the Founders made the national government one of limited and exclusive powers.⁹

⁴ The author does not define the Left to include, e.g., all liberals, or all Democrats, or all of any other group which may share ideological agreement with the Left as defined in the discussion herein. Further, the author is amusedly cautious of the Supreme Court's conclusion that all classifications erected around politically unpopular groups are unlawful and evil. See, discussion of *Romer v. Evans*, 517 U.S. 620 (1996), *infra*.

⁵ See, Robert H. Bork, *SLOUCHING TOWARDS GOMORRAH*, at p. 96 (1996).

⁶ *Ibid.* at p. 97. Bork argues that the ACLU'S brand of radical individualism which advocates, *inter alia*, that nude dancing is protected free speech or that metal detectors in airports are an unlawful intrusion upon private autonomy is internally discordant in that the organization favors more and substantial limits on individual choices in areas such as affirmative action or employer's rights. *Id.* at 97-98. The dichotomy of favoring individual choice while rejecting electoral choice is explored more thoroughly by evaluating the Supreme Court's decisions in *Romer v. Evans*, and *Lawrence v. Texas* in particular, *infra*.

⁷ See, James Madison, FEDERALIST NO. 39. In Federalist No. 39, Madison extolled the virtues of the Constitution's framework: republican government neither wholly national in form nor wholly federal, a framework equally deriving its authority from the consent of the majority and the confederation of states.

⁸ See, US CONST., ART I, §1[establishing Congress with all legislative powers], US CONST., ART II, §1[vesting executive powers in the President of the United States], US CONST., ART III, §1[The judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts...], U.S. Const., amend X [The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.].

⁹ James Madison, FEDERALIST NO. 39, "In this relation, then, the proposed government cannot be deemed a NATIONAL one; since its jurisdiction extends to certain enumerated objects only, and leaves to the several States a residuary and inviolable sovereignty over all other objects. It is true that in controversies relating to the boundary between the two jurisdictions, the tribunal which is ultimately to decide, is to be established under the general government. But this does not change the principle of the case. The decision is to be impartially made, according to the rules of the Constitution; and all the usual and most effectual precautions are taken to secure this impartiality. Some such tribunal is clearly essential to prevent an appeal to the sword and a dissolution of the compact; and that it ought to be established under the general rather than under the local governments, or, to speak more properly, that it could be safely established under the first alone, is a position not likely to be combated."

The Founders recognized that a system of co-equal states, while permitting multiple experiments in self government, would require some national identity and authority.¹⁰ Thus was borne a system in which the national government retained exclusive authority over select issues of a national character, among others: national defense,¹¹ interstate commerce,¹² immigration,¹³ a national bank.¹⁴ The wisdom of this approach is beyond controversy. Would the nation prefer to still have Confederate dollars or perhaps New Hampshire doubloons? Would it be desirable for a heavily immigrated state such as California,¹⁵ or for Canadian- borne Michigan Governor Jennifer Granholm¹⁶ to be vested with the power to regulate immigration and citizenship? The Constitution’s foresight was genius. For its time, unheralded genius, but genius still today.

Article I vested law and policymaking in the Congress, a model followed in each state.¹⁷ Made up of elected members of the several states the Congress was intended to reflect the people.¹⁸ The Left has never liked “populist” realism and so has sought to use

¹⁰ Alexander Hamilton in Federalist No. 6 recognized not only the dangers to the Union from foreign states, but also poignantly recognized, “A man must be far gone in Utopian speculations who can seriously doubt that, if these States should either be wholly disunited, or only united in partial confederacies, the subdivisions into which they might be thrown would have frequent and violent contests with each other. To presume a want of motives for such contests as an argument against their existence, would be to forget that men are ambitious, vindictive, and rapacious. To look for a continuation of harmony between a number of independent, unconnected sovereignties in the same neighborhood, would be to disregard the uniform course of human events, and to set at defiance the accumulated experience of ages.” Alexander Hamilton, FEDERALIST NO. 6. *See also*, Alexander Hamilton, FEDERALIST NO. 9, “A FIRM Union will be of the utmost moment to the peace and liberty of the States, as a barrier against domestic faction and insurrection.”

¹¹ US CONST., ART II, §2[President shall be commander in chief of the Army and Navy of the United States, and of the militia of the several states...]

¹² US CONST., ART I, §8.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *See*, Jeffrey S. Passel and Wendy Zimmerman, “Are Immigrants Leaving California,” April 1, 2001 at <http://www.urban.org/publications/410287.html> . Passel and Zimmerman in an Urban Institute Study find that California leads the nation in immigrants.

¹⁶ Michigan Governor Granholm was born in Vancouver, British Columbia. *See*, <http://www.michigan.gov/gov/0,1607,7-168--57920--,00.html>

¹⁷ *See e.g.*, CAL. CONST. ART. IV, §1 (California), N.Y. CONST., Art. III, §1 (New York), MA CONST., Part the Second, Art. Ch. 1, §1, Art. I. (Massachusetts), FL CONST., Art. III, §1 (Florida). NE CONST., Art. III, §CIII-1 (Nebraska). Although Nebraska’s revised Constitution created only a unicameral legislature, thus rejecting the two house framework of the United States and each of the other States, its Constitution clearly vests the legislative power in that sole Legislative body. NE CONST., Art. III, §CIII-1.

¹⁸ As Hamilton and/or Madison noted in Federalist No. 52, the most basic structures of the House of Representatives were intended to reflect the people. Most pointedly these concerns were reflected in the qualifications to be elected and the frequency and term of elections. FEDERALIST NO. 52. Hamilton and Madison echoed this sentiment when they wrote “The scheme of representation, as a substitute for a meeting of the citizens in person...” *Id.*

judicial fiat to accomplish what it could not in state houses or ballot boxes.¹⁹ In each instance, the Left has insisted that Constitutional imperatives, nearly always implicit, must invalidate undesirable [in their perspective] legislation.

*C. Griswold Forward: The Constitutional Sword of Legislating Privacy Rights through the Courts.*²⁰

The state of Connecticut circa 1958 through its popularly chosen representatives enacted a law banning the use of contraceptives.²¹ The executive director and medical director of the Planned Parenthood League of Connecticut challenged the law after their arrest under the statute.²² Following a tortured construction of the 14th Amendment and the Bill of Rights, an implicit right to contraception emanated from the penumbras of the Bill of Rights to invalidate the law.²³ State legislative acts must yield to the 14th Amendment, the Court held, where the two contradict.²⁴ *Griswold* was notable in that the Court created the constitutional conflict- the clash between marital privacy rights and the Connecticut statute was judicially manufactured in that no such marital right to contraception appears in the Constitution, *and* no married couple invoking said rights was a party to the case.²⁵ *Griswold*, in fact, inaugurated the beginning of the Left's strategy and preference for judicial policymaking.²⁶

In 1992 the people of Colorado enacted Constitutional Amendment 2 by statewide referendum, repealing all Colorado local ordinances to the extent they prohibited

¹⁹ As more fully developed in Section I, *infra*, the case of *Griswold v. Connecticut*, 381 U.S. 479 (1965) is illuminative. The Connecticut statute at issue was, in hindsight, likely quite silly. However, neither legislative silliness, nor legislative imprudence requires judicial correction. California, for example, criminalizes the act of battery disposal in ordinary trash. 22 Cal. Code Reg. 66273.2. Absent the crazed lawbreaker who launches a used battery through a police station window, the California law's inherent unenforceability makes it uncommonly silly. *cf.*, *Lawrence v. Texas*, 539 US 528 (2003) (Thomas, J., dissenting). The citizens and legislators of California and Connecticut are and were more than capable of revising or eliminating these statutes through the legislative process. The single-minded focus on judicial policy-making, thus, appears hostile to legislative democracy.

