Constitutional privacy: The evolution of a doctrine

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Constitutional privacy: The evolution of a doctrine

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University of Nevada, Las Vegas, 1990
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The constitutional right to privacy has, gradually and precariously, become ingrained in the American legal landscape. Recognized as a fundamental individual right, the right to privacy naturally coincides with the political philosophy of Western democracy. Owing to men like Thomas Hobbes and John Locke, the basis of power in society was conceptually converted to the people; specifically, to the individual. The Founding Fathers, in laying down the foundations of American society, pursued the political philosophy of the predominance of the individual in society. Herein lies the legal justification of the right to privacy as a constitutional guarantee.

Although the right to privacy is not actually enumerated in the Constitution, over a century of common law precedent and judicial interpretation has authorized certain personal activities as being outside the scope of governmental regulation. The constitutional defense of such freedoms have been regarded as Fourteenth Amendment due process guarantees to life, liberty, and property. It was not until 1965 that the 'right to privacy' invalidated an intrusive state statute on its own merit. In *Griswold v. Connecticut,*
the Supreme Court ruled that proscribing the use of contraceptives to married couples was unduly burdensome. As interpreted, contraceptive regulation violated personal privacy protected by certain express guarantees within the Bill of Rights including the First, Third, Fourth, Fifth, and Ninth Amendments. These constitutional protections create 'zones of privacy' through association and emanation. The judicial acknowledgment of the right to privacy invited further challenges which involved intensely personal situations and choices, the most controversial of which is the right to choose abortion. *Roe v. Wade* was the precedent setting case which granted women the right to choose abortion based on Fourteenth Amendment rights to due process. A succession of subsequent cases made their way to the Supreme Court which clarified the degree of state regulation and in the process expanded the right to privacy and reproductive choice. The most recent cases, however, changed that trend allowing states greater latitude in regulating abortion. Hence, is the volatile nature of the constitutional right to privacy.
ACKNOWLEDGMENTS

The author would like to extend the utmost gratitude to her parents Dolores and Ray Mandarino and brothers and sisters Mickey, Linda, Danny, Lisa, and Pat for their faith, tolerance, and patience. Professional and personal thanks to Professors Jerry Simich and Michael Bowers for their direction and invaluable academic contributions. Special thanks goes to Todd Gilbertson for his immeasurable support.

Helena Ann Mandarino
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THE UNKNOWN CITIZEN
(To JS/07/M/378)
This Marble Monument is Erected by the State

He was found by the Bureau of Statistics to be
One against whom there was no official complaint,
And all the reports on his conduct agree
That, in the modern sense of an old-fashioned word, he was a saint,
For in everything he did he served the Greater Community.
Except for the War till the day he retired
He worked in a factory and never got fired,
But satisfied his employers, Fudge Motors Inc.
Yet he wasn’t a scab or odd in his views,
For his Union reports that he paid his dues,
(Our report on his Union shows it was sound)
And our Social Psychology workers found
That he was popular with his mates and liked a drink.
The press are convinced that he bought a paper every day
And that his reactions to advertisements were normal in every way.
Policies taken out in his name prove that he was fully insured,
And his Health-card shows that he was once in the hospital but left it cured.
Both Producers Research and High-Grade Living declare
He was fully sensible to the advantages of the Installment Plan
And had everything necessary to the Modern Man,
A phonograph, a radio, a car and a frigidaire.
Our researchers into Public Opinion are content
That he held the proper opinions for the time of year;
When there was peace, he was for peace; when there was war, he went.
He was married and added five children to the population,
Which our Eugenist says was the right number for a parent of his generation,
And our teachers report that he never interfered with their education.
Was he free? Was he happy? The question is absurd;
Had anything been wrong, we should certainly have heard.

W.H. Auden
March 1939
INTRODUCTION

We live in a continual competition with society over the ownership of ourselves.

Arnold Simmel, "Privacy Is Not an Isolated Freedom"

Society is a guardian and is responsible for fostering the general moral, intellectual and emotional framework of its citizens. In order to endure, the government must be able to indoctrinate a political covenant among its members. Thus, licensed obstetricians welcome us into state regulated hospitals; we are fed FDA approved baby food so that we may grow up and mandatorily attend an educational institution which is run by local authorities in accordance with state programs following provisions suggested by the federal Department of Education. In effect, the government systematizes nearly every aspect of our lives. This is the

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1See, for example, Plato's Republic, trans. G.M.A. Grube (Indianapolis: Hackett Publishing Company, 1974), in which Socrates promoted strict discipline and education of youth through comprehensive state-run instructional programs to make the young good citizens. Jean-Jacques Rousseau also advanced the notion of societally-sponsored education, because all citizens "have equally a need for guidance. [They] must be taught what it is they will. From this increase of public knowledge would result . . . harmony . . . and the highest power of the whole." See, Rousseau, The Social Contract, trans. Charles Frankel (New York: Mafner Publishing Co., 1947), 35.
function of all governments: to maintain an operative, peaceful, cohesive and lasting society. We, in turn, live in an environment which is most conducive to our individual survival, providing security, private property and companionship.²

So where do we, as individuals, find the latitude to just be ourselves? To establish and maintain intimate relationships, to think and create and develop our intellectual and spiritual natures requires a sphere of privacy apart from society, even though we are products of society. While "no man is an island unto himself," neither is he an open book for all the world to see. Society must allow its members repose from the demands and challenges of being a public person. However, society often exceeds its sphere of propriety, for not only are human beings persistently inquisitive (and intrusive) creatures, but what is more imposing, the government, and its attendant surveillance squads, assumes it has a vested interest in the private activities

²John Locke reasoned that security and private property are the only reasons why mankind joins into a political society: "... though men when they enter into society give up the equality, liberty and executive power they had in the state of nature into the hands of the society, to be so far disposed of by the legislative as the good of the society shall require; yet it being only with an intention in every one the better to preserve himself, his liberty and property . . . " See, Locke, Treatise of Civil Government: An Essay Concerning the True Original, Extent and End of Civil Government, ed. Charles L. Sherman (New York: Appleton-Century-Crofts, Inc., 1937), 85.
of its citizens -- sometimes justifiably so; sometimes not.³

For example, do the state and local governments that legally prohibit consensual homosexual relations have a vested interest in the sex lives of these individuals? Homosexuality is culturally taboo, and therefore unacceptable in the eyes of most legislators. Isn't the federal Constitution designed to protect the individual rights of unpopular or misunderstood social minorities? Many would argue that the AIDS epidemic has changed the private nature of sexual relations, both homosexual and heterosexual, and therefore regulation is not overly intrusive.⁴

Americans love their liberties, but those liberties are not absolute. Even in a society which boasts individual freedom above all else, such freedom must maintain a sense of social responsibility. While

[i]nsufficient freedom will subdue the spirit of enterprise and resolution on which so much of civilized progress depends . . . unbridled freedom will clash inexorably with the life of others.⁵


inexorably with the life of others.⁵

The debate over the right to privacy is one of individual rights versus societal order, and is particularly controversial in democratic America. Because our society is comprised of a melting pot of staunchly held opinions and beliefs, our political and legal representatives are often embroiled in debate over the unbalanceable scales of individual and societal interests. Unfortunately, in most circumstances one interest must be sacrificed for the existence of the other; individual privacy and public policy are often at odds.

History has shown that an excessive zeal for a particular ideology or institution causes a despotic and uncompromising mentality which could result in economic and social stagnation,⁶ fascism,⁷ and in the most extreme cir-


⁷Italian fascist, Alfredo Rocco exhorts that fascist dogma does not "accept a bill of rights which tends to make the individual superior to the state and to empower him to act in opposition to society. Our concept of liberty is that the individual must be allowed to develop his personality in behalf of the state. . . " Rocco, "The Political Doctrine of Fascism," in Readings on Fascism and National Socialism (Denver, Colorado: Alan Swallow Paperbacks, no date), 36.
cumstances, genocide. History has also shown that the absence of governmental regulation, and a lack of communal cohesiveness likewise subjugates individual liberty. Too much freedom incites the masses into a state of chaos and private warfare: "wherein men live without other security, than what their own strength, and their own invention shall furnish them withal." One could argue, as Thomas Hobbes did, that the life of man is no better when the government is oppressive, than when there is no government, or when the governing body is ineffective.

Proponents of the right to privacy would argue that if the intruder is the government, then oppression has the stamp of legitimacy which few people, if any, could fight back and win. A government with unlimited sovereignty, the acquiescence of a passive or intimidated people, and the use of coercion, is far more a threat to individual liberties than the madman with an ax. Censorship of thought and action and too rigid a surveillance of individual beliefs and conduct, moreover, invites underground conspiratorial attitudes and a deep mistrust of government. The spirit of a people cannot be repressed for too long without eventual resistance to the government and subsequently, as Arnold

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8Arendt Hannah recounts the principles and consequences of fascism and the reign of terror which resulted from the racist philosophy of "total domination," in The Origin of Totalitarianism (Cleveland, Ohio: The World Publishing Co., 1966).

Simmel points out, towards each other.

Opposition to freedom raises the issue of freedom. If there were no opposition to freedom, it would have to be invented... A vital society continues to question it, and to keep it in flux. But without it, there would not be a society, no basis for any claims, no freedom, no privacy, no boundaries, no individuals -- but only the war of each against all.10

A good example of the internal conflict caused in a society when the government disregards individual rights to free thought and beliefs is the Red Scare led by Senator Joseph McCarthy during the 1950s. The exaggerated specter of communism had neighbor spying on neighbor and browbeating Congressmen leading legislative inquests against blameless citizens.11 Those who subscribed to a leftist philosophy, belonged to a labor union, or associated with suspected communists were liable to be blackballed from their chosen professions and even to serve prison sentences.12 In hind-


11The United States Supreme Court eventually declared this to be an unconstitutional infringement of individual rights. See, for example, Watkins v. United States, 354 U.S. 178 (1957), overturned a "contempt of Congress" conviction as "necessarily invalid under the Due Process Clause of the Fifth Amendment." See also, Sweezy v. New Hampshire, 354 U.S. 234 (1957), where the Court invalidated state legislative contempt convictions based on the due process clause of the 14th Amendment.

sight, was the government justified in employing "Big Brother" tactics against its people? Did it serve a greater cause? If not, then, perhaps with some foresight, the greater Leviathan will learn to respect the private acts and beliefs of its members unless there is imminent danger that the whole or any of its parts will in any way be harmed.\textsuperscript{13}

This thesis represents an effort to vindicate a right to privacy for the American people. It attempts to explain why privacy needs are a significant component of Western democratic ideals and expectations. Chapter One looks at both the personal and societal importance of privacy, and how it is consistent with the American concept of ordered liberty deeply entrenched in the history of our nation. Chapter Two examines the actual constitutional framework of a right to privacy. From its roots as a tort remedy in trespass and defamation cases, to search and seizure and self-incrimination considerations, to the very controversial rights to autonomy, there is no doubt that privacy protections have come a very long way. The discussion in Chapter Three will narrow the general focus of privacy to the constitutionally protected areas of reproduction, contracep-

\textsuperscript{13}See, John Stuart Mill, \textit{On Liberty}, \textit{Representative Government, The Subjection of Women}. (New York: Oxford University Press, 1933), 14-15. In \textit{On Liberty}, Mill explains the "Harm Principle" in representative democracies, that is, "the sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number, is self-protection. That the only purpose for which power can be rightfully exercised over any member of a civilized community against his will, is to prevent harm to others."
tion, and abortion, in a case-by-case analysis of Supreme Court decisions. Finally, Chapter Four will consider the future of a right to privacy in light of recent Supreme Court decisions limiting the constitutional safeguards of certain types of privacy decisions.
EXPLORING THE CONCEPT OF PRIVACY

An American has no sense of privacy. He does not know what it means. There is no such thing in the country.

George Bernard Shaw

This chapter will examine different aspects and interpretations of the concept of privacy, and why it plays a significant role in the lives of human beings. There have been psychological examinations for why the individual psyche needs its space;\(^1\) moral considerations,\(^2\) cultural variations,\(^3\) social explanations\(^4\) and political\(^5\) and legal

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\(^3\)For example, Alan Westin, Privacy and Freedom (New York, Atheneum Publishers, 1967).


justifications are all comprised within this seemingly familiar affair. Thus, we begin with the definition of the very word itself.

Defining Privacy

Privacy/ (prɪ - və - sē) 1 a: the quality or state of being apart from company or observation: SECLUSION b: freedom from unauthorized intrusion (one’s right to -) 2 archaic: a place of seclusion 3: SECRECY.

Privacy, as defined by Webster’s New Collegiate Dictionary, is described in three relatively simple concepts: seclusion, freedom and secrecy. Yet, one scholar describes privacy as "a confusing and complicated idea." Another asserts that there is no definable way to describe privacy "... perhaps, because it is undefinable. Like the grand concepts of liberty and equality, privacy may be too large to be clearly identified." Perhaps a better understanding of the right to privacy is possible if the definitions of privacy, as put forth by Webster, are examined separately.

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The ensuing analysis proposes to clarify that the concept of **freedom** is what is meant by the **right to privacy**.

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Seclusion

I never said, "I want to be alone."
I only said, "I want to be left alone."

Greta Garbo

Definitions 1a and 2 describe privacy as a being-apart-from others, and thus akin to loneliness, alienation, isolation and ostracism. Is this what is meant when one speaks of the right to privacy, that is, the right to be lonely? Privacy is not a negative state-of-being, says Michael Weinstein, who asserts that several variables must exist for someone to be in the state of privacy.

> Privacy appears in consciousness as a condition of voluntary limitation of communication to or from certain others in a situation, with respect to specified information, for the purpose of conducting an activity in pursuit of a perceived good. The variables of choice, limited communication, relevant others, a situational context, activity, and a good to be attained must all be present in the full construction of privacy.\(^\text{10}\)

Privacy is not loneliness since loneliness is an unwanted condition which is thrust upon an individual who in fact seeks social contact or affection. Privacy is not alienation since alienation is a state of unrelatedness from

\(^{10}\)Michael A. Weinstein, "The Uses of Privacy in the Good Life," in *Privacy: Nomos XIII*, 94.
one's social context or oneself. Isolation is not privacy since isolation is a term which refers to complete aloneness while privacy permits one to enjoy the company of relevant others in a more intimate context. Finally, privacy is not ostracism since the latter is a condition of involuntary banishment and the former is always voluntary withdrawal.

Privacy is, in short, a positive human condition. While some forms of being-apart-from-others can be negatively construed, privacy is desirable. It is an affirmation of freedom and self-determination. It allows people to assemble and share ideas and affords to individuals the freedom they need to achieve goals and flourish as human beings.¹¹

Secrecy

Definition 3 asserts that privacy is a synonym for secrecy. While both secrecy and privacy involve the withholding of information, secrecy is more compelling and more orchestrated, or as sociologist Edward Shils declares,

SECRECY IS PRIVACY made compulsory. With more severe sanctions for the disclosure of information, more emphatic demands for its withholding from persons authorized to receive it, secrecy appears to be an

¹¹Westin affirms that privacy is a basic human need: "Anthropological studies have shown that the individual in virtually every society engages in a continuing personal process by which he seeks privacy at some times and disclosure and companionship at other times. . . The reason for the universality of this process is that individuals have conflicting roles to play in any society; to play these different roles with different persons, the individual must present a different "self" at various times. Restricting information about himself and his emotions is a crucial way of protecting the individual in the stresses and strains of this social interaction." Westin, Privacy and Freedom, 13.
extension of privacy. It is privacy with higher more impassable barriers. Yet secrecy is the enemy of privacy.  

Secrecy is used against individual privacy. It is a tool employed to manipulate and control information, while privacy is protective and selective over the disclosure of information. Secrecy denotes sneakiness, deviousness, or underhandedness; when someone has to do something on the sly, then that person is secretive. Privacy, on the other hand, refers to autonomy or the freedom to choose to do something without that action becoming public.

When a government quashes the right of people to act privately, then the defiant citizenry must act secretly. For example, in the Soviet Union, people who wanted to worship had to do so secretly. However, with the allowance of glasnost and the more tolerant attitude toward religious beliefs, individuals are now allowed to worship privately.  

"Privacy is the voluntary withholding of information reinforced by a willing indifference," explains Shils. "Secrecy is the compulsory withholding of knowledge, rein-

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12Shils, The Torment of Secrecy, above, 201.

13In the Soviet Union, prior to "glasnost," religion existed by implication, says Alec Nove. However, in 1988, religious attitudes began to change. Glasnost began to bring the church into the more open society. For example, "the word 'God' could not, for decades, be spelt with an initial capital letter. Only in most recent years has this become possible, and it is now commonplace. . . Recordings of church choirs have now become available. . . [A] televised discussion [was] held in March 1988 on different [religious] world views. . . " See, Nove, Glasnost' in Action (Boston, Massachusetts: Unwin Hyman, 1989), 118-119.
forced by a prospect of sanctions for disclosure."¹⁴

When secrecy is associated with the function of governments, it is granted more legitimacy than when an individual or a private group acts secretly. Much to the dismay of First Amendment advocates who see freedom of the press as a means to keep the American government and its representatives from acting secretly, the Supreme Court has found a sound constitutional basis for governmental secrecy. In United States v. Nixon,¹⁵ the Court found executive privilege to be functionally licensed in the operation of government. Some find it ironic, however, that the President of a democracy is rendered the constitutional justification to act secretly, while a general right of privacy is considered a substantive and precarious constitutional right. Philip Kurland asserts:

[I]f the Supreme Court can find a constitutional basis, made up of whole cloth, for executive privilege, which is a secrecy proposition, it should more readily find in the Constitution the basis for an expansive privacy doctrine. The latter -- individual privacy -- is consistent with the Constitution's primary function of limitation of arbitrary governmental power. The former -- government secrecy -- is not; indeed, it is inconsistent with it.¹⁶

¹⁴Shils, The Torment of Secrecy, 26.

¹⁵United States v. Nixon, 418 US 683 (1974). The Supreme Court ruled that executive privilege (i.e., the right to withhold information, documents, or testimony from congress or the courts) does have limited constitutional basis. The Chief Executive must reasonably show that disclosure of information could imperil the national interest.

Furthermore, a more sophisticated international military network tacitly requires that the national government become all the more impenetrable at the expense of individual liberties. Official secrets and industrial activity, in accordance with the nuclear arms race, are becoming uncomfortably close. The price of system maintenance and national security is the lessening of individual privacy, notes Carl Friedrich.

The need for official secrecy has, under the heading of security, been extended at the expense of private secrecy (privacy) as investigatory activities, prying into the private lives of individuals, have become ever more aggressive.17

If individual privacy becomes too endangered by governmental secrecy, then, as in totalitarian regimes such as Nazi Germany, individuals will resort to secrecy. The difference between privacy and secrecy, therefore, is the extent to which external constraints force their will upon independent human beings.

Freedom

I think I am free when I can do what I want; this tiny protoplasmal center of radiant energy demands that alien impacts shall not thwart its insistences and self-assertions.

Judge Learned Hand

When one speaks of the right to privacy, then definition 1b is the corresponding interpretation, that is, free-

dom from unauthorized intrusion. Generally, four variables are present when defining an individual's right to privacy: (1) the individual elects to limit access to his thoughts, actions, and so forth. This suggests an individual is free to make rational choices; (2) the individual temporarily chooses to sever communication and information from certain others or society; (3) the individual's privacy serves a desired purpose; (4) privacy is an individual prerogative and an inherent human liberty. These variables are significant characteristics to the American love of liberty and freedom. It is, thus, surprising that a constitutional right to privacy has fared as dubiously as it has in the United States. It is, perhaps, because of the negative connotations, just discussed, that accompany the right to privacy; it engenders fears of an unmanageable and alienated America. The right to privacy is significant in still other ways, as the next section will examine.

Evaluating Privacy

The Social-Psychological Significance of Privacy

We are, in a sense, always alone, in a world of fleeting events and images. Not meant despairingly, yet realistically, each of us moves on to meet new companions, new challenges, and new ideas in a way unique to ourselves. Contrary to the ancient Greek philosophy which maintained

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18 David M. O'Brien, Privacy, Law, and Public Policy, 4.
that the individual is teleologically a part of the larger whole,\textsuperscript{19} natural rights philosophers, such as Thomas Hobbes and John Locke, approached the theory of the individual in society as "all being free, equal and independent."\textsuperscript{20} It is therefore necessary that the individual be prepared for the vicissitudes that life offers, for only within the individual mind are the resolutions accommodating life to be made. Sociologists and psychologists agree that privacy allows the individual the time and space required to recruit and redefine himself and his social situation. Privacy, in a world of social tensions and high expectations, is the outlet in the pressure cooker of life. Individuals instinctively create "self-boundaries," within which "our own interests are sovereign, all initiative is ours, we are free to do our thing, insulated against outside influence and observation."\textsuperscript{21}

Being human means spontaneity, originality, and at times, even irrationality. Being a member of society means

\textsuperscript{19}For example, Aristotle professed that "the polis is prior in the order of nature to the family and the individual. The reason for this is that the whole is necessarily prior [in nature] to the part." See, \textit{The Politics of Aristotle}, ed. and trans. Ernest Barker (New York: Oxford University Press, 1981), 6.


\textsuperscript{21}Arnold Simmel argues that the desire for privacy is different in different cultures. Because the individual is the central value in the United States, the felt need for privacy is greater here than in other societies. See, Simmel, "Privacy Is Not an Isolated Freedom," above, 72.
standards of conformity and contempt for noncompliance. Privacy acts as the resolution between these opposing forces. It allows individuals their mortal indiscretions without being branded as iconoclasts, perverts, or eccentrics by their peers. The dichotomy of existence is the public face and the private I. The separation between actual self and social self is functional, notes Michael Weinstein,

> because the person can invisibly transgress social norms and thereby keep up appearances in his social relations, undertake consumption which is disapproved, enact unorthodox postures, and, most important, relax after encounters with unbearable people with whom relations are necessary.\(^2\)

The ability to act privately, therefore, is the power to be master of the identity that one creates in the world. This gives the individual in society the sense that he is not an impotent entity in an impersonal universe. It allows people some modicum of control over their immediate environment; an environment that includes body, mind and heart.

The inner sense of privacy, and mutual respect for it, may be a mechanism that helps to secure the conditions for living fraternally in a world where men are not gods, where to know all is not to understand and forgive all.\(^3\)

Critics of the right to privacy allege that all the ado over the claims for personal autonomy is degenerating the

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\(^2\)Michael A. Weinstein, "The Uses of Privacy in the Good Life," 97.

need for law and order within society. They suggest that by promoting the individual above all else, the foundation of community fellowship is being sacrificed, and that anti-social behavior is being fostered. Because of the "ME" attitude, individuals are losing touch with society, and values, and the general feeling of self-worth that comes with a healthy affiliation with others. Hence, privacy, argue the critics, is the psychosis of the post-modern, liberal era.

The Moral Significance of Privacy

When critics argue that privacy is producing the decline of values within society, it is important to appreciate what these values are. If people in the United States

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24A vociferous attack on privacy was made by H.W. Arndt: "The cult of privacy rests on an individualist conception of society, not merely in the innocent and beneficial sense of a society in which the welfare of individual is conceived as the end of all social organization, but in the more specific sense of 'each for himself and the devil take the hindmost'... An individualist of this sort sees 'the Government' where we might see 'the public interest.'" See, Arndt, "The Cult of Privacy," Australian Quarterly XXI, no., 3 (September 1949): 69, 70-71.

25The modern era advanced the predominance of the individual over society. The classical liberal philosophy will be explained in greater detail later in Chapter 1. One philosopher, Richard Wasserstrom, argues that cultural hang-ups and taboos are what cause the individual to go into hiding. It is societal qualms that are inducing the 'cult of privacy.' "We have made ourselves excessively vulnerable... because we have accepted the idea that many things are shameful unless done in private... Indeed our culture would be healthier and happier if we diminished substantially the kinds of actions that we now feel comfortable doing only in private, or the kinds of thoughts we now feel comfortable disclosing only to those with whom we have special relationships." See, Wasserstrom, "Privacy: Some arguments and assumptions," Philosophical Dimensions of Privacy, 330-331.
were asked what they value most, a plethora of different answers would be given. Some value family, marriage, love, money, education, freedom, and so on. These values are present in varying degrees of intensity, among different age groups and ethnic groups, and within the disparate expanse of the country. If an individual prefers a private life of education and religious meditation, would it be right to accuse that individual of being a decadent factor in the decline of the institution of marriage and family?

Throughout history individual values have been debated, weighed, fought over, and even killed for, and no one single value has infinitely prevailed. There is one constant regarding values and morality, however, and that is tolerance and understanding. As Charles Fried discerned it, the principle of morality, far from representing a complete system of values, establishes only the equal liberty of each person to define and pursue his values free from the undesired impingement of others.

Equal deference to individual values is important because it is telling the person that he has worth as a freethinking, rational, and intelligent human being.

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26 Such historical events inspired Thomas Jefferson to comment that "[m]illions of innocent men, women, and children, since the introduction of Christianity, have been burnt, tortured, fined, imprisoned; yet we have not advanced one inch towards uniformity. What has been the effect of coercion? To make one half of the world fools, and the other half hypocrites." See, Jefferson, "Query XVII," in Writings (New York: Literary Classics of the United States, 1984), 286.

The philosophy of paternalism, on the other hand, says that authority, governmental or religious, is charged with guiding the morality and mentality of the people, since "the people" are generally unable to act morally on their own. For most legal scholars, and Americans in general, this proposition amounts to blasphemy. H.L.A. Hart explains why freedom is the primary value:

The unimpeded exercise by individuals of free choice may be held as a value in itself with which it is 'prima facie' wrong to interfere; or it may be thought valuable because it enables individuals to experiment -- even with living -- and to discover things valuable both to themselves and to others. But interference with individual liberty may be thought an evil requiring justification for simpler, utilitarian reasons; for it is itself the infliction of a special form of suffering -- often very acute -- on those whose desires are frustrated by the fear of punishment.

Experimenting with life and its consequences has been the moral lesson. Many times the voice of authority was wrong; not infrequently, it was ethically outrageous and morally bankrupt, designed to serve one purpose which was to promote and maintain the power of the man or institution.

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Some legal paternalists include Lord Devlin, James Fitzjames Stephen and Edmund Burke. They exhort the necessary existence of a stringently enforced moral code among all members of society, regardless of whether their offense is detrimental to society. A paternalist, for example, would contend that an individual must be protected from himself, and that this a necessary role of law. See, for e.g., Devlin, The Enforcement of Morals (Oxford: Oxford University Press, 1959), Stephen, Liberty, Equality, Fraternity (New York: Cambridge University Press, 1967), and Burke, Reflections on the Revolution in France (New York: Arlington House, 1955).

