The Legitimacy of Fundamental Rights Asserted Using Substantive Due Process: Privacy, Abortion, Sodomy, and Marriage

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The Legitimacy of Fundamental Rights Asserted Using Substantive Due Process:
Privacy, Abortion, Sodomy, and Marriage

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Submitted in partial fulfillment of the graduation requirements for Honors in Political Science

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March, 2015

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Abstract

The aim of my research was to determine, through an original intent approach to the United States Constitution, whether the asserted "fundamental" rights associated with the Due Process and Equal Protection Clauses of the Fourteenth Amendment were reflective of the Framers' intentions for the rights protected by the Ninth Amendment, or if the Supreme Court has been illegitimately engaging in substantive due process. Through a case study using qualitative document analysis on the right to privacy, the right to abortion, the right to sodomy, and the right to marry, I concluded that there are no rights protected by the Ninth Amendment because it was intended to be a rule of construction for the Constitution and Bill of Rights. Additionally, when subjected to a legitimacy test, the rights to privacy, abortion, and sodomy were all illegitimately asserted using substantive due process. Only the right to marry was legitimately asserted using substantive due process. Furthermore, the analysis resulted in the serious consideration of a living Constitution approach in order to afford the Court more legitimacy.
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Introduction

The United States Supreme Court has identified a multitude of unenumerated rights as "fundamental." These rights include, but are certainly not limited to, the right to privacy (See Griswold v. Connecticut 381 U.S. 479 [1965]), the right to abortion (See Roe v. Wade 410 U.S. 113 [1973]), the right to rear one's own children (See Wisconsin v. Yoder 406 U.S. 205 [1972]; see also Pierce v. Society of Sisters etc. 268 U.S. 510 [1925]), the right to travel (See Shapiro v. Thompson 394 U.S. 618 [1969]) and the right to same sex sexual activity (See Lawrence v. Texas 539 U.S. 558 [2003]). Though these "fundamental" rights are nowhere to be found explicitly in the United States' Constitution, the Framers included the Ninth Amendment which alludes to other rights that are "retained by the people." Similarly, the Fourteenth Amendment refers to indistinct "privileges or immunities of citizens of the United States."

Since the Supreme Court stripped the Fourteenth Amendment of all of its substance by gutting the privileges and immunities clause in the Slaughter-House Cases, 83 U.S. 36 (1873), the Court has expanded the protection of substantive rights under the Fourteenth Amendment using the Due Process and Equal Protection Clauses, which were originally intended to protect procedural rights. This process, known as substantive due process, was applied to the economic realm (See Lochner v. New York, 198 U.S. 45 [1905]) until it was repudiated and deemed illegitimate in West Coast Hotel Company v. Parrish, 300 U.S. 379 (1937), when Chief Justice Hughes asserted that the "legislature is entitled to its judgment" (Rossum and Tarr, 157). One year later, in footnote 4 of United States v. Carolene Products Company 304 U.S. 144 (1938), Justice Stone outlined what would become the justification for applying Due Process to civil liberties despite its poor reputation in what is referred to as the "Lochner era." Vague references to unenumerated rights combined with the questionable Due Process jurisprudence prompted me
to question whether the asserted “fundamental” rights that the Supreme Court of the United States has identified through the Due Process and Equal Protection Clauses of the Fourteenth Amendment are natural rights that the Framers intended to be protected by the Ninth Amendment, or has the Supreme Court been illegitimately engaging in substantive due process?

**Literature Review**

The text of the Ninth Amendment says “The enumeration of certain rights, shall not be construed to deny or disparage others retained by the people” (US Const. amend. IX). There is an incredible amount of debate over what this one amendment means and how it should be interpreted. Some scholars interpret the Ninth Amendment as a rule of construction that has no substantive content at all (Pollock 1983; Rapaczynski 1988). Kurt Lash interprets the Ninth Amendment as having substantive content, but contends that this content is only judicially enforceable at the state and local level (2004). Calvin Massey asserts that the Ninth Amendment is comprised of natural and positive rights which include the asserted “fundamental” rights (1987). Alex Kozinski contends that if the Ninth Amendment does protect natural rights, then those natural rights are constantly changing over time (2012). Then there are those who interpret the Ninth Amendment as having substantive content and contend that this content should be protected by the federal judiciary (Barnett 1988; Sherry 1988). In opposition, Michael McConnell argues that rather than judges using their reasoning to protect those rights “retained by the people,” they should only look to the text, history, and purpose of the Constitution as intended by the Framers (1988).

The US Supreme Court’s interpretation of the Ninth Amendment is crucial because ultimately it is the one which affects the citizens of the United States; additionally, SCOTUS’s
interpretation sets precedent for future justices’ understanding of what is and is not a fundamental right. The Court’s prevailing interpretation was articulated in *Griswold* (1965) which held that the Ninth Amendment has at least enough substantive content to cast a shadow, but the extent of the rights protected by the Ninth Amendment are unfathomable (Lockhart, Kamisar and Choper 1981).

In light of the Supreme Court’s understanding of the Ninth Amendment, it is not difficult to understand why the Court has never relied on it, but instead has turned to the Fourteenth Amendment to assert “fundamental” rights. Any time an individual is deprived of “life, liberty, or property,” the Fourteenth Amendment has been interpreted by the Court as requiring the government to provide heightened justification to ensure that government action is not taken without due process of law (Barret and Cohen 1981; Lockhart, Kamisar and Choper 1981). The substance of “liberty” has been interpreted by the Court as including certain unenumerated fundamental rights which were “deeply rooted in this Nation’s history and tradition” such that “neither liberty nor justice would exist if they were sacrificed” (Alderman and Kennedy, 1995 citing *Bowers v. Hardwick* 478 U.S. 186 [1986]).

There is a clear debate between scholars on the Supreme Court’s use of the Fourteenth Amendment to assert unenumerated rights as fundamental and requiring the same protection afforded to those enumerated in the Bill of Rights. Opponents of substantive due process assert that the Court’s use of the Fourteenth Amendment’s Due Process Clause is illegitimate because 1) it is a divergence from the text of the Constitution, 2) it is undemocratic because it gives the Supreme Court, an unelected body with life-tenure, more power than they have the Constitutional right to exercise, and 3) that “liberty” was meant only to include those rights enumerated in the Bill of Rights (Alderman and Kennedy 1995). Some scholars simply warn
against substantive due process because it deals with judge-made law hardly rooted in the text of the Constitution (Koehlinger 1990).

Supporters of the use of the Due Process Clause of the Fourteenth Amendment to protect “fundamental” rights contend that 1) the Supreme Court is simply interpreting the text of the Constitution, something justices must do, 2) it is their life tenure that gives Supreme Court justices the unpressured ability to protect certain rights that are unlikely to be protected through the legislative branch, and 3) the Supreme Court will look to history, precedent, and reason to draw conclusions, which it has done for its entire existence (Alderman and Kennedy 1995). Furthermore, some scholars argue that the Framers intended it to be the judiciary’s responsibility to elaborate on the “unwritten Constitution” which was left to adapt to the changing times (Richards 1979; Amar 2012). In any case for or against substantive due process, Akhil Amar is apt to point out that there is no textual evidence in the Constitution that prohibits the recognition of unenumerated rights, as long as they do not contradict those already enumerated in the Bill of Rights (2012).

**Research Design**

In response to my research question, I hypothesized that the Supreme Court has illegitimately engaged in substantive due process when asserting some, but not all, “fundamental” rights that were not intended to be protected by the Framers. To evaluate the legitimacy of these “fundamental” rights, I did a case study of four asserted “fundamental” rights from 1965 to the present: the right to privacy, the right to abortion, the right of sodomy, and the right to marry. I presumed an original intent approach for this research because I am of the mind that the Framers wrote the Constitution carefully and with specific intentions which were meant
to last the test of time, and as I hypothesized, that substantive due process is an illegitimate expansion of the Court's power. However, American society's understanding of which rights are fundamental may have changed over the course of history. Therefore, the possibility of accepting a living Constitution approach may afford the Court more legitimacy as well as the citizens more rights.


In light of the conclusions drawn on the Framers' intentions for the Ninth Amendment and in accord with the pertinent literature and current debates on the subject, I used the following criteria to determine whether the Supreme Court illegitimately engaged in substantive due process: Does the majority opinion of the case 1) assert a fundamental right and 2) rely on the Equal Protection or Due Process Clause of the Fourteenth Amendment? If the data is negative in either, the Court did not engage in substantive due process and the remaining criteria are
irrelevant. If the data shows an affirmative response to both 1) and 2), then it can be determined that the Court was engaged in substantive due process. The legitimacy of the Court’s reasoning is determined by the consideration of the following conditions: Does the Majority Opinion 3) diverge from the text of the Constitution, and/or 4) give the Supreme Court more power than the Constitution grants? If yes, I concluded that the Court illegitimately engaged in substantive due process. Adversely, does the Majority Opinion 5) assert a right found in the Bill of Rights, and/or 6) assert a right included in Appendix A—that is, those rights retained by the people through English Common Law, The Declaration of Colonial Rights, and state constitutions which the Framers’ understood were protected without being enumerated in the US Constitution. If yes, then I concluded that the Court’s engagement in substantive due process was legitimate.

Data and Analysis

The Framers’ Intentions for the Ninth Amendment

The intentions of the Ninth Amendment’s inclusion in the Federal Bill of Rights are rooted in the debates between the Federalists and Anti-Federalists. One of the Anti-Federalists’ reservations about ratifying the proposed Federal Constitution was the lack of a Bill of Rights; however, this was highly contested by the Federalists. Since James Madison, a Federalist, wrote and proposed the Bill of Rights, including the Ninth Amendment, in response to the Anti-Federalists concerns, I will begin the data and analysis with those concerns.

“Federal Farmer IV” provided an exemplary argument asserted by the Anti-Federalists during the ratification period.1 Anti-Federalists feared the Supremacy Clause of the proposed Constitution, believing that it would be used to supersede the rights, laws, and customs

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1 The “Letters from the Federal Farmer” are often thought to have been authored by Richard Henry Lee; however, the authorship is contested, therefore, I will refer to the author as the “Federal Farmer.”
established by the States if they were deemed incompatible with the Federal Constitution by the federal government ("Federal Farmer IV" 1787, 246). The Federal Farmer identified the two opposing schools of thought on the powers granted and the powers yielded or retained when creating a constitution. This was the pivotal difference between the views of the Federalists and the Anti-Federalists on the necessity of a Bill of Rights. The first reflected Federalist’s sentiments that what is not granted as a power to the national government is of course reserved by the people:

When people make a constitution, and delegate powers that all powers not delegated by them to those who govern is reserved in the people and that the people, in the present case, have reserved in themselves, and in their state governments, every right and power not expressly given by the federal constitution to those who shall administer the national government ("Federal Farmer IV" 1787, 247).