²⁰ One might contend that the using the Constitution as a sword to invalidate state actions is structurally incongruent with the Constitution and Bill of Rights. The Bill of Rights in particular, is more aptly a shield- a set of limits or protections from specific state actions.

²¹ Conn. Gen. Stat. §53-32 (1958 rev.)

²² *Griswold v. Connecticut*, 381 US 479 (1965).

²³ *Id.*

²⁴ *Id.* at 482. Justice Douglas' majority opinion noted that the Supreme Court does not "sit as a super-legislature to determine the wisdom, need, and propriety of laws that touch economic problems, business affairs, or social conditions." The Court then invalidated the Connecticut statute based upon the privacy rights of married couples, notwithstanding that the appellants were not a married couple prosecuted under the statute. It is precisely the Court's bootstrapping of privacy rights which inure to married couples to invalidate the statute which evidences the Court was indeed sitting as a super-legislature.

²⁵ The Court's reasoning is both unremarkable and extraordinary. The opinion is unremarkable in that the 14th Amendment clearly invalidates any state law conflicting with a Constitutional right. See, *Loving v. Virginia*, *Brown v. Board of Education*, *Casey v. Planned Parenthood*, *infra*. Justice Douglas' opinion is remarkable in that it created the right [to contraception] used to invalidate the Connecticut law.

²⁶ The Court would later concede that *Griswold* marked the most pertinent beginning point in its path of using substantive due process to invalidate state statutes. See, *Lawrence v. Texas*, 539 U.S. 528 (2003).

discrimination based on homosexual, lesbian or bisexual orientation.²⁷ The Supreme Court struck down the statute on Equal Protection Clause grounds, holding that the Amendment failed to meet even the rational basis test.²⁸

Several things are illuminative about the *Romer* Court's reasoning. First, the case was a facial challenge to the entire Amendment.²⁹ Second, unlike the petitioners in *Griswold*, the parties lacked actual standing- none had sustained an injury in fact alleged to have been caused by the amendment.³⁰ Third, the Court appraised the conduct of the voters of Colorado and determined it to be pernicious.³¹ As the Court noted:

“If the constitutional conception of ‘equal protection of the laws’ means anything, it must at the very least mean that a bare... desire to harm a politically unpopular group cannot constitute a legitimate governmental interest.”³²

These three facts in particular weigh strongly in favor of the Court acting as a super-legislature. Most notably, the combination of allowing plaintiffs with arguable standing to facially challenge the entire Amendment evidences that not only the bringing of the suit, but the Court's invalidation of the Amendment was an act of political preference, not legal judgment.

Also illustrative is the sweep of the Court's unilateral assessment of the motives of the Colorado electorate. The Court's opinion concludes its inquiry: “We must conclude that Amendment 2 classifies homosexuals not to further a proper legislative end but to make them unequal to everyone else...A State cannot so deem a class of persons a

²⁷ Colo. Const., Art. II, §30b, see also, *Romer v. Evans*, 517 US 620 (1996). Amendment 2 not only repealed existing ordinances pertaining to protections from discrimination on the basis of sexual orientation, the Amendment likewise foreclosed further legislative action to create such protections. *Id.*

²⁸ *Id.* at 633. The Court summarized the rational basis test thusly: “The search for the link between classification and objective gives substance to the Equal Protection Clause. It provides guidance and discipline for the legislature, which is entitled to know what sorts of laws it can pass; and it marks the limit of our own authority. In the ordinary case a law will be sustained if it can be said to advance a legitimate government interest, even if the law seems unwise or works to the disadvantage of a particular group, or if the rationale for it seems tenuous.” *Id.* (citations omitted).

²⁹ *Id.* at 641 (opinion of Scalia J., dissenting).

³⁰ The case was filed seeking injunctive relief to enjoin the amendment's enforcement. *Id.* at 625. Among the plaintiffs were government entities that had enacted laws which would be invalidated by Amendment 2, and homosexual persons who alleged that enforcement would subject them to immediate and substantial risk of discrimination on the basis of their sexual orientation. *Id.* The municipal entities arguably had a greater standing claim as the Amendment's language immediately invalidated the ordinances passed by those locales to prohibit discrimination based upon sexual orientation. The individual plaintiffs, however, possessed only a, in the Court's words, *risk* of discrimination. *Id.* It is difficult to conceive of a human being with any characteristics (i.e., a person with an identifiable age, gender, nationality, religion) who might not likewise be under a theoretical immediate risk of discrimination based upon those traits.

³¹ Amendment 2 was enacted by popular referendum, not through the Legislature. The Court thus undertook a puzzling inquiry of motive, ultimately concluding that the majority of voters were motivated by animus.

³² *Id.* at 633 (citing, *Department of Agriculture v. Moreno*, 413 U.S. 528, 534 (1973)).

stranger to its laws.”³³ The Court’s own reasoning evidenced that the sole question was whether a class of homosexuals may be singled out for disfavored treatment? Justice Kennedy’s majority opinion made clear that under the equal Protection Clause, a homosexual class could not be disfavored.³⁴

Having recognized the penultimate question that Amendment 2 posed the then-unique question of the proper legal status or preference which may be afforded a class of homosexuals, the Court’s opinion is laid bare as a political act- a rejection of a political opinion [that homosexuals as a class are not entitled to preference in non-discrimination laws].³⁵ Further, the mere fact that the Amendment 2 received a 46% “No” vote signifies that it was a very closely waged political battle.³⁶ Moreover, as the three dissenting justices noted, a homosexual population of roughly 4% which garnered 46% of the overall vote does not suggest a politically unpopular group singled out for disfavored treatment.³⁷ Rather, it reflected an ongoing political dialogue in which one side lost one election. The political power of homosexuals has been borne out by other electoral gains.³⁸

Justice Scalia’s *Romer* dissent, among other scholarship, makes fair arguments that the *Romer* majority’s opinion is irreconcilable with the Court’s prior decisions upholding, for example, bans on polygamy or statutory forfeiture of voting rights by felons and polygamists.³⁹ Those particular arguments and comparisons however provocative or substantial in their own right, are uninteresting to the primary question of whether the trend towards preferential judicial policymaking has terminated with the present National Security Agency wiretapping drama.

³³ Id. at 637.

³⁴ See fn. 23, supra.

³⁵ In 1996 when *Romer* was decided, the Court’s *Bowers v. Hardwick* opinion [no due process right to homosexual sodomy] was still considered good law as *Lawrence v. Texas*, see discussion infra, had not yet been handed down, and the same-sex marriage “rebellion” sparked in Massachusetts and San Francisco, among others, had not yet been sparked. *Romer* was a thus “unique for its time” analysis of homosexual class rights. Likewise, the Canadian Supreme Court had not yet judicially compelled same-sex marriage as it did in 2003 in *Halpern v. Toronto*, 2003 WL 34950 (Ontario Ct. App.). See also, *Lawrence v. Texas*, supra 539 U.S. at 589(Scalia, J., dissenting).

³⁶ *Romer*, supra at 653 (Scalia, J. dissenting).

³⁷ Id.