There are no absolutes, as many people have discovered, thus, the iniquities of life are the restrictions and oppressions falsely established. If privacy is necessary to psychologically or physically free the individual from culturally imposed restraints, then it is hard to see how the right to privacy destroys the values of a nation; particularly a country so fervent about individual freedoms.

The Political Justification for the Right to Privacy

American political culture is premised on the words of Thomas Jefferson in the Declaration of Independence:

We hold these Truths to be self-evident, that all Men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the Pursuit of Happiness.—That to secure these Rights, Governments are instituted among Men, deriving their just Powers from the Consent of the Governed.—

According to the dictates of reason, and to the document that set us free as a nation, no one may be a master over others unless it is by consent. The American form of limited sovereignty declares that "the people" created a government to protect individual liberties against encroachment from men in general, and from the government in particular. The governed are subject to the laws of government, not subjugated to the whims of authority. Freedom, equality, and independence are entitlements endowed upon human beings prior to the creation of government. Conditionally, however, individuals must refrain from certain actions which would enslave free men. "He who may intrude upon another at
will is the master of the other and, in fact, intrusion is a primary weapon of the tyrant."\(^{30}\)

The American political system can be described as a series of fortresses; walls exist everywhere separating church and state, the three branches of government, the two houses of Congress, federal and state government, individual liberties from arbitrary governmental encroachment and, finally, criminal and civil laws separating one citizen from the other. This was designed not only to counteract a concentration of power, but also to preserve a large measure of autonomy whereby institutions and individuals could carry out their affairs.\(^{31}\) If, for instance, the President could interfere with the duties of the legislative or judicial branches, then we could reasonably expect to live in fear of despotism. Or, if popular religion were to infiltrate our governmental institutions, we could hardly expect freedom of conscience and belief to endure.\(^{32}\) And, if the private domain were to be permeated by intruders at random, then we

\(^{30}\)Edward J. Bloustein, "Privacy as an aspect of human dignity: an answer to Dean Prosser," 165.

\(^{31}\)See, for example, James Madison who, expounding on the ideas of Charles-Louis de Montesquieu, advanced the principle of separation-of-powers. Madison stated "that where the whole power of one department is exercised by the same hands which possess the whole power of another department, the fundamental principles of a free education are subverted." Madison, "Essay #47," in James Madison, Alexander Hamilton and John Jay, The Federalist Papers (New York: New American Library, 1961), 304.

are by no means equal.

Francis Bacon aptly asserted that "knowledge . . . is power."\(^3\) Hence, ill-begotten information about ourselves, our thoughts and our actions arms the possessor of such information with the power to discredit our names and reputations and to deprive us of a future of freedom and autonomy. Information about private conduct can be distorted and disclosed, misinterpreted out of context and used against us making us slaves to the past and prisoners of the present.\(^4\) Certainly, this was not intended for a politically free people, or meant by a political philosophy which, above all else, exalts the individual.

The individual in Western democracies plays an important role in the political system by holding representatives accountable. The ballot is the means whereby citizens have their say in government; they state their choice by marking the box next to the politician or proposition. The privacy of their choice is the one way that the voter is assured that he could be true to his personal and political convictions. Community pressures and other intimidations cannot

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\(^4\) Data banks are primarily responsible for invading individual privacy. Hyman Gross asserts that data banks are an "offense to self-determination. We are subject to being acted on by others because of conclusions about us which we do not know and whose effect we have no opportunity to counteract." See, Gross, "Privacy and Autonomy," in *Privacy: Nomos XIII*, 174.
reach the privacy of the ballot box.\textsuperscript{35}

Freedom of convictions in a democratic society keeps the system dynamic and the political process open and competitive:

Only an individual free to shape his own life and that of his immediate human relations is capable of fulfilling the vital function of a citizen in a democratic community, and thus privacy becomes the corollary of democracy.\textsuperscript{36}

If there were no individual privacy, if we lived in an open communal society, differences of opinion would eventually languish away under the weight of public opinion, fear of ostracism, or loss of esteem. If there were no variety of views or differences of opinion there would be no need for democracy. The tyranny of popular morality and opinion was a quandary that our Founding Fathers sought to avoid through various channels designed to protect the rights of minorities.\textsuperscript{37} Though these impediments (e.g., passing laws only with the consent of both houses of Congress, the Senate filibuster, judicial review, etc.) may make our political


\textsuperscript{36}Ibid., 116.

\textsuperscript{37}James Madison, for example, strove to remedy the problem of the tyranny of the majority in "Essay #51" of the Federalist Papers, 324. "Whilst all authority in it [the federal republic of the United States] will be derived from and dependent on the society, the society itself will be broken into so many parts, interests and classes of citizens, the rights of individuals, or of the minority, will be in little danger from interested combinations of the majority. In a free government the security for civil rights must be the same as that for religious rights."
system complex, slow, and at times counterproductive, it is a system aimed at compromise and it necessitates tolerance. Because we are able to bend with the diversities of interests and opinion, our government will not break as a result of being unable to adjust to the changes which will eventually confront all societies.

The most powerful argument for the right to privacy in Western democracies is, thus, the right of every individual to self-determination. It is every citizen’s right to vote his conscience, or belong to a political organization, if he in fact chooses to be political at all. It is every citizen’s right to choose between Protestantism, Catholicism, Buddhism, atheism, ad infinitum, as his belief system. Individual self-determination must not be laid in the lap of a disinterested bureaucracy whose records care nothing about justice or circumstance; nor must it be manipulated by a malicious political foe whose warped sensibilities seek only the downfall of his opponent; nor should one’s decisions be sacrificed to self-righteous religious groups whose secular odyssey tolerates only one course of conduct. Contrary to totalitarianism where the individual is thought to exist for the institutions and where individual values are determined by the institutional superstructure, liberal democratic thought credits its citizens with the rationality to create, maintain, amend, and advance the political and economic society in which they live.
Ideological Origins of the Right to Privacy

As with all laws and political principles, the right to privacy evolved as a result of historical, philosophical, and political circumstance. The intellectual ferment which preceded and influenced the men who framed our system of government advanced a revolutionary form of governing based on a new way of understanding mankind. No longer was man considered a mere pawn of kings, enthroned by "blue blood" and "divine right." The Enlightenment revealed to thinkers that vassalage was exploitative and erroneous; reason showed philosophers that life could be more free, equal, and productive.

The time was the Seventeenth Century; an era of radical change. Continental tradition was being challenged by the inevitability of science, industrialization, and capitalism. Feudalism was undermined because of the mass migration of serfs into urban areas. A large concentration of wage laborers in cities such as London, and poor purchasing power because of high prices manifested themselves in scores of people living at or under the poverty line.\textsuperscript{38} Such an assemblage of unpropertied indigents posed a potential threat to the propertied class. The English Civil War was

\textsuperscript{38}Christopher Hill writes "that in this period England was 'relatively' overpopulated - that the population was greater than the economy as then organised could absorb." See Hill, The Century of Revolution, 1603 - 1714 (New York: W. W. Norton & Company, 1980), 18.
imminent.39

The face of religion was changing as well. While the conservative Church of England (Episcopalian) frowned upon the profit-making incentive of the marketplace, the up-and-coming prominence of the theological left (including Presbyterianism, Puritanism, and Calvinism) was encouraging a much more liberating ideology. They urged that to work assiduously, and to make the best use of one's talents, was to earn God's favor. Their promotion of effort, industry, study, and a sense of purpose, also led to the scientific quest.

The diligence with which men were now applying their labor and conscience fostered a new skepticism. Instead of accepting the heavens as taught in the church, men were inspired to study the heavens for themselves and, therein, find the laws of the universe. With each new discovery, a previously held belief was shattered. The scientific method thus caused the deterioration of authority in the Seventeenth Century. From the Pope of Rome to the astronomer Ptolemy, authorities once taken at their word were questioned and frequently rejected. Historian Christopher Hill writes:

The initial challenge to authority came from the Protestant appeal to the individual conscience. . .

39The Civil War was to last from 1642-1649. It was also called the "Puritan Revolution" because of the social consequences of Puritan thought, for example, individualism, materialistic initiative, etc. Ibid., 63ff.
Economic individualism in society (the breakdown of village community and gild, the rise of capitalism) combined with individualism in religion to produce quite a new authority, that contained within each man's breast.\textsuperscript{40}

Europe was in a state of flux. Its intellectual, moral, and economic composition was being torn down in order to rebuild, and men, as dynamic as the times, were there to record their empirical observations. Scientific, religious, and political revelations began to emerge, most of which concentrated on the individual human being and his environment . . . and then came Thomas Hobbes.

Thomas Hobbes

\textit{Wisdom} is acquired not by reading of books, but of men. \textit{Leviathan}

Why would a man of learning and privilege, a man bred to walk with the aristocracy and the intellectual elite conclude that "the life of man, [is] solitary, poor, nasty, brutish, and short?"\textsuperscript{41} Hobbes' incisive observations invariably led him to his cynicism, for what he saw were paupers fighting to survive, a middle class (yeomen, industrialists, etc.) laboring to advance their lot and an aristocracy manipulating to keep and further their fortune. And in all of these affairs of men, from prince to pauper, Hobbes saw that men were equally capable of each others'
undoing. This, alas, was the problem.

Man's relative equality of body and mind, as well as his infinite appetites and aversions, consequently, make foes of mankind. In a pre-governmental state, or a state of nature where everything is for the taking, our neighbors are but bothersome hindrances, frustrating our personal goals and desires. There is no private property or industry, for one's ability to protect the fruits of his labor and his possessions is uncertain. Man in this type of society is doomed to a life of struggle and competition, endeavoring "to destroy or subdue one another."  

Hobbes then took a fundamental understanding of human nature, that is, that man is primarily self-interested, and asked why men would want or need a government when, without government, man is in his most sovereign state. In the state of nature, man has unfettered liberty to do what is necessary to preserve and improve his condition; that is to say, he has 'natural rights.'

However, reason, and again self-interest, urge mankind to abide by natural laws in order to secure his state and estate in a ruthlessly competitive world. If mankind in general agrees to "do not that to another, which thou would-

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42Ibid., 80-84.

43Natural rights or 'jus naturale' is "the liberty each man hath to use his own power, as he will himself, for the preservation of his own nature . . . and consequently, of doing anything, which in his own judgement and reason, he shall conceive to be the aptest means thereunto." Ibid., 84.
est not have done to thyself," then men are appealing to the 'law of nature.' "44 Three fundamental precepts, according to Hobbes and the natural law, will abet peace among men: first, "that every man ought to endeavour peace, as far as he has hope of attaining it,"45; second, "that a man be willing, when others are so too . . . to lay down this right to all things; and be contented with so much liberty against other men, as he would allow other men against himself,"46; and third, "that men perform their covenants made."47

Hereafter, man, who before the covenant had complete liberty, relinquishes his natural rights to a sovereign, one or an assembly possessing absolute power, created to keep the peace and to execute the law for that purpose. After-all, "covenants without the sword, are but words, and of no strength to secure a man at all."48 Free men authorize the sovereign who will thereafter subject them to his omnipotent rule.

Hobbes' influence on the right to privacy seems precarious enough, since he was a political positivist in the

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44 Natural law or 'lex naturalis' is a "precept or general rule, found out by reason, by which a man is forbidden to do that, which is destructive of his life, or taketh away the means of preserving the same; and to omit that, by which he thinketh it may be best preserved." Ibid.
45 Ibid., 85.
46 Ibid.
47 Ibid., 93.
48 Ibid., 109.
most literal sense of the word; his theory of the state was based wholly on the command theory of law. However, it is important to consider that Hobbes required popular consent to legitimate the authority of the sovereign. The individual had to be a responsible moral agent, at one point, for it is individually that men reason and covenant the state into existence. Thus, the public sphere was derived from the private sphere. The private man did not go unnoticed by Hobbes. After the covenant, private interaction is regulated.49

Moreover, Hobbes wrote during a time which regarded natural law precepts, or the rules for ethical behavior, and man's natural rights, as the same thing. Philosophers throughout the Middle Ages believed that natural rights were derived exclusively from natural law -- the moral law.50

By distinguishing the two, Hobbes conceptually relieved the

49"In this way Hobbes is able to identify natural man with private man, and so present a view of society as based on and reducible to relationships between private individuals as part of the natural order of things." Ian Shapiro, The Evolution of Rights in Liberal Theory (New York: Cambridge University Press, 1986), 60.

50For example, St. Thomas Aquinas professed the divine dispensation of the law. Natural law was an objective plan realized by divine revelation; man was to adjust his life to the tenets thereby laid down. See, Aquinas, Summa Theologica, vol. 1 (New York: Benziger Brothers, Inc., 1947), 993-1119. Other philosophers who united natural law and natural right were William Ockham and Jean Gerson. For further discussion, see Richard Tuck, Natural rights theories: Their origin and development (Cambridge: Cambridge University Press, 1979).
individual from the restraints of the church. The fact that Hobbes attributed to human beings natural rights without the traditional moral overtones seems to indicate that he believed individuals are capable of, and indeed at times require, the freedom to act autonomously.

"The greatest liberty of subjects," asserts Hobbes, "dependeth on the silence of the law." This is Hobbes' concession of negative liberties, after the covenant, as a further source of autonomous action. Negative freedoms are those unrestricted activities which have been pretermitted by the sovereign, and involve most day-to-day social and economic action, including

the liberty to buy and sell, and otherwise contract with one another; to choose their own abode, their own diet, their own trade of life, and institute their children as they themselves think fit; and the like.

A consequence of negative libertarianism is that it requires mutual tolerance among the members of society for those activities for which the law does not speak. For instance, if there is no law determining the volume at which one may play a musical instrument, he may play very loud.

51"The exact moral status of these natural laws is complex and elusive, but in one important respect, Hobbes stands traditional natural law arguments on their heads...all recognized the existence of some relationship between natural right and law, such that natural rights were either derived from natural law or at least limited by it." See, Shapiro, The Evolution of Rights in Liberal Theory, 42.

52Hobbes, Leviathan, 143.

53Ibid., 139.
In the state of nature, his neighbor might be disposed to destroy the trumpet and/or trumpeter. However, in the state, the law forbids assault, murder, and the destruction of private property. Thus, everyone subject to the law must acquire tolerance.

The sovereign is established to regulate and protect individual interaction as they privately pursue personal goals. As each individual subjectively, though legally, endeavors to advance his lot, typical of human nature, the larger social sphere likewise benefits. Hobbes' laissez-faire attitude toward economic, familial, and religious life contributed to the classical liberalist approach to society.  

John Locke

[I]t will be very difficult to persuade men of sense that he who with dry eyes and satisfaction of mind can deliver his brother unto the executioner to be burnt alive, does sincerely and heartily concern himself to save that brother from the flames of hell in the world to come.

A Letter Concerning Toleration

Locke, like Hobbes, professed that men existed, equal-

54 Shapiro, The Evolution of Rights in Liberal Theory, 62. Frank M. Coleman asserts that Hobbes is the father of American constitutionalism: "In Hobbes's philosophy the only possible source of public authority is the private need of independently-situated political actors, each of whom is vested with a prior, if not necessarily superior, right to act according to self-defined standards of conscience and interest. Public order is, by nature, artificial." See Coleman, "The Hobbesian Basis of American Constitutionalism," Polity VII (Fall 1974): 65.
ly, in a state of nature before the creation of government. He also theorized that the creation of government was engendered as a result of self-interest; the protection of private property was Locke’s primary purpose of the state. However, Locke diverged from Hobbes in several important respects.

For Hobbes, once the people accepted natural law precepts as the most rational way to coexist, mankind renounced their natural rights to an absolute sovereign until that sovereign was no longer able to keep the covenant. According to Locke, there are three fundamental flaws with this statement: first, that natural laws and rights exist concurrently and continually before and after the creation of civil society; second, that mankind cannot consent to a government more power than they themselves possess, for this is contrary to the laws of nature; and third, that the government is accountable to the people, who may alter or abolish the commonwealth when it acts contrary to their natural rights.

True to the Cartesian passion of his day, Locke asserted that all knowledge, including moral knowledge, begins within the confines of the human mind. Man is instilled with reason and the ability to act freely upon his environment with the use of his labor and his intelligence. Even in the state of nature, man is capable of employing his moral intuition in his daily, unfettered existence. As
Locke averred,

[the state of nature has a law of nature to govern it, which obliges everyone; and reason, which is that law, teaches all mankind who will but consult it, that being all equal and independent, no one ought to harm another in his life, health, liberty or possessions.55

Transgressors of the law of nature are defectors of the universal order and deserve just punishment for their crimes; thus, "every man hath a right to punish the offender, and to be executioner of the law of nature."56  What mankind is in need of, being in the state of nature, is a common judge to adjudicate without the subjective passion characteristic of an injured party. For this reason, and for codification and protection of the law, men join together into civil society. Herein, men consent and sanction representatives of the people and of the natural law.

Locke denounces absolute sovereignty, for this arbitrarily puts a single individual in a favorable position to transgress the laws of nature.57  Natural rights are intrinsic to mankind and are inherently safeguarded by its possessor; hence, according to Locke, the Hobbesean sovereign is a potential defector of the law of nature. Locke


56Ibid., 8.

57"This were to put themselves into a worse condition than the state of nature, wherein they had the liberty to defend their right against the injuries of others, and were upon equal terms of force to maintain it, whether invaded by a single man or many in a combination." Ibid., 92.
endorses separating the powers of sovereignty (executive, legislative, judicial) and making them accountable to the people. While Hobbes legitimated the sovereign with just the initial covenant, Locke maintained that consent is a continual and never-ending process. The legislation of representatives must win the consent of the majority of the commonwealth before it is legitimate. Legislation is illegitimate when it fails to do what it was created to do; that is, to protect the natural rights of the people and to protect the people from the self-interest and passions of all the members of society, and, in particular, to preserve private property.

Whensoever, therefore, the legislative shall transgress this fundamental rule of society, and either by ambition, fear, folly, or corruption, endeavour to grasp themselves or put into the hands of any other of an absolute power over the lives, liberties, and estates of the people, by this breach of trust they forfeit the power the people had put into their hands . . . and it devolves to the people, who have the right to resume their original liberty. . . 58

The basis for all rights is private property. Property is appropriated by man through his industry and labor. Man’s ability to shape something out of nature into a creation of his own is a gift granted by God, says Locke, and thus can never be expropriated legitimately without man’s consent. Property resides in one’s talents and reason, in one’s labor and strength, and allows man to be master of himself and of all he could dominate from his earth. Pro-

58Ibid., 148.
tection of property is what brings men together into the commonwealth.59

The right to privacy essentially grew out of Locke's conception of private property. It was thinkers such as Locke who fostered the legitimacy of society on natural rights instead of Machiavellian might. Appropriating property is the basic autonomous action bestowed upon man by God; henceforth, an individual's estate is inviolable.

Another guarded sphere of autonomy for Locke was individual conscience. Reason unfolds the divinity of God and the natural law, therefore the relationship of man to his God, if he has one, is entirely exclusive. Intolerance of one's religious beliefs is insupportable, particularly if it is governmental in nature.60

The care of souls is not committed to the civil magistrate, any more than to other men... because it appears not that God has ever given any such authority to one man over another, as to compel any one to his religion.61

To Locke, and many others of his generation, the most fundamental actions and assets of mankind are those veiled

59"The great and chief end, therefore, of men's uniting into commonwealths, and putting themselves under government, is the preservation of their property..." Ibid., 82.

60In the seventeenth century, religious institutions played a burdensome role in individual lives. Church attendance was mandatory -- absences were punishable by law. Payment of tithes, one-tenth of an individual's produce or payment, was given to a clergyman at random. Church courts were common, as were charges of heresy, sexual misconduct, etc. See, Hill, The Century of Revolution, 1603-1714, 63ff.

61John Locke, A Letter Concerning Toleration, 172.
by the need for autonomy. Both Hobbes and Locke believed that the individual is the basis for all legitimate rights. However, Locke instilled these rights with a more lasting effect, once the government had been established, than did Hobbes. Locke asserts that natural law can determine the negative freedoms of citizens by limiting government, whereas with Hobbes, individual freedoms are those disregarded by the sovereign. Locke was less suspicious of the motives of mankind and urged greater tolerance and acceptance of the great bounty of human reason. Because of his approach, and respect for reason and liberty, Locke has been considered the inspiration of contractarian political theory. Moreover, when Locke placed moral and civil limitations on governments as a consequence of the axiomatic principles of natural law, he also enlivened the quest for creating the ideal limited government, which lay in wait a continent away.

The Influence of Classical Liberalism on the American Social Contract

It is clear that John Locke, among other modern political theorists, provided the men undertaking the great
American experiment with substantive normative background
principles. For example, Thomas Jefferson included Locke
as among "the three greatest men that have lived, without
any exception, and as having laid the foundation of those
superstructures which have been raised in the Physical and
Moral sciences..." Indeed, Jefferson's Declaration of
Independence was criticized as being an emulation of Locke's
treatise of civil government. Although Jefferson denied
the charge, he did admit to attempting to incorporate
Locke's views of epistemology and government with those of
his own and of other political theorists. In an extract

64See, John Dunn, "The Politics of Locke in England and America
in the eighteenth century," Political Obligation in its Historical
Context (Cambridge, Great Britain: Cambridge University Press,
1980). Dunn recounts: "The Adamses and Jefferson, Dickinson and
Franklin, Otis and Madison, had come to read the Two Treatises with
gradually consolidated political intentions and they come to it to
gather moral support for these intentions," 75.

65The other two men Jefferson referred to were Francis Bacon
and Isaac Newton, in a letter "To John Trumbull, Paris, Feb. 15,
1789, on Bacon, Locke, and Newton," Writings, 940.

66Morton White relates how Richard Henry Lee, one of
Jefferson's contemporaries, charged that Jefferson "copied from
Locke's treatise on government," in The Philosophy of the American

67Writing about the Declaration of Independence, Jefferson
stated: "Neither aiming at originality of principle or sentiment,
nor yet copied from any previous writing, it was intended to be an
expression of the American mind. . . . All its authority rests then
on the harmonizing sentiments of the day, whether expressed in
conversation, in letters, printed essays, or in the elementary
books of public right, as Aristotle, Cicero, Locke, Sidney, &c." In
a letter "To Henry Lee, Monticello, May 8, 1825, on the object
of the declaration of independence," Writings, 1501.
on a recommendation for instruction at the University of Virginia, moreover, Jefferson declared:

Resolved, that it is the opinion of this Board that as to the general principles of liberty and the rights of man, in nature and in society, the doctrines of Locke, in his "Essay concerning the true original extent and end of civil government," and of Sidney in his "Discourses on government," may be considered as those generally approved by our fellow citizens. . . .68

One need only look at the similarities between Locke's treatise on government and the Declaration of Independence to understand how Richard Henry Lee came to the conclusion that the declaration was copied. As a "self-evident" principle, as Jefferson asserts, or one otherwise based on reason, it is understood that "all men are created equal; that they are endowed by their creator with inherent and inalienable rights; that among these are life, liberty, & the pursuit of happiness."69 This concurs almost identically with Locke's epistemology:

Man being born, as has been proved, with a title to perfect freedom, and an uncontrolled enjoyment of all the rights and privileges of the law of nature equally with any other man . . . hath by nature a power . . . to preserve his property -- that is his life, liberty, and estate. . . .70

While the terminology may be different, for example,

68"Report to the President and Directors of the Literary Fund," March 4, 1825, ibid., at 479.

69The original draft of Jefferson's Declaration of Independence included the words that are underlined. Ibid., 19-24.

between 'the pursuit of happiness' and 'estate', it is clear that the significance of human life, for both, is to possess the means through which man has and may further prolong his life and livelihood, and this no one may rightfully take from him. Those who violate this fundamental rule of society, particularly if it is the government, warrant admonishment, for "there remains still in the people a supreme power to remove or alter the legislature"\textsuperscript{71} exceeding its authority, ",... and to institute a new Government...",\textsuperscript{72} conducive to their natural rights.

When James Madison proposed his amendments to the Constitution to protect individual liberties and to alleviate fears of those who would support the Constitution with further guarantees of their civil rights against the federal government, he too followed a natural rights based philosophy. In his speech to the House of Representatives of June 8, 1789, Madison declared that first and foremost, an amendment guaranteeing that "all power is originally vested in, and consequently derived from, the people," be prefixed to the Constitution. He argued,

That Government is instituted and ought to be exercised for the benefit of the people; which consists in the enjoyment of life and liberty, with the right of acquiring and using property, and generally of pursuing

\textsuperscript{71}For Locke, the legislature was the branch of government primarily responsible for enacting the laws necessary for the preservation of property and the peaceable coexistence of the people. \textit{Ibid.}, 100.

\textsuperscript{72}Quoted from Jefferson's \textit{Declaration of Independence}. 
and obtaining happiness and safety.
That the people have an indubitable, unalienable, and indefeasible right to reform or change their Government, whenever it be found adverse or inadequate to the purposes of its institution.73

Locke and the Founding Fathers believed in inherent natural rights, evident to those who possess the reason by which to discover the rules of the universe. A written Constitution assumes that there is a system of fundamental laws and principles that can prescribe the functions and limitations of a government.74 Thomas Jefferson, James Madison, et al, believed, along with Locke, that individuals must be fundamentally free to worship and believe. Thus, the First Amendment to the Constitution was established, securing a separation between church and state, freedom of religion, speech, press, and assembly. The Framers reasoned that an individual's property was inviolable and enacted the Third, Fourth, and Fifth Amendment to the Constitution.75

Most importantly, through generations of observation and


74This was the argument of Alexander Hamilton, James Madison, Thomas Jefferson and countless statesmen and philosophers urging limited government including Locke, Montesquieu, Alexis de Tocqueville, John Stuart Mill, et al.