The second school of thought revealed the fears of the Anti-Federalists “that the people, when they make a constitution, yield all power not expressly reserved to themselves” ("Federal Farmer IV" 1787, 247). This argument was strengthened by the overall immense fear expressed by the Anti-Federalists of those in power. The Federal Farmer asserted that people would choose either argument, as it suited their needs, but expressed concern that “the general presumption being, that men who govern, will, in doubtful cases, construe laws and constitutions most favourably for increasing their own powers” ("Federal Farmer IV" 1787, 247). The Federal Farmer also addressed the fact that most States had adopted their own bills of rights and constitutions which he claimed reflected fundamental rights by arguing that it was impractical to think that the national government would consult every single State constitution when making laws to determine what rights were fundamental and may not be infringed upon ("Federal Farmer IV" 1787, 248).
Another important point of contention between the Federalists and Anti-Federalists was the recognition of certain fundamental rights which were written into the body of the text of the proposed constitution, such as the right to a writ of *habeas-corpus* or freedom from *ex post facto* laws, and that it must follow that the national government must recognize all of the other rights expressed by the States. Furthermore, he argued that if the federal government found it necessary to establish one right in the Constitution, then it must follow that the exception of other rights meant those excepted rights were unprotected by the power of the States ("Federal Farmer IV" 1787, 248-249). "The establishing of one right implies the necessity of establishing another and similar one" (Storing 1981, 249). This idea is similarly asserted in "Brutus II" ("Essays of Brutus II" 1787, 374). Simply put, the Anti-Federalists either wanted all rights enumerated or none at all. The Federal Farmer added a caveat to this argument: it was not his aim to "enumerate rights of inconsiderable importance," but rather only the fundamental rights were of particular concern (Storing 1981, 250).

Another Anti-Federalist writer, John DeWitt, offered a slightly different view of the Anti-Federalists as he did not claim to reject the proposed Constitution due to a lack of a Bill of Rights; however, he did recognize that if there were ever an appropriate time for a Bill of Rights that it was very reasonable that it was at that time ("John DeWitt" 1787, 21). DeWitt articulated the Anti-Federalists' fear of those in power as it pertained to the government receiving the natural rights which are surrendered upon entering into a social contract ("John DeWitt" 1787, 21). He wrote of these rights saying that "they are entrusted in the hands of those, who are very willing to receive them, who are naturally fond of exercising them, and whose passions are always striving to make bad use of them" ("John DeWitt" 1787, 21). Furthermore, he described

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2 See Appendix A for an exhaustive list of explicit rights in the text of the US Constitution.
those who first enumerated a Bill of Rights in a government as having an “insatiable thirst for unconditional control over [their] fellow creatures” (“John DeWitt” 1787, 22). John DeWitt’s writings reflected the Anti-Federalists’ understanding of what it meant to enter into and ratify this Constitution. The people of the thirteen original States were entering into a social contract which was to become permanent and to which they must surrender some of their natural rights. DeWitt’s expressed caution towards the people in power, whom he felt were eager to receive those rights, was also grounded in his fear that they intended to make bad use of the lack of protection of those rights from their power. Therefore, the people could not be too precise or too cautious or too accurate in explaining what they surrendered and what they retained. He explicitly stated his belief that whatever was not expressly granted to the government was of course retained by the people by their State constitutions, most of which retained the English common law, and State bills of rights. This belief made clear why he would not wholly endorse the attachment of a bill of rights because he concluded this to be obvious and implicit in the making of a constitution. This is a positive grant to government view where the government enjoys the powers which are granted by the constitution and those which are never mentioned, and never intended to be granted, are “enjoy[ed] by tacit implication” (“John DeWitt” 1787, 22).

The opposition to a Bill of Rights asserted by the Federalists is just as compelling as the arguments presented by the Anti-Federalists. In “Federalist Paper No. 84,” Alexander Hamilton, writing under the pseudonym Publius, wrote, in part, to the concerns of Anti-Federalists located in New York and addressed their demands for a Bill of Rights. Hamilton pointed out the lack of bills of rights in several of the States, including New York. Using New York’s State constitution as an example, Hamilton indicated that the body of the State constitution contained provisions in

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3 “Federalist Paper No. 84” also addressed the issue of expenses
favor of certain rights and adopted the common and statute laws of Great Britain both of which secure the rights of the people without declaring them in a bill of rights (See Appendix A). Hamilton asserted that the proposed constitution did this as well. Additionally, highlighting the concern voiced by John DeWitt about the States’ bills of rights, Hamilton pointed out that bills of rights have historically been stipulations between kings and their subjects, and that they have “no application to constitutions professedly founded upon the power of the people” (Hamilton 1788, 469-470). He added that this proposed Constitution did not seek to regulate “every species of personal and private concerns” (Hamilton 1788, 470).

Hamilton argued that a Bill of Rights in the proposed Constitution was “dangerous” and “unnecessary” and he wondered “why declare that things shall not be done which there is no power to do” (Hamilton 1788, 470)? Hamilton contended that the enumeration of an inevitably unexhausted list of rights could potentially lead to the federal government claiming more power than it was actually granted, because the enumeration of rights in the federal Constitution may cause those in power to assume that they are also granted the sole “power to prescribe proper regulations concerning [those rights]” (Hamilton 1788, 471).

The man charged by Congress to draft the Bill of Rights, and reasonably the commanding authority on the intent of each Amendment, was also a Federalist: James Madison. In a speech to the Virginia Ratifying Convention on Ratification and Amendments, Madison asserted his reasons for the omission of a declaration of rights in the proposed constitution (Madison 1788, 401-407). James Madison understood the structure of the Constitution to be one that granted power to the national government which were “the gift of the people, and may [be] resumed by them when perverted to their oppression, and every power not granted thereby, remains with the people, and at their will” (Madison 1788, 404). Furthermore Madison asserted “that no right of
any denomination, can be cancelled, abridged, restrained or modified, by the general
government. . . except in those instances in which power is given by the constitution for these
purposes” (Madison 1788, 404). This speech reveals Madison’s view of the powers granted and
rights retained under the proposed constitution. He agreed with Hamilton in his speech in
Congress on the Amendments to the Constitution, on June 8, 1789:

that, by enumerating particular exceptions to the grant of power, it would disparage those
rights which were not placed in that enumeration, and it might follow by implication, that
those rights which were not singled out, were intended to be assigned into the hands of
the general government, and were consequently insecure. . . I conceive, that may be
guarded against. I have attempted it, as gentlemen may see by turning to the last clause of
the 4th resolution (Madison 1789, 206).

Thus, what is now recognized as the Ninth Amendment was born from the clause referenced
above in the original amendments presented to Congress which read:

The exceptions here or elsewhere in the constitution, made in favor of particular rights,
shall not be construed as to diminish the just importance of other rights retained by the
people; or as to enlarge the powers delegated by the constitution; but either as actual
limitations of such powers, or as inserted merely for greater caution (Madison 1789, 206-207).

The tension between the Federalists and Anti-Federalists had major implications. If it
could not be reconciled, not all of the States would ratify the proposed Constitution. As provided
by the data, the most serious point of disagreement was the inclusion of a Bill of Rights without
which the Anti-Federalists were hesitant to ratify. In order to encourage those reluctant States to
ratify, the Bill of Rights was used as a concession by the Federalists to the Anti-Federalists;
however, James Madison, a Federalist, was to write the Bill of Rights. In an effort to clarify the
divisive debate over the type of constitution which was ratified, as well as to safeguard against
the fears he shared with Federalists over the enumeration of rights, James Madison included the
final clause of the 4th resolution in his suggestions for amendments to the Constitution. In its
original form, the Ninth Amendment included a provision stating that it was partly included
"merely for greater caution" (Madison 1789, 207). This spoke to the fears of the Federalists. The
"other rights retained by the people" clarified the recognition of the States' constitutions and bills of rights, not the inclusion of those rights in the amendment, but the recognition and guarantee that they will not be destroyed by the federal government (Madison 1789, 207). Following this analysis of the intentions of James Madison when he proposed the resolution, which would become the Ninth and Tenth Amendments to the Constitution, as well as in light of the debates between the Federalists and Anti-Federalists, I must conclude that the Ninth Amendment has no substantive content at all. The Ninth Amendment is a clarification of the debate: clear instructions for how to read the document, or as it is commonly referred to in constitutional law, a rule of construction.

Although there is no substantive content found in the Framers' intentions for the Ninth Amendment, that does not mean that there were no other rights recognized by Americans at the time of the Founding which may illuminate the origins of the asserted "fundamental" rights in mid-20th century Supreme Court jurisprudence. In 1774, the First Continental Congress recommended to the 13 original States that they each establish their own State governments before the colonies declared independence from British rule. Excepting Connecticut and Rhode Island, all of the States ratified new State constitutions between 1776 and 1780. Many of these constitutions had bills or declarations of rights attached and seven states included a right to the English common law, which included the Magna Charta, the English Bill of Rights, and English statutory law. Additionally, the First Continental Congress resolved to declare the "rights of the Colonies in general" in addition to their violation by Great Britain and the ways in which they could be restored ("Declaration of Colonial Rights" 1774, 1). After ratification of the Federal
Constitution, the Bill of Rights was attached, and the body of the text of the Constitution also guaranteed several rights. A compilation of all of these enumerated rights can be found in “Appendix A.”

Jurisprudence Analysis

I have argued that the Ninth Amendment was a concession by one political group to another and was intended to be a rule of construction for how to read and interpret the text of the Constitution. Therefore, the Ninth Amendment was not intended to protect any natural, fundamental, or substantive rights. Thus, it must be concluded that none of the “fundamental” rights asserted through the Supreme Court’s jurisprudence, including privacy, abortion, sodomy, and marriage will ever coincide with the original intent for the Ninth Amendment.

However, the intense debate which led to the Ninth Amendment’s existence was about the protection of rights the colonists already enjoyed under English Common Law, and/or had been recently and explicitly retained by the States’ constitutions, and/or were protected by the United States Constitution and Bill of Rights (See Appendix A). These rights are not found within the Ninth Amendment nor does the Ninth Amendment grant these rights, because that is not the function of the Ninth Amendment. However, these rights are not denied or disparaged by the federal Constitution, which is made clear by the Ninth Amendment, and ultimately are retained by the States and the people. Since privacy, abortion, sodomy, nor marriage are protected by the Ninth Amendment, it must be determined whether the Supreme Court is illegitimately engaging in substantive due process by asserting these rights as fundamental.