³⁸ Id at 645 (Scalia, J. dissenting), see also Louise Chu, “*San Francisco voters approve handgun, military recruiting bans*,” SAN FRANCISCO CHRONICLE, Nov. 9, 2005. Voters in the City and County of San Francisco overwhelmingly approved Measure I, banning military recruiters from public schools and colleges. Whether the ban was directed at the military’s policy on homosexuals, as is the university community’s challenge to the federal Solomon Amendment, or was instead a symbolic repudiation of the Iraq War is in question, but the gay rights’ issues likely played a role. See also, Stanley Kurtz, “*San Francisco to Army: Drop Dead. The perils of the counter recruitment movement*,” THE WEEKLY STANDARD, Volume 011, Issue 11, Nov. 28, 2005 (discussing Measure I and the court challenge to the Solomon Amendment).

³⁹ *Romer*, supra, at 650 (Scalia, J., dissenting).

The State of Texas enacted a law prohibiting homosexual sodomy.⁴⁰ Two individuals convicted under the law challenged its constitutionality.⁴¹ The Court utilized the substantive due process rational basis test, as it did in *Romer*, to invalidate the law again holding that the majority may not use the power of the State to enforce ethical or moral principles.⁴²

The question arises as to whether *Lawrence* is an example of judicial policymaking? On the one hand, the case was a Constitutional challenge arising from the criminal conviction of *Lawrence* and his co-defendant. These petitioners clearly had standing and a right to seek redress through the courts. However, several factors betray the opinion as judicial activism dismissive of pluralistic democratic process. First, the Court rejected stare decisis and overruled an on-point opinion only 17 years old.⁴³ Notably, the Court did not use a novel theory to circumvent its earlier holding in *Bowers v. Hardwick* in reaching its decision in *Lawrence*. It did not, for example, adopt an Equal Protection Clause analysis to avoid contradicting its earlier substantive Due Process Clause analysis in *Bowers*. Instead, the Court simply revisited its earlier ruling and overruled it. Second, the Court's failure to apply its own recent precedent is itself troubling. The mere overruling of precedent is not in itself proof of judicial policymaking. However, in light of the fact that the *Lawrence* majority relied heavily on its earlier opinion in *Casey*, to support its conclusion, the judicial policymaking determination is perfunctory.⁴⁴ The Court used *Casey* and its predecessor opinion in *Roe v. Wade* to establish the due process liberty interest which protects the right to private [homo] sexual conduct.⁴⁵ The Court then overlooked, deliberately it seems, that *Casey*'s rationale rested on stare decisis grounds.⁴⁶ The Court, thus, used stare decisis to uphold the identical substantive due process right [to privacy] in *Casey* which it upheld in *Lawrence* by rejecting the same principle of stare decisis.⁴⁷

Third, in settling an ongoing debate in the culture war, the *Lawrence* Court relied heavily on both the arguments and evidence submitted by the American Civil Liberties Union and on foreign law.⁴⁸ The need to circumvent American constitutional law begs

⁴⁰ Tex. Penal Code Ann. §21.06(a) (2003), see also *Lawrence v. Texas*, 539 US 528 (2003). This Author agrees with Justice Thomas who noted the Texas law was "uncommonly silly." *Id.* at 604 (Thomas, J., dissenting).

⁴¹ *Lawrence v. Texas*, *supra*, at 563.

⁴² *Id.* at 574 (citing, *Planned Parenthood of Southeastern Pa v. Casey*, 505 U.S. 833, 850 (1992)).

Concededly, the *Lawrence* Court phrased its inquiry as a question (May the majority use the power of the State to enforce ethical or moral principles...?) whereas this author paraphrased the Court's inquiry as a statement. However, that the court invalidated the statute on a mere rational basis inquiry [holding that the statute did not have any legitimate governmental interest] provides a concrete basis on which to determine the Court did in fact conclude that neither a State nor its people may enforce laws predicated upon social mores or principles.

⁴³ *Bowers v. Hardwick*, 478 U.S. 186 (1986).

⁴⁴ *Planned Parenthood of Southeastern Pa v. Casey*, *supra*, fn. 33.

⁴⁵ *Id.*

⁴⁶ *Id.* at 844-46, 854-869.

⁴⁷ Whether there existed grounds on which to distinguish *Casey* from *Lawrence* on the stare decisis issue is immaterial. The Court's failure to even address the stare decisis issue is proof enough that the court reached a desired policy result, and then bootstrapped an analysis.

⁴⁸ See *Lawrence*, *supra*, 539 U.S. at 574-578. As Justice Scalia wrote in his *Romer* dissent, the issue of how society is to treat homosexuals (whether opposition to homosexuality is as reprehensible as race or

the question of whether the Court's opinion was in fact based on Constitutional jurisprudence or was simply a desired policy justified by any support the Court could locate.

Fourth, the Court's own opaque reasoning in overruling *Bowers*, but not explicitly barring morals-based laws suggests tortured, results-oriented reasoning.⁴⁹ By concluding that the Court's duty was to define the liberty of all, not to mandate its own moral code, the Court undertook the contrary. Justice Kennedy's majority opinion in both reasoning and result, firmly rejects morality or the desire to preserve traditional mores as a sufficient justification for class-wide treatment of homosexuals.⁵⁰ Rejecting tradition, or preservation of societal mores as a legitimate governmental interest would have sufficed as at least a consistent substantive due process clause analysis.⁵¹ The Court, however, immediately dismembered its own calculus.

Whether one agreed with the Court's due process analysis or not, the analysis could be justified as a reasonable extension of both the Court's liberty analysis in *Casey* and its appraisal of classwide disfavored treatment of homosexuals in *Romer*.⁵² Inexplicably, the Court immediately truncated its analysis by stating that its opinion did not implicate "whether the government must give formal recognition to any relationship homosexual persons seek to enter."⁵³

The Court's statement is clearly designed to limit criticism that its decision in *Lawrence* would mandate same-sex marriage. This is troubling and illustrative of the dangers of judicial policymaking for several reasons. At a basic justiciability level, the Court's statement that *Lawrence* would not compel recognition of same-sex marriage, an issue not before it, appears to lightly tread the chasm between dicta and an impermissible advisory opinion.⁵⁴

Next, the Court's self-indulgent foray into same-sex marriage illustrates that it was again cognizant of its intrusion into a cultural debate whose remedy lies in

religious bias) is precisely the cultural debate that gave rise to Amendment 2 in Colorado. See, *Romer*, supra, at 637 (Scalia, J., dissenting). Where the Constitution says nothing about this subject, it is left to be resolved by normal democratic means. *Id.* Emphatically, the Court has no business deciding for the rest of the country that disapproval or animosity toward homosexuals is evil. *Id.*

⁴⁹ Specifically, the Court overruled the *Bowers* Court's conclusion that a State's interest in promoting social mores or traditions could not justify the statute's invasion of the petitioner's liberty interest under substantive due process analysis. The Court stated the "issue is whether the majority may use the power of the State to enforce these [social] views." *Lawrence*, supra, 539 U.S. at 570.

⁵⁰ *Id.* (citing, *Bowers v. Hardwick*, 478 U.S. at 216 (Stevens, J., dissenting)). Justice Stevens' dissent in *Bowers*, adopted by the *Lawrence* majority, likening sodomy laws to miscegenation prohibitions, concluded that neither tradition nor history could justify a law infringing upon a liberty interest. *Id.*

⁵¹ The Court concluded in *Romer* that singling out a class of homosexuals for disfavored treatment amounted to bias and a bare desire to harm a politically unpopular group. Such animus could not constitute a legitimate governmental interest under the Equal Protection Clause. *Lawrence* therefore could be seen as a reasonable extension of the *Romer* equal protection analysis to substantive due process analysis.

⁵² See footnote 51, supra.

⁵³ *Lawrence*, supra, at 578.