75James Madison introduced a bill of rights to the Constitution to appease the states who feared that the federal government would assume the powers of a monarchy. Of the twelve amendments that were proposed by Madison, ten were ratified by the states which went into effect in 1791. These amendments, thus, were enacted to protect individual rights from usurpations of power only by the federal government.
experience, they realized that power corrupts and needs to be limited. Thus, the Framers created a system where the people are an everpresent reminder that statesmen are dispensable, and split up governmental power, with a built in checks and balances, to insure against the natural progression towards tyranny.76

The principle of a right to privacy shares similar characteristics with the principles of liberty and freedom. First, it is a means to individual happiness since it allows one to choose and act upon situations in his life. Second, it encourages private property by setting proper boundaries between 'yours' and 'mine'. Third, it fosters the general well-being of the community by providing the space which individuals require to reflect upon daily life. Like liberty and freedom, the qualities of privacy cannot be captured in one contained definition. Nevertheless, the

76Thus, the Constitution created three branches of government. "Article 1" provides for a Legislature to be split into two houses: the House of Representatives provides representation by population, representatives are elected by the people every two years, and they control appropriations; the Senate accomodates equal representation among the states, senators are elected by the people (courtesy of the Seventeenth Amendment of the Constitution) every six years, and they control revenue. Both houses must concurrently pass laws. "Article 2" provides for a separate Executive, the President, elected by the people every four years, and is responsible for executing the laws enacted by the Legislative branch. He may check the congress through his power of the veto (which the congress may override). "Article 3" created the Judiciary, the mediating branch of government, which is responsible for interpreting the laws of the congress, and thereby safeguarding the Law of the Land. They serve for terms of good behavior, are appointed by the President and confirmed by the Senate. Hence, are just few of the examples of the self-imposed limitations of the United States government as established by the Constitution.
Supreme Court has tried to fit privacy rights into a coherent Constitutional context. Chapter Two will recount the history of the Constitutional justification for a right to privacy in the United States.
CHAPTER TWO

THE CONSTITUTIONAL BASIS OF
THE RIGHT TO PRIVACY

The right to be let alone is indeed the beginning of all freedom.

Justice William O. Douglas

The right to privacy as a legal concept arose out of the common law's commitment to individual property rights. Prior to 1890, before Warren and Brandeis wrote their seminal article, "The Right to Privacy,"¹ a viable legal rationale for the right to privacy was virtually nonexistent. Legal precedents for the right to privacy did not begin to appear until the Twentieth Century; before this, protection of privacy was mentioned as a matter of political and judicial philosophy and authoritative pronouncements.² Warren and Brandeis were, however, able to extract existing English and American tort law, classified under property, contract, or implied trust, and to compose a new tort infringe-


ment, that is, the violation of the right to privacy -- the right to be let alone.³

Reportedly, Warren and Brandeis wrote their article out of sheer frustration with the intrusive journalistic tactics of their day. A prominent Boston family, the social activities of the Warren household were frequently depicted by the press. Freedom of the press being a fundamental American value, Warren and Brandeis had to show why the right to be let alone was as legally valuable, and as philosophically indispensable, as the First Amendment guarantee. Hence, they cited case law which had established that one's image, thoughts, actions and possessions belonged exclusively to the possessor to disclose or not to disclose.

For example, in Prince Albert v. Strange,⁴ the private etchings of public figures Queen Victoria and Prince Albert were acquired by defendant Strange who attempted to obtain a profit from the plaintiff's artwork. Both the public figure issue and the property issue (copyrights) came before the equity court. Concerning the first matter the Vice Chancellor Knight Bruce stated:

[t]he author of manuscripts, whether he is famous or obscure, low or high, has a right to say of them, if innocent, that whether interesting or dull, light or heavy, saleable or unsaleable, they shall not, without

³Judge Thomas Cooley was the first to introduce the legal concept of privacy, as well as the phrase the "right to be let alone," in Torts 2d. ed. (1888), at 91.

his consent, be published.\(^5\)

The property issue was also decided in favor of the plaintiff. Copyright statutes protect all of the author's profit arising from publication. Common-law protects the author against the appropriation of his work for publication against his will. Thus, the Vice Chancellor asserted that

\[
\text{[u]pon the principle ... of protecting property, it is the common law, in cases not aided or prejudiced by statute, shelters the privacy and seclusion of thought and sentiments committed to writing, and desired by the author to remain not generally known.}^6
\]

The inviolability of private property was applied to intangible possessions of thoughts, sentiments, and emotions. The Strange case also protected the right of the author against vivid published descriptions of his artwork. The Vice Chancellor ruled that a detailed account of an artist's work had the same effect as appropriation or reproduction, and violated the artist's right to property both in terms of tangible profit, and in his right to privacy.\(^7\)

Two other cases cited by Warren and Brandeis establish-

\(^5\)Ibid., note 6, at 199.

\(^6\)Ibid., note 3, at 200.

\(^7\)'A copy or impression of the etchings would only be a means of communicating knowledge and information of the original, and does not a list and description of the same? The means are different, but the object and effect are similar; for in both, the object and effect is to make known to the public more or less of the unpublished work and composition of the author, which he is entitled to keep wholly for his private use and pleasure, and to withhold altogether, or so far as he may please, from the knowledge of others.' Lord Cottenham in Prince Albert v. Strange, 1 McN. & G. 23, 43 (1849), quoted in Warren and Brandeis, note 1, 202.
ed that breach of contract or confidence was likewise a violation of private property. *Yovatt v. Winyard*\(^8\) and *Abernathy v. Hutchinson*\(^9\) are two early nineteenth century cases where the court found for the plaintiffs' right to property in their ideas and compositions. Neither case involved a public personage whereby the defendant could claim a compelling social interest defense. In *Yovatt*, the court found that Yovatt's medical formula, the recipe of which had been obtained by a former employee and later competitor, was protected under Yovatt's right to property in compositions or ideas. An additional legal precedent had been established by the court in regard to breach of trust or confidence between employer and employee -- a contractual obligation not to be violated by the indiscretion of the latter. In *Abernathy*, it was held that an instructor's medical lectures remained his property despite an eager student's attempt to copy down and publish them.

*Tuck v. Priester*\(^10\) and *Pollard v. Photographic Co.*\(^11\)

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\(^8\) *Yovatt v. Winyard*, 1 J. & W. 394 (1820), cited in Warren and Brandeis, at 212.

\(^9\) *Abernathy v. Hutchinson*, 3 L. J. Ch. 209 (1825), cited in Warren and Brandeis, at 207.

\(^10\) *Tuck v. Priester*, 19 Q.B.D. 639 (1887), cited in Warren and Brandeis, at 208. Plaintiff's property, a picture, was reproduced by the defendant with the instructions to make only a specified number of copies. The defendant exceeded the allowed quota and sold them for a lesser price than the plaintiffs. The Lord Justices unanimously ruled that the plaintiffs were entitled to an injunction, and damages for breach of contract.
are private property cases in which decisions protecting an individual’s name or likeness were rendered by the court. The basis for these claims actually relied on maintenance of trusts and contracts, but they did serve as precedents in forging a new perspective on the right to privacy. Shortly after Warren and Brandeis published their article, two noteworthy cases involving the appropriation of an individual’s name or likeness were decided which focused on the right to privacy by means of property rights.12

Warren and Brandeis argue that not only are property rights infringed upon in cases where one’s thoughts, actions, and likeness are being unwillingly exposed, but more importantly, the inviolate personality. The individual has an inherent right not to have to suffer humiliation, fear, or the loss of property, both tangible and intangible, at

11 Pollard v. Photographic Co., 40 Ch. Div 345 (1888), ibid. A woman’s photograph was enjoined from being sold commercially by the photographer who took the photograph. The court ruled that this was a breach of contract since the plaintiff did not permit nor anticipate that her photograph, taken under ordinary circumstances, would become the object of a commercial venture.

12 Roberson v. Rochester Folding Box Co., 171 N.Y. 538, 64 N.E. 442 (1902). The picture of a particularly pulchritudinous woman was taken of her without her consent, and was later distributed on a circular by the milling company with her picture under the advertisement. While the New York Court of Appeals rejected the privacy claim (for lacking a common-law history), the state legislature passed an act prohibiting appropriation of name or likeness, for commercial purposes, without consent. In Pavesich v. New England Life Insurance Co., 122 Ga. 190, 50 S.E. 68 (1905), the Georgia Supreme Court found in favor of the plaintiff whose picture was used in an ad without his consent, on the basis of violating one’s right to privacy. Thus, this was the first court to recognize the right to privacy.
the mercy of unscrupulous swindlers. Thus, the counselors’ legal opinion is also a moral conclusion as they attest that the rights, so protected, whatever their exact nature, are not rights arising from contract or from special trust, but are rights against the world. . . the principle which protects personal writings and any other productions of the intellect or of the emotions, is the right to privacy, and the law has no new principle to formulate when it extends this protection to the personal appearance, sayings, acts, and to personal relation, domestic or otherwise.13

Warren and Brandeis claim that any and all uninvited and unwanted intrusions on one’s person should have a legal remedy covered under one tort — the protection of the right to privacy. However, William Prosser contends that this very abstract appeal is the very reason that the legal right to privacy is likened to “that of a haystack in a hurricane.”14 In an analytical attempt to clarify the right to privacy, Prosser maintains that rather than just one tort, there are four distinct torts dealing with violations of personal privacy.

The four privacy interests that Prosser distinguishes

13Warren and Brandeis, 213. The ‘judicial contractionist’ debate over the right to privacy was alive at its conception. Warren and Brandeis insisted that “[t]he application of an existing principle to a new state of facts is not judicial legislation. To call it such is to assert that the existing body of law consists practically of the statutes and decided cases, and to deny that the principles (of which these cases are ordinarily said to be evidence) exist at all. It is not the application of an existing principle to new cases, but the introduction of a new principle, which is properly termed judicial legislation.” Ibid., note 1.

are:

1. **Intrusion upon the plaintiff’s seclusion or solitude, or into his private affairs.** Intrusions of this sort must be shown to have caused mental distress. Included are trespass,⁵ eavesdropping or wiretapping,⁶ and nuisance⁷. In all circumstances, the intrusion must be upon something that is private in nature.

2. **Public disclosure of private facts.** The disclosure must be made public, and not mere gossip among a small group of individuals. Moreover, the facts disclosed must be offensive and injurious to the ordinary person of reasonable sensibilities.⁸

3. **Publicity which places the plaintiff in a false light in the public eye.** Violations of this kind include publicity attributing to the plaintiff an opinion or ut-

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⁵For example, DeMay v. Roberts, 46 Mich. 160, 9 N.W. 146 (1881). The defendant intruded upon the plaintiff during childbirth. The court granted recovery to the plaintiff, but did not specify the ground (which was either trespass or battery).

⁶The gravamen in this circumstance is the "intentional infliction of mental distress." Prosser, 108.

⁷For an intrusion to qualify as a nuisance, the offense must be overt, and not just minor disturbance in a quiet place. The nuisance must be "offensive and objectionable to a reasonable man." Ibid.

⁸The commanding case here is Melvin v. Reid, 112 Cal. App. 285, 297 Pac. 91 (1931). The plaintiff, at one time a prostitute and a defendant in a popular murder trial, attained a life of respectable obscurity. Years later, her original name and her story would be used in a motion picture. The court held in favor of the plaintiff based on the violation of her right to privacy.
terance not made,\textsuperscript{19} or use of the plaintiff’s picture in an article, book, etc., with which he has no consensual connection.\textsuperscript{20} The false light need not be a defamatory one, but it must be objectionable to a man of ordinary sensibilities. The interest protected is reputation, and the rewards are based on degrees of mental distress.

4. \textbf{ Appropriation, for the defendant’s advantage, of the plaintiff’s name or likeness.} The appropriation must actually identify the plaintiff (as opposed, for example, to the use of a mere name like John Smith), and it must be shown that the defendant profited from the appropriation (usually a pecuniary advantage). The interest protected is a proprietary one (i.e., the exclusive use of one’s name or likeness), and not one based on mental distress.

Prosser’s legal analysis was hailed by many who thought the right to privacy was a vague and subjective legal concept. Warren and Brandeis’ conception of privacy as a legal entity in itself was virtually analyzed out of judicial existence by Prosser. Edward Bloustein, however, waged a sharp rebuttal on Prosser’s narrow legal and philosophical

\textsuperscript{19}For example, in \textit{Lord Byron v. Johnston}, 2 Mer. 29, 35 Eng. Rep. 851 (1816), the plaintiff succeeded in enjoining the circulation of a poem, which he thought was inferior, from being attributed as his work.

\textsuperscript{20}For example, \textit{Pavesich v. New England Life Insurance Co.} See text at note 12 above.
insight. Bloustein's attack focused on Prosser's inability or unwillingness to accept the general principle of privacy upon which Warren and Brandeis relied, but were unable to state in concrete legal terms during the latter part of the nineteenth century. The principle, as Bloustein understands it, is that individuals are legally protected against intrusions which are "affronts to personal dignity." Freedom, in the traditional sense of Western culture, means personal control over the external circumstances affecting daily life. Bloustein's intention, as he himself states, is "to propose a general theory of individual privacy which will reconcile the divergent strands of legal development - which will put the straws back into the haystack." His refutation retraces Prosser's categorization of the four distinct torts and attempts to demonstrate how the general theory of privacy underlies each of Prosser's claims.

1. The intrusion cases. Prosser maintains that, as in the case of DeMay v. Roberts, the gravamen of the wrong was the infliction of mental distress. Bloustein argues that whether or not mental distress was inflicted, the intrusion constituted the debasement of individuality. The Fourth Amendment of the Constitution was created to protect


\[22\] Ibid., 156.

\[23\] The childbirth case. See text at note 15 above.
individual liberties, asserts Bloustein, without which individual dignity would be unmercifully crushed under the weight of intrusive government surveillance and/or public opinion.  

2. The public disclosure cases. Prosser contends that, if private facts, which are offensive to the reasonable man of ordinary sensibilities, are publicly exposed, the interest which has been violated is that of reputation. Bloustein, on the other hand, argues that, as was the case in Melvin v. Reid, to disclose facts of an individual's past life is an affront to the inviolate personality. To open up the private life to public scrutiny is to blatantly disregard the limits of human decency, says Bloustein, and violates the individual's expectation of privacy.  

24 The Fourth Amendment's protection against unreasonable searches and seizures emanates supplementary individual privacy protections. See, for example, Silverman v. United States, 365 U.S. 505 (1961); Wolf v. Colorado, 338 U.S. 25 (1949); United States v. Lefkowitz, 285 U.S. 452 (1932); Gouled v. United States, 225 U.S. 298 (1912); Boyd v. United States, 116 U.S. 616 (1886); see also, Brandeis' dissent in Olmstead v. United States, 277 U.S. 438 (1928): "The makers of our Constitution . . . conferred as against the government, the right to be let alone -- the most comprehensive of all rights and the right most valued by civilized men." Bloustein states, "these cases represent . . . a recognition that unreasonable intrusion is a wrong because it involves a violation of constitutionally protected liberty of the person." Bloustein, 165.

25 See text at note 18 above.

26 See, for example, Katz v. United States, 389 U.S. 347 (1967). The Court ruled that the petitioner, Katz, had a reasonable expectation of privacy, even though he was placing a call in a see-through glass public telephone booth. First, the Court said, "the Fourth Amendment protects people, not places," id., at 361. Secondly, a person using a public telephone booth "is surely
mation involves injury to reputation, and, as Warren and Brandeis confirm, the laws of slander and libel offer sufficient protection in the spreading of falsehoods.\(^{27}\) The right to privacy, however, "implies the right not merely to prevent inaccurate portrayal of private life, but to prevent its being depicted at all."\(^{28}\)

3. The use of name or likeness. According to Prosser, when a plaintiff's name or likeness is appropriated for the defendant's advantage, the interest violated is a proprietary one. Again, Bloustein proclaims that this is an affront to human dignity for the same reasons the Georgia Supreme Court held in *Pavesich v. New England Life Insurance Co.*:

The knowledge that one's features and form are being used for such a purpose and displayed in such places as advertisements are often liable to be found brings not only the person of an extremely sensitive nature, but even the individual of ordinary sensibility, to a realization that his liberty has been taken away from him, and so long as the advertiser uses him for these purposes, he cannot be otherwise than conscious of the fact that he is, for the time being, under the control of another, and that he is no longer free, and that he is in reality a slave without hope of freedom, held to service by a merciless master; and if a man of true

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\(^{27}\) Warren and Brandeis, "The Right to Privacy," 197-198.

\(^{28}\) Ibid., 218.
instincts, or even of ordinary sensibilities, no one can be more conscious of his complete enthrallment than he is.29

4. The false light cases. Bloustein agrees with Prosser that by falsely attributing to the plaintiff an opinion or utterance, one's reputation is thereby violated, but adds that the "[s]lur on reputation is an aspect of the violation of individual integrity."30 To attribute to an individual a false endorsement or derogatory characterization, not only violates his freedom of choice, but also casts him in an unfair light in the eyes of his peers the society at large. Not only is his reputation at stake, but subsequently his right as an individual to present himself to the world as he feels is proper has been infringed.

The inviolate personality is not a tabula rasa lying in wait for unsympathetic publishers, et al., to indiscriminately impose their impressions. As Warren and Brandeis and Bloustein attempted to convey, the right to privacy is a fundamental human necessity. The right to privacy facilitates the concomitant ideals of liberty and freedom which are the inheritance of a rich history of western political


30Bloustein, 179. See, for example, Gill v. Curtis Publishing Company, 38 Cal. 2d 273, 239 P.2d 630 (1952). A photograph of a couple shown hugging in a public place was randomly taken. In a published article, their picture was displayed, without consent, with a caption under the photo reading that this was the "wrong kind of love." The court ruled that the use of a photograph, taken in a public place, is not an offense in itself unless a false or derogatory comment is attributed to it.
theory.

Fourth Amendment Privacy Protection

Acknowledging the potential intrusiveness of the ways of authority, the Framers, at the outset, restricted the prerogative of government to exceed its boundaries:

AMENDMENT IV: The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.31

The security of all Americans, according to the Fourth Amendment, lies in their fundamental immunity from the whims of their government and the frequent temerity of those in positions of power. Personal privacy probably gains the range of its protection from the appreciation private property has been afforded throughout history, and in particular, from the modern political philosophy of men such as John Locke. The sanctity of the home has long been recognized as more commanding than kings, as was expressed by William Pitt, the Elder:32

The poorest man may in his cottage bid defiance to all the force of the Crown. It may be frail -- its roof may shake -- the wind may blow through it -- the storm may enter -- the rain may enter -- but the King of England cannot enter -- all his force dares not cross

31 The United States Constitution. Fourth Amendment to the Bill of Rights.

32 William Pitt (1708-1778) was the first Earl of Chatham, in Great Britain.
the threshold of the ruined tenement.\textsuperscript{33}

Although the Fourth Amendment to the Constitution was adopted in 1791, the Supreme Court did not link privacy and the amendment until 1886 in \textit{Boyd v. United States}.\textsuperscript{34} In this case, the first liberal reading of the Fourth Amendment was given. The Court held as unconstitutional a statute allowing the government to mandate the accused to produce shipping invoices of allegedly illegally imported goods. Justice Joseph Bradley argued that such a statute violated the Fourth and Fifth Amendment privacy rights of the petitioner; such rights are fundamental and should not be deprived of their effects.

[C]onstitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half of their efficacy, and leads to gradual deprecation of the right, as if it consisted more in sound than in substance.\textsuperscript{35}

As a result of Justice Bradley’s ruling, the police could only confiscate the actual contraband of a crime, whereas before they could seize an individual’s papers as mere evidence of a crime. The \textit{Boyd} ruling assisted the


\textsuperscript{34}Boyd v. United States, 116 U.S. 616 (1886). There was an 1877 case, \textit{Ex Parte Jackson}, 96 U.S. 727, 733 (1878), which held that Congress could not authorize the postal service to invade the privacy of mail. However, the first discussion of the relationship took place in \textit{Boyd}. See, O’Brien, \textit{Privacy, Law, and Public Policy}, 41.

\textsuperscript{35}Boyd v. United States, 116 U.S. at 630.
concept of individual privacy as a right, backed by constitutional amendments, outweighing police procedure.

However, in *Olmstead v. United States*, a majority of the Supreme Court held in favor of the government in a Fourth Amendment challenge. Chief Justice William Howard Taft ruled that the Fourth Amendment's warrant clause applied only to physical trespass and not to evidence obtained through the use of a device (a wiretap) which traces communication conveyed to "telephone wires, reaching to the whole world from the defendant's home or office." Ignoring Justice Bradley's advice in *Boyd*, the Court gave an unduly literal reading to the Fourth Amendment, and held that the evidence was admissible. Thus, Justice Brandeis was compelled to write one of the most famous dissents in Supreme Court history.

Remaining true to his article, "The Right to Privacy," Brandeis declared his fealty to the inviolate personality. He reminded the Court of the Framers' intention when drafting the Constitution, that is, to enhance the freedom and

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*Olmstead v. United States*, 277 U.S. 438 (1928). The petitioner was convicted of importing and selling liquor in violation of the National Prohibition Act. The incriminating evidence was seized as a result of a wiretap placed in the defendants' homes and offices. A U.S. Court of Appeals rejected petitioners' argument that the evidence was a result of an illegal search and seizure. The U.S. Supreme Court granted certiorari.

*Weeks v. United States*, 232 U.S. 383 (1914), the Supreme Court established the exclusionary rule, which dismisses illegally obtained evidence from a criminal trial.
happiness of individuals by limiting the power of government, even though the government is operating under the auspices of law and order.

Experience should teach us to be on our guard to protect liberty when the government’s purposes are beneficent. Men born to freedom are naturally alert to repel invasion of their liberty by evil-minded rulers. The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding.\(^3\)\(^8\)

Brandeis feared that the advances in technology were becoming an ever-present threat to the individual’s ‘right to be let alone.’ He contended that the Court was contradicting the precedent laid down in \textit{Ex Parte Jackson},\(^3\)\(^9\) which proscribed authorities from tampering with mail correspondence, by condoning the intrusion of telephone conversations. In fact, explained Brandeis,

\[\text{the evil incident to invasion of the telephone is far greater than that involved in tampering with the mails. Whenever a telephone line is tapped, the privacy of the persons at both ends of the line is invaded.}\(^4\)\(^0\]

The psychological oppression which results from the legitimacy of this sort of governmental action is simply not what the makers of the Constitution had in mind:

They recognized the significance of man’s spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations.

\(^3\)\(^8\) \textit{Olmstead v. United States}, 277 U.S. at 479.

\(^3\)\(^9\) See text at note 34 above.

\(^4\)\(^0\) \textit{Olmstead v. United States}, 277 U.S. at 475-476.
They conferred, as against the government, the right to be let alone -- the most comprehensive of rights and the right most valued by civilized men.\textsuperscript{41}

Brandeis' influence on the right to privacy, and the inviolate personality, was not recognized until several Fourth Amendment cases later.\textsuperscript{42} In \textit{Katz v. United States},\textsuperscript{43} the area under electronic surveillance was not a private home, hotel room, or office, but a public telephone booth. The evidence was obtained from the telephone booth, through a wiretap. The Government argued that since the evidence was obtained from an area generally considered 'public', it was legally seized. The Supreme Court ruled that the evidence was inadmissible based on a new conception of exactly what it is that the Fourth Amendment protects. According to Justice Potter Stewart, writing for the majority,

\begin{quote}
the Fourth Amendment protects people, not places. What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. . . [b]ut what he seeks to preserve as
\end{quote}

\textsuperscript{41}Id. at 478.

\textsuperscript{42}See, \textit{Goldman v. United States}, 316 U.S. 129 (1942). Incriminating evidence, obtained by government agents placing a sensitive microphone against the wall of an adjoining office, was upheld by the Court as legally obtained under the language of the Fourth Amendment. In light of the \textit{Olmstead} decision, it was clear that the Court was allowing all evidence seized, short of an actual physical trespass. In \textit{Silverman v. United States}, 365 U.S. 505 (1961), the Court held evidence, obtained by installing a spike microphone through the wall of the adjoining house, inadmissible based on the trespass ground. In a concurring opinion, Justice Douglas demonstrated allegiance to the Brandeis conception of the right to be let alone. See text at note 26 above.

private, even in an area accessible to the public, may be constitutionally protected.\textsuperscript{44}

The Katz decision introduced a measuring stick for deciding whether or not an individual's "reasonable expectation of privacy" has been violated under the meaning of the Fourth Amendment. Thus, it overturned the physical trespass requirement in Olmstead and Goldman, thereby expanding the concept of privacy. However, Justice Stewart's analysis of privacy has opened up a plethora of legal questions. For example, what are the circumstances under which the Fourth Amendment protects people and their privacy? How can it be shown that an individual "justifiably relied" upon his sphere of privacy? -- When the individual relied upon keeping incriminating evidence private?\textsuperscript{45} Furthermore, if expectations of privacy are inordinately subjective then can a legal framework be fashioned around the Katz ruling? Subjective interpretation of expectations of privacy could engender an abyss of determinations from individual, to police and to the courts.

Justice Stewart has been criticized on many counts that his reading of the Fourth Amendment has been too liberal. Justice John Marshall Harlan's concurrence attempted to clarify what the Court meant by "reasonable expectations of

\textsuperscript{44}Id. at 351-352.

privacy" as a twofold requirement: "first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is expected to recognize as 'reasonable.'"46 But, if an individual's expectation of privacy is also in reference to his basic social situation, the protection of the Fourth Amendment is a relative concept, and therefore weakened, when interpreted according to the Katz rule. As Anthony Amsterdam discerned:

An actual, subjective expectation of privacy obviously has no place in a statement of what Katz held or in a theory of what the fourth amendment protects. It can neither add to, nor can its absence detract from, an individual's claim to fourth amendment protection. If it could, the government could diminish each person's subjective expectation of privacy merely by announcing half hourly on television that 1984 was being advanced by a decade and that we were all forthwith being placed under comprehensive electronic surveillance.47

The Katz ruling attempted to secure the inviolate personality, or the right to be let alone, when the Court announced that the Fourth Amendment protects persons. Like Justice Brandeis, Justice Stewart wanted to encase the individual in a personal sanctuary which intruders could not penetrate without invitation or, at least, probable cause. However, the legal principle proved to be too abstract in actual practice and subsequent court cases relied primarily upon a strict application of the Fourth Amendment to privacy

46Katz v. United States, 389 U. S. at 361.

The constitutional principle for a right to privacy has relied not only on the Fourth Amendment's protections against unreasonable searches and seizures, but also on the Fifth Amendment's protection against self-incrimination. Many pro-privacy advocates have argued that the inclusion of these constitutional provisions forcefully indicates that the Founding Fathers wanted the individual to maintain a sense of autonomy from government intrusion into the personal lives of its citizens. Although, concurrently, the Fourth and Fifth Amendments would seem to signify the right to privacy in principle, the government has been able to elude the full effect of these Amendments when taken separately. The next section demonstrates how the protection against self-incrimination has been interpreted to overlook

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48See, for example, United States v. White, 401 U.S. 745 (1971). Incriminating evidence, obtained by a radio transmitter placed on an informant, and overheard by government agents who had to testify in lieu of the absent informant, was upheld by the Supreme Court. Justice Byron White pronounced: "Our problem, in terms of the principles announced in Katz, is what expectations of privacy are constitutionally 'justifiable' -- what expectations the Fourth Amendment will protect in the absence of a warrant. So far, the law permits the frustration of actual expectations of privacy by permitting authorities to use the testimony of those associates who for one reason or another have determined to turn to the police, as well as by authorizing the use of informants..." Id. at 752. Accurate and probative evidence, espoused Justice White, should not be ignored because of substantive constitutional barriers.