As was set out in the research design, the legitimacy of the Supreme Court’s engagement in substantive due process must be analyzed using the following criteria: Does the Majority
Opinion of a case 1) assert a fundamental right and 2) rely on the Equal Protection or Due Process Clause of the Fourteenth Amendment? If the data is negative in either, the Court did not engage in substantive due process and the remaining criteria are irrelevant. If the data shows an affirmative response to both 1) and 2), then it can be determined that the Court was engaged in substantive due process. The legitimacy of the Court's reasoning for engaging in substantive due process must be analyzed as follows: Does the Majority Opinion 3) diverge from the text of the Constitution, and/or 4) give the Supreme Court more power than the Constitution grants? If yes, I concluded that the Court illegitimately engaged in substantive due process. Adversely, does the Majority Opinion 5) assert a right found in the Bill of Rights, and/or 6) assert a right included in Appendix A? If yes, then I concluded that the Court's engagement in substantive due process was legitimate. The corresponding data is presented below in “Table 1: Legitimacy of Substantive Due Process Rights.”

<table>
<thead>
<tr>
<th>Case</th>
<th>Asserts a Fundamental Right</th>
<th>Relies on DP or EP Clause of XIV Amendment</th>
<th>Diverges from text of US Constitution</th>
<th>Expands Power of SCOTUS</th>
<th>Asserts Right from BR</th>
<th>Asserts Right in Appendix A</th>
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</table>

4 Due Process Clause of the Fifth Amendment
The Right to Privacy

Olmstead v. United States, 277 U.S. 438 (1928)

Federal prohibition officers used wiretaps to record private telephone conversations which were entered into evidence to convict Roy Olmstead of violating the National Prohibition Act. The wiretaps were installed without trespassing onto any of the defendants’ property. The constitutional question presented in Olmstead v. United States (1928) was “whether the use of evidence of private telephone conversations between the defendants and others, intercepted by means of wiretapping amounted to a violation of the Fourth and Fifth Amendments” (455).

The majority opinion, delivered by Chief Justice Taft, held that neither the Fourth nor Fifth Amendments were violated. Justice Taft recognized that the conversations were not forced or induced as Olmstead and those he spoke with were voluntarily conducting their business without the knowledge of the wire taps. Since it was not coerced, the Fifth Amendment was not violated. Furthermore, Taft held that the Fourth Amendment was not violated either. After the invention of the telephone, a Washington statute made it a misdemeanor to intercept telephone messages; however, intercepting a phone message did not constitute an illegal search or seizure. Taft looked directly to the Framers’ intentions which were to confine the unwarranted searches and seizures to a person’s house, person, papers, and effects and relied on the text of the Constitution. Taft confined the scope of the “sole object and purpose of [a] search and seizure” to “a material ingredient” (459). In short, the Constitution definitively protects private physical materials; the Constitution does not say anything about the protection of telephone messages, private or otherwise. Ultimately, Justice Taft relied heavily on the historical purpose of the Fourth Amendment which was “to prevent the use of governmental force to search a man’s
house, his person, his papers and his effects, and to prevent their seizure against his will” (463). He does not assert any fundamental right to privacy outside of the scope of the Fourth Amendment, which in effect can still be infringed with a legitimate warrant.

Justice Holmes delivered a separate opinion which he wrote to identify a dichotomous issue presented in this case between wanting to find criminals and the concern that Government should not engage in illegal activity. He finds “a less evil that some criminals should escape than that the Government should play an ignoble part” (470). Most significantly though, Holmes never asserted any fundamental right to privacy.

Justice Brandeis’ dissenting opinion attacked the majority opinion for relying so heavily on the language of the Fourth Amendment. Furthermore, he wrote completely in favor of adopting a Living Constitution approach. Brandeis referenced Chief Justice Marshall in *McCulloch v. Maryland*, 17 U.S. 316 (1819), argue that it was the Court’s duty to expound on the Constitution to cover circumstances which the Framers could have never thought of, such as, in this case, wiretapping of telephones (472). Justice Brandeis argued that the evil which legislation is meant to remedy must not be taken as the only evil which the legislation may address. Constitutions must have a wider application so as to persist through time. This can only be achieved if, when applying the Constitution, it does not only reflect “what has been, but of what may be” (473). Additionally, he argued that as time and technology progress, the means to infringe on individuals’ privacy will expand (473); the Constitution must protect against changing times to secure the right of personal privacy. Justice Brandeis drew an analogy between the mail and the telephone, citing *Ex Parte Jackson*, 96 U.S. 727 (1878), to assert that just as the mail is a “public service furnished by the government,” so is the telephone (475). Justice Brandeis relied on his own explanation of the “right to be let alone” set out in his Harvard Law
Review article to assert the “privacy of an individual” which should be protected, and concluded that “every unjustifiable intrusion by the Government…whatever the means employed, must be deemed a violation of the Fourth Amendment” (478-79).

Two other dissenting opinions were delivered. The first was by Justice Butler which held that the Court must look to precedents and the Founders’ intentions and apply the Fourth Amendment similarly in this case (488). The second was delivered by Justice Stone who wrote separately to focus on the Court’s ability to consider any question that comes out of the judgment of a case, even if it is not the question the Court was originally limited (469). Neither assert a fundamental right to privacy.

In accord with the above criteria, I concluded that Olmstead (1928) did not assert a fundamental right in the majority opinion. Consequently, the Court did not engage in substantive due process. However, the dissenting opinion argued in stark contrast to the prevailing decision. Justice Brandeis dismissed the original intent approach to interpreting the Constitution and completely adopted a living Constitution approach, which ultimately lead him to assert the right to be let alone.

_Griswold v. Connecticut, 381 U.S. 479 (1965)_

A Connecticut statute criminalized any persons who used “any drug or article to prevent contraception” as well as any accessories to obtaining such preventative measures. Griswold, the executive director of Planned Parenthood League of Connecticut, and Buxton, a licensed physician, were convicted of violating the statute for acting as accessories by prescribing contraceptives to a married woman (480). Griswold and Buxton appealed claiming that the statute violated their Fourteenth Amendment rights (480).
The majority opinion, delivered by Justice Douglas, asserted that the issue did implicate the Due Process Clause of the Fourteenth Amendment, but the Court refused to rely on the Due Process Clause jurisprudence laid out by *Lochner v. New York*, 198 U.S. 45 (1905), as its guide. Justice Douglas asserted that the justices 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. This law, however, operates directly on an intimate relation of husband and wife and their physician’s role in one aspect of that relation (482).

The opinion protected these intimate relations by asserting a fundamental right to privacy which Douglas claimed is created by “several fundamental constitutional guarantees,” which are the right of association contained in the First Amendment, the prohibition of quartering soldiers, and thus privacy in the home, contained in the Third Amendment, the freedom from unreasonable searches and seizures in their persons, houses, papers, and effects contained in the Fourth Amendment, the privacy of not being forced to incriminate oneself contained in the Fifth Amendment, and the Ninth Amendment (484). All of these penumbras have been protected by the Due Process Clause in precedents after the *Lochner* era, and Douglas relied on those precedents in his opinion to support the Court’s use of the Due Process Clause in this case.

Justice Douglas claimed that the right to privacy in the intimacy of the marital relation is “older than the Bill of Rights” to justify his stretched claim to rely on the Bill of Rights to protect this particular right (486). However, he did not assert a right found in the text of the Bill of Rights. Similarly, there is no right to privacy in Appendix A.

A landmark concurring opinion was delivered by Justice Goldberg. He found the birth control law unconstitutional, not by the Due Process Clause of the Fourteenth Amendment, but
rather by precedent and "the language and history of the Ninth Amendment" (487). Justice Goldberg asserted that

The language and history of the Ninth Amendment reveal that the Framers of the Constitution believed that there are additional fundamental rights, protected from governmental infringement, which exist alongside those fundamental rights specifically mentioned in the first eight constitutional amendments (487).

He argued that the Ninth Amendment has effect and is meant to protect rights, such as marital privacy, that are "so basic and fundamental and so deep-rooted in our society" (quoted in Snyder v. Massachusetts, 291 U.S. 97, 493). Goldberg expressed that the Ninth Amendment was not an independent source for rights, but rather that the enumeration of the first eight amendments was not an exhaustive list of all fundamental rights that make up the liberty protected by the Fifth and Fourteenth Amendments. Justice Goldberg quoted Justice Brandeis' reference to the right to be let alone in his dissent in Olmstead and justified his unprecedented reliance on the Ninth Amendment by writing "Although the Constitution does not speak in so many words of the right of privacy in marriage, I cannot believe that it offers these fundamental rights no protection" (495).

Justice Harlan held that the Connecticut statute was unconstitutional in a concurring opinion because the statute violated the Due Process Clause of the Fourteenth Amendment and did not require any further support than that the statute "violates basic values 'implicit in the concept of ordered liberty'" (quoted in Palko v. Connecticut, 302 U.S. 319, 500). Harlan argued against and warned that the use of the incorporation doctrine to limit the content of the Due Process Clause to solely protecting rights already found in the Constitution is "unacceptable" and that it inappropriately increased the power of the Supreme Court (500). Justice Harlan asserted that the incorporation doctrine which applies the Due Process Clause only to the text of the
Constitution is not judicial self-restraint, but rather results in decisions unfounded in history (501). Any interpretation of the Constitution which occurs should take notice of the “liberty” content of the Due Process Clause with regards to how history, society’s basic values, federalism, and separation of powers have protected liberties (500).

Similarly, Justice White relied entirely on the Due Process Clause of the Fourteenth Amendment to concur in the judgment that the Connecticut statute deprived the married couple of liberty without due process of law. Justice White found it nearly impossible to justify the means of this overly broad statute which prohibited the use of contraception by married persons, to the end of the State’s interest which was to prevent engagement in illicit sexual relations (506).

A dissenting opinion was delivered by Justice Black, and was joined by Justice Stewart. Black argued that there was no constitutional provision which forbid any law to be passed that may abridge the right to privacy. Substituting more flexible or restrictive words, such as privacy, diminishes the meaning of guaranteed rights which are protected by constitutional provisions (509). Justices Black and Stewart warned that the Court should not make changes to the Constitution to keep up with the times; rather, this is the purpose of legislation (510). Without any amendment preventing the legislature from passing laws that infringe on a right to privacy, Justice Black refused to rely on the Ninth or Fourteenth Amendments to strike down the Connecticut law (511). “If properly construed, neither the Due Process Clause nor the Ninth Amendment, nor both together, could under any circumstances be a proper basis for invalidating the Connecticut law” (511). Reliance on the Due Process Clause misplaces power to determine whether laws are necessary from the legislature into the Court’s hands (513). “The use of federal courts…to veto federal or state laws simply takes away from Congress and States the power to
make laws based on their own judgment” (513). Justice Black asserted that there was no Constitutional provision which grants the Courts power to oversee the making of laws or to strike them down if judges feel they are unreasonable or contrary to natural law. Instead, the Court has the power to decide whether laws are unconstitutional only if they are forbidden by the Constitution. Finally, Justice Black accused Justices White and Goldberg of engaging in “some natural law due process philosophy” which had been repudiated by the Court (516).