⁵⁴ Federal courts are prohibited from issuing advisory opinions. Article III requires that a federal court may not issue opinions except in a case or controversy. See, US CONST. Art III, §2, see also, 13 Wright & Miller, FEDERAL PRACTICE AND PROCEDURE, Section 3529.1 (1984) at p.298

democratic procedures.⁵⁵ Most importantly, the Court's desire to limit its own opinion is a guilty "hand caught in the cookie jar" admission.

The Court clearly apprehended that its substantive due process analysis would naturally encompass a subsequent claim that an individual's liberty interest protected the right to same-sex marriage. The Court's eagerness to distance itself from its own analysis betrays its recognition, and rejection of, the reasoning employed to justify a preferred policy result. Nowhere in its other jurisprudence has the Supreme Court gone to such pains to self-limit its own reasoning. The Court did not, for example, in striking down Virginia's miscegenation law on Equal Protection grounds mutilate its own reasoning.⁵⁶ In striking down the Virginia law banning interracial marriage the Court reasoned "[d]istinctions between citizens solely because of their ancestry" are "odious to a free people whose institutions are founded upon the doctrine of equality."⁵⁷

The *Loving* Court's reasoning was so unassailable that its command needed no self limit. One could hardly imagine Chief Justice Warren writing,

"We hold the Virginia statute to be unconstitutional as an unlawful racial classification and illegitimate violation of the liberty interest and right to marry, but we do not mean to state by this opinion that individuals may marry chipmunks or that necrophilia must be recognized by the State."

Instead, the Court interpreted the law at issue in the context of both the Constitution's text and prior case law. Such is the business of judging. The *Loving* Court did not hurry to qualify its analysis though some of its language might easily compel the requirement of same-sex marriage or polygamy.⁵⁸

The Due Process and Equal Protection Clauses alone have not formed the sole basis of attack of the Left's assault on democratic legislation. A majority of the death penalty states in the U.S. in 2005 permitted capital punishment for minors.⁵⁹ Seventeen year old Christopher Simmons was convicted of murder and sentenced to death under Missouri's death penalty statute.⁶⁰ Simmons challenged his sentence under the 8th Amendment's prohibition of cruel and unusual punishment, notwithstanding that the Supreme Court had held only fifteen years earlier that capital punishment was constitutional as applied to seventeen year old's.⁶¹

⁵⁵ See fn. 48, supra.

⁵⁶ *Loving v. Virginia*, 388 U.S. 1 (1967).

⁵⁷ Id. at 10 (citing, *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943)). The Court further stated, "To deny this fundamental freedom on so unsupportable a basis as the racial classifications embodied in these statutes, classifications so directly subversive of the principle of equality at the heart of the Fourteenth Amendment, is surely to deprive all the State's citizens of liberty without due process of law." Id.

⁵⁸ The *Loving* Court wrote "Marriage is one of the "basic civil rights of man," fundamental to our very existence and survival. *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942). See also *Maynard v. Hill*, 125 U.S. 190 (1888)." Id. The Court's reasoning could easily compel a substantive due process right to polygamy or same-sex marriage.

⁵⁹ See, *Roper v. Simmons*, 543 U.S. 551, 609 (2005)(Scalia, J., dissenting).

⁶⁰ Id. at 556, 558.

⁶¹ *Stanford v. Kentucky*, 492 U.S. 361 (1989)

Justice Kennedy again writing for the Court held the Missouri statute unconstitutional as applied to minors on grounds that it violated the 8th Amendment's prohibition on cruel and unusual punishment.⁶² The Court invalidated the Missouri law, reasoning that evolving standards of decency had demonstrated a national consensus that the juvenile death penalty was cruel and unusual.⁶³ Several features of the Court's opinion evidence the use of the 8th Amendment to dispatch legislation beyond the Left's democratic reach.

First, the Court rejected, as it did in *Lawrence*, its own recent precedent.⁶⁴ Worse, the Court did not reject its own reasoning in *Stanford v. Kentucky* on the grounds that it was decided wrongly, but instead reasoned that the Constitution's definition of cruel and unusual had changed in the span of fifteen years.⁶⁵ The mere reversal of precedent does not necessarily imply a political rather than a judicial act, however, it is noteworthy that the stare decisis reasoning used to prolong *Roe*'s vitality in *Casey* was then supported by Justice Kennedy, but cast away in *Roper*.⁶⁶

Second, the Court engaged in what can only be called mathematic gymnastics to create a "national consensus" that the death penalty as applied to minors was cruel and unusual. Earlier in *Stanford* the Court had opined that whether a national consensus exists should be determined by reference to state statutes.⁶⁷ Justice Scalia's *Roper* dissent recognized the Court found a national consensus against the juvenile death penalty because 18 states barred juvenile capital punishment.⁶⁸ As Justice Scalia so aptly stated, "Words have no meaning if the views of less than 50% of the death penalty States can constitute a national consensus."⁶⁹

Third, is the abundant democratic hostility of the Court's reasoning. By devising an analysis which ignored precedent and looted the definition of "consensus" by defining it to include less than a simple majority, the Court clearly toiled to reach a result its earlier *Stanford* reasoning would not embrace.⁷⁰ Importantly, by declaring the juvenile death penalty to be per se unconstitutional the Court forever removed the debate of the policy's propriety from the people or their elected representatives.⁷¹ Indeed, those 18 States lauded by the Court as a national consensus are now forever foreclosed from

⁶² *Roper*, supra, at 565-57.

⁶³ Id.

⁶⁴ See, *Stanford v. Kentucky*, supra.

⁶⁵ *Roper v. Simmons*, supra at 608 (2005)(Scalia, J., dissenting).

⁶⁶ Justice Kennedy joined the Court's plurality opinion in *Casey*. See, *Casey*, supra.

⁶⁷ *Stanford v. Kentucky*, supra, 492 U.S. at 370.

⁶⁸ See, *Roper v. Simmons*, 543 U.S. at 609 (Scalia, J., dissenting). 18 states represented 47% of the states permitting capital punishment. Id.

⁶⁹ Id.

⁷⁰ A "consensus" is "An opinion or position reached by a group as a whole. AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE, (4th ed. 2000). Semantically, even a simple majority might not constitute a consensus, but the Court's suggestion that a minority of states could constitute a consensus is verbal pillory.

⁷¹ *Roper v. Simmons*, 543 U.S. at 612 (Scalia, J., dissenting).

reconsidering their policies.⁷² It is an open question whether legislators in those states would have voted for the bans were they aware that their vote would be sealed in bedrock for all eternity by the Court, or had they been advised their vote on what may very well have been a public policy experiment, might be used to decide the same issue in every other State in the Union.⁷³ Indeed, a more provocative question might be the impact of other state policy experiments in euthanasia, medical marijuana, or mandatory health insurance?⁷⁴ The fifty state laboratories are likely imperiled by the Court's broad swath.