49See Justice Douglas's majority opinion in Griswold v. Connecticut, 381 U.S. 479 (1965), in which he explained how several of the protections in the Bill of Rights create a zone of privacy, discussed below.
the privacy premise inherent in its goal.

Fifth Amendment Privacy Protection

The Fifth Amendment enumerates five procedural guarantees; the third guarantee protects the criminally accused from incriminating himself during any part of his detainment by the government (from arrest and examination to indictment and trial). Protection from self-incrimination, or nemo tenetur seipsum prodere (no one is bound to accuse himself), precedes English common-law, and is considered one of the truisms of the law of nature. For example, in the early eighteenth century, Lord Chief Baron Geoffrey Gilbert wrote, in his Law of Evidence, that, while the best evidence of guilt is a confession,

this Confession must be voluntary and without Compulsion; for our Law in this differs from the Civil Law, that it will not force any Man to accuse himself; and in this we do certainly follow the Law of Nature, which commands every Man to endeavour his own Preservation; and therefore Pain and Force may compel Men to confess what is not the truth of Facts, and consequent-

50 "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any Criminal Case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." (Emphasis added) The United States Constitution. Fifth Amendment to the Bill of Rights.

ly such extorted Confessions are not to be depended on.52

The right not to give evidence against oneself is upheld as one of the primary constitutional guarantees of the right to privacy; that is to say, it offers an individual the prerogative to withhold information about himself, whether incriminating or not, from the government. However, the manner in which the Fifth Amendment has been interpreted renders its privacy protection as superficial speculation. In 1896, the Supreme Court ruled that grants of immunity offset one's right not to testify about oneself in a court of law, since the sole purpose of the amendment is to "secure the witness against criminal prosecution."53 The Court's interpretation narrowly construed the Fifth Amendment's protection to merely self-incrimination; that is to say, if there is no possibility of a legal prosecution, regardless of whether information one is being compelled to testify may jeopardize life, liberty, or property outside the courtroom, the individual must relinquish his Fifth Am

52Levy, quoting Lord Chief Baron Geoffrey Gilbert, at 327.

53Brown v. Walker, 161 U.S. 591 (1896). Grants of immunity were first upheld under the Federal Constitution, reasoning that the Fifth Amendment could not be "construed literally as authorizing the witness to refuse to disclose any fact which might tend to incriminate, disgrace, or expose to unfavorable comment." Id. at 596. See also, Murphy v. Waterfront Commission, 378 U.S. 52 (1964), which reaffirmed Brown's immunity decision, but held that immunity must provide protection against both state and federal prosecution. By 1956, the Court was declaring that grants of immunity "[have] become part of our constitutional fabric," in Ullman v. United States, 350 U.S. 422 (1956).
Amendment privilege. Indeed, a refusal to testify, after being granted immunity from prosecution, may result in a contempt of court conviction. Thus, the Fifth Amendment guarantee against self-accusation, immunity, and privacy do not legally mix. According to Robert McKay:

Even though protection against certain harmful consequences is assured through a sufficient grant of immunity, the privacy interest is relinquished upon disclosure compelled in return for a grant of immunity. Moreover, there is no way to protect against the related damage to reputation. It is not easy to square the privacy interest (which arguably is) a prime purpose of the privilege with immunity statutes that require surrender of privacy.54

To further weaken the privacy of individuals faced with bearing information against themselves, the Supreme Court upheld a policy distinction which maintains that the Fifth Amendment protects testimonial evidence, but not physical evidence. For example, in Schmerber v. California,55 a policeman ordered a physician to take a sample of blood from the accused, over Mr. Schmerber’s objections, in order to secure evidence needed to secure a conviction of driving while intoxicated. Like Breithaupt v. Abram,56 but unlike


56Breithaupt v. Abram, 352 U.S. 432 (1957). Blood obtained from an unconscious party in a fatal auto accident used to convict the defendant was upheld by the Supreme Court since the means to extract the blood was reasonable, that is, "under the protective eye of the physician."
Rochin v. California, Justice William Brennan asserted that the privilege against self-incrimination, as binding on the states,

protects the accused only from being compelled to testify against himself, or otherwise provide the State with evidence of a testimonial or communicative nature, and that the withdrawal of blood and use of the analysis in question did not involve compulsion to these ends. Schmerber v. California.

The dissenting Justices (Black, Fortas, Douglas, and Chief Justice Warren) objected on the grounds that compelled blood samples violate the individual’s right to privacy, based on Justice Douglas’ opinion in Griswold v. Connecticut. In a separate dissent, Justice Douglas contended: "No clearer invasion of the right to privacy can be imagined than forcible bloodletting of the kind involved here." Schmerber v. California. 384 U.S. at 779.

While the Supreme Court has narrowly interpreted the principle of the Fifth Amendment, Leonard Levy argues that American law is ignoring the history of the amendment.

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57 Rochin v. California, 342 U.S. 165 (1952), the accused swallowed pills, which the police officers saw near his person, to be rid of the evidence. Officers immediately took the accused to a hospital where they ordered a physician to pump his stomach. The Supreme Court rejected evidence being obtained this way, since "[t]his is conduct that shocks the conscience."


59 The right to privacy is based upon emanations of certain rights in the Bill of Rights, in Griswold v. Connecticut, 381 U.S. 479 (1965), discussed below.

60 Schmerber v. California, 384 U.S. at 779.
The right not to be a witness against oneself imports a principle of wider reach, applicable, at least in criminal cases, to the self-production of any adverse evidence, including evidence that made one the herald of his own infamy, thereby publicly disgracing him. The clause extended, in other words, to all the injurious as well as incriminating consequences of disclosure by witness or party. But this inference drawn from the wording of the clause enjoys the support of no proof based on American experience, as distinguished from English, before the nineteenth century. Clearly . . . to speak merely of a right against self-incrimination stunts the wider right not to give evidence against oneself.61

Privacy and the Due Process Clause of the Fourteenth Amendment

The due process clause was established to secure citizens from arbitrary deprivation, by government, of life, liberty, and property. Due process established the principle, in the Fifth Amendment,62 and reestablished in the Fourteenth Amendment,63 that both the federal and state governments have limited and express powers. There are two kinds of due process. Procedural due process, as defined by Daniel Webster, is procedure "which hears before it con-

61Levy, Origins of the Fifth Amendment, 427.

62The fourth provision of the Fifth Amendment of the United States Constitution commands: "No person shall...be deprived of life, liberty, or property, without due process of law." Applies only to violations of procedure by the federal government.

63Section 1 of the Fourteenth of the United States Constitution protects "[a]ll persons born or naturalized of the United States," including citizens of the several states, to due process of law; that is, "nor shall any State deprive any person of life, liberty, or property, without due process of law."
demns, which proceeds upon inquiry, and renders judgment only after trial." To be sure, a defendant's rights have been violated when the legal treatment he received is considered "shocking to the sense of justice of the civilized world." substantive due process is used by the Court to strike down arbitrary or unreasonable legislation and executive acts, or acts and legislation that improperly oversteps governmental authority. In privacy cases, the Court has exercised substantive due process.

Traditionally, the Court has rendered legislation arbitrary or unreasonable when it is considered to infringe upon fundamental (natural law) values. Such values are not readily traceable to constitutional text or historical

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65 Justice Benjamin Cardozo set forth criteria for the Court to determine whether a state has violated rights protected by the due process clause of the Fourteenth Amendment in Palko v. Connecticut, 302 U.S. 319 (1937). In this case he ruled that the double jeopardy provision of the Fifth Amendment did not apply to the States through the Fourteenth Amendment. Rights so protected are "essential to a fair and enlightened system of justice." An example of a violation of due process is Moore v. Dempsey, 261 U.S. 86 (1923), It was ruled that defendants could not receive a fair trial because of mob influence over judge, jury, witnesses, and defense counsel, and was thus determined violative of the due process clause of the Fourteenth Amendment.

66 In particular, decisional privacy cases. That is, in circumstances where private individuals must resolve to do something fundamental in accordance to their own conscience and well-being. As compared to, privacy involving the withholding of information.
example. In *Meyer v. Nebraska*, the Supreme Court reversed a conviction of a teacher for teaching German; he violated a state law which prohibited the teaching of a foreign language to young children. The Court ruled that this statute unduly infringed upon the parents’ or guardians’ right to oversee and cultivate the education of their own children. Justice James C. McReynolds laid the basis for a broad reading of the Fourteenth Amendment’s concept of personal "liberty":

> Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.

This decision advanced the impetus for granting personal liberty under court-sponsored substantive due process. Thus, the right to privacy was granted the germ of legal validity; personal rights that can be deemed to be "fundamental" or "implicit in the concept of ordered liberty" are included in the guarantee of personal privacy. Among

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68 *Id.* at 399.
these rights are activities relating to marriage,71 contraception,72 procreation,73 family relationships,74 and child rearing and education.75 Consequently, the right for women to have an abortion was also deemed fundamental, based on the Due Process Clause of the Fourteenth Amendment.76

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71Loving v. Virginia, 388 U.S. 1 (1967), the Court invalidated a Virginia miscegenation statute on the basis of the Due process and Equal Protection Clauses of the Fourteenth Amendment. Chief Justice Warren declared: "The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men." Id. at 12.

72Eisenstadt v. Baird, 405 U.S. 438 (1972), struck down a Massachusetts statute prohibiting the distribution of contraception to unmarried individuals based on the Equal Protection and Due Process Clause of the Fourteenth Amendment. Brennan, J.,: "If the right to privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." Id. at 453.


74Prince v. Massachusetts, 321 U.S. 158 (1944), the Court upheld a statute making it a crime for a girl under eighteen years to sell any newspapers, periodicals, or merchandise in public places despite the fact that a child of the Jehovah's Witnesses faith believed that it was her religious duty to do so.

75Pierce v. Society of Sisters, 268 U.S. 510 (1925), invalidated an Oregon law requiring children to attend public schools. Under the view of protected rights stated in Meyer, supra, Justice McReynolds held that the law interfered "with the liberty of parents and guardians to direct the upbringing and education of children under their control." Id. at 534-535.

76Roe v. Wade, 410 U.S. 113. The Supreme Court invalidated a Texas statute making it a criminal offense to "procure an abortion" except "by medical advice for saving the life of the mother."
The problem with substantive due process is the absence of textual authorization. While an individual’s right to this or that may seem fundamental, reasonable, indeed even compelling, many critics are not satisfied with a natural rights justification. It looks too much like judicial legislation; substantive due process gives a majority of Supreme Court justices, unelected and unaccountable, the right to make social policy. Justice Hugo Black denounced such judicial policy making, stating,

[i]f these formulas based on "natural justice". . . are to prevail, they require judges to determine what is or is not constitutional on the basis of their own appraisal of what laws are unwise or unnecessary. The power to make such decisions is of course that of a legislative body.77

Justices Byron White and William Rehnquist, similarly maintain that if a statute or law seems fundamental, but is not supported by constitutional text, than the political process will, or at least should, rectify the inequity.78

Blackmun, J.,: "This right of privacy, whether founded in the Fourteenth Amendment’s concept of personal liberty and restrictions upon state action, as we feel it is, or, as the District Court determined, in the Ninth Amendment’s reservation of rights to the people, is broad enough to encompass a woman’s decision whether or not to terminate her pregnancy." Id. at 153.


78Justices White and Rehnquist’s dissenting sentiments are the same both in Roe, supra, and in its companion case Doe v. Bolton, 410 U.S. 179 (1973). "I find nothing in the language or history of the Constitution to support the Court’s judgement. The Court simply fashions and announces a new constitutional right for pregnant mothers and, with scarcely any reason or authority for its action, invests that right with sufficient substance to override most existing state abortion statutes. . . In my view its judgement is
Moreover, notes John Hart Ely, substantive due process may be wrong when considered in light of vague constitutional affinities, such as in the Lochner era, but it is downright insidious the way it applied in Roe. A woman's sacred right to control the functions of her body looks constitutional and sounds constitutional, but, says Ely, it smells of something else.

The problem with Roe is not so much that it bungles the questions it sets itself, but rather that it sets itself a question a Constitution has not made the Court's business. It looks different from Lochner — it has the shape if not the substance of a judgment that is very much the Court's business, one vindicating an interest the Constitution marks as special — and it is for that reason perhaps more dangerous.

Justice Douglas wanted to avoid the accusation that a right to privacy had no constitutional foundation, by attempting to build an airtight structure encompassing many of the provisions of the Bill of Rights. Thomas Jefferson said, in writing on the Bill of Rights, "[a] brace the more will often keep up the building which would have fallen with an improvident and extravagant exercise of the power of judicial review that the Constitution extends to this Court." Id. at 221-222.

The Lochner era refers to a catalyst of cases involving economic substantive due process. The Supreme Court invalidated a series of state statutes instituting police powers of various sorts (e.g., setting maximum working hours) only to be struck down by judicial decisions upholding the liberty of contract between employer and employee. See for example, Lochner v. New York, 198 U.S. 45 (1905), Coppage v. Kansas, 236 U.S. 1 (1915), and Adair v. United States, 208 U.S. 161 (1908).

that brace the less."\(^{81}\) For Douglas, the brace of certain enumerated rights is the foundation for the palace of liberties.

**Zones of Privacy**

Justice Douglas reasoned in *Griswold v. Connecticut*\(^{82}\) that guarantees of personal privacy are emanations from specific constitutional protections enumerated in the Bill of Rights. Penumbras\(^{83}\) of privacy exist, it was held, by virtue of certain express guarantees. For example, nowhere in the First Amendment does it state "Congress shall make no laws abridging the freedom of association," yet in *NAACP v. Alabama*,\(^{84}\) the Court did recognize that the right to organize and to join an organization for the advancement of beliefs is a supplemental right to freedom of speech, of peaceable assembly and petition, and to the free exercise of religious beliefs. Hence, the First Amendment creates a "zone of privacy" under which people may interact, choose, or believe.

Likewise, the Third Amendment, which prohibits the

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\(^{81}\)Writing to James Madison, March 15, 1789, on the conveniences of a bill of rights, in Jefferson’s *Writings*, above, 944.

\(^{82}\) *Griswold v. Connecticut*, 381 U.S. 479 (1965), invalidated a state statute criminalizing the use of, or assistance or counseling for the use of contraceptives.

\(^{83}\) *PENUMBRA* is defined as an "outlying, surrounding region; periphery; fringe." The American Heritage Dictionary of the English Language, 1973 ed., s.v. "penumbra."

quartering of soldiers "in any house" during peacetime without the consent of the owner, creates another zone of privacy, which, along with the Fourth Amendment’s guarantee "to be secure in their persons, papers, and effects against unreasonable searches and seizures," allots citizens with a citadel of privacy protections. The Fifth Amendment’s protection against self-incrimination is but another buffer between the citizen and the government’s attempt to confiscate incriminating evidence against him, and thus, protects the privacy of his knowledge and thoughts. Finally, the Ninth Amendment was cited by Douglas as proof that rights not enumerated are not necessarily excluded, but are constitutionally retained by the people if it could be shown that they are fundamental, or at least in the ambit of constitutional protections. Justice Douglas proposes, as did Justice Bradley in Boyd, that constitutional provisions should be given full effect, for a niggardly interpretation would undermine centuries of revered mores.

We deal with a right of privacy older than the Bill of Rights -- older than our political parties, older than our school system. Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is

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85 "Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives?" asks Justice Douglas, indicating the Fourth Amendment privacy protection. "The very idea is repulsive to the notions of privacy surrounding the marriage relationship." Griswold v. Connecticut, 381 U.S. at 485-486.
an association for as noble a purpose as any involved in our prior decisions.86

Justice Douglas' opinion in Griswold roused justification of a right to privacy per se. Thus, while Douglas asserted that he had constructed an unenumerated fundamental right out enumerated fundamental rights, that is, the First, Third, Fourth, Fifth, and Ninth Amendments, the constitutional penumbra was again attacked as judicial legislation. In his dissent in Griswold, Justice Black accused the Court of adjudicating upon its own personal views of higher justice and insisted that no provision of the Constitution specifically gives such blanket power to courts to exercise such a supervisory veto over the wisdom and value of legislative policies and to hold unconstitutional those laws which they believe unwise or dangerous.87

Robert Bork, the controversial scholar of original intent, declared that Justice Douglas "performed a miracle

86 Id. at 486.

87 Id. at 512 (Black, J., dissenting). However, see Robert Dixon's rebuttal, accusing Justice Black of inconsistency. Dixon argues that Black's insistence on the "clear meaning" of the constitutional text does not coincide with some of his other interpretations. "It may not be too clear to some students of constitutional law why, under Mr. Justice Black's 'clear meaning' analysis, obscenity, group libel, and associational privacy are constitutional absolutes along with simple free speech, while marital privacy, in the Griswold context of access to birth control information, is no part of the due-process liberty which the fourteenth amendment applies to the states." See, Dixon, "The Griswold Penumbra: Constitutional Charter for an Expanded Law of Privacy?" Michigan Law Review 64 (December 1965): 209-210.
of transubstantiation," that is, he modified substantive
due process into the language of legitimate constitutional
text. Privacy is too selective a right to be constitutional-
al. Contends Bork:

Griswold . . . is an unprincipled decision. . . We are
left with no idea of the sweep of the right to privacy
and hence no notion of the cases to which it may or may
not be applied in the future.89

Since privacy is essentially legally undefinable there will
be the further judicial bias of picking and choosing which
individuals or groups are constitutionally protected by the
right to privacy, and thereby allowing judges to impose
their own moral predilections.90

On the other hand, while Black, Bork, and others argue
against the right to privacy exclusively on the basis of its
omission from the Constitution, others suggest that the
Framers' constitutional philosophy should be the major con-
sideration for judicial interpretation. The historical
documents of the Framers indicate their concern for the
freedom and rights of the people, for religious toleration,
and juristic fairness. Depending upon one’s interpretation,

88Robert Bork, "Neutral Principles and Some First Amendment
H. Garvey and T. Alexander Aleinikoff, Modern Constitutional
Theory: A Reader (St. Paul, Minnesota: West Publishing Co., 1989),
40-47.

89Ibid., 45.

90Robert Bork, "Judicial Review And Democracy," Encyclopedia
York: Macmillan, 1986), 1061-64.
the Ninth Amendment is the constitutional proof that funda­
damental rights, such as that of privacy, are included in
the constitutional scheme of ordered liberty.

The Ninth Amendment

James Madison, the father of the Bill of Rights, feared
that by including a declaration of certain rights, other
equally fundamental rights would be repudiated.91 This
misgiving inspired him to create Resolution #4, as it was so
announced to the House of Representatives in 1789:

The exceptions here or elsewhere in the Constitu­
tion, made in favor of particular rights, shall not be
so construed as to diminish the just importance of
other rights retained by the people, or as to enlarge
the powers delegated by the Constitution. . . 92

This provision was subsequently shortened and became
the Ninth Amendment to the Bill of Rights:

The enumeration in the Constitution of certain
rights, shall not be construed to deny or disparage
others retained by the people.

91See, for example, his letter to Thomas Jefferson of October
17, 1788, in which Madison states: "... there is great reason to
fear that positive declaration of some of the most essential rights
could not be obtained in the requisite latitude." In, The Mind of
the Founder: Sources of the Political Thought of James Madison, ed.
205-6. Alexander Hamilton expressed similar thoughts in "Essay
#84," The Federalist Papers, above, that a bill of rights would be
dangerous.

92Speech to the House of Representatives, June 8, 1789. Here
he introduced all the other provisions of the Bill of Rights,
adding the fourth resolution to allay the fears of the delegates
over government license with other rights of the people not
In *Griswold*, the Ninth Amendment was finally appealed to at length. Justice Douglas mentioned it as one of the enumerated rights within the penumbra. However, Justice Arthur Goldberg, in his concurring opinion, upholds the Ninth Amendment on its own merit. An infinite number of natural rights belong to the people, and the Framers knew that not all of them could be immediately recognized during the initial ratification of the Constitution and the Bill of Rights. Realization of fundamental rights, when challenged by the legislative or executive acts, is thus left to the interpretation of constitutional rights by the judiciary.\footnote{Thomas Jefferson, responding to Madison's letter of October 17, 1788, wrote: "In the arguments in favor of a declaration of rights, you omit one which has great weight with me, the legal check which it puts into the hands of the judiciary. This is a body, which if rendered independent and kept strictly to their own departments, merits great confidence for their learning and integrity." Jefferson, *Writings*, 943-44.}

In determining how judges are to undertake this momentous, life-giving task, Goldberg asserts that judges must look to the "traditions and [collective] conscience of our people" and discern whether a principle is "so rooted [there]. . . as to be ranked as fundamental," and "is of such a character that it cannot be denied without violating those 'fundamental principles of liberty which lie at the base of all our civil and political institutions.'"\footnote{Justice Goldberg, quoting from *Snyder v. Massachusetts*, 291 U.S. 97 (1934). *Griswold v. Connecticut*, 381 U.S. at 487 (Goldberg, J., concurring).} Invading the confines of the marital bedroom, an institution supported by
the state, and then dictating the conditions by which married couples may interact, is a contradiction and a violation of their fundamental rights.

Once again, the fundamental rights thesis for upholding a right relating to privacy was criticized by those constitutional literalists (Justice Black), die-hard democrats (John Hart Ely), and original intent advocates (Robert Bork) as not based on the reality of constitutional law. The route to finding a constitutional basis for the right to privacy has been anything but easy (and to Black, Ely and Bork, legitimate). The following chapter will examine what the right to privacy protects, focusing on those issues which constitutional literalists abhor most -- that is, substantive rights to contraceptive and reproductive autonomy.
CHAPTER THREE

PROTECTIONS AFFORDED BY THE RIGHT TO PRIVACY

I am concerned here with privacy as a constitutional right, recognized as eligible for some protection against official acts waving the banner of "public good."

Louis Henkin
"Privacy and Autonomy"

Privacy protections established by the various provisions in the Bill of Rights and the Fourteenth Amendment (canvassed in Chapter Two) are not as firmly rooted in the legal landscape as are, for example, the rights of free speech and press. Lacking clear constitutional text, rights recognized as fundamental endure at the mercy of judicial interpretation, for "whoever so shall giveth may also taketh away." Regardless of the amplitude at which some may argue that the right to privacy exists in political principle,¹ the judicial powers that be, at the final appeal, are the

¹See, for example, Justice Douglas' majority opinion in Griswold v. Connecticut, 381 U.S. 480 (1965). "We deal with a right of privacy older than the Bill of Rights - older than our political parties, older than our school system . . ." Id. at 486. Louis Henkin argues that the Constitution, by its very political nature, and the time of its conception (i.e., the Enlightenment), would implicitly grant a right to privacy: "The Constitution does not confer private rights; they are antecedent to and independent of the Constitution." See, Henkin, "Privacy and Autonomy," Columbia Law Review 74 (1974): 1412.
ultimate decisive factors.\(^2\) Chapter Three will endeavor to recount and review the Supreme Court’s treatment of the most precarious area within the right to privacy; that is, rights to autonomy.\(^3\)

**Privacy and Reproductive Autonomy**

There is not a more profound and intimate human affair than the decision over whether, when, and how one’s body will bring into existence another human life. Yet, state legislatures throughout American history have persistently attempted to regulate reproductive freedom based on their responsibility to oversee the health, safety, welfare, and morals of its citizenry. Thus, for one reason or another, laws determining an individual’s reproductive destiny have been a legitimate exercise of a state’s police power. However, because of the fundamentally intimate nature of reproductive freedom, disputes over whether the state had

\(^2\) Cf. the liberal Warren Court, the Court which per se recognized the right to privacy, with the conservative Rehnquist Court. Only three members of the present Court, (Brennan, Marshall, and Blackmun) consistently recognize that a right to privacy constitutionally exists. I will analyze the current Court in Chapter Four.

\(^3\) Rights to autonomy include freedom to choose one’s lifestyle, and to decide, without government interference, upon intimate matters concerning reproduction and sexuality. Henkin notes that "... the Court has been vindicating not a right to freedom from official intrusion [such as that in search and seizure cases], but to freedom from official regulation [e.g., freedom from contraception or abortion laws]." Henkin, "Privacy and Autonomy," 1424-1425. Since the abortion decision is one that must be made with a third-party, that is, a physician and possibly a hospital staff, albeit confidentially, it has become more accurate to say that the right to choose and procure an abortion is a right to autonomy rather than a right to privacy.
exceeded its bounds eventually made their way to the Supreme Court.

In 1927, in the case of Buck v. Bell, the Court upheld the state's power to sterilize an individual against her objection to prevent the procreation of, in Justice Oliver Wendell Holmes' terminology, "imbeciles." Thus, so long as the sterilization programs were conducted with adequate procedural safeguards, the so-called mentally deficient were harshly deprived of procreative rights on the rationale that

[it is better for all the world, if instead of waiting to execute degenerate offspring for crime, or let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind.]

The decision rendered in Buck incited criticism as being fundamentally immoral, if not 'anti-constitutional'. It was not until 1942 that the highest court in the land recognized reproductive rights in Skinner v. Oklahoma. Justice Douglas, writing for the majority, struck down a

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6Buck v. Bell, 274 U.S. at 207. This decision continued to be employed for nearly fifty years. Over 7,500 involuntary sterilizations were performed in Virginia (where the case was challenged) between 1924 and 1972. See, Gould, The Mismeasure of Man, 335.

state statute which mandated the sterilization of individuals convicted at least three times of "felonies involving moral turpitude." The Court based its decision on the equal protection guarantee of the Fourteenth Amendment, since white collar criminals fared substantially better at sentencing. However, the language of Justice Douglas' opinion resounded of substantive due process, emphasizing the violation of a fundamental human right:

> We are dealing here with legislation which involves one of the basic civil rights of man. Marriage and procreation are fundamental to the very existence and survival of the race . . . There is no redemption for the individual whom the law touches. Any experiment which the State conducts is to his irreparable injury. He is forever deprived of his basic liberty.