Justice Stewart and White joined again in a dissent written by Stewart which addressed the majority’s reference to “no less than six Amendments” and argued that the Court did not assert an infringement on any single one of them, especially not in the Ninth Amendment (527). Stewart wrote that the Court is “here to decide cases agreeably to the Constitution and laws of the United States” (530). Since he could not find a right to privacy in the Bill of Rights, any provision in the Constitution, nor in any precedents, Justice Stewart claimed that the Connecticut law should stand.

_Griswold_ asserted a fundamental right to privacy in the majority opinion and did so relying on the Due Process Clause of the Fourteenth Amendment, qualifying it as a substantive due process case. Furthermore, the right to privacy is not found in the Bill of Rights or Appendix A. In Justices Harlan’s concurring opinion and Black and Stewarts dissenting opinions, it is abundantly clear that the majority opinion illegitimately engaged in this substantive due process by greatly expanding the power of the Supreme Court through the legislative powers the Court assumed in this case, in addition to its improper reliance on the Ninth Amendment’s purpose.

_The Right to Abortion_

_Eisenstadt v. Baird_, 405 U.S. 438 (1972)
A Massachusetts law made it a felony for anyone to distribute any contraceptive device unless the distributor was “a registered physician administering or prescribing it for a married person, or an active registered pharmacist furnishing it to a married person presenting a physician’s prescription” (438). William Baird was convicted of violating the law after giving a lecture where he displayed contraceptives and then invited the audience to “help themselves” to the materials (466). The constitutional question presented in this case was whether there was a rational explanation, related to the State’s aims for the contraceptives statute, for the differentiation between married and single persons.

To reconcile the issue presented, the majority opinion, delivered by Justice Brennan, determined the aims for the Massachusetts statute. Brennan denied that the statute’s purpose was to “deter premarital sexual intercourse” (448). He relied on Justice Goldberg’s opinion in Griswold to address the distinction between premarital and extramarital concerns by drawing a parallel between the two and arguing that contraceptives are made available to everyone for the protection against diseases (449). Additionally, Justice Brennan refuted that the aim of the Massachusetts statute was to “serve the health needs of the community by regulating the distribution of potentially harmful articles” (450). He supported this claim by relying on the chapter heading in which the statute was placed: ‘Crimes Against Chastity, Morality, Decency, and Good Order,’ and argued that not all contraceptives are dangerous; therefore, if public health were the true aim of the law, the statute would be overly broad (450). Furthermore, Justice Brennan argued that even if the true aim of the statute was to protect public health against the distribution of dangerous substances, the law was unnecessary since there were already federal and State laws aimed at this end (452). Finally, Brennan argued that the aim of the law was to prohibit the use of contraceptives by unmarried persons for moral reasons (452). Relying
completely on *Griswold*. Justice Brennan asserted that whatever rights were protected by the Constitution for married persons must also be protected for single persons (453). Brennan turned, not to the Framers' text in the Constitution, but to the Framers' ideals that laws must apply equally to all of its citizens; therefore, the Massachusetts statute violated the Equal Protection Clause of the Fourteenth Amendment.

Though Justice Douglas agreed with the judgment reached in this case, he did not agree that it was an Equal Protection issue, but rather that the statute violated the First Amendment (454). Douglas asserted that Baird was exercising his First Amendment right to free speech while making an educational lecture in which he used contraceptives "as an aid to understanding the ideas which he was propagating;" in this case he was endorsing the use of contraceptives (459). He relied on First Amendment jurisprudence to assert Baird's handing of a visual aid, the contraceptive, to a woman as conduct, though not verbal expression, which is understood and protected as free speech (458).

Another concurring opinion delivered by Justice White and joined by Justice Blackmun accepted that the State's aim, when it enacted the statute, was a legitimate interest in public health (461). Consequently, it was reasonable for the State to regulate the distribution of potentially dangerous medicines, including contraceptives. Justice White argued that restricting Baird's distribution of a nonhazardous contraceptive, the vaginal foam, did not achieve the aim of the legislation and it also restricted married persons from accessing their right to contraceptives as was asserted in *Griswold* (464). Furthermore, White found the record lacking of the recipient's marital status and thus claimed that it was unnecessary to consider the constitutional protection of Baird's distribution to a married or an unmarried woman (464-65).
Justice Burger delivered the dissenting opinion where he argued that the only issue to be
decided was whether or not Baird, neither a physician nor a pharmacist, was wrongly convicted
for distributing contraceptives without a medical license, an issue that Burger claimed Justice
Brennan disregarded in his opinion (465-66). Burger concluded that he was rightfully convicted
under the Massachusetts statute (466). His largest reason for dissenting in judgment was that he
did not agree with the opinion’s engagement in substantive due process or the reasons that led
the Court to its judgment (467). Burger disagreed that the State’s aim was not a legitimate
interest in public health and that the history of the legislation, being rooted in moral grounds,
denied the medically valid statute legitimacy (467). Justice Burger indicated that views of foods
and drugs change every day and it is improper for the Court to strike down a law based on such
unstable opinions (470). Regardless of the dangers of any substance, Burger argued that
regulating “the choice of a means of birth control, although a highly personal matter, is also a
health matter” and may reasonably be regulated by the State to ensure that such a decision in a
health matter be supervised by a licensed physician (470). Finally, Burger asserted that the
opinion did not seek the support of the text of the Constitution and that the use of *Griswold* as a
controlling precedent was inappropriate because the Massachusetts statute did not prohibit the
use or distribution of contraceptives, it merely sought to regulate their distribution (471).

The majority struck down purpose after purpose until Justice Brennan concluded that the
statute’s true aim was to prevent unmarried persons from using contraceptives for solely moral
reasons. The act of second guessing the Massachusetts legislature and deciding what the “true”
intentions of the legislation were was exactly what was repudiated in *West Coast Hotel Company
v. Parrish* (1937) in the economic realm because it was seen as an illegitimate expansion of the
Court’s powers.
Roe v. Wade, 410 U.S. 113 (1973)

Jane Roe claimed that a Texas abortion statute, which prohibited abortions except to save the life of the mother, violated her Fourteenth Amendment rights to equal protection and due process as well as violated her right to privacy protected by the First, Fourth, Fifth, Ninth, and Fourteenth Amendments (113). Roe, a single woman, was unable to obtain an abortion since her pregnancy was not medically life threatening and filed suit for declaratory and injunctive relief while she was still pregnant (113). A physician with two pending prosecutions against him, Dr. Hallford, and a childless couple, the Does, were consolidated with Roe, but only Roe was found to have standing.

The majority opinion, delivered by Justice Blackmun, was joined by Chief Justice Burger and Justices Douglas Brennan Stewart Marshall and Powell. Blackmun began his opinion with the pertinent history of abortion so as to provide proper insight to "the state purposes and interests behind the criminal abortion laws" that Roe claimed infringed on her fundamental "right to choose to terminate her pregnancy" (129). Blackmun's outline of abortion laws began with "ancient attitudes" and argued that both ancient Greeks and Romans performed abortions, no religion prohibited abortions, and abortions were only resorted to when the life of the pregnant woman was in danger (130). Second, Blackmun analyzed the history of the "Hippocratic Oath" which revealed an absolute prohibitory attitude towards abortive measures. This attitude was a minority view amongst ancient Greeks and could be confined to the Pythagoreans; however, as Christianity grew in popularity, so did the coinciding Pythagorean thought (131). Third, Justice Blackmun discussed the "common law" view of abortion which made it a misdemeanor if done before "quickening" despite the wide variety of opinions on when life begins (132). Following English common law, Blackmun looked to "English statutory law"
which maintained the pre and post quickening ideas with its first criminal abortion law in 1803 (136). The jurisprudence and statutes that followed considered both the life of the woman as well as the potential life of the fetus (137). Fifth, Blackmun discussed “The American law” which until the mid-19th century, relied on English common law. American legislation began with the quickening distinctions which eventually disappeared, as the penalties for having an abortion increased until abortions were eventually banned from almost every state, except to save the pregnant woman’s life.

From this historical overview, Blackmun revealed that the right to choose to have an abortion has shrunk over time; however, the opinion failed to cite a right found in Appendix A. Next, Blackmun presented “The position of the American Medical Association,” which shifted from 1857 when an appointed committee referred to abortion as “general demoralization,” to 1970, when a reference committee proposed several resolutions which “asserted that abortion is a medical procedure that should be performed by a licensed physician in an accredited hospital…and that no party to the procedure should be required to violate personally held moral principles” (143). Blackmun also provided “The position of the American Public Health Association” through the listing of the “Standards for Abortion Services” adopted in 1970 as well as the “risks associated with abortion …that are recognized as important” (145). He also cited the “Uniform Abortion Act” of 1972 to include “The position of the American Bar Association” (146).

Finally, before addressing the issue in the case, Justice Blackmun identified three reasons which explained and justified the existence of criminal abortion laws today: 1) to “discourage illicit sexual conduct,” which he found to be of no legitimate interest, 2) to protect pregnant women during a potentially dangerous medical procedure, which he argued was a “definite
Interest," and 3) to protect the life of the fetus, which he found to be, not only an interest, but an obligation (148). Justice Blackmun's opinion concluded that the Texas law violated the Due Process Clause of the Fourteenth Amendment, as well as indicated the possible implication of the Ninth Amendment to identify the right to privacy, which was implicated in this case as it protected a woman's right to decide to terminate her pregnancy (152-53). This right was not presumed to be absolute and "must be considered against important state interests in regulation" (154).

Blackmun argued that this regulation must submit to a "compelling state interest" test (155). However, the realm of privacy in this case is much different than that which had already been identified by the Court. The privacy of the woman, at some point, is not only her privacy, but extended to the privacy of the potential life of the fetus (159). The opinion made no attempt to determine when that life begins, but it did assert that the State has a legitimate interest in protecting both the woman and the fetus (162). From this conclusion, the Court outlined a trimester framework which held a) in the first trimester, the woman may exercise her right to choose to terminate her pregnancy without interference from the State, b) in the second trimester, the State may regulate abortion procedures in the interest of maternal health, and c) in the third trimester, or when the fetus becomes viable, the State may act in the interest of the fetus which may include banning abortion, except "for the preservation of the life or health of the mother" (164-165).