As the Supreme Court noted twenty years ago in another death penalty case, "In a democratic society legislature, not courts, are constituted to respond to the will and consequently the moral values of the people."⁷⁵ The *Roper* opinion is thus evidenced as judicial hostage taking of what are properly questions for the people and their legislatures. Justice Scalia noted this in his *Roper* dissent, pointing out, "By what conceivable warrant can nine lawyers presume to be the authoritative conscience of the Nation."⁷⁶

Fourth, is the Court's reference to foreign law and the advocacy of certain Left-oriented groups.⁷⁷ Again the contrast between *Casey* and *Roper* is instructive. The American Psychiatric Association's amicus brief played a role in the Court's conclusion that juveniles lack the cognitive development to appreciate their actions when embarking on a capital crime.⁷⁸ However, fifteen years earlier the American Psychiatric Association opined in *Hodgson v. Minnesota*, that juveniles were mature enough to decide whether to obtain an abortion.⁷⁹ Ignoring its own precedent the *Roper* Court simply "look[ed] over the heads of the crowd and picked out its friends."⁸⁰

Section II: The War on the War Powers

And so now the Left comes to the NSA'S "domestic wiretapping."⁸¹ Specific details of the covert program are scant, but the general thrust of the program appears to be that beginning in early 2002 the NSA began monitoring telephone numbers and email addresses discovered in the computers, cell phones, and address books of captured Al

⁷² *Id.*

⁷³ *Id.*

⁷⁴ See, *Gonzales v. Oregon*, ___ U.S. ___ slip op. (2006)(Oregon euthanasia law), *Gonzales v. Raich*, 545 U.S. ___ slip op. (2005)(California medical marijuana law), Frances Burns, "Romney wants compulsory health insurance," WASHINGTON TIMES, Jun. 21, 2005 (Massachusetts debates requiring all residents to purchase health insurance).

⁷⁵ *Gregg v. Georgia*, 428 U.S. 153, 175-76 (1976).

⁷⁶ *Roper v. Simmons*, 543 U.S. at 616 (Scalia, J., dissenting).

⁷⁷ The Court relied heavily on European and international law. *Roper v. Simmons*, 543 U.S. at 567.

⁷⁸ *Id.* at 569.

⁷⁹ *Hodgson v. Minnesota*, 497 U.S. 417 (1990), *Roper v. Simmons*, 543 U.S. at 617-18 (Scalia, J., dissenting).

⁸⁰ *Roper v. Simmons*, 543 U.S. at 617(Scalia, J., dissenting) (citation omitted).

⁸¹ See e.g., , Dan Eggen, "Justice Dept. Investigating Leak of NSA Wiretapping," WASHINGTON POST, December 31, 2005, at A01, David Tell, "The Worst of Times," THE WEEKLY STANDARD, Vol. 011, Issue 17, Jan. 1, 2006.

Qaeda operatives.⁸² The surveillance program is focused primarily (71%) on foreign targets, but has included the monitoring of communications with persons in the United States.⁸³

The Administration's warrantless surveillance of calls between some US citizens and members of Al Qaeda is lawlessness run amok, exalts a reinvigorated and excited Left. The President may be impeached for this, warns Democratic Senator Barbara Boxer – a model of Leftist dialogue and theory- because he has admitted he did not follow the Foreign Intelligence Surveillance Act (“FISA”).⁸⁴ The charge may have factual merit, but as discussed, *infra*, is legally askew.

FISA governs electronic surveillance for “foreign intelligence information.”⁸⁵ FISA states a President may get judicial approval from a FISA court to obtain foreign intelligence information.⁸⁶ FISA permits the Executive Branch to seek a warrant to conduct surveillance before or 72 hours after conducting a search or surveillance in foreign intelligence cases.⁸⁷ The Bush administration has offered two principal justifications for the NSA program: 1) the Congressional Authorization for Use of Military Force passed after the September 11th attacks and; 2) Constitutional authority.⁸⁸ While the former almost certainly justifies the NSA program, this article concerns only the Constitutional Article II justification.⁸⁹ Article II, Section 2 of the United States Constitution states,

⁸² See, Tell, *Ibid*.

⁸³ *Ibid*. Of the 7,000 contacts monitored by the NSA program, approximately 500 were located in the United States.

⁸⁴ See e.g., Ben Johnson, “Impeaching ‘Big Brother’,” FRONT PAGE MAGAZINE, Dec. 21, 2005, at <http://www.frontpagemag.com/Articles/ReadArticle.asp?ID=20635>, see also, blog of Congressman John Conyers at <http://www.conyersblog.us/> (arguing the NSA program is unlawful), David Jackson, “Gore: Domestic spying goes beyond Bush's authority,” USA TODAY, Jan. 6, 2006 (Gore does not call for impeachment as other Democrats have done), ABSNEWS.com, Jan. 17, 2006 at <http://abcnews.go.com/Politics/TheNote/story?id=1513546> (former Vice President did not go as far as some Democrats who have called for the President's impeachment).

⁸⁵ See Foreign Intelligence Surveillance Act at 50 U.S.C. 1802.

⁸⁶ 50 U.S.C 1805 (a)(3), see also, *In re: Sealed Case*, 310 F.3d 717, 722 (U.S. Foreign Surveillance Ct. of R. 2002).

⁸⁷ 50 U.S.C. 1805, 50 U.S.C. 1805(f) (emergency orders).

⁸⁸ Associated Press, “Gonzales Defends NSA Wiretapping Program,” Jan. 24, 2006 at <http://www.foxnews.com/story/0,2933,182652,00.html>

⁸⁹ The Supreme Court in *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), held that the Congressional Authorization for Use of Military Force authorized the President to conduct military detentions of individuals. *Id.* at 517; see also Congressional Authorization for Use of Military Force. 115 Stat. 224. Other scholars have opined that the AUMF provides justification for the NSA program. See, Cass R. Sunstein, “Presidential Wiretapping: Disaggregating the Issues,” Dec. 20, 2005 at http://uchicagolaw.typepad.com/faculty/2005/12/presidential_wi_1.html. Professor Sunstein notes that if surveillance is taken to be an ordinary incident of war the argument that FISA controls the AUMF is substantially weakened. Sunstein also notes the cases do not clearly support the view that when monitoring (a) an international call involving (b) someone with an Al Qaeda connection (c) to or from the United States, the President must, (d) under post-9/11 conditions, obtain a warrant.

“The President shall be commander in chief of the Army and Navy of the United States, and of the militia of the several states, when called into the actual service of the United States.”⁹⁰

The Left maintains that the NSA program violates the FISA warrant requirement and is, hence, unlawful. What arises is a fundamental contradiction between an explicit article of the Constitution and a federal statute.⁹¹ It is an elemental inquiry into whether Congress can act as a check on the Executive’s war powers going to the basic principles of the Constitutional structure.⁹²

As a threshold question, this inquiry demands a determination of whether the United States is in fact at war such that the Executive’s Article II war powers are invoked? The absence of a formal Congressional declaration of war in this instance is unpersuasive. Likely dispositive is the Authorization for Use of Military Force which declared the President may use “all necessary and appropriate force” against nations, organizations, and persons associated with the September 11th attacks.⁹³ The Congressional Authorization clearly intended and authorized use of the American military forces. As Commander in Chief of those forces the President’s war powers are necessarily implicated.⁹⁴ The Supreme Court confirmed this when it reasoned that “There can be no doubt that individuals who fought against the United States in Afghanistan as part of the Taliban, an organization known to have supported the Al Qaeda terrorist network responsible for those attacks, are individuals Congress sought to target in passing the AUMF.”⁹⁵ The NSA program is directed at Al Qaeda and its members and supporters.⁹⁶ Thus, the President’s Article II war powers are involved.⁹⁶

That the War on Terror crosses transnational boundaries including the borders of the United States, or that it implicates citizens of numerous nations including this Nation’s, only serves to heighten the Constitutional powers delegated to the Executive, not to diminish them. As Alexander Hamilton famously wrote in Federalist No. 74,

“Of all the cares or concerns of government, the direction of war most peculiarly demands those qualities which distinguish the exercise of power by a single hand. The direction of war implies the direction of the common strength; and the power of directing and employing the common strength, forms a usual and essential part in the definition of the executive authority.”⁹⁷

⁹⁰ U.S. CONST., ART. II, § 2.