Justice Douglas acknowledged that one's reproductive destiny ought to remain exclusively and autonomously with oneself. While Justice Douglas ruled in behalf of the petitioner on Equal Protection grounds, the right to privacy rationale lingered in the background. Douglas' contempt for government regulation in matters fundamentally intimate would finally surface in the very controversial decision of Griswold v. Connecticut. A Connecticut statute made it a criminal offense to

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8Justice Douglas proposed that 'strict scrutiny' be applied because of the severity of sterilization laws lest "invidious discriminations are made against groups or types of individuals in violation of the constitutional guaranty of just and equal laws." Id. at 541.

9Ibid.

either use birth control devices or to give information or instructions for their use. The General Statutes of Connecticut, sections 53-32 and 54-196, mandated respectively:

Any person who uses any drug, medicinal article or instrument for the purpose of preventing contraception shall be fined no less than $50 or imprisoned not less than 60 days nor more than one year or both fined and imprisoned.

Any person who assists, abets, counsels, causes, hires or commands another to commit any offense may be prosecuted and punished as if he were the principle offender.

Appellants Estelle Griswold, Executive Director of the Planned Parenthood League of Connecticut, and Charles Lee Buxton, a licensed physician who served as medical director for the League at its center in New Haven, were arrested, convicted and fined $100 each for giving information, instruction and advice to "married persons" as to the means of preventing conception. On appeal to the United States Supreme Court, Justice Douglas, speaking for five members of the Court, asserted that the appellants had standing to raise the constitutional rights issue of the married couples with whom they had a professional relationship.

Connecticut argued that it was exercising a legitimate and 'compelling' state interest; that is, by proscribing the use of birth control devices it was discouraging extramarital relations and preventing sexually transmitted diseases. Justice Douglas denounced the public interest rationale put forth by the state and maintained that the
statute egregiously encroached upon the sanctity and privacy of the marital relation -- a relation, argued Justice Douglas, which by its very nature merits a legal fortress against state interference.

Justice Douglas bypassed the Fourteenth Amendment due process argument, and introduced a 'de facto' constitutional existence for the right to privacy. Like a right that had always existed and lay in wait only to be discovered, Justice Douglas explained that there is a right to privacy by virtue of "specific guarantees in the Bill of Rights." These specific guarantees act as a penumbra for other related rights. Thus, as marriage is the autonomous association of free individuals, married couples are protected in their association by the First Amendment (though the First Amendment may not specifically mention the marriage relationship or the activities and beliefs that take place within it). Moreover, as the Connecticut law must invade the privacies of the marital bedroom to be effective,

11"We do not sit as a super-legislature to determine the wisdom, need, and propriety of laws that touch economic problems, business affairs, or social conditions." Id. at 482.

12For a detailed discussion of this matter see pp. 76-80 above.

13Justice Douglas cited NAACP v. Alabama, 377 U.S. 288 (1958), explaining that the Connecticut contraception statute is in violation of the principle long upheld by the Court, that a "governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms," id. at 307, cited in Griswold, 381 U.S. at 485.
effective, it violates the Fourth Amendment.\textsuperscript{14}

There could not have been a more representative case, nor a more activist Court,\textsuperscript{15} to establish the precedent for a constitutional right to privacy. Once the constitutional justification for autonomy had been made, the walls of governmental regulation began to tumble down. Soon, what the married couple had been given a private right to do in the sanctity of the marital chambers, unmarried couples had been given the same private rights to do anywhere (in private).\textsuperscript{16}

In Eisenstadt \textit{v.} Baird,\textsuperscript{17} appellee Baird distributed contraceptives to the audience after delivering a lecture on

\begin{itemize}
  \item \textsuperscript{14}Justice Douglas also cited the Fifth Amendment, as stated in \textit{Boyd v. United States}, 116 U.S. 616 (1886), as well as the Fourth Amendment, protecting "the sanctity of a man's home and the privacies of life" against all governmental intrusions, and \textit{Mapp v. Ohio}, 367 U.S. 643 (1961), which applied the exclusionary rule to the states and further affirmed the fundamental character of the right to privacy.
  \item \textsuperscript{15}The [Earl] Warren Court (1953 - 1968) is notable for its disposition to overturn state statutes and government procedures and establishing judicially created guidelines for government procedure. This Court is most often accused of exercising substantive due process.
  \item \textsuperscript{17}\textit{Eisenstadt v. Baird}, 405 U.S. 438 (1972).
\end{itemize}
overpopulation and contraception. A package of contraceptive foam was given to a single young woman. Baird was convicted in a Massachusetts state court for violating a Massachusetts statute which made it a crime to sell, lend, or give away any contraceptive "drug, medicine, instrument or article." According to the law, only physicians were permitted to administer or prescribe contraceptive drugs or articles for married persons, and pharmacists were permitted to fill prescriptions for contraceptive drugs or articles only for married persons. The state's rationale for contraceptive regulation, moreover, was to prevent the spread of 'disease' and depravity, not to prevent pregnancy.

Baird's conviction was upheld by the Massachusetts Supreme Court. He petitioned for a writ of habeas corpus which was subsequently dismissed by the United States District Court for the District of Massachusetts. The United States Court of Appeals, however, vacated the District Court's order and

18 Massachusetts General Laws Ann., c. 272, section 21 provides a maximum five-year prison term for "whoever . . . gives away . . . any drug, medicine, instrument or article whatever for the prevention of conception . . ." except those authorized by section 21A, including registered physicians who "may administer to or prescribe for any married person drugs and articles intended for the prevention of pregnancy or conception," and registered pharmacists who "may furnish such drugs or articles to any married person presenting a prescription from a registered physician." Cited in Eisenstadt v. Baird, 405 U.S. at 440-441.

19 The Massachusetts Supreme Judicial Court maintained that the purpose of the law was "to protect purity, to preserve chastity, to encourage continuance and self-restraint, to defend the sanctity of the home, and thus to engender in the State and nation a virile and virtuous race of men and women." Id. at 448.
remanded the case with instructions to grant the writ discharging the appellee. The United States Supreme Court affirmed the judgment of the Court of Appeals, which held that the prohibition on contraception conflicted with "fundamental human rights" under *Griswold v. Connecticut*.

Justice Brennan wrote the opinion for four members of the Court (Powell and Rehnquist did not participate). Brennan based his decision, in part, on the Fourteenth Amendment Equal Protection Clause since,

> [i]f under *Griswold* the distribution of contraceptives to married persons cannot be prohibited, a ban on distribution to unmarried persons would equally be impermissible. It is true that in *Griswold* the right to privacy in question inhered in the marital relationship. Yet the marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional make-up. If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.\(^2\)

Moreover, the Court dismissed the compelling state interest argument put forth by Massachusetts: first, it held that the "deterrent to fornication" (or extramarital and premarital sex) rationale was not the purpose of the state statute since "[i]t would be plainly unreasonable to assume that Massachusetts has prescribed pregnancy and birth of an

\(^2\)Id. at 453. Reportedly, Justice Brennan used this opinion as a persuasive prelude to help Justice Blackmun with the constitutional issue of an abortion decision [*Roe v. Wade*] which was pending (particularly the last sentence of the quote). See, Bob Woodward and Scott Armstrong, *The Brethren* (New York: Avon Books, 1979), 193ff.
unwanted child as punishment for fornication"; and second, the prohibition of contraception to unmarried individuals would have only a "marginal" effect towards its stated objective. Furthermore, if the intent of the law was to protect the health of its citizens, would it not include all citizens both married and single? The statute, it was concluded, was both overbroad and discriminatory.

When, then, may a state regulate the health, safety, welfare, and morals of its citizens? Granting that consenting married and unmarried adults have a fundamental right to be sexually active without state interference, does this apply as well to minors? Moreover, may the state attempt to insure the safety of contraceptives as a legitimate public health measure?

In Carey v. Population Services International, the Court answers these questions -- in part[s]. That is, seven members of the Court, in an opinion by Justice Brennan, agreed that a New York statute prohibiting the distribution of non-prescription contraceptives to adults, except through a licensed physician, was unconstitutional under the right to privacy protections afforded by the Fourteenth Amend-

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22Carey v. Population Services International, 431 U.S. 678 (1977). Section 6811 (8) of the New York Education Law made it a crime (1) for any person to sell or distribute any contraceptive of any kind to a minor under 16; (2) for anyone other than a licensed pharmacist to distribute contraceptives to persons 16 or over; and (3) for anyone, including licensed pharmacists, to advertise or display contraceptives.
ment's Due Process Clause. However, there was no majority opinion by the Court invalidating the New York law as it applied to the distribution of non-prescription contraceptives to individuals under sixteen years of age.

The opinion of the Court was divided into five parts. Justice Brennan joined by Justices Stewart, Marshall and Blackmun argued that minors have a constitutional right to privacy unless restrictions serve a significant state interest. In this instance, he maintained, the state failed to justify such an imposing statute. Justice Lewis Powell objected to "subjecting restrictions on the sexual activity of the young to heightened judicial review," but he conceded that the states should have a broader reach in regulating the activities of adolescents. He would also allow the state to encourage minors to seek the advice of their parents before engaging in sexual intercourse. Justice John Paul Stevens argued that the statute violated due process by forcing minors who are sexually

23Parts I, II, III, and V, comprised the opinion of the Court. Parts II and III dealt with the issue of whether the state had a sufficient compelling interest in restricting distribution of contraceptives to persons over sixteen years. Part IV considered the ban on contraceptives to minors under sixteen years of age.

24Because of the ruling in Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52 (1976), Brennan held that "since the State may not impose a blanket prohibition or even a blanket requirement of parental consent on the choice of a minor to terminate her pregnancy, the constitutionality of a blanket prohibition of the distribution of contraceptives to minors is a fortiori foreclosed." Eisenstadt v. Baird, 405 U.S at 694.

25Id. at 705.
active to bear children.\textsuperscript{26} Justice White concurred with Stevens, asserting that the state had not demonstrated that the prohibition contributed to the deterrent purposes advanced by the state as justification for the restrictions. Both Justices Stevens and White rejected the argument "that a minor has the constitutional right to put contraceptives to their intended use, notwithstanding the combined objections of both parents and the state."\textsuperscript{27} Chief Justice Warren Burger and Justice Rehnquist dissented from the judgment of the Court, maintaining that the state does have a compelling interest in both regulating the distribution of contraceptives, and prohibiting the distribution of contraceptives to minors under the age of sixteen years.

\textit{Carey} extended \textit{Griswold} and \textit{Baird} by invalidating a state ban on commercial distribution of nonmedical contraceptives, while still recognizing that the right to privacy is not absolute. A compelling state interest lurks behind all legislation, and is particularly forceful when fighting legal precedents with controversial constitutional support. Nevertheless, in the section that follows, it will be shown that a constitutional right to privacy fared surprisingly well in an area more intimate than any other, for a woman,

\begin{itemize}
\item \textsuperscript{26} "It is though a State decided to dramatize its disapproval of motorcycles by forbidding the use of safety helmets," argues Stevens. "One need not posit a constitutional right to ride a motorcycle to characterize such a restriction as irrational and perverse." \textit{Id.} at 715.
\item \textsuperscript{27}\textit{Id.} at 703.
\end{itemize}
yet seemingly more compelling than the contraception issue -- the right to choose an abortion.

Privacy, Autonomy and Abortion

The landmark case extending the right to privacy in decisions concerning whether or not to terminate a pregnancy is Roe v. Wade.\(^{28}\) The plaintiff, an unmarried pregnant woman, sought injunctive and declaratory relief against the enforcement of a Texas statute making it a crime to procure an abortion except for the purpose of saving the life of the mother. The District Court held that the right to choose whether to have children was protected by the Ninth Amendment and applicable to the states via the Fourteenth Amendment.

On appeal, the United States Supreme Court affirmed the judgment of the District Court. In a very technical opinion, legally, philosophically, and medically, Justice Harry Blackmun expressed the views of seven members of the Court, including the Chief Justice. The Court held that a constitutional right to privacy, founded in the Fourteenth Amendment's concept of personal liberty, was broad enough to encompass a woman's decision whether to terminate a pregnancy.\(^{29}\) Hence, Texas' statute criminalizing abortion was


\(^{29}\)Justice Blackmun cited precedents which recognized a right of privacy or zones of privacy, including: Union Pacific Railway Co. v. Botsford, 141 U.S. 250 (1891) (mandatory surgical examinations violated personal privacy); Stanley v. Georgia, 394 U.S. 557
found to be in violation of the Due Process Clause of the Fourteenth Amendment.

However, Justice Blackmun qualified this pronouncement: the state has a right to regulate abortions insofar as to assure that abortions are performed under circumstances that insure the maximum safety of the patient. To clarify this position, Justice Blackmun laid out guidelines indicating when a state’s interest in regulating abortions becomes compelling.

(a) For the stage prior to approximately the end of the first trimester, the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman’s attending physician.  

(2) For the stage subsequent to approximately the end of the first trimester, the State, in promoting its interest in the health of the mother, may, if it chooses, regulate the abortion procedure in ways reasonably re-


At this stage of pregnancy, it was determined, the mortality rate in abortion is less than the mortality rate in normal childbirth.
lated to maternal health.\textsuperscript{31}

(3) For the stage subsequent to viability, the State in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life and health of the mother.\textsuperscript{32}

The two dissenters in this case, and in all subsequent abortion cases, were Justices White and Rehnquist. White, joined by Rehnquist, asserted that "nothing in the language or history of the Constitution" supported the Court's judgment that women have the constitutional right to abortion. The Court, argued the dissenters, constructed a constitutional right where none had previously existed, and thus indulged in "an improvident and extravagant exercise of the power of judicial review."\textsuperscript{33} Moreover, Justice White indicated his doubts as to whether abortion is a fundamental right, depicting it as a frivolous feminine alternative.

At the heart of the controversy in these cases are those recurring pregnancies that pose no danger whatsoever to the life or health of the mother but are nevertheless unwanted for any one or more of a variety of reasons -- convenience, family planning, economics, dislike of children, the embarrassment of illegitimacy, etc.\textsuperscript{34}

\textsuperscript{31}For example, the state could regulate the qualifications of the doctor performing the abortion, the facility in which the abortion is to take place, etc. However, the state may not proscribe abortion at this stage.

\textsuperscript{32}\textit{Roe v. Wade}, 410 U.S. at 164-165.

\textsuperscript{33}Id. at 221-222 (White, J., dissenting). The dissents in \textit{Roe} apply also to \textit{Doe v. Bolton}, 410 U.S. 179 (1973), discussed below.

\textsuperscript{34}Id. at 221 (White, J., dissenting).
Justice Rehnquist further marked his disagreement with the *Roe* decision maintaining that, since a majority of the states have had statutes restricting abortion for at least a century, then, evidently, abortion is not "so rooted in the traditions and conscience of our people as to be ranked fundamental." His strict constructionist view of the Constitution was clear in his criticism of the *Roe* Court's willingness to use substantive due process. The concept of liberty as used in the Fourteenth Amendment applies only to cases which deprive an individual of his or her liberty without due process of law; Justice Rehnquist did not adjudge a woman's proscription from terminating a pregnancy to be compelling enough to warrant such a restriction to be a

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35 Quoting from *Snyder v. Massachusetts*, 291 U.S. 97 (1934), in *Roe v. Wade*, 410 U.S. at 174 (Rehnquist, J., dissenting). This particular statement in his dissenting opinion seems to contradict hundreds of years of common law precedent which permitted abortions. Abortion prior to quickening was generally allowable by law; abortions performed after quickening were punished as a misdemeanor. See, Justice Blackmun's majority opinion in *Roe*, where he relates the common-law and American law history of abortion laws. He concludes that "at common-law, at the time of the adoption of our Constitution, and throughout a major portion of the 19th century, abortion was viewed with less disfavor than under most American statutes currently in effect." See id. text at 133-141. See also, an article by Cyril Means, which asserted that abortion became a misdemeanor after quickening in the Seventeenth Century because of the religious zeal of jurist Sir Edward Coke who wrote a common law treatise used in law schools throughout the United States. Abortion laws in America gradually became more restrictive in the mid-Eighteenth Century as a measure designed to protect the health of women who died or were maimed because of the unsafe medical procedures of the day. See, Means "The Phoenix of Abortional Freedoms: Is a Penumbral or Ninth Amendment Right About to Arise from the Nineteenth-Century Legislative Ashes of a Fourteenth-Century Common Law Liberty?" *New York Law Forum* 14 (Fall 1968), quoted in Marian Faux, *Roe v. Wade* (New York: New American Library, 1988), 300-302.
deprivation of due process.\textsuperscript{36}

The companion case of \textit{Roe} was \textit{Doe v. Bolton}.\textsuperscript{37} The plaintiffs, an indigent pregnant woman and nine physicians licensed in Georgia, challenged a Georgia law which prescribed abortion except as performed by a duly licensed Georgia physician when necessary in "his best clinical judgment" because continued pregnancy would endanger the pregnant woman's life or injure her health; the fetus would likely be born with a serious defect; or, the pregnancy resulted from rape.\textsuperscript{38}

In an opinion by Justice Blackmun, the Court held that this provision of the law was not unconstitutionally vague since the physician may exercise his judgment in light of all the attendant circumstances (physical, emotional, psychological, familial, and the woman's age). However, the Court invalidated three procedural demands of the Georgia law: (1) a provision which required that all abortions be performed in hospitals accredited by the Joint Commission on

\textsuperscript{36}Justice Rehnquist argued that "liberty [in the meaning of the Fourteenth Amendment] is not always guaranteed absolutely against deprivation without due process of law. The test traditionally applied in the area of social and economic legislation is whether or not a law such as that challenged has a rational relation to a valid state objective." In this case, Rehnquist thinks that a woman's choice to abort a pregnancy should not fall within the meaning of liberty protected by due process, unless her life or health is threatened. \textit{Roe v. Wade}, 410 U.S. at 173.


Accreditation of Hospitals was held unconstitutional since the state did not show that only J.C.A.H. hospitals could meet its interest in protecting the patient, and because it required abortions in the first trimester to be performed in hospitals; (2) that the procedure be approved by the hospital staff abortion committee was unconstitutional since it was unduly restrictive of the patient's rights already safeguarded by the physician; and (3) the requirement of concurrence by two other physicians was unconstitutional since it had no rational connection with a patient's need, and it infringed upon the physician's right to practice.

The landmark decision handed down in Roe created a landslide of anti-abortion emotion throughout the country so intense that state legislatures attempted to allay the full effect of Roe by enacting restrictions on the right to abortion. One such case was Planned Parenthood of Central Missouri v. Danforth. A challenge was made to the validity of a Missouri statute which set forth conditions and limitations on abortions and established criminal offenses for noncompliance.

In a unanimous decision written by Justice Blackmun, the Court upheld: (1) a viability definition provision defining "viability," asserting that an abortion may not be performed unless the fetus has not reached the stage of

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viability as certified with reasonable medical certainty by the attending physician, unless it is necessary to preserve the life and health of the mother⁴⁰; (2) a pregnant woman’s consent provision requiring that, prior to submitting to an abortion during the first twelve weeks, a woman certify her consent to the procedure to assure that her consent is informed and freely given; and (3) a recordkeeping and reporting provision imposing requirements upon health facilities and physicians concerned with abortions regardless of the stage of the pregnancy, since it imposed no legally significant impact or consequence on the abortion decision or the patient/physician relationship.⁴¹

Speaking for six members of the Court,⁴² Justice Blackmun invalidated, as unconstitutional: (1) a spousal consent provision, since a state cannot "delegate to a spouse a veto power which the State itself is . . . prohibited from exercising during the first trimester. . . ."⁴³

⁴⁰"Viability," as defined by the Missouri statute, is "that stage of fetal development when the life of the unborn child may be continued indefinitely outside the womb by natural or artificial life-supporting systems." This definition concurs with Justice Blackmun’s definition in Roe, which defined viability as a fetus "potentially able to live outside the mother’s womb, albeit with artificial aid." Roe v. Wade, 410 U.S. 160.

⁴¹Moreover, the recordkeeping provision was guaranteed to be strictly confidential, and to be for statistical purposes only.

⁴²Justices Blackmun, Brennan, Marshall, Powell, Stewart, and Stevens.

⁴³Planned Parenthood of Central Missouri v. Danforth, 428 U.S. at 69. Justice Blackmun expressed the view that women must, necessarily, have the final say in incidents of pregnancy since she
and, (2) a standard of care procedure which impermissibly required the physician to preserve the life and health of the fetus regardless of the stage of pregnancy.\(^4\)

The majority vote dwindled to five\(^4\) when invalidating the following provisions: (1) a parental consent provision, since a state cannot constitutionally impose a blanket parental consent requirement as a condition for an unmarried minor’s (under eighteen years) abortion during the first twelve weeks of pregnancy for the same reasons given in the spousal consent provision. As it was emphasized in Roe, "the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman’s attending physician"\(^6\); and, (2) a saline amniocentesis prohibition, a safe and commonly used abortion procedure, since the state failed to show this to be a reasonable protection of maternal health, and was arbitrarily proscribed.\(^7\)

\(^4\)The Missouri statute further stated that any physician failing the attempt in preserving the life and health of the fetus, would be charged with manslaughter if the child’s death resulted. However, since the punishment was not severable from the act (since the standard of care provision applied before the point in viability and was, therefore, overbroad), the penalty was invalid. Id. at 83-84.

\(^5\)Justices Blackmun, Brennan, Marshall, Stewart, and Powell.

\(^6\)Roe v. Wade, 410 U.S. at 164.

\(^7\)The Court felt that Missouri enacted this provision to discourage abortions altogether, even though other methods of abortion, to be used in place of the outlawed method, were more
In a later case dealing with a parental consent statute, the Court could not produce a majority opinion. *Bellotti v. Baird*48 concerned a Massachusetts statute requiring parental consent before an abortion could be performed on an unmarried woman under the age of eighteen, but provided that an abortion could be obtained under a court order upon a showing of good cause if one or both parents should refuse consent. Thus, the statute in this case, argued Massachusetts, was consistent with the decision in *Danforth* in that it offered an alternative means for the minor woman for obtaining an abortion should her parents refuse their consent.

In a plurality opinion by Justice Powell, and joined by Chief Justice Burger, and Justices Stewart and Rehnquist, the law was held invalid. The Court held that the statute imposed "an undue burden upon the exercise by minors of the detrimental to maternal health. "As so viewed . . . the outright legislative proscription of saline fails as a reasonable regulation for the protection of maternal health. It comes into focus, instead, as an unreasonable or arbitrary regulation designed to inhibit, and having the effect of inhibiting, the vast majority of abortions after the first 12 weeks." *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. at 78-79.

48*Bellotti v. Baird*, 443 U.S. 622 (1979). *Hunerwadel v. Baird* was also on appeal from the same court. Jane Hunerwadel was given permission to intervene as a defendant and representative of all parents with daughters under eighteen, and either pregnant, or liable thereto. See also, *Bellotti v. Baird*, 428 U.S. 132 (1976), (Baird I) which first challenged the Massachusetts statute, but was vacated by the Supreme Court, which concluded that a U.S. District Court, which invalidated the parental consent statute, should have abstained and certified certain constitutional questions of the statute to the Supreme Judicial Court of Massachusetts.
right to seek an abortion," since it required the minor to seek parental approval first before seeking a prompt court order to secure permission to obtain an abortion. According to the concept of liberty found in the Fourteenth Amendment, "every minor must have the opportunity -- if she so desires -- to go directly to a court without first consulting or notifying her parents." The court must grant consent to the abortion if it is persuaded that the minor is mature, or if terminating the pregnancy is in her best interests.

Justice Stevens, joined by Justices Brennan, Marshall, and Blackmun concurred in the judgment, but argued that the Massachusetts statute was unconstitutional on its face based upon the precedents laid down in Roe and Danforth. Since the statute stated that no underage female, no matter how mature and well-informed, may receive an abortion without the consent of either both parents or a judge, the minor's abortion decision was subject in every instance to an absolute third-party veto.

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50 Id. at 647. The Court sympathized with the right of parents to be informed about their children's activities . . . in most circumstances. "The pregnant minor's options are much different from those facing a minor in other situations. . . . For example, pregnancy does not wait for a young girl to reach the legal age without seriously affecting her life. The consequences of pregnancy, moreover, "brings with it adult legal responsibility. . . In sum, there are few situations in which denying a minor the right to make an important decision will have consequences so grave and indelible." Id. at 642.
It is inherent in the right to make the abortion decision that the right may be exercised without public scrutiny and in defiance of the contrary opinion of the sovereign or other third parties.\textsuperscript{51}

Justice White dissented, expressing the view that the Massachusetts statute was not unconstitutional in requiring parental consent when an unmarried woman under the age of eighteen seeks an abortion. Indeed, he approved of an absolute parental or judicial check in all circumstances. Justice Rehnquist, as well, indicated he was willing to reconsider the \textit{Danforth} decision, but conceded to precedent until the opportunity to overturn the likes of \textit{Roe} and \textit{Danforth} should arise.

State legislatures became more zealous and more creative in enacting statutes restricting the choice of women to independently obtain an abortion, particularly underage women, with the passage of time. Justice Powell, speaking for six members of the Court, addressed this concern in \textit{Akron v. Akron Center for Reproductive Health},\textsuperscript{52} in his appeal not to stray from established precedent.

These cases come to us a decade after we held in \textit{Roe v. Wade} . . . that the right of privacy, grounded in the concept of personal liberty guaranteed by the Constitution, encompasses a woman's right to terminate her pregnancy. Legislative responses to the Court's decision have required us on several occasions . . . to define the limits of a State's authority to regulate the performance of abortions. And arguments continue to be made . . . that we erred in interpreting the Con-

\textsuperscript{51}Id. at 655.

stitution. Nonetheless, the doctrine of *stare decisis*, while perhaps never entirely persuasive on a constitutional question, is a doctrine that demands respect in a society governed by the rule of law. We respect it today, and reaffirm *Roe v. Wade*.\(^5\)

The city of Akron imposed a number of restrictions on the abortion procedure with the enactment of 'Ordinance No. 160-1978, Regulation of Abortions.' The first condition required that all abortions performed after the first trimester of pregnancy be performed in hospitals accredited by the J.C.A.H. or the American Osteopathic Association. The Court reaffirmed its decision in *Doe v. Bolton*, asserting that this provision unnecessarily impeded the abortion procedure, since it imposed additional costs, travel, and health risks on the pregnant woman. Since recent medical evidence showed that second trimester abortions could be safely performed on an outpatient basis in appropriate nonhospital facilities, the grounds on which Akron based this provision was not considered compelling, but rather a means to make abortions more difficult to obtain.\(^5\)

Second, the Court invalidated a parental consent ordinance which applied to women under the age of fifteen. In

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\(^5\) *Id.* at 419-420. Justice Powell's majority opinion was joined by Mr. Chief Justice Burger, and Justices Brennan, Marshall, Blackmun, and Stevens.