Justice Stewart concurred in the judgment reached by the opinion; however, he prefaced his agreement by clarifying that he viewed the judgment reached in Griswold as having been clearly "decided under the doctrine of substantive due process" (168). Consequently, his opinion, as well as the majority's is of the same jurisprudence. Furthermore, Stewart stated that the
opinion's judgment is not founded in the language of the Constitution, but rather in the broad meaning of "liberty:"

The Constitution nowhere mentions a specific right of personal choice in matters of marriage and family life, but the "liberty" protected by the Due Process Clause of the Fourteenth Amendment covers more than those freedoms explicitly named in the Bill of Rights (168). Like the Justice Brandeis' dissent in Olmstead (1928), Stewart made the argument for a Living Constitution approach: "concepts like... 'liberty'... were purposefully left to gather meaning from experience... the statesmen who founded this Nation knew too well that only a stagnant society remains unchanged" (169). Finally, upon procuring the fundamental "right of a woman to decide whether or not to terminate her pregnancy" from the right to bear or beget a child, Justice Stewart argued that the state's interests must survive strict scrutiny (170). Though he agreed that the asserted state interests of public health and the protection of the potential life of the fetus were legitimate aims, sufficient to allow regulation and even prohibition in the late stages, that is not what the Texas statute did. Therefore, Stewart concluded that the abortion statute was unconstitutional.

Justice Rehnquist's dissent accused the Court of applying constitutional law too broadly in this case due to the imprecision of the facts pertaining to the actual stage of pregnancy Roe was in when she filed her complaint (171). Furthermore, Rehnquist argued that it was inappropriate to invoke the right to privacy as it had previously been applied in the Supreme Court; however, he did recognize that the "liberty" protected by the Fourteenth Amendment "embraces more than the rights found in the Bill of Rights" (173). He argued that the Court acted more like a legislature than a judiciary when applying its "compelling state interest" test, usually
applied to Equal Protection claims, rather than a "rational basis" test which is usually applied to
Due Process claims (173).

The conscious weighing of competing factors that the Court's opinion apparently
substitutes for the established test is far more appropriate to a legislative judgment than a
judicial one (173).

Through this mismatched reasoning and the very specific outlining of the trimester framework,
Rehnquist argued that "the Court's opinion will accomplish the seemingly impossible feat of
leaving this area of the law more confused than it found it" (173).

Finally, Justice Rehnquist could not agree with the decision to strike down the Texas
statute entirely as the Court did (177). The statute could not be declared unconstitutional, since it
could still be applied in the third trimester or after viability; Rehnquist argued it should be
declared unconstitutional, not in toto as the Court did, but only as it applied to the present case
(177-78). What Rehnquist called "difficult to justify" is a divergence from past practice in the
Supreme Court and a further expansion of the Court's power.


The Pennsylvania Abortion Control Act of 1982 included five provisions, which several
abortion clinics and a class of physicians challenged their constitutionality before they took
effect (772). The five provisions required 1) that a woman seeking an abortion must provide her
informed consent before the procedure as well as be provided with specific information at least
twenty-four hours before the abortion occurs, 2) that a minor seeking an abortion must provide
the informed consent of one parent, but must provide a judicial bypass in case of special
circumstances, 3) that a married woman seeking an abortion must provide a signed statement that
she made her husband aware of the abortion, 4) that a medical emergency will excuse a woman
of complying with the aforementioned provision, and 5) that facilities which perform abortions must comply with certain reporting requirements (772).

The joint majority opinion was delivered by Justices O'Connor, Kennedy, and Souter. The joint opinion in this case wrote to reaffirm the holding in Roe v. Wade in three parts 1) a woman has the right to choose to terminate her pregnancy before viability without interference by the State, 2) the State has the power regulate abortions after viability, and 3) the State has legitimate interests in protecting the health of the pregnant woman and the potential life of the fetus (772). Additionally, they asserted that substantive due process required the Court to use their "reasoned judgment" to determine the "substantive sphere of liberty" protected by the Federal Constitution (773). The joint opinion plainly admitted to its engagement in substantive due process. Their decision was not founded in the Bill of Rights or Appendix A; in fact the Court argued it was their duty to diverge from the text of the Constitution:

Neither the Bill of Rights nor the specific practices of the States at the time of the adoption of the Fourteenth Amendment makes the outer limits of the substantive sphere of liberty which the Fourteenth Amendment protects. See Const., Amdt. 9... The inescapable fact is that adjudication of substantive due process claims may call upon the Court in interpreting the Constitution to exercise that same capacity which by tradition court always have exercised: reasoned judgment... That does not mean we are free to invalidate state policy choices with which we disagree; yet neither does it permit us to shrink from the duties of our office (773).

In light of these reasons, the joint opinion refused to overturn Roe since they had already asserted the right to abortion "combined with the force of stare decisis" (773). The opinion focused intently on the doctrine of stare decisis in their explanation for the reaffirmation of Roe so as to maintain the Court's legitimacy. The opinion asserted that Roe was still applicable because it influenced women's choices for twenty years, there had been no scholarly epiphanies which weakened the decision, and no Constitutional Amendment had been passed which would
overturn the decision; all of which supported the reaffirmation of Roe (776). According to the opinion, if the Court was to overturn Roe, it would only be in response to political pressure which the Court could not succumb (775). Furthermore, though the joint opinion refused to overturn Roe, it disagreed with the trimester approach asserted by the Roe Court’s judgment; instead, the joint opinion claimed to assert a greater import on the State’s legitimate interest in protecting the potential life of the fetus and therefore, constitutional regulation before viability (776-77).

From this argument, the joint opinion indicated that States may make it more difficult to exercise a fundamental right as long as the regulation does not constitute an “undue burden” (778). An “undue burden standard” was to be understood as “a state regulation [that] has the purpose or effect of placing a substantial obstacle in the path” of a person exercising a fundamental right, such as to the right to have an abortion (778).

Finally, the Court turned to the Pennsylvania Abortion Control Act and pinned each of the five challenged provisions against the new “undue burden” standard: 1) the medical emergency provision imposed no undue burden, 2) the informed consent and twenty-four hour waiting period provision imposed no undue burden, 3) the spousal notification provision did impose an undue burden, 4) the parental consent provision caused no undue burden, and 5) the reporting requirement provision caused no undue burden (779-81). The only provision which was thus found unconstitutional was the spousal notification provision, because the effect could have prevented many women who were in abusive relationships from obtaining an abortion; additionally, the implications of affirming this provision would return the marital relationship to the common law era where a wife must seek her husband’s approval for every decision she would ever make (780).
Several justices disagreed on the undue burden test and how it was applied in this case. Justice Stevens wrote an opinion concurring in part, and dissenting in part to contend that 24 hour waiting period provision imposed an undue burden on women (781). He argued that the delay in the exercise of the woman’s right to carry out her decision served no legitimate purpose (781). Justice Blackmun wrote an opinion concurring in part, concurring in the judgment, and dissenting in part in which he argued for strict scrutiny to be used as the proper standard in this case. Blackmun argued that doing so would have invalidated the informed consent provision, the 24 hour waiting period provision, the parental consent provision, and the reporting requirement provision (782).

Furthermore, Blackmun asserted that the trimester framework set out in Roe was “far more administrable, and far less manipulable” than the undue burden standard set forth in the joint opinion (782). Blackmun warned against following Justice Rehnquist’s opinion because it so heavily relied on tradition rather than recognizing the substantive liberties protected by the Due Process Clause (782). This was a warning against an original intent approach and yet another argument for a Living Constitution interpretation.

The opinion concurring in the judgment in part, and dissenting in part delivered by Chief Justice Rehnquist, and joined by Justices White, Scalia, and Thomas, wrote to assert that Roe was wrongly decided and should be overruled, in which case all of the Pennsylvania provisions would be upheld (782). Rehnquist criticized the Court for claiming to reaffirm Roe, when in reality it completely gutted what Roe asserted. He even argued that the fundamental right to abortion was not upheld by the joint opinion (782-83). Chief Justice Rehnquist further criticized the Court for its consideration of public opinion when making its decision and deciding that Roe could not be overruled because there was public opposition to such an opinion (783).
Finally, Rehnquist agreed with Blackmun’s opinion and supported the constitutionally-based and historically founded use of “strict scrutiny” in *Roe* over the “undue burden” standard asserted in the majority opinion which he argued was “a standard which is not built to last” (784). However, though Rehnquist did conclude that the right to an abortion is a form of liberty, protected by the Due Process Clause of the Fourteenth Amendment, he did not assert it as a fundamental right. Therefore, Rehnquist argued that the provisions be subjected to the rational basis test, rather than strict scrutiny or undue burden which in effect is a legislative judgment, as was done in this case (784).

Justice Scalia, joined by Chief Justice Rehnquist and Justices White and Thomas to concur in judgment in part and dissent in part. Scalia argued that a right to abortion was not protected by the Constitution as it is not mentioned. In addition, history of it being criminalized and prohibited must be weighed (785). Thus, he argued that the States may continue to regulate and prohibit such action, if the people so democratically decide (785). But, this was not for the Court to decide nor should the people protest to the Courts rather than to their legislatures (786). Scalia accused the joint opinion of engaging in substantive due process similar to that seen in *Dred Scott* and warned against the dangers of that kind of “reasoned judgment” which “should be voted on, not dictated” (786).

The Right to Sodomy


In this case, the respondent, Hardwick, was charged for violating a Georgia statute, which criminalized sodomy, for consensually engaging in said sexual activity in his own home with
another adult male. Hardwick challenged the constitutionality of the statute on the basis that the statute violated his fundamental right, as a practicing homosexual, to engage in sodomy (190).

Justice White delivered the majority opinion which refused that the Court could assert homosexual sodomy as a fundamental right found in the Federal Constitution. The opinion saw no connection between the precedents which asserted family, marriage, or procreation as fundamental rights, grounded in some way in the text of the Constitution, and homosexual sodomy as was claimed by the respondent (190-93). Secondly, Justice White recognized that the Due Process Clause of the Fourteenth Amendment had been used outside of the scope of procedural deprivation of life, liberty, and property to protect substantive rights, including those aforementioned, which are protected by the Federal Constitution (191). He identified the methods by which these fundamental rights had been asserted: that the liberty is “implicit in the concept of ordered liberty,” such that “neither liberty nor justice would exist if [they] were sacrificed,” or that they are “deeply rooted in this Nation’s history and tradition” (191-92).

Justice White could not categorize homosexual sodomy as a fundamental right by those standards, as sodomy had been historically criminalized by English common law as well as by all 50 States until 1961 (193). Similarly in a concurring opinion, Chief Justice Burger found nothing in the Constitution or in a “millennia of moral teaching” to strike down a law that had been enforced since 1816 (197). Justice White warned the Court against striking down State laws and discovering new fundamental rights:

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 (194).

Finally, the opinion did not agree with the respondent’s dependence on Stanley v. Georgia, 394 U.S. 557 (1969), which dealt with reading materials the Court found to be
explicitly protected by the First Amendment, to claim that since the activity occurred in the privacy of his home it should not be subjected to limitation by the government (195). This exact reasoning was rebutted in *Olmstead* (1928), *Roe* (1973), and *Carey v. Population Services*, 431 U.S. 678 (1977), and the Court once again denied it in *Bowers*.