⁹¹ One should note that Article II is an explicit clause of the Constitution. For decades the Left has used implicit rights, e.g., in *Griswold*, *Roe*, and *Lawrence*, to invalidate Congressional and state legislative acts.

⁹² cf., *Hamdi v. Rumsfeld*, supra, 542 U.S. at 580. (Thomas, J., dissenting).

⁹³ 115 Stat. 224

⁹⁴ U.S. CONST., ART. II, §2: “The President shall be commander in chief of the Army and Navy of the United States, and of the militia of the several states, when called into the actual service of the United States...”

⁹⁵ *Hamdi v. Rumsfeld*, supra, 542 U.S. at 518.

⁹⁶ See, *Tell*, supra, at fn. 81.

⁹⁷ FEDERALIST NO. 74, see also, *Hamdi v. Rumsfeld*, supra, 542 U.S. at 581. (Thomas, J., dissenting).

The Supreme Court has long paid heed to Article II's plenary grant of power to the Executive branch in its exclusive delegations.⁹⁸ In addressing the President's foreign affairs' powers in 1936 the Court reasoned the President "has his confidential sources of information. He has his agents in the form of diplomatic, consular and other officials. Secrecy in respect of information gathered by them may be highly necessary, and the premature disclosure of it productive of harmful results."⁹⁹

As Justice Thomas recognized in his *Hamdi* dissent, judicial interference in the foreign affairs domain destroys the purpose of vesting primary responsibility in a unitary Executive.¹⁰⁰

The FISA law itself contains a check in that a FISA warrant requires a certification from a national security officer.¹⁰¹ Nonetheless, some on the Left have charged that the Administration's interpretation of Executive power leads to an unchecked presidency.¹⁰² The Founders considered and rejected such a contention. The Constitution provides a check to the Executive's power over the military by vesting in the Legislative Branch the sole authority to raise armies, and to declare war.¹⁰³ But that the Constitution vests the war making authority in the President seems beyond dispute.¹⁰⁴ Thus, the Constitution's own internal framework checks Presidential power while at the same time energizing the Executive. Congress likely has many checks on the program including defunding the program or the NSA entirely, but rewriting the President's Article II war powers is not one of those options.

Nor is the uniqueness of this war a substantive charge. That the war on terror might last for years, decades, or even generations does not lessen the Constitutional gravamen set forth in Article II, Section 2. National security surveillance by its very nature differs from criminal justice surveillance and is often long range and interrelates various sources and types of information.¹⁰⁵ That it might embrace technologies never contemplated by the Founders, or be fought among bits, bytes, and radio waves does not diminish the wisdom of Article II's delegation to the Executive. As Hamilton wrote in 1787,

⁹⁸ Article II, Section 2 delegates to the Executive command of "...the Army and Navy of the United States, and of the militia of the several states, when called into the actual service of the United States..." Section 2 also delegates to the President that "He shall have power, by and with the advice and consent of the Senate, to make treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the advice and consent of the Senate, shall appoint ambassadors, other public ministers and consuls..."

⁹⁹ *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936).

¹⁰⁰ *Hamdi v. Rumsfeld*, supra, 542 U.S. at 580. (Thomas, J., dissenting).

¹⁰¹ *In re: Sealed Case*, 310 F.3d at 739

¹⁰² Jane Harman, "Checks and balances, interrupted" San Francisco Chronicle, Feb. 5, 2006.

Congresswoman Harman went so far as to suggest President Bush was a tyrant on par with Saddam Hussein. Such ad hominem invective lacking any basis in the Constitution does not suffice for legal argument nor even effective advocacy. It does, however, typify the Left's assault on the Constitution.

¹⁰³ U.S. CONST. ART. I, § 8, see also, Alexander Hamilton, FEDERALIST NO. 23.

¹⁰⁴ U.S. CONST., ART. II, § 2.

¹⁰⁵ *In re: Sealed Case*, supra, 310 F.3d at 740.

“The circumstances that endanger the safety of nations are infinite, and for this reason no constitutional shackles can wisely be imposed on the power to which the care of it is committed.”¹⁰⁶

The very issue posed by the NSA Program is nothing less than the authority of the President to conduct war. The Supreme Court has long recognized the President has constitutional authority to protect the national security and that such authority carries broad discretion.¹⁰⁷

The Foreign Intelligence Surveillance Court of Review sidestepped this critical issue in 2002.¹⁰⁸ In *In re: Sealed Case* the FISA Court of Review rejected restrictions in a foreign surveillance warrant placed on the government by a FISA judge based on both statutory and constitutional grounds.¹⁰⁹ In that case, the trial court granted a Justice Department application for a FISA court order, but further required that certain other restrictions be met, including that the Department’s “law enforcement officials shall not make recommendations to intelligence officials concerning the initiation, operation, continuation or expansion of FISA searches or surveillances.”¹¹⁰ This was the now-famous “wall” between intelligence gathering and criminal investigations referred to at length in the 911 hearings, and Congressional debates over the Patriot Act.¹¹¹

The FISA Court of Review invalidated the restrictions placed on the warrant on several grounds, the consideration of which illuminate the Constitutional question at issue here. Most importantly, the Court of Review reversed the lower court’s restrictions on the grounds that the court’s order unconstitutionally usurped the Executive Branch’s powers.¹¹² Specifically, the court concluded that the lower court’s order impermissibly interfered with the Attorney General’s Article II authority to determine how to deploy personnel resources.¹¹³ The Court relied on the Supreme Court’s language in *Morrison v. Olson* wherein the Supreme Court cautioned the D.C. Circuit to avoid administrative guidance to the Independent Counsel as actions having “serious constitutional ramifications.”¹¹⁴ Thus, the Court of Review recognized specifically in the FISA warrant context that the FISA warrant process can, and in that case did, tread dangerously close to Constitutional separation of powers issues.

The Court of Review’s rejection of the lower court’s restrictions [on the court order approving surveillance] was ultimately based on a statutory analysis of FISA and a finding that FISA amplified the President’s power by providing a mechanism that at least

¹⁰⁶ Alexander Hamilton, FEDERALIST NO. 23.

¹⁰⁷ *Hamdi v. Rumsfeld*, supra, 542 U.S. at 581. (Thomas, J., dissenting)(citing, *Prize Cases*, 2 Black 635, 668,670 (1863)).

¹⁰⁸ See, *In re: Sealed Case*, supra at footnote 86.

¹⁰⁹ *In re: Sealed Case*, 310 F.3d at 719-20.

¹¹⁰ *Id.* at 720.

¹¹¹ *Id.* at 728-733, 743

¹¹² *Id.* at 731.

¹¹³ *Id.* (citing, *Morrison v. Olson*, 487 U.S. 654 (1988)).

¹¹⁴ *Id.* at 731-32.

approaches a classic warrant and which therefore supported a conclusion that the FISA searches were constitutionally reasonable.¹¹⁵ The Court, however, did take for granted that the President did have constitutional authority to conduct warrantless surveillance for foreign intelligence purposes.¹¹⁶

Next, the Court of Review explored without extending, the Supreme Court's holding in its *Keith* decision.¹¹⁷ The Supreme Court in *Keith* adopted the view that a more relaxed warrant could suffice in domestic intelligence searches.¹¹⁸ The Court of Review noted the *Keith* Court had avoided the issue of warrantless foreign intelligence searches, however, the Court elected not to take the next step and explicitly follow the Fourth Circuit's reasoning in *Truong* and embrace *Keith's* unanswered query.¹¹⁹ In that the Court had already concluded reversal was required based on the FISA statute itself, and in that it had already assumed the President's inherent authority to conduct warrantless foreign intelligence searches, the Court's decision not to overtly answer *Keith's* unanswered question was likely more a question of judicial restraint rather than substantive deliberation.