\(^5\) Justice Powell thought it was necessary for it to clarify its position on the trimester distinction established in *Roe v. Wade*. States took the cue that at thirteen weeks it was free to more stringently regulate the abortion procedure, without seriously considering how the regulation "reasonably relates to the preservation and protection of maternal health." *Id.* at 163.
compliance with *Bellotti v. Baird*, it was held that the statute did not establish a procedure by which a minor could avoid a parental veto of her abortion decision. In every case, the Court stated, the pregnant girl must be able to prove her informed consent, her maturity to make this decision, or that termination of pregnancy would be in her best interest to an impartial judge, before exposing her plight to the emotionally-charged response of her parents.

[I]t is clear that Akron may not make a blanket determination that all minors under the age of 15 are too immature to make this decision or that an abortion never may be in the minor's best interest without parental approval.55

The Akron ordinance also required that the woman seeking an abortion give "truly informed consent." That is, the attending physician had to explain to her the status of her pregnancy and the stage of development of the fetus, the potential date of viability, the physical and emotional complications that may occur as a result of the abortion, and a list of the agencies that offer assistance and information regarding birth control, adoption, and childbirth. The Court held that this requirement was not enacted as a measure to protect maternal health, and that it unduly burdened the woman's abortion decision.

[I]t is fair to say that much of the information required is designed not to inform the woman's consent but rather to persuade her to withhold it altogether . . . much of the detailed description of "the anatomical and physiological characteristics of the particular

55*Akron v. Akron Center for Reproductive Health*, at 440.
unborn child" . . . would involve, at best, speculation by the physician. And . . . the dubious statement that "abortion is a major surgical procedure," and proceeds to describe numerous possible physical and psychological complications of abortion, is a "parade of horribles" intended to suggest that abortion is a particularly dangerous procedure.56

The Court also invalidated a requirement that the woman wait twenty-four hours after signing the consent form because there was no evidence that this waiting period would make abortions safe. Rather, it would impose additional costs, travel, and possible health risks upon the pregnant woman. Finally, the Court invalidated the provision that fetal remains be disposed of in a "humane and sanitary manner," because the word "humane" was "impermissibly vague" for a statute which mandates criminal liability.57

Justice Sandra Day O'Connor, joined by Justices Rehnquist and White, waged a sharp dissent against the Court for invalidating legislative regulations that do not unduly burden the right to abortion. In fact, Justice O'Connor found that judicial involvement in an area in which knowledge and technology is so dynamic, is foolhardy for an institution which relies substantially upon precedent. Legislatures, she argues, are better able to react to the changes in medical technology, and should not, "as a matter of constitutional law, have to speculate about what con-

56 Id. at 444-445.

57 For example, would a humane disposal require "some sort of 'decent burial' of an embryo at the earliest stages of formation?" Id. at 451.
stitutes "acceptable medical practice" at any given time."\textsuperscript{58}

An example of how the Court may have undermined a right deemed fundamental based on \textit{stare decisis} is its trimester formulation. As medical technology progresses, the trimester framework for regulating abortions becomes obsolete because the point at which a fetus can survive outside the mother's womb is moved back towards conception, while the point at which a state's interest in maternal health becomes compelling is moved forward towards childbirth. Demanding that a state follow the precedent set down in \textit{Roe} is therefore futile.

The \textit{Roe} framework, then, is clearly on a collision course with itself. . . Moreover, it is clear that the trimester approach violates the fundamental aspiration of neutral principles "sufficiently absolute to give them roots throughout the community and continuity over significant periods of time."\textsuperscript{59}

\textbf{Planned Parenthood Association of Kansas City, Missouri, Inc. v. Ashcroft,}\textsuperscript{60} was decided the same term as

\textsuperscript{58}Id. at 458 (O'Connor, J., dissenting).


Akron. Four issues were decided in a judgment rendered by Justice Powell. First, following its decision in Doe and Akron, the Court held a provision requiring abortions be performed in a hospital after twelve weeks of pregnancy to be an unconstitutional obstacle for the pregnant woman. Second, the requirement that minors seek either parental consent or consent from the juvenile court before being able to obtain an abortion, was upheld as constitutional and consistent with their rulings in Bellotti and Akron. Third, a provision requiring a pathology report for each abortion performed was upheld by the Court as reasonably relating to a health-related state concern. And fourth, the condition that there be two physicians present during a post-viability abortion was also upheld as rationally relating to a valid state objective. Since the first physician's primary concern is the life and health of the mother, a second

that all second-trimester abortions be performed in hospitals, since Virginia included "outpatient hospitals." Justice Powell, speaking for the Court, found that the state was reasonably exercising a legitimate interest in protecting the woman's health.

The appellants argued that a pathology requirement involved additional expense. Missouri and several health professionals argued that a pathology examination is not only the norm for all surgically removed tissue to test for abnormalities that could indicate more serious problems, but also insures that clinics conform to ethical and/or accepted medical standards. Thus, Justice Powell stated, "[i]n weighing the balance between protection of a woman's health and the comparatively small additional cost of a pathologist's examination, we cannot say that the Constitution requires that a State subordinate its interest in health to minimize to this extent the cost of abortions." Planned Parenthood Association of Kansas City, Mo., Inc. v. Ashcroft, 462 U.S. at 489.
physician is necessary to provide for the life and well-being of the fetus.\textsuperscript{62}

The final case in which the Supreme Court invalidated a state statute for unconstitutionally infringing upon a woman’s right to terminate her pregnancy, demonstrated the allegiance of the Court to \textit{stare decisis}. \textit{Thornburgh v. American College of Obstetricians and Gynecologists}\textsuperscript{63} involved the Pennsylvania Abortion Control Act of 1982;\textsuperscript{64} a sweeping list of restrictions which challenged some of the precedents laid down by the Court in prior decisions.

Appellees, an organization of obstetricians and gynecologists and various individuals, challenged the statute alleging that the law violated the United States Constitution, and sought declaratory and injunctive relief. The United States District Court for the Eastern District of Pennsylvania denied the plaintiffs’ preliminary injunctive relief, concluding that a likelihood of success on the merits had not been established. On appeal, the United

\textsuperscript{62}According to \textit{Roe v. Wade}, \textit{supra}, the state has a compelling interest in a third-trimester fetus. Appellants argue that this second-physician requirement interferes in the doctor-patient relationship. However, privacy is afforded, according to precedent, during the first two trimesters of pregnancy: "\textit{[T]he State in promoting its interest in the potentiality of life may, if it chooses, regulate, and even proscribe, abortion except where it is necessary . . . for the preservation of the life or health of the mother.}" \textit{id.} at 164-165.


States Court of Appeals for the Third Circuit ordered a remand as to a provision of parental consent, and directly held several other provisions of the Abortion Control Act unconstitutional. Treating the resulting appeal as a petition for certiorari, the United States Supreme Court affirmed the opinion of the lower court.

Justice Blackmun, joined by Justices Marshall, Powell, and Stevens, indignantly reproved the intent of the Pennsylvania statute:

In the years since this Court's decision in Roe, States and municipalities have adopted a number of measures seemingly designed to prevent a woman, with the advice of her physician, from exercising her freedom of choice.

Blackmun accused these states and municipalities of finding any and every excuse, "under the guise of maternal health," to hinder a woman's abortion decision. The Court,

65 The Court of Appeals held the following sections of the Pennsylvania statute unconstitutional: a portion of sec. 3205, relating to "informed consent." That is, the woman was to be informed of a "parade of horribles," including the potential physical and psychological risks of her decision; sec. 3208, concerning "printed information" regarding the agencies that could assist her should she decide to carry the fetus to term; sec(s). 3210 (b) and (c) concerning postviability abortions, including a "standard of care" requirement and a second-physician requirement; and, sec. 3211 (a) mandating a physician to report his basis for a finding of nonviability, and sec(s). 3214 (a) and (h) regarding the reporting of anonymous statistical information about the women obtaining abortions.

thus, proceeded to invalidate the following provisions of the statute:

(1) Section 3205. An informed consent provision, the kind which was held unconstitutional in *Akron*, requiring that the physician relate a "litany of information" and a "parade of horribles." The information that was to be relayed to the pregnant woman included, (a) the name of the physician who would perform the abortion, (b) the possible detrimental psychological and physical effects resulting from an abortion, (c) the medical risks involved in the abortion procedure, (d) the assumed gestational age of the fetus, (e) the medical risks associated with carrying the fetus to term, (f) the available medical assistance benefits for prenatal care, childbirth, and neonatal care, and (g) the fact that the father would be liable to assist in the child's financial support, "even in instances where the father has offered to pay for the abortion."

(2) Section 3211 (a). A viability definition provision that required the physician to report the basis for his

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67 *Akron v. Akron Center for Reproductive Health*, 462 U.S. at 444-445. The state's purpose for imposing this provision, insisted the Court, was simply to discourage women from obtaining an abortion.

68 Section 3205 of the Abortion Control Act. Subsection (g) posed a particular problem in cases of rape or incest -- a rather insensitive requirement for a woman dealing with such a tragic experience. "This type of compelled information," concluded the Court, "is the antithesis of informed consent." *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. at 764.
determination that a fetus is not viable after the first trimester, since the state failed to show that it was advancing any legitimate interest;

(3) Section 3214 (a). Abortion reporting requirements which must include,

- identification of the performing and referring physicians and the facility or agency;
- information as to the woman's political subdivision and State of residence, age, race, marital status, and number of prior pregnancies; the date of her last menstrual period and the probable gestational age; the basis for any judgment that a medical emergency existed; the basis for any determination of nonviability; and the method of payment for the abortion.

While Section 3214 (e)(2) of the Act assures that these reports will not be available for the public record, there is a catch in that each report would be available for public inspection and copying for fifteen days after receiving the report, based on the guarantee that the identity of the women will not be disclosed. Moreover, Section 3214 (h) provides that a report of complications "shall be open to public inspection and copying." Such a requirement, declared the Court, is only a disingenuous means to violate the right to privacy.

Pennsylvania's reporting requirements raise the spectre of public exposure and harassment of women who choose to exercise their personal, intensely private, right, with their physician, to end a pregnancy. Thus, they pose an unacceptable danger of deterring the exercise of that right, and must be invalidated.69

(4) Section 3210 (b). A standard of care provision,

69Id. at 767-768.
requiring a physician to provide the necessary degree of care to preserve the life and health of the post-viable fetus. The Court held, following the reasoning of the Court of Appeals, that the provision required a "trade-off" between the woman's health and fetal survival, whereas the primary consideration should have been with the health of the mother. 70

(5) Section 3210 (c). A requirement that a second physician be present during an abortion when there is a possibility that the fetus is viable, even though there may be no medical emergency. Justice Blackmun held that since the Pennsylvania statute did not provide a medical emergency exception, whereby the woman's health would not be endangered by the delay in the arrival of the second physician (as Justice Powell qualified it in Ashcroft), 71 the provision was invalid.

In invalidating these provisions, Justice Blackmun is remaining true to the belief that the right to privacy, which he helped to establish, is a fundamental constitutional guarantee, regardless of the criticism and controversy this right has confronted. His function as a Supreme Court justice, as he sees it, is to uphold the law for minorities and majorities alike, and especially to remain objective in

70 Id. at 768-769.

71 Planned Parenthood Association of Kansas City, Mo., Inc. v. Ashcroft, 462 U.S. at 482-486.
the face of religious or moral questions. In conclusion, Justice Blackmun maintains,

> [f]ew decisions are more personal and intimate, more properly private, or more basic to individual dignity and autonomy, than a woman's decision -- with the guidance of her physician and within the limits specified in Roe -- whether to end her pregnancy. A woman's right to make that choice freely is fundamental. Any other result, in our view, would protect inadequately a central part of the sphere of liberty that our law guarantees equally to all.72

Justice Stevens wrote a separate concurrence in which he strongly supported the Court's affirmation of a right to privacy based on the Fourteenth Amendment's Due Process Clause. Numerous precedents have been established by this very liberal clause, based on liberties recognized as fundamental by the Court, including liberties which have been recognized by the great dissenter in abortion cases -- Mr. Justice Byron White.73 Justice Stevens, baffled by the sudden change in the definition of liberty by Justice White, remarked, "I fail to see how a decision on child-bearing becomes 'less' important the day after conception than the

72Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. at 772.

73For example, in Griswold v. Connecticut, 381 U.S. 479, White stated "I find nothing in this record justifying the sweeping scope of this statute, with its telling effect on the freedom of married persons, and therefore conclude that it deprives such persons of liberty without due process of law." Id. at 507 (White, J., concurring). Likewise, in Eisenstadt v. Baird, 405 U.S. 438, he concurred with the result: Just as in Griswold "... so here to sanction a medical restriction upon distribution [to married persons] of a contraceptive not proved hazardous to health would impair the exercise of the constitutional right." Id. at 464-465 (White, J., concurring).
day before."\textsuperscript{74} If it is because of the moral issues involved in the abortion decision which have wreaked the present political havoc, asserted Justice Stevens, then "the basic question is whether the "abortion decision" should be made by the individual or by the majority."\textsuperscript{75} In considering whose value judgments (i.e., the Court or the pro-life advocates) are being applied to whom (pro-life advocates or pregnant women), Justice Stevens concluded, "Justice White is quite wrong in suggesting that the Court is imposing value preferences on anyone else."\textsuperscript{76} On the contrary, in his view, the Court has preserved the freedom of individuals to determine value preferences for themselves.

The majority remain free to preach the evils of birth control and abortion and to persuade others to make correct decisions while the individual faced with the reality of a difficult choice having serious and personal consequences of major importance to her own future -- perhaps to the salvation of her immortal soul -- remains free to seek and to obtain sympathetic guidance from those who share her value preferences.\textsuperscript{77}

Justice White, joined by Justice Rehnquist, dissented, declaring that it was time that the Court reverse its opinion in \textit{Roe}, embrace the "proper understanding" of the Constitution, and change its course from the "difficult and

\textsuperscript{74}Thornburgh \textit{v.} American College of Obstetricians and Gynecologists, 476 U.S. at 776.

\textsuperscript{75}Id. at 777.

\textsuperscript{76}Id. at 778.

\textsuperscript{77}Id. at 781.
continuing venture into substantive due process."78

First, according to the dissenters, the Court is illogically following the rule of *stare decisis*, since this principle of law is insubstantial without the rule of law to sustain it. Justice White contended that

when governing legal standards are open to revision in every case, deciding cases becomes the mere exercise of judicial will, with arbitrary and unpredictable results.79

Second, since the Court has been consistently having to invalidate state statutes which have been attempting to place restrictions of abortions, it is clearly undermining the will of the people. The Constitution is a document of the people, and the right to abortion is not a part of the document. Since the Court is invalidating legislative acts which are, presumably, the will of the people, the dissenters conjectured, then the Court is sabotaging the American system of government for an imaginary constitutional right.

Justice White consistently has accused the Court of imposing its own value preferences. In doing so, he argued, the Court is permitting potential life to be vacuumed away. His dissents do not persuade, however, that he is more abhorred by the Court exercising substantive due process, than its authorization of "the evil of abortion."80 It

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78 Quoting from his dissent in Planned Parenthood of Central Missouri v. Danforth, id. at 785-786.

79 Id. at 787.

80 Id. at 797.
appears that this is an issue where value preferences cannot help but be imposed, even within the "objective" branch of the government. One either sides with Justice Stevens' point of view that the Court must protect choice at the grassroots level by constructing constitutional barriers, or with Justice White's point of view that choice must be protected at the political level by toppling judicial constraints. Both positions are equally ingrained in the American concept of ordered liberty; both positions equally incite emotional responses clothed in intellectual polemics. Up until Thornburgh, we saw Justice Stevens' view reign. However, in other cases, beginning with Maher v. Roe, Justice White's view prevails. Round two of the right to privacy match has begun.

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CHAPTER FOUR

LIMITATIONS ON THE RIGHT TO PRIVACY

For today, the women of this nation still retain the liberty to control their destinies. But the signs are very ominous, and a chill wind blows.

Justice Harry A. Blackmun
Webster v. Reproductive Health Services
Dissenting opinion.

Previous chapters have reviewed the steady climb of the right to privacy as a constitutional protection, but that progress stops abruptly in the cases that will be discussed in this chapter. The conservative majority on the Supreme Court, given its interpretational prerogative, simply refuses to go beyond any of the 'substantive' rights to autonomous choice and/or opportunity, granted by preceding Courts. Indeed, the present Court has substantially limited the ability of persons to exercise rights previously recognized as constitutional.\(^1\) Thus, in several states, individuals are now left with a token right to privacy (particularly in regards to abortion rights) which hardly meets the prevalent

\(^1\)These cases will be discussed in further detail, in particular, Webster v. Reproductive Health Services, 109 S.Ct. 3040 (1989), below.
expectations.²

President Ronald Reagan's goal to direct the political philosophy of the Supreme Court towards greater judicial and social conservativism was furnished with three golden opportunities. First, in the summer of 1981 Justice Potter Stewart (a member of the Roe v. Wade majority) retired from the Court. He was replaced by Justice Sandra Day O'Connor, the first woman ever appointed to the Supreme Court and a conservative. As a former Arizona state court of appeals judge, she paid a great deal of attention to precedent and to legislative decisions. She also pays heed to the decisions of state courts. With this type of 'hands-off' judicial philosophy, in addition to her 'personal abhorrence' to abortion, she was the ideal candidate for President Reagan, earning him praise for his political savvy in appointing a woman.³

²A survey on the Supreme Court and the Constitution reveals that a majority of Americans believe that the right to privacy is an enumerated constitutional guarantee, and includes such protections as sexual and reproductive autonomy, and the right to choose euthanasia. See, "Poll finds belief in a Constitutional right to privacy," Las Vegas Review Journal, 19 February 1990, p. 6(A).

Second, Chief Justice Burger (who also voted with the majority in *Roe v. Wade*) vacated his seat on the High Court in 1986 and arch-conservative Justice William H. Rehnquist (one of the two dissenters in *Roe*) was elevated to take his place. The position that opened for associate justice was filled by Antonin Scalia -- a staunch conservative and a Roman Catholic. Justice Scalia is a proponent of judicial self-restraint, stating "I am not comfortable with imposing my moral views on society."\(^4\) Like Chief Justice Rehnquist, Justice Scalia contended that the right to privacy was imprudently fabricated by judicial activists devoid of constitutional authorization. Justice Scalia, however, appears to be more ardent in his quest to overrule *Roe v. Wade*, proclaiming the cause that Justices Rehnquist and White once chiefly commanded.\(^5\)

Finally, Justice Lewis F. Powell (still yet another member of the *Roe* majority) announced his retirement in

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\(^5\)For example, in *Webster v. Reproductive Health Services, Inc.*, 109 S.Ct 3040 (1989), he criticized the opinion of the Court (written by Rehnquist and joined by White, et al) for not explicitly overruling *Roe*: "The outcome of today’s case will doubtless be heralded as a triumph of judicial statesmanship. It is not that, unless it is statesmanlike needlessly to prolong this Court’s self-awarded sovereignty over a field where it has little proper business since the answers to most of the cruel questions posed are political and not juridical..." Id. at 3064 (Scalia, J., concurring in part and concurring in the judgment).
1987. After two unsuccessful attempts to nominate a conservative Justice to take Powell's position, including Robert Bork and Douglas Ginsburg, Anthony M. Kennedy was finally appointed to the bench. Described as a quiet and scholarly man, Justice Kennedy has proven to be very conservative in civil rights cases, supporting state authority over the rights of individuals in criminal cases. Moreover, Kennedy is Chief Justice Rehnquist's model strict-constructionist, voting with the Chief Justice consistently (90% of the time), whereas Justice Powell tended to waver on civil rights, individual liberties, and church/state issues.

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6 For example, Justice Kennedy voted with the majority in the following criminal cases in the 1988-1989 term: Stanford v. Kentucky, Wilkins v. Missouri, Penry v. Lynaugh, held, in a 5-4 decision, that it is not "cruel and unusual" punishment to execute juveniles or the mentally retarded; United States v. Monsanto, Caplin & Drysdale v. United States, held, in a 5-4 decision, that the government may seize assets defendants plan to use to pay attorneys' fees; and, Skinner v. Railway Labor Executives' Association, held, in a 7-2 decision, that mandatory alcohol and drug testing of railroad workers, after a major accident and/or safety violation, are constitutional. See, Joan Biskupic, "Solid New Majority Evident As 1988-1989 Term Ends," Congressional Quarterly Weekly Report 47 (8 July 1989): 1694, 1696-1697.


8 Neil Skene writes that Justice O'Connor, who during her first eight years laid low and generally voted with the conservatives, is finally coming into her own becoming the swing vote that Justice Powell once was. "O'Connor has become the pivot point for the court on a number of issues. Her votes with the other conservatives, like Powell's, are often accompanied by separate opinions that narrow the focus and the reach of the decision." See, Skene, "O'Connor Becoming The New Powell," Congressional Quarterly Weekly
The conservative Court majority is adjudicating as though it has some catching-up to do; as though to put the reins on reckless unenumerated constitutional guarantees (in particular the right to privacy). This was evident even before the Reagan appointees were seated on the bench. For example, the Court refused to extend the right to privacy to protect homosexuality. In *Bowers v. Hardwick*, the Court, in an opinion by Justice White, joined by Chief Justice Burger and Justices Powell, Rehnquist, and O'Connor, upheld as constitutional a Georgia statute criminalizing sodomy.

Respondent, Mr. Hardwick, was arrested while in the process of violating the Georgia statute in the privacy of his bedroom with an adult consensual partner. The United States Court of Appeals for the Eleventh Circuit reversed his conviction holding that the statute in question violated the constitutional principles of *Griswold v. Connecticut*,

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10 Georgia Code Ann. Section 16-6-2 (1984) provides, in part:

"(a) A person commits the offense of sodomy when he performs or submits to any sexual act involving the sex organs of one person and the mouth or anus of another. . .

"(b) A person convicted of the offense of sodomy shall be punished by imprisonment for not less than one nor more than 20 years. . ."
Eisenstadt v. Baird, Stanley v. Georgia,\footnote{In Stanley v. Georgia, 394 U.S. 557 (1969), the Court held that the First and Fourteenth Amendments protect the right of individuals to read and/or watch obscenity in the privacy of their own homes. Justice Marshall asserted: "If the First Amendment means anything, it means that a State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch. Our whole constitutional heritage rebels at the thought of giving government the power to control men's minds." \textit{Id.}, at 565-566.} and Roe v. Wade, as well as the Ninth Amendment and the Due Process Clause of the Fourteenth Amendment. The Supreme Court reversed the Court of Appeals' decision for lacking constitutional support of a fundamental right to engage in homosexual sodomy.\footnote{A couple, John and Mary Doe, were also plaintiffs in the action, challenging their right as a married, heterosexual couple to engage in the actions the Georgia statute proscribes. The District Court held that they did not have standing since they did not sustain, nor were in any danger of sustaining, direct injury from the enforcement of the statute. The Court of Appeals affirmed this ruling. \textit{Bowers v. Hardwick}, 478 U.S. note 2, at 188.} After all, announced Justice White, how could an activity be fundamental and be contrary to the longstanding laws of almost half of the states in America? Homosexuality does not rank as a fundamental right when viewing such rights as being "deeply rooted in this Nation's history and tradition."\footnote{\textit{Id.} at 192, quoting Justice Powell in \textit{Moore v. East Cleveland}, 431 U.S. 494, 503 (1977). Justice White proceeds to amass all the archaic anti-sodomy laws which persevered to the present-day. See, \textit{id.} note 5, at 192-194.}

Moreover, according to Justice White, while rights
protecting the privacy of marriage and family, the privacy of procreative and contraceptive choice, and even rights protecting the privacy of choosing whether to terminate a pregnancy have been recognized as fundamental, contrary to the opinion of the Court of Appeals, these cases have nothing in common with homosexual intimacy. "No connection between family, marriage, or procreation on the one hand and homosexual activity on the other has been demonstrated." What Justice White's decision demonstrated, conclusively, was the frugality of strict-constructionism in recognizing substantive due process rights.

Nor are we inclined to take a more expansive view of

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17Bowers v. Hardwick, 478 U.S. at 191. Justice Blackmun, however, pointed out in his dissent that the Court has protected the autonomy of family relations not to impose "a preference for stereotypical households," but rather because it contributes to the happiness of individuals. Id. at 205. See also, Laurence Tribe, the attorney for the defendant, who argued that cases which protect contraceptive freedom, for example, are not merely guaranteeing a right to indulge in a particular pharmaceutical product, but rather the right to engage in sexual expression. Because of its highly personal nature, the government has no business intentionally imposing sanctions (in one case pregnancy, in Hardwick's case jail) to dissuade an activity it may find morally wrong. See Tribe, American Constitutional Law, 2d ed., above, 1423.
our authority to discover new fundamental rights imbedded in the Due Process Clause. The Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution.18

Finally, the respondent argued that the Georgia statute has no rational basis for its existence except for the fact that it is thought to be 'morally' objectionable to the majority of the electorate. Morality, Justice White contended, should not be the hand that motivates the ax in due process claims. Prescribing a moral code is a permissible activity of state law, and morality alone could thus be the rational basis for state statutes which encroach upon some individual's rights, that is, if they are not explicitly or even implicitly protected by the Constitution.19

Justice Blackmun, joined by Justices Brennan, Marshall and Stevens, dissented, arguing that the real issue, the issue that the majority is evading, is "the right to be let alone."20 The dissenters charged the majority with focus-


19Justice Powell concurred, although he stressed that subsection (b) of the Georgia statute, which provides for the punishment for engaging in homosexual sodomy, is a possible violation of the Eighth Amendment protection against cruel and unusual punishment. He stated, "[t]he Georgia statute at issue . . . authorizes a court to imprison a person for up to 20 years for a single private, consensual act of sodomy. In my view, a prison sentence for such conduct - certainly a sentence of long duration - would create a serious Eighth Amendment issue." Id. at 197.

20Id. at 199, quoting Justice Brandeis' dissenting remark in Olmstead v. United States, 277 U.S. 438, 478 (1928).
ing on the activities, for example homosexual sodomy,\textsuperscript{21} rather than the principle being challenged: the right to harmless personal preferences and predilections. Justice White is clearly wrong, averred the dissent, when he argued that the dispute brought on by the respondent and past cases recognizing privacy are unrelated. This is undoubtedly a privacy issue since there is no activity more intimate than sexuality.