Justice Powell also failed to find a fundamental right to homosexual sodomy in the Federal Constitution in his concurring opinion. He wrote separately to suggest that the respondent should be protected by the Eighth Amendment, because the Georgia statute made a single private act of homosexual sodomy to be a felony, punishable for up to 20 years in prison which Powell argued was clearly excessive, and thus unconstitutional, but this issue was not considered by the majority (197).

Justice Blackmun argued in his dissenting opinion that the case was about “the right to be let alone,” not “a fundamental right to engage in homosexual activity” harking back to Justice Brandeis in *Olmstead* (1928) (199). Blackmun argued that the opinion distorted the issue due to the heightened and unnecessary focus on the homosexual nature of this particular case, as the Georgia statute applied to the entire citizenry of the state (200). Blackmun asserted that “the sex or status of the persons who engage in the act was irrelevant as a matter of state law” (200). Similarly, the claim that the Georgia statute unconstitutionally infringed on the respondent’s right to privacy and to intimate association “does not depend in any way on his sexual orientation” (201).

Justice Blackmun referenced precedent to support his argument that the Court recognized the constitutional protection of the private sphere of individual liberty in two different ways: first, privacy of certain individual decisions, and second, privacy of activities in certain physical
He argued both were implicated in this case. In response to the opinion’s denial that this case resembled the protection of marriage, family, children, and parenthood, Justice Blackmun wrote:

"Only the most willful blindness could obscure the fact that sexual intimacy is a "sensitive, key relationship of human existence, central to family life, community welfare, and the development of human personality" (quoted in Paris Adult Theatre I v. Slaton, 413 U.S. 49 [1973], 205).

Furthermore, Blackmun acknowledged that freedom of choice inevitably lends itself to individuals making different choices (205-06). Simply because the respondent’s choice differed from a long-standing majority view did not mean that it interfered with the rights or interests of other citizens (206).

Justice Blackmun asserted that this case implicated protection under the Fourth Amendment, and “the right of the people to be secure in their…houses,” as it was understood in Boyd v. United States (207). Additionally, he asserted that the Court misrepresented Stanley (1969) which Blackmun argued was also protected under the Fourth Amendment, not the First (207). Ultimately, in response to the Court’s reliance on justice, tradition, and history and in favor of a Living Constitution approach, Justice Blackmun wrote:

"That depriving individuals of the right to choose for themselves how to conduct their intimate relationships poses a far greater threat to the values most deeply rooted in our Nation’s history than tolerance of nonconformity could ever do (214)."

Another dissenting opinion, delivered by Justice Stevens, considered two questions: whether a State could prohibit sodomy as a neutral law, and if it could not, could a State maintain the statute if it were to only be enforced against homosexuals (216)? Justice Stevens cited precedents to argue that tradition and history do not protect a law from constitutional analysis and individual decisions of married persons were protected by the Due Process Clause of the
Fourteenth Amendment. He concluded that a State may not prohibit sodomy between married persons in the privacy of their home nor between unmarried heterosexual adults:

When individual married couples are isolated from observation by others, the way in which they voluntarily choose to conduct their intimate relations is a matter for them—not for the State—to decide. . . cases like Griswold, Eisenstadt, and Casey surely embrace the right to engage in nonreproductive sexual conduct that others may consider offensive or immoral (217-18).

As it pertained to the criteria for legitimacy, the majority opinion did not engage in substantive due process because the Court did not assert a fundamental right nor did they rely on either the Due Process or Equal Protection Clauses of the Fourteenth Amendment. However, Justice Powell’s concurrence and both of the dissenting opinions offered interesting alternative approaches to this case. Predictably, one of the dissents, Justice Stevens’, argued for substantive due process. Almost as unsurprisingly, Blackmun’s dissent relied on Justice Brandeis’ right to be let alone which I have argued is a great expansion of the power of the Supreme Court and implicitly departs from the text of the Constitution. Justice Powell’s concurring opinion did not attempt to engage in substantive due process; rather he argued for a completely legitimate route, asserted in the Bill of Rights and Appendix A, to remedy the case.


Houston police responded to a reported weapons disturbance in John Lawrence’s private residence. Upon entry, the police witnessed Lawrence and another adult male, Garner, engaging in a consensual, sexual act. The authorities arrested and convicted the petitioners for violating a Texas statute which prohibited persons of the same sex to “engage in certain intimate sexual conduct” (558). Lawrence and Garner challenged the constitutionality of the Texas statute claiming that it violated the Due Process Clause of the Fourteenth Amendment (558).
Justice Kennedy delivered the majority opinion which relied heavily on precedents, but most importantly, did not rely on *Bowers* (1986). Kennedy wrote that *Griswold* (1965) protected the right to privacy in the marital realm, including choices of sexual conduct; *Eisenstadt* (1972) extended privacy to protect extramarital sexual conduct; *Roe* (1973) and *Carey* (1977) defined the rationale that people, including women and citizens under the age of 16, have substantive protection of certain liberties under the Due Process Clause of the Fourteenth Amendment when making fundamental decisions affecting their life.

Justice Kennedy then distinguished this case from *Bowers* (1986): the Georgia statute at issue in *Bowers* was a neutral law which applied to heterosexuals and homosexuals; whereas, the Texas statute at issue in this case applied only to homosexual conduct (561). Furthermore, the Court relied on Justice Blackmun’s dissenting opinion in *Bowers*, which focused on the right to be let alone as it applied to “private human conduct…in the most private of places, the home” (561). Justice Kennedy’s logic was as follows: if a person is free, and in the privacy of their own home, then they have the constitutional liberty to make private choices; therefore, if a free homosexual citizen chose to make the private choice to engage in any sexual conduct, they have the constitutional liberty to make that choice (561).

Kennedy wrote to overrule *Bowers*, which he argued should have been decided using Justice Stevens’ reasoning rather than Justice White’s, in this opinion using “the protection of liberty under the Due Process Clause” rather than making this an Equal Protection case which others suggested (561). Justice O’Connor wrote to this point. He distinguished between *Bowers* and this case by arguing that the Texas statute at issue in *Lawrence* violated the Equal Protection Clause, not the Due Process Clause, of the Fourteenth Amendment by disparaging homosexuals as a group and not affording them, as opposed to heterosexuals, equal protection of the law from
being criminalized for the same act (565-67). Justice Kennedy disagreed for several reasons: 1) the Court found that *Bowers* contradicted other precedents, as well as history, which ironically the majority relied on in that opinion, 2) relying solely on the Equal Protection Clause could leave open the option of redrafting the statute to over broadly apply to all Texas citizens, which would be constitutional as was determined in *Bowers*, and 3) neither State courts nor European courts have used the decision set forth in *Bowers* as controlling (563-64).

One of the largest focuses in Kennedy’s opinion was on rebutting the historical reasons supporting the statute which criminalized sodomy. He asserted that historically, sodomy laws did not differentiate between heterosexuals and homosexuals because this distinction was not drawn until the late 19th century (562). Additionally, the respondents were consenting adults acting in the privacy of Lawrence’s home (560). Historically, sodomy laws had not been used to prosecute private acts between consenting adults, but rather against adults committing predatory acts against other non-consenting adults or minors (562). Furthermore, Kennedy argued that these criminal sodomy laws were aimed primarily at “prohibit[ting] nonprocreative sexual activity more generally” (562). In light of precedents, prohibiting private sexual conduct between consenting adults without passing a rational basis test is unconstitutional government encroachment on the right of liberty protected by the Due Process Clause of the Fourteenth Amendment (565). Ultimately, the Court asserted that homosexuals’ “right to liberty under the Due Process Clause gave them the full right to engage in their [private sexual] conduct without intervention of the government” because the Texas statute’s purpose did not further a legitimate state interest (564).

Justice Scalia wrote a dissenting opinion which equated the reasoning for overruling *Bowers* with those which were denied in *Casey* (568). He criticized the Court because it refused
to overrule Roe in Casey, despite overwhelming public dissatisfaction in an attempt to maintain
the Court's legitimacy and respect from the people. But, in Lawrence, the majority asserted that
overruling its decision was in response to "the widespread opposition to Bowers, a decision
resolving an issue as 'intensely divisive' as the issue in Roe" (568).

He also criticized the Court for failing to claim to assert a fundamental right to sodomy,
and not subjecting the sodomy law to the scrutiny to which it would be if it were deemed a
fundamental right. Instead, the Court used the rational basis test in a way that had never been
used before to protect "an exercise of... liberty" (568-70). Justice Scalia argued that overruling
Bowers and striking down the Texas statute based on a lack of a compelling state interest, which
sufficed in Bowers, would implicate the potential to strike down any State law enacted in the
interest of morality, greatly expanding the power of the Court for which the Lochner era was
definitively repudiated (569).

Furthermore, Justice Scalia did not support the invocation of the Equal Protection Clause
of the Fourteenth Amendment either because he argued that the law applied to both men and
women and was only distinguished by the choice of partner (572). Striking down the statute on
those grounds would call into question all State laws which prohibit "laws against adultery,
fornication, and adult incest" (572). Additionally, Scalia pointed out that there were many State
laws which prohibit exercises of a person's liberty, such as prostitution and drug use. This is
because, he argues, "there is no right to "liberty" under the Due Process Clause" (572). Despite
this, if the Court is going to apply such illegitimate substantive due process, which Scalia
accused the majority of doing, it only protects fundamental rights which are "deeply rooted in
this Nation's history and tradition," not merely an activity which had gained "emerging
awareness" (571).
Finally, Justice Scalia accused the Court of choosing a side "in the culture war" over homosexuality where it should have remained impartial (573). He argued that it is the people of Texas' place to repeal laws which no longer coincide with the majority views, not that of an "impatient" Court (573). Justice Thomas agreed in another dissenting opinion and added that Justice Stewart's dissenting opinion in Griswold should be controlling as he did not find a constitutional provision to support a right to privacy (574).

It was made clear in Bowers that a homosexual right to sodomy was not found in the Bill of Rights nor could it be found in Appendix A; Lawrence blatantly deviated from the text of the Constitution and even the tradition of substantive due process jurisprudence and is clearly an illegitimate engagement in substantive due process as the Court is accused by the dissenting justices. Justice Kennedy quotes himself in his concurring opinion in County of Sacramento v. Lewis, 523 U.S. 833, 857, (1998), stating that "[H]istory and tradition are the starting point but not in all cases the ending point of the substantive due process inquiry" (562). The consideration of an emerging awareness of a distinctly homosexual right to engage in private sexual conduct is the epitome of a living Constitution approach.