Indisputably, FISA exists and the President apparently did not use its warrant provisions before or after conducting the NSA surveillance. However, FISA is an act of Congress, not a constitutional article. The President is vested, by Article II, with an inherent authority to conduct war. The Founders took care in making this delegation plenary:

“Of all the cares or concerns of government, the direction of war most peculiarly demands those qualities which distinguish the exercise of power by a single hand. The direction of war implies the direction of the common strength; and the power of directing and employing the common strength, forms a usual and essential part in the definition of the executive authority.”¹²⁰

That Congress through FISA gave the Executive an additional basis upon to which exercise its constitutional powers was considerate, but in a time of war such a legislative grant is redundant and, in this case, unconstitutionally inimical to the separation of powers.¹²¹ Analogously, Congress might also pass a law authorizing the President to receive ambassadors, or authorizing itself to pass laws relating to interstate

¹¹⁵ Id. at 742.

¹¹⁶ Id. (adopting the reasoning of *U.S. v. Truong Dinh Hung*, 629 F.2d 908 (4th Cir. 1980). The *Truong* Court, as did other courts considering the issue, held that the President had inherent authority to conduct warrantless searches to obtain foreign intelligence information. *In re: Sealed Case*, supra, 310 F.3d at 742.

¹¹⁷ *United States v. District Court (Keith)*, 407 U.S. 297 (1972).

¹¹⁸ Id. at 322. The *Keith* Court recognized the appreciable difference between ordinary crime and crime like that in the case before it, which could pose a threat to national security. Id.

¹¹⁹ *In re: Sealed Case*, supra, 310 F.3d at 744.

¹²⁰ Alexander Hamilton, FEDERALIST NO. 74.

¹²¹ In times of peace FISA might arguably be a lawful restriction of Presidential power though this article does not consider such a contention. The author notes, however, to the extent national security is an ongoing process, the FISA law itself may constitute an unconstitutional restraint of the Executive's Article II powers even in times of peace, insofar as it is applied to foreign and national security intelligence.

commerce, naturalization, or bankruptcy. But such laws are duplicative of inherent powers under the Constitution.¹²² While Congress might legislatively bless certain plenary powers of the President, it cannot remove them.¹²³

Section III: Noseless Victories: The to Legislate or Not to Legislate Quandary

In the case of the NSA'S surveillance program the Left has finally discovered Article I and has decided that they like FISA more than the Constitution. Thus, they face an intellectual and practical dilemma. They can continue to insist that FISA somehow subverts or supplants the explicit and plenary war powers granted by Article II to the Executive Branch. Or the Left can protect decades of jurisprudential wizardry and concede to the Executive the Constitution's explicit endowment.

Continuing to rely upon Article III courts as a venue for preferential policymaking carries its own risks, however. The intrinsic dilemma posed by judicial lawmaking is that each case addresses only one policy. The selective and myopic use of the courts to reverse democratic failures can produce unintended consequences and Noseless Victories.¹²⁴ The Left's obsession with two issues, abortion and capital punishment, provides an illustration.¹²⁵

Abolition of the death penalty has long been a shibboleth of the Left.¹²⁶ In 2004 that objective came closer to reality when the Supreme Court abolished the juvenile death penalty in *Roper*. However, in implementing its litigation strategy the Left arguably dynamited the foundations of the right to abortion. As discussed previously, the right to abortion narrowly escaped judicial reversal in *Casey*, surviving on the slimmest string of stare decisis.¹²⁷

In *Roper* as well as in *Lawrence*, the Supreme Court turned its back on recent precedent and impliedly cast away stare decisis as a defining judicial principle.¹²⁸ Further, *Casey* and *Roper* both made an important doctrinal shift in constitutional analysis: each allowed for changes in science and mankind's knowledge of itself justify

¹²² U.S. CONST., ART. II, §3 (President shall receive ambassadors....," U.S. CONST., ART. I, §8 (Congress shall have power to...regulate commerce among the states, establish a uniform rule of naturalization, and uniform laws on the subject of bankruptcies throughout the United States).

¹²³ The process by which Constitutional powers and rights may be amended is solely through the Constitutional amendment process set forth in Article V. U.S. CONST., Art. V.

¹²⁴ "Noseless victories" refers to the Japanese proverb of cutting off one's nose to spite one's face, i.e., a form of Pyrrhic victory.

¹²⁵ Bork, supra, SLOUCHING TOWARD GOMORRAH, at 164-65. Bork identifies both in Britain and the U.S. a permanent working alliance between liberals in academia and the media, their counterparts in government and its agencies, in private and trade union lobbies, in the courts and law firms, to oppose severe punishments, most specifically, capital punishment. Bork identifies the intersection of radical egalitarianism and radical individualism in the abortion issue. Id. at 183.

¹²⁶ Id.

¹²⁷ See, discussion of *Planned Parenthood v. Casey*, supra, Section I.

¹²⁸ See discussion, supra, Section I. *Roper* overruled *Stanford v. Kentucky*, *Lawrence* rejected *Bowers v. Hardwick*.

abandoning precedent and rewriting both the constitutional inquiry and the analysis by which it is made. In *Casey*, the Court altered its trimester inquiry established in *Roe*, replacing it with a more flexible viability standard precisely because medical advancements had revealed *Roe*'s trimester system to be inconsistent with scientific fact.¹²⁹

Roper too, used science to justify its result. In determining that evolving standards of decency forbade execution of minors under the age of eighteen, the Court relied heavily on the science of psychology. The Court girded its opinion on scientific evidence that juveniles' lack of maturity and underdeveloped sense of responsibility are found in youth more often than in adults and are, thus, more understandable among the young.¹³⁰ In so doing the Court relied heavily on the amicus briefs of the American Psychiatric Association (APA) and the treatises on juvenile psychology and child development cited therein.¹³¹

As discussed briefly in Section I, the APA opined in earlier abortion cases that juveniles did possess the requisite maturity to make moral choices about abortion yet supplied science to the contrary in *Roper*. It may very well be that the science of child development and neurology had evolved in the intervening years.¹³² Nonetheless a significant nomological predicament has been posited.

Casey, though upholding *Roe*, left room for refinements to its central holding based on evolving science in maternal health and fetal development.¹³³ This "sliding-stick" holding left *Roe* untouched only by yet to be discovered science. Science in its present state, now defines fetal viability as early as 23 weeks in contrast to *Roe*'s formulary of 28 weeks.¹³⁴ Of course, *Casey*'s principal foundation was stare decisis, a judicial cornerstone ripped conveniently asunder in *Roper* and *Lawrence*. The Left, hence, must now contemplate the very real possibility that its single-minded quest to overturn the death penalty may have laid a jurisprudential basis for *Roe*'s reversal.

¹²⁹ See, *Casey*, supra, 505 U.S. at 860. Specifically, Justice O'Connor noted, "We have seen how time has overtaken some of *Roe*'s factual assumptions: advances in maternal health care allow for abortions safe to the mother later in pregnancy than was true in 1973, see *Akron I*, supra, at 429, n. 11, and advances in neonatal care have advanced viability to a point somewhat earlier. Compare *Roe*, 410 U. S., at 160, with *Webster*, supra, at 515-516 (opinion of Rehnquist, C.J.); see *Akron I*, supra, at 457, and n. 5 (O'Connor, J., dissenting)."