The fact that individuals define themselves in a significant way through their intimate sexual relationships with others suggests, in a Nation as diverse as ours, that there may be many "right" ways of conducting those relationships, and that much of the richness of a relationship will come from the freedom an individual has to 'choose' the form and nature of these intensely personal bonds.\textsuperscript{22}

The Court loses sight of its objective when it fails to see that it is, in large part, a mediator and interpreter of what the concept of liberty means. If an activity as personal as sexual intimacy is not a liberty, one could argue that the whole lot of those rights that have been accepted as fundamental, are not. Laurence Tribe thus protests that

\[s]ix decades of privacy precedents from Meyer v. Nebraska and Skinner v. Oklahoma to Griswold v. Connecticut and Roe v. Wade, were dismissed in two brisk paragraphs as having no relevance to this issue, since those cases involved rights relating to "family,

\textsuperscript{21}This emphasis on 'homosexual' sodomy posed the question of an Equal Protection violation, considering the general language of the statute. See, id. Part I and note 2, at 200-203 (Blackmun, J., dissenting).

\textsuperscript{22}id. at 205.
Indeed, that is the whole problem with proponents of strict constructionism. They look beyond the principles of what the concepts of liberty and freedom mean in the here-and-now society, and only see the unknowable intentions of the Framers of the Constitution. Ronald Dworkin maintains that what the literalists really see is just a mirage. He finds their intellectual basis, of denying the successional culmination of fundamental principles that increase in society over time, as greatly wanting. Our Constitution, argues Dworkin, is a "charter of principle" and not "a collection of political settlements." Dworkin convincingly asserts:

Since their question-begging rhetoric about "judge-made law" and "new rights" rests on no reasoned intellectual basis, it provides even less discipline than the traditional interpretive method, because the latter does demand coherent and extended argument, not just name-calling.

Hence, argues Dworkin, strict constructionists conveniently go about picking and choosing rights (e.g., the right to legally integrated education) that then magically

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23 Tribe, American Constitutional Law, 1422.


26 Ibid.
appear to gain constitutional legitimacy. This is aptly demonstrated by the Court's acceptance of contraceptive and procreative privacy as having a constitutional foundation, but excludes that right to sexual privacy. The conservatives on the Court do not stop here, as the next section will show. They also disingenuously placed impassible constitutional barriers on the right to abortion, while simultaneously affirming (although reluctantly) the constitutionality of abortion.

Limitations on the Right to Abortion

In *Maher v. Roe*, defendants brought suit against Maher, Commissioner of Social Services in Connecticut, for denying Medicaid funds for nontherapeutic abortions. They contended that Title XIX of the Social Security Act, as well as the Fourteenth Amendment's guarantees of due process and equal protection, require the state to subsidize nontherapeutic abortions, since Connecticut's policy effectively nullifies the right to reproductive privacy established in *Roe v. Wade* for indigent women who wish to obtain an abortion. Connecticut's policy subsidizes childbirth, moreover, and thus violates the principle laid down in *Roe* that "abor-

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27*Maher v. Roe*, 432 U.S. 464 (1977). See also *Beal v. Doe*, 432 U.S. 438 (1977), which was decided the same term, and held that Title XIX of the Social Security Act does not require the funding of nontherapeutic abortion as a condition of participation in the Medicaid program which was established by that Act. Justice Powell, writing for the majority in *Beal*, based his decision on the language of Title XIX itself.
tion and childbirth, when stripped of the sensitive moral arguments surrounding the abortion controversy, are simply two alternative methods of pregnancy. 28 Indigent women who wish to obtain an abortion are denied their due process rights to privacy in addition to equal protection since the state subsidizes those indigent women who choose to carry the fetus to term. The United States District Court for the District of Connecticut invalidated the Connecticut policy of distinguishing between abortion and childbirth asserting that

[t]o sanction such a justification would be to permit discrimination against those seeking to exercise a constitutional right on the basis that the state simply does not approve of the exercise of that right. 29

Justice Powell, writing the opinion of the Court, and joined by Chief Justice Burger, Justices Stewart, White, Rehnquist, and Stevens, reversed the District Court's ruling. 30 Powell declared that the state need not constitutionally subsidize the medical costs of indigents at all, and they are certainly under no obligation to subsidize nontherapeutic abortions. He dismissed the equal protection challenge advancing the position that indigent women seeking

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28 This was the interpretation of the District Court for the District of Connecticut in Roe v. Norton, 408 F. Supp. 660, note 3, at 663.

29 Id. at 664.

30 The Court of Appeals for the Second Circuit read the Social Security Act to allow, but not to require, state funding of nontherapeutic abortion. 522 F. 2d. 928 (1975).
an abortion do not constitute a suspect class: "this Court has never held that financial need alone identifies a suspect class for purposes of equal protection analysis."\(^{31}\)

The central question under the Equal Protection Clause then becomes whether Connecticut’s policy of denying benefits for abortion violates a right that has been deemed constitutionally fundamental. If it does, then the policy would be constitutionally invalid unless the state could show a compelling state interest. Past state provisions struck down by the Supreme Court were proven to be unduly burdensome to the woman seeking to terminate a pregnancy.\(^{32}\) In this instance, wrote Powell, that is not the case.

Connecticut places no obstacles -- absolute or otherwise -- in the pregnant woman’s path to an abortion. An indigent woman who desires an abortion suffers no disadvantage as a consequence of Connecticut’s decision to fund childbirth; she continues as before to be dependent on private sources for the service she desires.\(^{33}\)

\(^{31}\)Maher v. Roe, 432 U.S. at 471.

\(^{32}\)For example, Roe v. Wade, 410 U.S. 113 (1973) invalidated the sweeping Texas prohibition of abortions as being an impermissible interference with a woman’s decision whether to terminate a pregnancy; Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52 (1976) invalidated a spousal consent requirement as an impermissible interference of a woman’s decision; Carey v. Population Services International, 431 U.S. 678 (1977) held that a requirement for a lawful abortion "is not unconstitutional unless it unduly burdens the right to seek an abortion." Maher v. Roe, 432 U.S. at 472-473.

\(^{33}\)Id. at 474. Justice Powell has accepted abortion as a Hobbesean negative liberty. Abortion, asserts the Court, is a ‘hands-off’ issue, available by virtue of the fact that it is pretermitted by the state. See text at pp. 33-34
By resolving that the Connecticut regulation did not violate a fundamental interest, and that it was not discriminating against a suspect class, the Court thus went on to determine whether the regulation was "rationally related" to a "constitutionally permissible" purpose. By subsidizing childbirth, and not nontherapeutic abortions, the regulation was explicitly encouraging childbirth. Even Roe recognized the state's interest in protecting potential life, declared the Court, therefore the regulation was held to be constitutional.

The dissents were wrathful, particularly the dissent written by Justice Thurgood Marshall who accused the Court of insensitivity and ignorance. The Court's endeavor to avoid strict scrutiny, by employing mere rationality instead, is an affront to the poverty-stricken women who will never be able to recover from their plight with additional, unwanted children.

above. This conception is the deficiency of labelling abortion rights as a right to privacy, asserts Rhonda Copelon. The right to privacy is a negative right which confers a right to be let alone (as opposed to a positive right of self-determination). "Not only does the negative right of privacy carry no corresponding state obligation to facilitate choice; the integrity of a woman's decision-making process is not even protected against purposeful manipulation through the selective provision of state resources, in this case, the funding of childbirth." Copelon, "Beyond the Liberal Idea of Privacy: Toward a Positive Right of Autonomy," in Michael McCann and Gerald Houseman, eds., Judging the Constitution, 302-303.

Absent day-care facilities, she will be forced into full-time child care for years to come; she will be unable to work so that her family can break out of the welfare system or the lowest income brackets. If she already has children, another infant to feed and clothe may well stretch the budget past the breaking point. All chance to control the direction of her own life will have been lost.\footnote{Maher v. Roe, 432 U.S. at 458-459 (Blackmun, J., dissenting).}

All of the dissenters (Justices Brennan, Marshall and Blackmun) agreed that a fundamental right has 'de facto' been denied to a specific class of women without the benefit of a compelling state interest. While Connecticut is not actually putting obstacles in the path of an indigent woman's decision to choose abortion, it may just as well put a shark-infested moat around the abortion clinics and hospitals with a sign reading "paying customers only."\footnote{Justice Brennan quoted Justice Felix Frankfurter revealing an analogous example to the Connecticut statute: "To sanction such a ruthless consequence, inevitably resulting from a money hurdle erected by the State, would justify a latter-day Anatole France to add one more item in his ironic comments on the 'majestic equality' of the law. 'The law, in its majestic equality, forbids the rich as well as the poor to sleep under bridges, to beg in the streets, and to steal bread'. . ." in Griffin v. Illinois, 351 U.S. 12, 23 (1956) (concurring opinion). Id. at 483.}

Another case decided that same term, Poelker v. Doe,\footnote{Poelker v. Doe, 432 U.S. 519 (1977).} takes the Maher precedent a step further. The city of St. Louis, at the directive of its Mayor, Mr. Poelker, prohibited the performance of abortions in city hospitals except when there was a grave threat to maternal health. The
United States Court of Appeals for the Eighth Circuit ruled that the city's policy was an unconstitutional equal protection violation of indigent women's rights, since the hospital publicly financed childbirth. Furthermore, it was additionally violative in that nonindigent women were able to obtain abortions in private hospitals. Following the decision in *Maher v. Roe*, the Court applied, *per curiam*, the same principles and reversed the lower court's ruling.38

Justice Brennan, joined by Justices Marshall and Blackmun, likewise objected on the same grounds as in *Maher*; the St. Louis regulation denies indigent pregnant women due process by effectively denying them services they cannot afford. However, there is the additional obstacle of prohibiting the physicians, who work in public hospitals, from undertaking a minor operation that they would otherwise perform. Thus, in some communities, this would reduce the number of physicians who may perform abortions in a hospital setting, which could impose additional risks to the woman. Moreover, women from small communities, both rich and poor, would be burdened with additional travel and cost since they

38"We agree that the constitutional question presented here is identical in principle with that presented by a State’s refusal to provide Medicaid benefits for abortions while providing them for childbirth... For the reasons set forth in our opinion in [*Maher*], we find no constitutional violation by the city of St. Louis in electing, as a policy choice, to provide publicly financed hospital services for childbirth without providing corresponding services for nontherapeutic abortions." *Id.* at 521.
would be forced to travel elsewhere to obtain an abortion. The reasoning of the Court is ironic, the dissenters pointed out, since the majority manipulated the rationale for governmental regulation of abortions provided for in Roe to the detriment of its actual purpose — to protect maternal health. Finally, the dissenters accused the Court of regressing to the point in time when states could force women to bear children that they did not want.

The dissenters' fears were compounded when in Harris v. McRae, the Court upheld a federal statute which effectively permitted states to force women to bear children that they could not or should not bear. The federal statute, known as the 'Hyde Amendment', put stipulations on state participation in the Medicaid program. The Amendment for fiscal year 1980 provided:

[N]one of the funds provided by this joint resolution shall be used to perform abortions except where the life of the mother would be endangered if the fetus were carried to term; or except for such medical procedures necessary for the victims of rape or incest when such rape or incest has been reported promptly to a law enforcement agency or public health service.

This was found to be an unconstitutional burden in Akron v. Akron Center for Reproductive Health, 462 U.S. 416, which invalidated a 24-hour waiting period before obtaining an abortion, because the requirement imposed undue costs, travel and possible health risks upon the pregnant woman.

Harris v. McRae, 448 U.S. 297 (1980).

Pub. L. 96-123, sec. 109, 93 Stat. 926. The terms of the Amendment in fiscal year 1977 did not include the rape or incest exception, Pub. L. 94-439, sec. 209, 90 Stat. 1434. However, for the majority of fiscal year 1978, and all of fiscal year 1979, the rape and incest exception was
The Hyde Amendment, so-called after conservative Representative Henry Hyde, R-Ill., substantially revoked funding for abortions even when it would be medically prudent to do so. The Court, in an opinion by Justice Stewart, joined by Chief Justice Burger, Justices White, Powell, and Rehnquist, upheld the Hyde Amendment after having answered two questions: statutory and constitutional.

The statutory question asked whether states who participate in the Medicaid program are required to fund those included in addition to another exception which provided for "instances where severe and long-lasting physical health damage to the mother would result if the pregnancy were carried to term when so determined by two physicians," Pub. L. 95-205, sec. 101, 91 Stat. 1460; Pub. L. 95-480, sec. 210, 92 Stat. 1586. The Court made note of the fact that all fiscal years of the Amendment will be generically referred to as the 'Hyde Amendment.' Id. note 4, at 303.

For example, young women with diabetes are prone to blindness during pregnancy, due to a worsening of a diabetic retinopathy. In addition, juvenile diabetics have a propensity to advance the diabetes faster, and their aggravated condition increases the risks of kidney problems, and vascular problems of the extremities. Other complications of pregnancy include phlebitis, varicose veins and thrombophlebitis, to name a few. See, id. note 5, at 353, (Stevens, J., dissenting), citing affidavits from McRae v. Califano, 491 F. Supp. 630, 670.

The appellees contended that despite the Hyde Amendment, a state must pay for medically necessary abortions since the Amendment is only a limitation on federal reimbursement for this procedure, and on the basis that Title XIX provides for states to subsidize the costs of all medically necessary procedures and cannot exclude an operation simply because abortion is involved.

Appellees contended that the Hyde Amendment violates the Due Process Clause and the Equal Protection component of the Fifth Amendment and the Establishment Clause of the First Amendment.
medically necessary abortions without federal reimbursement. The Court held that states are not solely responsible for funding medically necessary abortions based on the concept of "cooperative federalism." Title XIX was created as a scheme, by federal and state governments, to bilaterally subsidize the costs of indigent health care. Since the federal program was amended, the states were limited accordingly, and are thus relieved of the financial responsibility within the conditions provided for by the Hyde Amendment.

The constitutional question was answered in several parts. The first constitutional challenge was whether the Hyde Amendment violates the right of a woman to terminate her pregnancy, implicit in the Due Process Clause of the Fifth Amendment. Remaining steadfast to its "obstacle" analysis as professed in Maher, the Court reiterated its position that due process cannot be violated absent actual government obstruction of a desired constitutional right. Disregarding the critical difference between Maher and Harris, which literally involves life and liberty, Justice Stewart reasoned that

it simply does not follow that a woman's freedom of choice carries with it a constitutional entitlement to the financial resources to avail herself of the full range of protected choices.\footnote{Harris v. McRae, 448 U.S. at 316.}

Indigence, not government, is the culprit in this case. Thus the Court held that the Hyde Amendment did not violate

\footnote{Harris v. McRae, 448 U.S. at 316.}
the Due Process Clause of the Fifth Amendment.

The second constitutional challenge was whether or not the Hyde Amendment violated the Establishment Clause of the First Amendment. The appellees charged that the Hyde Amendment executes policy that is dangerously close to the tenets of the Roman Catholic Church: that is, the belief that ensoulment begins at conception therefore making abortion murder.46

Justice Stewart maintained that the Hyde Amendment did not conflict with the Establishment Clause since

... it has a secular legislative purpose ... its principle primary effect neither advances nor inhibits religion, and ... it does not foster an excessive government entanglement with religion.47

Simply because the Hyde Amendment may resemble principles that belong to a particular faith does not indicate that it has adopted those tenets. Indeed, this would invalidate much of our commonplace legislation; "[t]hat the Judeo-Christian religions oppose stealing does not mean that a State or the Federal Government may not ... enact laws

46The Roman Catholic Church has the strictest views on abortion, says Rabbi Aryeh Spero, prohibiting direct abortion of a fetus even in cases where it may be necessary to save the mother's life. The Church does permit remedial procedures, e.g. radiation treatments for cancer patients, which may indirectly kill the fetus. See, Spero, "Therefore Choose Life: How the Great Faiths View Abortion," Policy Review 48 (Spring 1989): 38-44.

prohibiting larceny." The similarities, concluded the Court, are not sufficiently convincing.

The third constitutional challenge was whether the Hyde Amendment violates the Equal Protection component of the Fifth Amendment. Arguing that the Hyde Amendment allows subsidization of medically necessary procedures and not medically necessary abortions, the appellees charged that poor women are being discriminated against. Justice Stewart, however, once again resurrected the Maher precedent asserting that "poverty, standing alone, is not a suspect classification," the differences between the two cases notwithstanding.

Finally, it was left to the Court to decide what, if any, was the legitimate governmental objective of the Hyde Amendment. Justice Stewart concluded that it was recognized in Roe v. Wade that the state has an "important and legitimate interest in protecting the potentiality of human

\[48^*\] Ibid.

\[49^*\] See, Bolling v. Sharpe, 347 U.S. 497 (1956). The Court held that the Fifth Amendment Due Process Clause grants equal protection to individuals from discrimination by the federal government.

\[50^*\] Harris v. McRae, 448 U.S. at 323.

\[51^*\] A legitimate governmental objective is a necessary component for sustaining statutory classifications in Fifth Amendment Equal Protection controversies that do not impinge upon fundamental Constitutional rights or suspect classifications.
By subsidizing childbirth and not abortion, the state is simply and 'rationally' exercising its interest in potential life.

Justice Stevens, dissenting, found the Court's priorities confounding. First, the state's interest in protecting potential life, in Roe, was never meant to threaten actual life. Second, protecting potential life becomes a realistic governmental factor in the third trimester only, and when potential life threatens actual maternal life, the latter's interest constitutionally prevails. Third, prior to the third trimester, the only governmental regulation allowed, in the context of the Roe decision, is to protect maternal health. The present decision, thus, clearly runs askew of the precedent it has attempted to emulate.

Furthermore, Justice Stevens argued that the Hyde Amendment failed to exercise impartiality -- a trait that all governments should display.

When the sovereign provides a special benefit or a special protection for a class of persons, it must define the membership in the class by neutral criteria; it may not make special exceptions for reasons that are constitutionally insufficient.

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53 Harris v. McCane, 448 U.S. at 350-354 (Stevens, J., dissenting).

54 Id. at 349.
The Court's criterion in *Harris* was not neutral, and therefore the majority failed to live up to the objectivity requirements of the equal protection guarantees of the Constitution. There are two objectives that Title XIX was enacted to satisfy: financial need and medical need. When an indigent woman must obtain an abortion out of medical necessity, therefore, she should be eligible to receive governmental subsidization. After all, a medically necessary procedure is a medically necessary procedure. That the Court refused to see this, in the words of Justice Stevens, "constitute[s] an unjustifiable, and indeed blatant, violation of the sovereign's duty to govern impartially."55

Justice Brennan, avowing that a due process violation had taken place, disclosed that just when a constitutional minority most needed the intervention of the judicial branch, they were abandoned. He charged the sponsors of the Hyde Amendment of attempting to impose the moral views of the political majority on individuals. Worse yet, stated Brennan, the Amendment targets its puritanical wrath on those least able to defend their rights to life and liberty -- the poor and powerless. The fact is, those people most in need of the subsidization of Medicaid are arbitrarily denied it, and are therefore denied a constitutionally recognized right to privacy. There need not be governmental obstacles to achieve this blatant disregard of rights, as

55 *Id.* at 356-357.
the legislature and the Court have demonstrated. "It mat-
ters not that in this instance the Government has used the
carrot rather than the stick."56 A cunning manipulation of
funds works just as well as prison bars for those that need
the funds.57

Justice Marshall, taking the Equal Protection defen-
sive, contended that the Court was acting unconscionably in
replacing strict scrutiny with mere rationality. Clearly,
there is a definable group, poor, pregnant women, being
denied a constitutional right: access to abortions. The
fact that medically necessary abortions are being denied
makes the issue one of callous indifference on the part of
the Court, and cruelty on the part of the legislature.

Three years prior to Harris v. McRae, Justice Marshall
made a prediction that appears to have come true. In Maher
v. Roe, he warned that the decisions in Beal, Maher and
Poelker would
be an invitation to public officials, already under
extraordinary pressure from well-financed and carefully
orchestrated lobbying campaigns, to approve more such

56Id. at 334 (Brennan, J., dissenting).

57Justice Brennan pointed out that the Court has never
failed to invalidate legislation granting or withholding
funds that invariably leads to a violation of constitutional
rights. E.g., in Sherbert v. Verner, 374 U.S. 398 (1968),
the Supreme Court invalidated a state unemployment statute
which would not pay unemployment insurance to a woman who
had refused to work on Saturdays because of her religious
beliefs. The statute required that recipients must accept
any suitable employment. The Court held that the statute
unconstitutionally infringed upon her First Amendment rights
to the Free Exercise of religion. Id. at 334-335.
restrictions [on abortion subsidizations].

The fact that the restrictions disregard the dire necessity of a simple and possibly life-saving operation, as in *Harris v. McRae*, indicates that the Court has gone astray of the promise of reproductive privacy that was offered in *Roe v. Wade*. While the language of "life and liberty" never rang clearer, the majority of the Supreme Court did not hear it, although the pro-life lobbyists did. Ever in search of a constitutional challenge to *Roe v. Wade*, and motivated by the new turn in the Court, the pro-life forces achieved a small but certain constitutional victory in the following Supreme Court decision.

*Webster v. Reproductive Health Services* marks the first actual obstruction of *Roe v. Wade* by the Supreme Court. Chief Justice Rehnquist found, or rather created, his first opportunity to sabotage the trimester framework of *Roe* which delineated the stages and the extent that a state may enforce its interest in protecting maternal health and potential life. By undermining the trimester framework the Supreme Court rendered greater latitude to states to regulate, and perhaps even restrict, abortions prior to viability. Chief Justice Rehnquist, with whom Justices White and Kennedy joined, upheld Missouri Revised Statutes section

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188.029, which provides:

Before a physician performs an abortion on a woman he has reason to believe is carrying an unborn child of twenty or more weeks gestational age, the physician shall first determine if the unborn child is viable by using and exercising that degree of care, skill, and proficiency commonly exercised by the ordinarily skillful, careful, and prudent physician engaged in similar practice under the same or similar conditions. In making this determination of viability, the physician shall perform or cause to be performed such medical examinations and tests as are necessary to make a finding of the gestational age, weight, and lung maturity of the unborn child and shall enter such findings and determination of viability in the medical record of the mother.

In upholding this provision, the Court reversed rulings of both the United States District Court for the Western District of Missouri and the United States Court of Appeals for the Eighth Circuit. The Court of Appeals found section 188.029, requiring viability tests be performed when a physician believes the fetus to be at twenty weeks gestational age, to be an unconstitutional burden, imposing greater expense and risk to both the pregnant woman and the fetus.61

60 Justice Scalia concurred in the result, but criticized the Court for not overturning Roe v. Wade outright. Justice O'Connor also concurred in the result, finding that sec. 188.029 imposed no 'undue burden' on the right to abortion, and not for the reasons put forth by the plurality.

61 851 F. 2d. 1071, at 1075. For example, an 'amniocentesis' must be performed to determine lung maturity which can be dangerous to both the woman and the fetus. Indeed, the medical community does not assume that proper lung maturity occurs until at least the thirty-second week of pregnancy. Such tests as Missouri requires, thus, were ruled to be irrational and therefore unconstitutional. Though fetal gestational age can be determined accurately by
Rehnquist, however, criticized the lower courts' interpretations for being too literal; that is, both the District Court and the Court of Appeals mistakenly read section 188.029 as an unwavering mandate which required a viability test for all women at approximately twenty weeks of pregnancy regardless of the physician's better judgment. Thus, even though the second sentence of the provision states that at twenty weeks a physician "shall perform . . . such medical examinations and tests," Rehnquist accused the lower courts of creating 'constitutional difficulties' since they did not read the statute in view of the general intent of the statute. By virtue of the first sentence of section 188.029, which provides that the physician use his best professional judgment and skill, the Chief Justice held that the second sentence is not an irrational mandate at all, but rather a provision which simply creates a presumption of viability. Therefore, since the state may 'rationally' ultrasound, which shows the size and external fetal development, fetal survivability before twenty-four weeks is unlikely, even with today's most sophisticated technology. See, Gina Kolata, "Doctors' Tools Limited In Testing Fetal Viability," The New York Times, 4 July 1989, p. 10(A). See also, Joanne Silberner, "When the Law and Medicine Collide," U.S. News and World Report, 7 July 1989, 23.

Justice Stevens dissented from this part of the plurality's opinion on two legal grounds: first, because it is settled practice of the Supreme Court to accept "the interpretation of state law in which the District Court and the Court of Appeals have concurred even if an examination of the state-law issue without such guidance might have justi-
direct the physician to check for viability at twenty weeks, then section 188.029 violates the strict trimester structure of *Roe v. Wade* by promoting its interest in protecting potential human life. Since section 188.029 is reasonably designed to protect potential human life and creates the presumption of viability at twenty weeks, the provision permissibly interferes with second trimester privacy established in *Roe* and its progeny. In the balance between viable potential life and second trimester

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64 William Webster, arguing on behalf of Missouri, maintained that the purpose of the statute was to protect possible viable fetuses. Physicians agree that there is a potential four-week margin of error in determining fetal gestational age when depending on the woman's recollection of her last menstrual period. However, this rule of error does not necessarily apply to ultrasound determinations of gestational age. See, Silberner, "When the Law and Medicine Collide," 23.

65 Rehnquist cited the precedents established in *Roe v. Wade*, 410 U.S. 113 (1973), (the privacy of the pregnant woman and her physician is protected up until the third trimester of pregnancy), *Colautti v. Franklin*, 439 U.S. 379 (1979), (held that a determination of viability is solely a matter for the attending physician's judgment), and *Akron v. Akron Center for Reproductive Health*, 462 U.S. 416 (1983), (invalidated a city statute which required that all second trimester abortions be performed in hospitals), as examples of section 188.029's inconsistency with the trimester framework. *Webster v. Reproductive Health Services*, 109 S.Ct at 3955-3056.
privacy, proclaimed Rehnquist, the former must prevail and, therefore, the Roe framework cannot stand.\footnote{66}{That is a stunningly bad argument,} asserts Ronald Dworkin. Roe never implied that the right to seek an abortion was absolute and tucked deep within the narrow confines of the trimester structure in terms of weeks, days or hours. Roe simply protected a woman's decision to terminate a pregnancy up until viability. "Viability is usually placed at about seven months (28 weeks) but may occur earlier, even at 24 weeks."\footnote{67}{Webster v. Reproductive Health Services, 109 S.Ct. at 3056.} Roe v. Wade, 410 U.S. at 160. Although Justice Blackmun arranged the regulation of abortions into a medically supported trimester framework, his opinion did not imply that the viable fetuses could be aborted at 20 weeks gestational age. Thus, it would seem that Chief Justice Rehnquist is committing the 'constitutional difficulty' here: ". . . Rehnquist offered his bad argument in an effort not to reconcile his decision with judicial precedent, as judges often do, but to show that his decision was 'inconsistent' with precedent, which is extraordinary. The conclusion is irresistible that he had determined in advance somehow to damage Roe v. Wade." Dworkin, "The Future of Abortion," The New York Review of Books 36 (28 September 1989): 47.