The Right to Marry

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

In 1958, Mildred Jeter, an African American woman, and Richard Loving, a Caucasian man, were married in Washington DC. Upon return to their residential state of Virginia, the Lovings were charged with violating the state's prohibition on interracial marriage in addition to leaving the state to evade the law. The Constitutional question posed was whether the Virginia
statute which prohibited interracial marriage conflicted with the Equal Protection and Due Process Clauses of the Fourteenth Amendment.

With a unanimous opinion, Chief Justice Warren wrote the majority opinion which explained why the Virginia statutes were repugnant to both the Equal Protection Clause and the Due Process Clause. Despite the state’s argument that marriage had been subjected to State police powers, and thus this matter, in accordance with the Tenth Amendment, should also be left to the State, the Court decided that the State’s power is not “unlimited” (7). Furthermore, the Court rejected the state’s defense that since the law punished both whites and non-whites equally, that the Court should default to a rational basis test and defer to the legislature; however, the Court denied this argument and Warren distinguished between those cases which depended merely upon the rational basis test and the case in question which dissimilarly involved racial classifications. Therefore, the Virginia statutes were found to be repugnant to the Equal Protection Clause of the Fourteenth Amendment since the spirit and purpose of the Fourteenth Amendment was to eliminate all unjust discrimination between races and these statutes relied distinctly on racial differences.

Chief Justice Warren also wrote that the statutes violated the Due Process Clause of the Fourteenth Amendment. It is at this point in his opinion where he recognized “one of the vital personal rights essential to the orderly pursuit of happiness by free men,” the right to marry (12). He relied solely on jurisprudence and did not reference the Bill of Rights, English Common Law, or history. The decision simply stated that the “freedom to marry, or not marry, a person of another race resides with the individual, and cannot be infringed by the State” (12).
Despite the long standing tradition of anti-miscegenation laws in the United States, the Supreme Court unanimously changed with the times. However, this case stands in stark contrast to all of those previously analyzed because it involved a very important factor which none of the others involved: racial discrimination. The purpose of the Fourteenth Amendment was to address cases such as *Loving* (1967). "The clear and central purpose of the Fourteenth Amendment was to eliminate all official state sources of invidious racial discrimination in the States" (10).

Though the liberty of the Due Process Clause was addressed, this case rested on the robust, certainly not spindly, legs of the Fourteenth Amendment. Therefore, it provided an interesting case for the legitimacy test because it did not conform to the previous pattern exhibited by the right to privacy, the right to abortion, or the right to sodomy.

The opinion asserted a fundamental right to marry. Though the opinion discussed both the Equal Protection and the Due Process Clauses, the right to marry is specifically asserted as it relates to this specific liberty being deprived without due process of law by the Virginia statutes. And though the right to marry cannot found in the Bill of Rights, Appendix A does include a right to marry without disparagement found in the *Magna Charta*. Additionally, the opinion did not diverge from the text of the Constitution because the racial component grounds the decision so firmly in the purpose of the Fourteenth Amendment. Finally, this decision did not expand the power of the Supreme Court; instead it allowed the Supreme Court to conform to the Constitution because of the Fourteenth Amendment in order to secure the right to marry for every citizen, regardless of their race. Therefore, in contrast to my assumption that there was a mutual exclusion between diverging from the text of the Constitution while expanding the power of the Supreme Court, and asserting a right from the Bill of Rights and/or Appendix A, the majority opinion engaged in substantive due process and did so legitimately.
Perry v. Schwarzenegger, 704 F. (N.D. Cal. 2010)

In November 2000, Proposition 22, which would amend California’s Family Code to include a definition of marriage as being between a man and a woman, was adopted by popular vote. In February 2004, the mayor of San Francisco challenged Proposition 22 by telling county officials to recognize same-sex marriages. The California Supreme Court nullified all those same-sex couples who received marriage licenses under this authority. In May 2008, San Francisco and others challenged Proposition 22 and won. The California Supreme Court held that all counties must issue marriage licenses to same-sex couples. In November 2008, Proposition 8, an amendment to the California constitution, which read “only marriage between a man and a woman is valid or recognized in California,” was put to a popular vote and passed. Two same-sex couples, one lesbian and the other gay, challenged Proposition 8 on the grounds that it deprived them of due process and equal protection protected by the Fourteenth Amendment.

US District Court Judge Walker\(^5\) concluded that Proposition 8 “unconstitutionally burdens the exercise of the fundamental right to marry” protected by the Due Process and Equal Protection Clauses of the Fourteenth Amendment (109). Walker wrote his opinion in two parts: first, on the Due Process Clause, and second, on the Equal Protection Clause.

The opinion’s due process section began by asserting that “the freedom to marry is recognized as a fundamental right protected by the Due Process Clause” and as such “the government must show that the intrusion withstands strict scrutiny,” while relying on precedent including Loving v. Virginia (1967) (109-110). However, the question raised by proponents of

\(^5\) I focused on the US District Court holding because even though proponents of Proposition 8 appealed this holding to the US Supreme Court, as Hollingsworth v. Perry 570 U.S. ___ (2013), the Court did not write on the merits of the case for lack of standing.
Proposition 8 was not whether the right to marry is a fundamental right, but whether the plaintiffs were seeking a new right distinct from marriage. Based on several widely accepted traditional American characteristics of marriage, such as proceeding with free consent, forming a household, agreeing to support one another and their dependents, creating a "stable, governable populace," being a central choice in an individual’s life, and an institution greater than a license to simply procreate, Walker decided that the plaintiffs did not seek some new right, but the right to marry as it had been historically understood (111). In response to proponents of Proposition 8’s claim that allowing same sex marriage would damage the institution of marriage, Walker argued that the result of *Loving* did not damage the institution of marriage nor did the lifting of state coverture laws; neither would allowing same-sex marriages.

Judge Walker also concluded that domestic partnerships did not fulfill the state’s due process obligation for the fundamental right to marry because it is a distinct institution with an inferior meaning to marriage and was specifically created to provide benefits while denying marriage to same-sex couples. Furthermore, proponents bore the “burden of producing evidence to show that Proposition 8 [was] narrowly tailored to a compelling government interest” (117). They failed to do so. Therefore, Walker concluded that Proposition 8 violated the Due Process Clause.

In addition to the strict scrutiny review required by challenges under the Due Process Clause, the Equal Protection Clause challenge required Walker to examine Proposition 8 under rational basis review due to the classification of a certain class, same-sex couples, and the burden on the fundamental right to marry. Proponents needed to provide a rational relationship between Proposition 8 and “some legitimate government interest” (118). Judge Walker concluded that Proposition 8 could not “withstand any level of scrutiny under the Equal Protection Clause, as
excluding same-sex couples from marriage is simply not rationally related to a legitimate state interest" (123). All six of the rationales set forth by the proponents of Proposition 8 were debunked.

Judge Walker argued that the institution of marriage has never been altered or diminished by the inclusion of minority classes, such as interracial marriage, or by the elimination of state enforced gender roles, such as the dissolution of coverture laws. In the same fashion, allowing same-sex marriage would have neutral, if not positive, effects on the institution of marriage.

As was the case in Loving, Judge Walker’s opinion asserted a fundamental right and did so relying on the Due Process and Equal Protection Clauses of the Fourteenth Amendment. Therefore, Perry qualifies as a substantive due process case. Determining its legitimacy is more difficult than any of the previous cases because the right to marry can be found in Appendix A, though it cannot be found in the Bill of Rights. It should follow, according to the legitimacy test set forth, that this seems to be a case of legitimate engagement in substantive due process. However, unlike in Loving, this opinion was required to diverge from the text of the Constitution which says nothing about same-sex couples, let alone same-sex marriage. Additionally, this opinion could be construed as an expansion of the power of the judiciary by challenging the People of California after they voted twice for legislation contrary to this decision. Accordingly, this case also seems to be an illegitimate engagement in substantive due process. Windsor presents a similar problem; I will attempt to reconcile both at the same time after the following analysis.

Edith Windsor and Thea Spyer were lawfully married in Canada and their marriage was recognized by the State of New York. Upon Spyer’s death, Windsor was denied her claim to the estate tax exemption for surviving spouses which, as defined by the federally mandated Defense of Marriage Act (DOMA), excluded same-sex partners. Justice Kennedy delivered the majority opinion in favor of Windsor to strike down DOMA in its entirety as unconstitutional.

The Defense of Marriage Act contained two operative sections: first, section 2 allowed States to refuse to recognize same-sex marriages and second, section 3, which was challenged in this case, amended the Dictionary Act to define marriage and spouse as follows: “the word ‘marriage’ means only a legal union between one man and one woman as husband and wife, and the word ‘spouse’ refers only to a person of the opposite sex who is a husband or a wife” (2). This definition applied to over 1,000 federal statutes and all federal regulations, effectively denying all same-sex couples, whether they were recognized as married by their State or not, eligibility for federal benefits and obligations.

This appeal came from the United States Court of Appeals for the Second Circuit, where the decision ruled in favor of Windsor and ordered the federal government to repay the estate tax. At this time, the President of the United States announced that he would no longer enforce DOMA due to its unconstitutional nature. Therefore, both parties’ interests in this case were the same: to declare DOMA unconstitutional. This raised a great debate on the standing of the United States as a party in this case. The majority ruled the United States had Article III standing because the lower court ruling directed the US government to refund Windsor which Justice Kennedy argued qualified as an economic injury. Just because the United States favored this outcome did not eliminate the injury.
In his dissent, Justice Scalia concluded that there was no longer an injury to the plaintiff after the lower court decision and that since the United States and Windsor agreed with the judgment, there was no longer an opposing party. He argued that this Court wanted to answer the abstract question of same-sex marriage and proceeded to do so unconstitutionally because of a lack of case or controversy required by Article III for adjudication. This is only the beginning of Scalia’s criticism of the majority of a gross expansion of the power of the Judiciary over Congress through an active pursuit of judicial review.

Justice Kennedy’s opinion recognized the historical definition and meaning of marriage and observed the evolving understanding or new perspective of marriage to include same-sex couples in twelve States and the District of Columbia. Kennedy’s opinion hinged on a defense of federalism in which the States have authority over defining and regulating domestic relations, including marriage; and the federal government, which was not granted authority by the Constitution over marriage, must respect the history and tradition of this exercise of the States’ sovereignty. And though Congress can make “limited federal laws that regulate the meaning of marriage in order to further federal policy,” Kennedy argued that DOMA’s reach was too far because of its applicability to every single federal law and thus disrupted the balance of federalism. In response, Justice Alito dissented concluding that DOMA did not deny the States their ability to legalize same-sex marriage and that defining who does and does not receive federal benefits and obligations is well within Congress’ power.