¹³⁰ *Roper v. Simmons*, supra, 543 U.S. at 569. Particularly, the Court identified three broad categories which differentiated juveniles from adults and, thus, made juveniles unacceptable for the State's harshest punishment: 1) a lack of maturity and an underdeveloped sense of responsibility; 2) juveniles are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure; 3) the character of a juvenile is not as well formed as that of an adult. *Id.*

¹³¹ *Id.* The Court itself cited several psychological texts in its opinion. *Id.*

¹³² Indeed, the *Roper* court cited to a recent article in the field- Steinberg & Scott, Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty, 58 *Am. Psychologist* 1009, 1014 (2003). *Id.*

¹³³ *Casey*, supra, 505 U.S. at 860.

¹³⁴ Peggy Peck, "Analysis: Advances redefine fetal viability," WASHINGTON TIMES, April 7, 2004. Peck reports that while 24-25 weeks is a more general average for viability, even a 23-week fetus will survive.

Indeed, the United States Supreme Court had agreed to review the constitutionality of the Partial Birth Abortion Ban Act of 2003, a statute which the Court held unconstitutional only six years ago.¹³⁵ Moreover, the United States' chief contention in that case is that the volume of medical knowledge available now concerning the partial birth abortion procedure raises doubts as to the continued vitality of the Court's 2000 opinion in *Stenberg v. Carhart*.¹³⁶

The unintended consequences at play between *Roper*, *Lawrence*, and *Casey* illustrate the hyper-folly in judicial legislation. Their interaction also illustrates the dilemma the Left faces in confronting the NSA program. Literal adherence to a Congressional act the Left in this case prefers (FISA), in opposition to explicit powers granted under Article II may erode a decades old and largely successful strategy of using the Constitution, implicit or explicit, to accomplish unreachable policy gains.

Conversely, the Left could embrace their newfound love for Article I democracy, and maintain that the courts are no longer the place for public policy battles. This might, however, prove unworkable in the majority of the country where the Left's secular agenda of gay marriage, rights for Guantanamo Bay terrorists, abortion on demand, and opposition to the Pledge of Allegiance are unpopular.¹³⁷ Democracy can be so very pedestrian and unaccommodating; nothing like the high octane intelligence required of public policy by Constitutional jurisprudence.¹³⁸

Or, the Left could admit that it is only some acts of legislation, and some clauses of the Constitution, which they prefer. For example, the 8th Amendment¹³⁹ or the church-state wall of separation clause of the 1st Amendment.¹⁴⁰ The Second Amendment seems

¹³⁵ See, "Supreme Court to take up late-term abortion issue," USA TODAY, Feb. 21, 2006.

¹³⁶ See, Pet. Brief, *Gonzales v. Carhart*, Case No. 05-380, at <http://www.usdoj.gov/osg/briefs/2005/2pet/7pet/2005-0380.pet.aa.html>. ("Although the [Appeals] court conceded that Stenberg did not stand for the proposition that "legislatures are forever constitutionally barred from enacting partial-birth abortion bans," it determined that legislatures could enact such bans only if, "at some point (either through an advance in knowledge or the development of new techniques, for example), the procedures prohibited by the Act will be rendered obsolete."].")

¹³⁷ See e.g., *Hamdi v. Rumsfeld*, supra (captured detainees can challenge basis for confinement in federal court), Am. Civil Liberties U., Press release, "ACLU of Colorado Challenges Law Forcing Public School Teachers and Students to Recite the Pledge of Allegiance," Aug. 12, 2003, at <http://www.aclu.org/religion/schools/16064prs20030812.html>, National Organization of Women supports same-sex marriage at <http://www.now.org/issues/lgb/marr-rep.html>, Am. Civil Liberties U., Press release, "Following Passage of Gay Marriage Bans in 11 States, ACLU Vows to Continue Striving for Equality," Nov. 3, 2004, <http://www.aclu.org/lgbt/relationships/12430prs20041103.html>.

¹³⁸ See generally, Stephen Breyer, ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION (2005). Justice Breyer's theory of "active liberty" sees the Court's noble role in shaping policy as essential in achieving the constitution's democratic objective. How this thought is reconcilable with the Court's rewriting legislation and invalidating popularly enacted referenda is both beyond the scope of this article as well as facially and arrogantly dismissive of popular republican democracy.

¹³⁹ See discussion of *Roper v. Simmons*, supra, Section I.

¹⁴⁰ The author notes no such clause exists, but the separation of church and state interpretation of the First Amendment is a sacred cow of the Left. See, <http://www.aclu.org/religion/index.html> ("The establishment clause requires the separation of church and state.").

unpreferred.¹⁴¹ Congress' interstate commerce power? Unpreferred where interstate commerce power is used to block Internet taxes, medical marijuana, or federal gun free school zones.¹⁴² To support federal minimum wage and other labor laws or to authorize environmental regulations, Article I Section 8 will suffice nicely.¹⁴³ Federal immigration power will do if it requires the states to keep funding the medical care and education of illegal aliens.¹⁴⁴ Federal overreaching and bigotry if the immigration power seeks to control the borders or regulate drivers' licenses.¹⁴⁵

Section IV: Conclusion

Ultimately, picking and choosing when and which clauses of the Constitution matter, could become a time consuming process interfering with, for example, the impeachment of George Bush or the *Lawrence*-driven push for same-sex marriage. As demonstrated above, the single minded pursuit of abolishing the death penalty through the courts may have sown the seeds of *Roe*'s reversal. Continued insistence that FISA overrides constitutionally-endowed Executive authority is the type of jurisprudential argument likely to cause unintended consequences for later policy debates.

Or perhaps this new love affair is just a tryst, a one night fling to be forgotten as soon as its enjoyment (or George W. Bush) is gone?

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¹⁴¹ See e.g., Jim VandeHei, "Democrats give up gun control issue," WASHINGTON POST, Oct. 26, 2003 (decade of rhetoric and advocacy by the Democratic Party in favor of federal regulation of firearms); <http://www.aclu.org/police/gen/14523res20020304.html> (no individual right to bear arms under the Second Amendment);

¹⁴² See, *Raich v. Gonzales*, 545 U.S. ___ slip op. (2005)((upholding Controlled Substances Act as valid exercise of interstate commerce regulatory power), *U.S. v. Lopez*, 514 U.S. 549 (1995)(striking down Gun-Free School Zones Act of 1990 as invalid act of interstate commerce regulation).

¹⁴³ See e.g., *GDF Realty Investments, Ltd. v. Norton*, 169 F. Supp. 2d 648 (W.D. Tex. 2001) (Endangered Species Act constitutional under interstate commerce clause of Article I, Section 8).

¹⁴⁴ Article I, Section 8 gives Congress power to regulate naturalization. See e.g., *LULAC v. Pete Wilson*, 997 F. Supp. 1244 (C.D. Cal. 1997) (invalidating California's Proposition 187).

¹⁴⁵ California, among other states is debating whether to issue driver's licenses to undocumented aliens. Tyche Hendricks, "Life without a License" SAN FRANCISCO CHRONICLE, Feb. 10, 2002. See also, ACLU Press Release, House 9/11 Commission Bill Includes Patriot II, National ID Card, Worst Anti-Immigration Measures in Decade," Sept. 27, 2004 at <http://www.aclu.org/safefree/general/18623prs20040927.html> (proposal for nation identification card was "anti-immigrant"); ACLU Press Release *Following Threat of ACLU of Virginia Lawsuit, Manassas Suspends Ordinance That Limit Right of Family Members to Live Together*, Jan. 5, 2006 at <http://www.aclu.org/immigrants/discrim/23404prs20060105.html> (Manassas, VA ordinance targeted at Latino's).