Rehnquist proceeded to justify his disassemblage of Roe. First, he blamed Roe for having created a "Procrustean bed" in the area of constitutional law dealing with abortion.\footnote{67}{Webster v. Reproductive Health Services, 109 S.Ct. at 3056.} A constitution whose language is cast in general terms is unable to adjudicate on as rigid a framework as Roe, particularly when dealing with a right not specifically mentioned in the Constitution. Moreover, judges should not be an "'ex officio' medical board."\footnote{68}{Quoting Justice White, dissenting, in Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52, 99. Ibid.} These reasons contribute to Rehnquist's position that the precedent established in Roe v. Wade is bad constitutional law and should

\footnote{66}{"That is a stunningly bad argument," asserts Ronald Dworkin. Roe never implied that the right to seek an abortion was absolute and tucked deep within the narrow confines of the trimester structure in terms of weeks, days or hours. Roe simply protected a woman's decision to terminate a pregnancy up until viability. "Viability is usually placed at about seven months (28 weeks) but may occur earlier, even at 24 weeks." Roe v. Wade, 410 U.S. at 160. Although Justice Blackmun arranged the regulation of abortions into a medically supported trimester framework, his opinion did not imply that the viable fetuses could be aborted at 20 weeks gestational age. Thus, it would seem that Chief Justice Rehnquist is committing the 'constitutional difficulty' here: ". . . Rehnquist offered his bad argument in an effort not to reconcile his decision with judicial precedent, as judges often do, but to show that his decision was 'inconsistent' with precedent, which is extraordinary. The conclusion is irresistible that he had determined in advance somehow to damage Roe v. Wade." Dworkin, "The Future of Abortion," The New York Review of Books 36 (28 September 1989): 47.

\footnote{67}{Webster v. Reproductive Health Services, 109 S.Ct. at 3056.}

\footnote{68}{Quoting Justice White, dissenting, in Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52, 99. Ibid.}
be overturned.69

The Chief Justice also denounced the trimester framework since he was unable to rationalize why the state's interest in potential life is compelling only after viability and not before.70 As section 188.029 demonstrates, stated Rehnquist, the state's interest could very well be compelling during the second trimester of pregnancy.

It is true that the tests in question increase the expense of abortion, and regulate the discretion of the physician in determining the viability of the fetus. Since the tests will undoubtedly show in many cases that the fetus is not viable, the tests will have been performed for what were in fact second-trimester abortions. But we are satisfied that the requirement of these tests permissibly furthers the state's interest in protecting potential human life, and we therefore

69Justice Blackmun made a significant rebuttal to the position that the Court should not promote judicial stipulations. Rehnquist's disenchantment with judicial regulation would cause an ivory tower full of constitutional doctrines to come crashing down. E.g., 'actual malice' standards for proving libel, 'obscenity' standards, the 'rational-basis' test, or intermediate and strict scrutiny formulations for evaluating Equal Protection claims. "Like the Roe framework," explained Blackmun, "these tests or standards are not, and do not purport to be, rights protected by the Constitution. Rather, they are judge-made methods for evaluating and measuring the strength and scope of constitutional rights of individuals against the competing interests of government." Id. at 3073 (Blackmun, J., dissenting). As for the "web of legal rules" that have been the result of Roe, Blackmun pointed out that fine legal distinctions run rampant throughout the Court's constitutional jurisprudence, e.g., 'release-time' programs which accommodate religious public-school instruction and the Establishment Clause. Id. at 3071-3075.

70Justice Blackmun wanted to know why the plurality feels the state's interest is so compelling during a woman's entire pregnancy. In a decision that will have such an intrusive effect upon pregnant women, Blackmun believes the Court owes a constitutional explanation on why it takes this position. Id. at 3075.
believe section 188.029 to be constitutional.  
Justice O’Connor disagreed with the reasoning that the Chief Justice used in ruling on section 188.029. She thought that Rehnquist spoke prematurely and imprudently. Section 188.029, declared O’Connor, simply does not conflict with any of the Court’s prior decisions, therefore, the plurality’s repudiation of the Roe trimester framework was unnecessary. Thus, she attempted to demonstrate how the viability testing provision and the previous Court decisions are compatible: “No decision of this Court has held that the State may not directly promote its interest in potential life when viability is possible.”

For example, in Thornburgh v. American College of Obstetricians and Gynecologists, the Court struck down a statute requiring the presence of a second physician during a post-viability abortion only because the requirement did

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71 Id. at 3057.

72 "The Court will not 'anticipate a question of constitutional law in advance of the necessity of deciding it.'" Quoting Ashwander v. TVA, 297 U.S. 288, 346 (1936) (Brandeis, J., concurring), quoting Liverpool, New York and Philadelphia S.S. Co. v. Commissioners of Emigration, 113 U.S. 33, 39. Nor should the Court "formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied." 297 U.S., at 347. Webster v. Reproductive Health Services, 109 S.Ct. at 3060-3061 (O’Connor, J., concurring in part and concurring in the judgment).

73 Id. at 3062.

not provide for exceptions in emergency situations. Thornburgh does not deny the state’s interest in protecting potential life at viability; it reaffirms regulations although it recognizes maternal health to be of greater importance. Colautti v. Franklin\textsuperscript{75} is also consistent with and similar to the intent of section 188.029. Colautti maintained that neither the legislature nor the courts may determine that a single feature (e.g., weeks of gestation, fetal weight, etc.) ascertains viability, because the point of viability differs with each pregnancy. The Court reaffirmed the state’s interest in potential life at viability. All the Court stressed was that "[v]iability is the critical point."\textsuperscript{76} This is consistent with section 188.029 since, as the plurality interpreted this provision, the second sentence requires when not imprudent "those tests that are useful to making subsidiary findings as to viability."\textsuperscript{77} The plurality also maintained that Akron v. Akron Center for Reproductive Health\textsuperscript{78} was inconsistent with section 188.029, since it invalidated a city statute that required all second trimester abortions to be performed in hospitals.

\textsuperscript{75}Colautti v. Franklin, 439 U.S. 379 (1979).

\textsuperscript{76}Id. at 388-389.

\textsuperscript{77}Webster v. Reproductive Health Services, 109 S.Ct. at 3055. Recited and emphasis added by Justice O’Connor, id. at 3062.

In Akron, the Court held that the statute imposed an undue

cost burden on women seeking an abortion during their second

termester of pregnancy. O'Connor pointed out that the

equirements in section 188.029 and in Akron are not the

same, since the latter provision unconstitutionally interfered

with a woman's decision to terminate a pregnancy well

before the compelling point of viability. Thus, Justice

O'Connor concluded

that requiring the performance of examination and tests

useful to determining whether a fetus is viable, when

viability is possible, and when it would not be medically

imprudent to do so, does not impose an undue

burden on a woman's abortion decision. On this ground

alone I would reject the suggestion that section

188.029 as interpreted is unconstitutional.79

O'Connor's judgment remained consistent to the position

that a state maintains broad power to regulate the perfor-

mance of abortions, so long as it does not impose an undue

burden on women seeking to terminate nonviable pregnancies.

Accordingly, she did not find section 188.029 to be an undue

burden. Thus, she did not think the plurality acted wisely

or objectively in its overzealous assault on Roe v. Wade.

"When the constitutional invalidity of a State's abortion

statute actually turns on the constitutional validity of Roe

v. Wade, there will be time enough to reexamine Roe. And to

do so carefully."80

79 Webster v. Reproductive Health Services, 109 S.Ct. at

3063 (O'Connor, J., concurring).

80 Id. at 3061.
Not only did Rehnquist seek to invalidate Roe's trimester framework, he also broadened the principles put forth in Maher v. Roe, Poelker v. Doe and Harris v. McRae. Section 188.210 of the Missouri Revised Statutes provides:

It shall be unlawful for any public employee within the scope of his employment to perform or assist an abortion not necessary to save the life of the mother.

And, section 188.215 states that it is unlawful for any public facility to be used for the purpose of performing or assisting an abortion not necessary to save the life of the mother.

Rehnquist found these provisions to be applicable to the precedents established in Maher, Poelker and McRae, and upheld the constitutionality of sections 188.210 and 188.215 as further examples of the 'negative' liberty or right to procure an abortion. Thus, the Court affirmed the state's power to make value judgments in favor of childbirth, provided that a state does not unduly abridge a woman's right to choose an abortion. Rehnquist wrote that Missouri's refusal to allow public employees to perform abortions in public hospitals leaves a pregnant woman with the same choices as if the State had chosen not to operate any public hospitals at all.

This assessment is untrue, contests Ronald Dworkin.

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81 The Chief Justice was joined by Justices White, O'Connor, Scalia and Kennedy on this part of his opinion.

82 See Copelon, "Beyond the Liberal Idea of Privacy: Toward a Positive Right of Autonomy," text at note 33 above.

83 Webster v. Reproductive Health Services, 109 S.Ct. at 3052.
"Public facilities," as defined by the Missouri statute, "includes any public institution, public facility, public equipment, or any physical asset owned, leased, or controlled by this state or any agency or political subdivision thereof." 84 Therefore, if a medical institution is private, (for example the Truman Medical Center in Kansas City), and staffed by private doctors, and administered by private corporations, and if it is on public land (the Truman Medical Center is leased from a political subdivision of the state), then the Missouri statute would prohibit the performance of abortions at this facility. 85 There is a drastic dissimilarity between Maher's indifference to the financial obstacles of indigent pregnant women, and the utilization of every political, social and economic power in the community to abridge the performance of abortions. In the former case, the state did not erect barriers opposing abortions by refusing to fund nontherapeutic abortions. However, the attempt to stretch the Maher principle to cases whereby all women's right to choose an abortion is severely restricted in a particular community is a desperate attempt to constitutionally undermine the performance of abortions.

84 Missouri Revised Statutes, section 188.200. See also, Justice Blackmun's dissenting opinion, id. note 1, at 3068, and Dworkin, "The Great Abortion Case," 53.

85 In 1985, 97% of all hospital abortions in Missouri, performed at sixteen weeks or later, were performed at the Truman Medical Center. Dworkin, ibid.
altogether. It is clear, charged Justice Blackmun, that sections 188.210 and 188.215 do not leave pregnant women with the same range of choices than if the state chose not to operate public hospitals at all.

The final provision of the Missouri Revised Statutes upheld by the Supreme Court is section 1.205, which provides in full:

1. The general assembly of this state finds that:
   (1) The life of each human being begins at conception;
   (2) Unborn children have protectable interests in life, health and well-being;
   (3) The natural parents of unborn children have protectable interests in the life, health, and well-being of their unborn child.
2. Effective January 1, 1988, the laws of this state shall be interpreted and construed to acknowledge on behalf of the unborn child at every stage of development, all the rights, privileges, and immunities available to other persons, citizens, and residents of this state, subject only to the Constitution of the United States, and decisional interpretations thereof by the United States Supreme Court and specific provisions to the contrary in the statutes and constitution of this state.

For example, Dworkin explains, "[a] city cannot force newsstands in shopping centers built on public land to sell only papers it approves. It cannot force theaters it supplies with water and power and police protection to perform only plays it likes." Ibid.

"The difference is critical," according to Blackmun. "Even if the State may decline to subsidize or participate in the exercise of a woman's right to terminate a pregnancy, and even if a State may pursue its own abortion policies in distributing public benefits, it may not affirmatively constrict the availability of abortions by defining as 'public' that which in all meaningful respects is private. With the certain knowledge that a substantial percentage of private health-care providers will fall under the public facility ban . . . [this] leaves the pregnant women with far fewer choices, or, for those too sick or too poor to travel, perhaps no choice at all." Webster v. Reproductive Health Services, 109 S.Ct at 3068-3069 (Blackmun, J., dissenting).
3. As used in this section, the term 'unborn children' or 'unborn child' shall include all unborn child or [sic] children or the offspring of human beings from the moment of conception until birth at every stage of biological development.

4. Nothing in this section shall be interpreted as creating a cause of action against a woman for indirectly harming her unborn child by failing to properly care for herself or by failing to follow any particular program of prenatal care.

This section was invalidated by the Court of Appeals for going against the dictum of the Supreme Court that "a State may not adopt one theory of when life begins to justify its regulation of abortions." However, Rehnquist reversed the interpretation of the lower court, and instead accepted the state's defense of its intention to remain 'abortion neutral'. Missouri argued that section 1.205 imposed no substantive restrictions on the performance of abortions. Thus, Rehnquist read the preamble as merely a value judgment, the kind of which was found to be constitutionally permissible in Maher v. Roe. In any case, at-

851 F.2d., at 1075-1076, quoting Akron v. Akron Center for Reproductive Health, Inc., 462 U.S. 416, 444 (1983), citing Roe v. Wade, 410 U.S., at 159-162. The lower federal court maintained that "the state intended its abortion regulations to be understood against the backdrop of its theory of life." Ibid. See also, Brief for Appellees, 19-23, contending that section 1.205 is intended to direct the interpretation for other provisions of the Missouri Act, e.g., to prohibit doctors in public hospitals from prescribing IUDs or some forms of the Pill, both of which dispel impregnated ova. Ibid.

Justices White, O'Connor, Scalia and Kennedy joined this part of the Chief Justice's opinion.

"[T]he right [to an abortion] protects the woman from unduly burdensome interference with her freedom to decide whether to terminate her pregnancy. It implies no limita-
tested the Chief Justice, the preamble, declaring that life begins at conception, may be read to indicate that the unborn are legally protected in tort and probate law. Rehnquist thus stipulated that until it can be shown that section 1.205 actually restricts abortions, it is too abstract for the Court to pass on its constitutionality.91

Justice Stevens dissented from this part of the Court's opinion on several constitutional grounds. First, he claimed that the preamble in section 1.205 of the MRS violates the constitutional right of contraceptive privacy established in Griswold v. Connecticut, Eisenstadt v. Baird and Carey v. Population Services International.92 This is so because Missouri defines conception as "the fertilization of the ovum of the female by the sperm of the male regardless of whether implantation has occurred."93 Thus, section

91 It is ironic, given Rehnquist's handling of section 188.029, that he quotes Tyler v. Judges of Court of Registration, stating that the Court "is not empowered to . . . abstract propositions, or to declare, for the government of future cases, principles or rules of law which cannot affect the result as to the thing in issue in the cases before it." 179 U.S. 405, 409 (1900), in Webster v. Reproductive Health Services, 109 S.Ct at 3050.

92 Id. at 3081. These contraceptive privacy precedents were derived from a long list of cases supporting personal choice in matters of marriage and family, see text at Chapter Three above.

93 Medical texts regard conception as the point when implantation actually occurs, approximately six days after fertilization. Id. at 3080-3081.
1.205 is a potential threat to certain types of contraceptives that prevent implantation of fertilized ova, such as the Pill and the IUD, and which can, thus, interfere with a woman's contraceptive choices — particularly if she is under the care of a physician working in a public hospital.

Second, Stevens challenged Missouri to explain the secular interest in enacting the preamble. The contention that life begins at the moment of conception is a religious conviction which thus violates the Establishment Clause of the First Amendment.94 Since Missouri has made a "legislative finding without operative effect,"95 that is, for not furthering a secular social objective, except for the imposition of Christian religious morality, then the preamble is unconstitutional.

As a secular matter, there is an obvious difference between the state interest in protecting the freshly fertilized egg and the state interest in protecting a 9-month-gestated, fully sentient fetus on the eve of birth. There can be no interest in protecting the newly fertilized egg from physical pain or mental anguish, because the capacity for such suffering does not yet exist; respecting a developed fetus, however, that interest is valid.96

94Indeed, a Missouri woman seeking contraceptive autonomy would fare better under legislation authored by St. Thomas Aquinas who believed that ensoulment did not occur until 40 days after fertilization for males and 80 days for females. Early abortions and abortifacients would, thus, be seen as merely the destruction of seed and not of man. See, Brief for Americans United for Separation of Church and State as amicus curiae, 13a, 17a, cited by Justice Stevens, id. at 3083.

95Stevens citing Brief for Appellants 22, id. at 3085.

96Id. at 3084 (Stevens, J., dissenting).
The Webster ruling, however, made it clear that fetal developmental distinctions no longer matter as they were elucidated in Roe v. Wade. Webster v. Reproductive Health Services has substantially weakened the right and ability of a woman to terminate an unwanted pregnancy, even in the earlier stages of pregnancy. In so doing, the Supreme Court has dispossessed many women in crisis situations of the full capacity to deal with their dire circumstances. For at least half of the population in many parts of the United States, self-determination -- a decidedly fundamental human and American right -- has become a ward of the state; all those intimate decisions denied, in the Court's mind, for the sake of democracy.\textsuperscript{97}

However, now that the abortion issue is back in the political arena, it is difficult to see how democracy has been vindicated by such an emotional issue as abortion. If anything, the abortion battle has thwarted the democratic process. Single-issue politics, on both sides of the abortion controversy, have taken over other important social and economic issues. Politicians are being courted by intense lobbying groups for their votes on more or less restrictive

\textsuperscript{97}Rehnquist asserted: "... \textit{[T]he goal of constitutional adjudication is surely not to remove inexorably 'politically divisive' issues from the ambit of the legislative process, whereby the people, through their elected representatives deal with matters of concern to them. The goal of constitutional adjudication is to hold true the balance between that which the Constitution puts beyond the reach of the democratic process and that which it does not.}" Id. at 3058.
abortion legislation. Longstanding political careers are now threatened by one’s abortion position alone!

... American democracy will be made poorer by the corruption of single-issue politics. Political decisions will be less sensitive to the complexities of the popular will, because ordinary voters are in a worse, not better, position to express their convictions and preferences across the range of political issues when politicians are forced to treat one issue as the only one that counts.98

Moral issues, such as religion or abortion, are very often the cause of violent factions within a community or country. While one half of the society is attempting to enforce its morality on the community, the other half becomes indignant at the former’s intrusive evangelicalism and/or unwavering fanaticism. This is certainly the case with abortion. However, the Founding Fathers sought ways to insure that no member or group in a society would be compelled, through governmental coercion, mob rule, or otherwise, to abide by foreign or conflicting beliefs. Thus, they entrusted the judiciary to be the final arbiters on controversies where a political compromise would be impossible or unfair. Alexander Hamilton sagaciously observed that

... it is not with a view to infractions of the Constitution only that the independence of the judges may be an essential safeguard against the effects of

occasional ill humors in the society. These sometimes extend no farther than to the injury of the private rights of particular classes of citizens, by unjust and partial laws. Here also the firmness of the judicial magistracy is of vast importance in mitigating the severity and confining the operation of such laws. . . Considerate men of every description ought to prize whatever will tend to beget or fortify that temper in the courts; as no man can be sure that he may not be tomorrow the victim of a spirit of injustice, by which he may be a gainer today. . . 99

It is the opinion of many that Roe v. Wade was an attempt to mitigate the interests of both personal privacy and governmental regulation in the formation of the trimester structure, thereby living up to the goals of accommodation and moderation in a democratic society.100 However, the Supreme Court in Webster v. Reproductive Health Services has failed to uphold this uniquely American ideal.


As of this writing, two abortion cases are pending before the Supreme Court. The cases involve parental consent statutes. Ohio v. Akron Center for Reproductive Health, which concerns the right of teen-age girls to obtain an abortion without involving their parents. A 1985 Ohio law, House Bill 319 of the Amended Ohio Revised Code Section 2919.12, requires that physicians notify at least one parent before performing an abortion on a minor, unless a juvenile court has issued an order giving the minor permission to obtain an abortion. The United States Court of Appeals for the Sixth Circuit, in Cleveland, declared the law unconsti-
tutional, citing Supreme Court precedents which have limited states' ability to impose undue burdens on teen-agers seeking abortions.\(^3\)

Hodgson v. Minnesota, Minnesota v. Hodgson,\(^4\) imposes a parental consent requirement which is much more restrictive and, many argue, punitive than the Ohio statute. A Minnesota statute, Minn. Stat. Ann. Sections 144.343 (2)-(7), mandates that both parents be notified before a teen-age girl may obtain an abortion, unless she can prove to a court "in an expedited confidential proceeding either that she is 'mature and capable of giving informed consent' or that the performance of an abortion would be in her best interest."\(^5\) The parental consent requirement applies to situations of divorce or parental desertion without exception. The United States Court of Appeals for the Eighth Circuit, in St. Paul, upheld the law in most respects.\(^6\) In a brief to the United

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\(^4\)Twin appeals cases, No. 88-1125 and No. 88-1309, respectively.

\(^5\)853 F.2d. 1452 (8th Cir. 1988), at 1453.

\(^6\)The Court of Appeals reversed and remanded the ruling of the United States District Court for the District of Minnesota, which held that the notice/bypass statute was unconstitutional, with directions that the District Court enter judgment that the notice/bypass statute is constitutional. The District Court held that the two parent notification statute failed to demonstrate that the state's inter-
States Supreme Court, Minnesota’s Solicitor General, Kenneth W. Starr, indicated not his concern for parental guidance in a delicate issue such as abortion, but rather the constitutional legitimacy of abortion. "There is simply no credible foundation for the proposition that abortion is a fundamental right," asserted Starr.7 Affirming the fears of the Webster dissenters,8 Minnesota and other abortion-restrictive states intend to annihilate Roe v. Wade, and are passing legislation to achieve this objective.9 The Minnesota est was in the best interest of protecting pregnant minors or for promoting family communication. Furthermore, the forty-eight hour waiting period requirement was found to be an unreasonable burden. Ibid.


8"It is impossible to read the plurality opinion . . . without recognizing its implicit invitation to every State to enact more and more restrictive abortion laws, and to assert their interest in potential life as of the moment of conception. All these laws will satisfy the plurality’s non-scrutiny, until sometime, a new regime of old dissenters and new appointees will declare what the plurality intends: that Roe is no longer good law." Webster v. Reproductive Health Services, 109 S.Ct. at 3077-3078 (Blackmun, J., dissenting).

9For example, the Idaho legislature passed the most restrictive abortion law of any state, making the procedure illegal except in cases of non-statutory rape reported in seven days, incest if the victim is younger than 18, severe fetal deformity or a threat to the mother’s life or physical health. "Idaho Senate OKs stiff abortion law," Las Vegas Review Journal, 23 March 1990, p. 4(A). However, Governor Cecil Andrus vetoed the legislation. Likewise, Maryland legislators attempted to enact strict abortion measures in order to challenge Roe v. Wade, but it was killed in committee hearings. The United States territory of Guam was next to challenge the historic abortion case with the nation’s strictest abortion law, but a federal judge temporarily blocked it after a class-action suit. "Maryland abortion
brief targeted Justice O'Connor's "undue burden" analysis for measuring state restrictions on abortion, arguing that "the undue burden analysis begs the question at issue," that is, whether there is a fundamental constitutional right to abortion.\textsuperscript{10}

Justice O'Connor, however, held her ground during oral arguments on the Minnesota law, questioning the state's unwillingness to provide for exceptions to the rule: "To get right to the heart of it," O'Connor said, addressing Minnesota's Chief Deputy Attorney General, John Tunheim, "the statute just doesn't provide any exceptions, although clearly there are some circumstances where notice is not in the child's best interest." Pressing the issue, she asked, "how do you defend the state's interest?"\textsuperscript{11}

Tunheim replied that "[t]here is no evidence that a noncustodial parent is not fit to be a parent," whereupon Justice Scalia, indirectly confronting O'Connor, injected his position that parents have a right to know about their

\textsuperscript{10}Greenhouse, "A New Round: Justices to Hear Cases on Parental Notice, but the Wider Issue again is Roe v. Wade," \textit{p. 24(A)}.

children's activities: "I had assumed that there is a par­
ternal interest as well as a filial interest." Tunheim agreed,
contending that the state presumes both parents have their
child's interest at heart.12

Justice O'Connor, in turn, rebutted, arguing "[t]hat
may be true in general . . . but probably you would concede
there might be circumstances where it is not in the best
interests of the child to tell both parents of her problem
and intention."13 Concessions is what Justice O'Connor's
abortion position is all about, and what makes her the
target justice in this no-win controversy. As her opinion
in Webster v. Reproductive Health Services demonstrates, she
supports the states' rights to firmly regulate abortions
while maintaining that women have a constitutional right to
reproductive privacy. However, does O'Connor believe that
all women share this right to reproductive privacy?14

12Ibid.

13Ibid. (Emphasis added).

14Justice O’Connor is expected to uphold Roe v. Wade,
the decision granting reproductive privacy to women. "Care­
ful observers have thought that in her concurring opinion in
[Webster] she seemed less opposed to guaranteeing women
substantive rights to an abortion than she has on other
occasions." Dworkin, "The Future of Abortion," above, note
3, at 47. See also, Donald Baer, "Now, the Court of less
Moreover, considering her indirect clash with Justice Scalia
during oral arguments on the Minnesota statute and her
position on according concessions in those circumstances
when notifying both parents would not be feasible, she will
probably rule that "two-parent notification" is an undue
burden, while perhaps not "single-parent notification."
Justices Blackmun, Brennan, Marshall, and Stevens will most
Compromise was what *Roe v. Wade* was all about — a balanced moral and political composite: thesis (protection of potential life) + antithesis (privacy and reproductive freedom of choice) = synthesis (Blackmun's trimester framework rendering reasonable protection to both). A moral code is indeed a necessary and honorable characteristic for any society, but American society must also accommodate the interests of the individual. The entire political and philosophical structure of American society was based on the theories of men like Thomas Hobbes and John Locke who recognized that the individual is antecedent to the state, and all political power, therefore, must emanate from the individual in order for the social alliance to work. Thus, the free and rational individual must be free to determine his own moral code and religious beliefs and likewise tolerate the beliefs of all others lest there be a moral battle of each against all.

This thesis attempted to show how privacy and all the protections surrounding such a liberty are harmonious, and fulfill and enhance the American ideal of individual freedom. Individuals live in society, but the principles of the United States Constitution guard against encroachments by that society, and all the divergent passions and beliefs that enflame the spirit at the risk of consuming individual

certainly uphold *Roe v. Wade* and grant teen-agers reproductive privacy in the cases presently pending before the Supreme Court.
autonomy. Hence, freedom of choice and self-determination fulfill Thomas Jefferson's promise of "life, liberty and happiness." Attaining those high ideals is a continual process of compromise and commitment to constitutional principles. By heeding the lessons of history and the dictates of reason over passion, one realizes that the right to privacy does indeed help to realize the promise of independence, of happiness, and of freedom.
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