Furthermore, Justice Kennedy argued that DOMA deprived Windsor of her equal liberty protected by the Due Process Clause of the Fifth Amendment and was subjected to strict scrutiny where it failed to assert a legitimate government interest for the classification. Kennedy concluded that the purpose of DOMA was “to ensure that if any State decides to recognize same-
sex marriages, those unions will be treated as second-class marriages for purposes of federal law...DOMA writes inequality into the entire United States code” (22). Where State governments were treating all marriages alike and enhancing “the recognition, dignity, and protection of the class in their community,” the federal government established two separate types of marriages within the States and disadvantaged the same community which these States attempted to protect (19). In his closing statements, Kennedy specified that “this opinion and its holding are confined to those lawful marriages” meaning that this decision did not implement same-sex marriage in every State, but that the federal government would also recognize any same-sex marriage which is recognized by any of the fifty States (26).

The strongest disagreement with the purpose of DOMA came from Justice Scalia while his sentiments were echoed by Chief Justice Roberts. The dissents admonished the majority for accusing Congress of “codify[ing] malice” (2). Scalia argued that the Court could have accused Congress and the President of acting outside of their granted power or for drawing “distinctions that prove to be irrational,” but instead Kennedy concluded that the purpose of the legislation was solely to “disparage and injure’ same-sex couples” (20-21). The implications of this type of conclusion, according to Scalia, were that anyone who disagrees with the Court on this matter will be considered to do so only to degrade same-sex couples without any legitimate reason.

In response to the penultimate disclaimer of the majority opinion, Justice Scalia wrote that there was nothing which would confine this Court’s decision. The result would be identical to the disclaimer provided in Lawrence, that it had nothing to do with “formal recognition to any relationship that homosexual persons might seek to enter” (22). The opinion heavily relied on the rationality behind the decision in Lawrence despite its claimer. Due to the nature of the majority’s rationale for the purpose of DOMA, Scalia argued that it was inevitable that any State
that denies recognition of same-sex marriage in the wake of this decision will be met with
opposition wielding a federally protected right asserted by this Court, despite any disclaimer the
majority provided.

Finally, the dissenting opinions all argued that this decision inappropriately and
unconstitutionally decided a passionate debate supported by rational and reasonable Americans
on both sides in every State in the nation. Deciding the definition of marriage should have been
left to the People and their legislative representatives at the federal and State levels. Scalia ended
his dissenting opinion with praise for the fervent democracy which the same-sex marriage debate
caused and complete disappointment in the Supreme Court for usurping the power of the People:
“the Court has cheated both sides, robbing the winners of an honest victory, and the losers of the
peace that comes from a fair defeat. We owed both of them better” (26).

The majority opinion asserted the fundamental right to marry through the Due Process
Clause of the Fifth Amendment, which provides the same freedom from deprivation of life,
liberty, and property without due process as the Fourteenth Amendment, except the Fifth applies
to federal laws, such as DOMA. Justice Scalia correctly observed that “the Constitution neither
requires nor forbids our society to approve of same-sex marriage” and thus this decision is a
divergence from the text of the Constitution (18). Furthermore, there is undeniable evidence that
this decision expanded the power of SCOTUS by defining “what the law is” in a 5-4 decision
largely split on the issue of whether there was even a case or controversy to be adjudicated (10).
The majority did not assert a right from the Bill of Rights, but it does assert a right from
Appendix A, as has been established in the previous cases.

The dilemma in determining whether the engagement in substantive due process in both
*Perry* and *Windsor* were legitimate or not, is the right to marry’s appearance in Appendix A.
This quality sets the entire set of marriage cases apart from the rest. Furthermore, the racial discrimination of Loving, which the Fourteenth Amendment was intended to protect against, clearly made that a legitimate engagement in substantive due process. However, neither Perry nor Windsor dealt with laws or “statutes directed at particular religious…national…or racial minorities” (U.S. v. Carolene Products Co., 304 U.S. 144, 152-153, n. 4 (1938)). Protection against racial discrimination is not only explicitly protected by the Fourteenth Amendment, but it is also namely subjected to heightened scrutiny by the Carolene Products footnote 4. The famous footnote continues: “whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry” (U.S. v. Carolene Products Co., 304 U.S. 144, 152-153, n. 4 (1938)).

I contend, with Judge Walker and Justice Kennedy, that homosexuals are exactly the type of discrete and insular minority to which Carolene Products footnote 4 was referring. “[G]ays and lesbians are the type of minority strict scrutiny was designed to protect...where a group has experienced a ‘history of purposeful unequal treatment’ or been subjected to unique disabilities,” such as “DOMA’s unusual deviation from the usual tradition of recognizing and accepting state definitions of marriage [which] operates to deprive same-sex couples of the benefits and responsibilities that come with the federal recognition of their marriages (Perry 121; Windsor 20). Therefore, since the fundamental right to marry is included in the liberty protected by the Due Process Clause of the Fourteenth and Fifth Amendments and homosexuality qualifies as one of those discrete and insular minorities referenced in Carolene Products footnote 4, then I must argue in favor of the legitimacy of the Courts’ engagements in substantive due process in both Perry and Windsor. Acceptance of these premises do not absolve the opinions from the
divergence from the text of the Constitution, but it does reconcile the expansion of the Courts’ power by accepting these cases as exactly those which were intended to be decided judicially through strict scrutiny.

**Conclusion**

In this study of the right to privacy, the right to abortion, the right to sodomy, and the right to marry, I hypothesized that the protection of some, but not all of the fundamental rights asserted were the result of illegitimate substantive due process. The data revealed that my hypothesis was correct. Asserting the fundamental rights to privacy, abortion, and sodomy were all accomplished through an illegitimate engagement in substantive due process by the majority opinion. Those majority opinions never asserted rights from the Bill of Rights or Appendix A. They always diverged from the text of the Constitution and ultimately greatly expanded the power of the Supreme Court. However, the Court paid the price of their legitimacy as was made obvious in *Casey* and *Lawrence*.

The right to marry proved to be a much more difficult jurisprudence to analyze. The inclusion of the “right to marriage without disparagement” in Appendix A qualified the right to marry as a right which was recognized by Americans at the time of the Founding, rooting it in our Nation’s history. Other aspects of the right to marry cases differentiated them from the illegitimate substantive due process cases such as racial discrimination intended to be protected against by the Fourteenth Amendment and sexual orientation discrimination intended to be judicially reviewed under strict scrutiny by *Carolene Products* footnote 4.

Furthermore, always present was a tension between those Justices adopting an original intent approach and those adopting a living Constitution or evolved understanding approach.
This led to an unexpected conclusion: if the Court were to completely adopt a living Constitution approach rather than an original intent approach to interpreting the Constitution, the Court would be afforded much more legitimacy. This is of great importance since the Court's legitimacy is often called into question by the American people, especially when substantive due process, a repudiated method, is utilized. The living Constitution approach enables the Court to legitimately diverge from the text of the Constitution while seeking to assert fundamental rights not asserted in the Bill of Rights or Appendix A, as times and opinions change.
### Appendix A: The Enumerated Rights of the Founding Era

<table>
<thead>
<tr>
<th>Right</th>
<th>English Common Law (EBR, MC, No)</th>
<th>Declaration of Colonial Rights (Yes or No)</th>
<th>US Constitution (FC, BR, No)</th>
<th>State Constitution(s) (0-13)</th>
<th>States</th>
</tr>
</thead>
<tbody>
<tr>
<td>Freedom of religion</td>
<td>No</td>
<td>No</td>
<td>BR</td>
<td>9</td>
<td>DE, GA, MA, MD, NC, NJ, NY, PA, VA,</td>
</tr>
<tr>
<td>Right to govern one's own state</td>
<td>No</td>
<td>Yes</td>
<td>No</td>
<td>4</td>
<td>DE, MA, MD, NC</td>
</tr>
<tr>
<td>Right to regulate internal</td>
<td>No</td>
<td>No</td>
<td>No</td>
<td>3</td>
<td>DE, MD, NC</td>
</tr>
<tr>
<td>Right to reform or establish a new government</td>
<td>No</td>
<td>No</td>
<td>No</td>
<td>5</td>
<td>DE, MA, MD, PA</td>
</tr>
<tr>
<td>Right of suffrage (men)</td>
<td>No</td>
<td>No</td>
<td>No</td>
<td>1</td>
<td>VA</td>
</tr>
<tr>
<td>Right of suffrage (freemen)</td>
<td>No</td>
<td>No</td>
<td>No</td>
<td>4</td>
<td>DE, MA, NH, PA</td>
</tr>
<tr>
<td>Right of suffrage (full age, property owners)</td>
<td>No</td>
<td>No</td>
<td>No</td>
<td>1</td>
<td>NY</td>
</tr>
<tr>
<td>Right of suffrage (white, male, Protestant, property owners)</td>
<td>No</td>
<td>No</td>
<td>No</td>
<td>2</td>
<td>GA, SC</td>
</tr>
<tr>
<td>Right of suffrage (male, property owners)</td>
<td>No</td>
<td>No</td>
<td>No</td>
<td>1</td>
<td>MD</td>
</tr>
<tr>
<td>Right of suffrage (full age)</td>
<td>No</td>
<td>No</td>
<td>No</td>
<td>1</td>
<td>NY</td>
</tr>
<tr>
<td>Right to petition the Legislature for the redress of wrongs</td>
<td>EBR</td>
<td>Yes</td>
<td>BR</td>
<td>5</td>
<td>DE, MA, MD, NC, PA</td>
</tr>
<tr>
<td>Right to life</td>
<td>No</td>
<td>Yes</td>
<td>BR</td>
<td>8</td>
<td>DE, MA, NC, NH, PA, SC,</td>
</tr>
<tr>
<td>Right to liberty</td>
<td>No</td>
<td>Yes</td>
<td>BR</td>
<td>7</td>
<td>CT, DE, MA, NC, NH, PA, SC, VA</td>
</tr>
<tr>
<td>Right to property</td>
<td>No</td>
<td>Yes</td>
<td>BR</td>
<td>9</td>
<td>CT, DE, MA, NC, NH, PA, SC, VA</td>
</tr>
<tr>
<td>Right to a trial of facts</td>
<td>No</td>
<td>No</td>
<td>No</td>
<td>2</td>
<td>MA, MD</td>
</tr>
<tr>
<td>Right to trial by jury</td>
<td>No</td>
<td>Yes</td>
<td>BR</td>
<td>10</td>
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<td>Right to satisfaction with the jury in a civil cause</td>
<td>No</td>
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<tr>
<td>Right to a speedy trial</td>
<td>No</td>
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<tr>
<td>Right to be informed of the nature and cause of all prosecutions of a criminal</td>
<td>No</td>
<td>No</td>
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<tr>
<td>Right to counsel</td>
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<tr>
<td>Right to witnesses</td>
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<td>BR</td>
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<tr>
<td>Right to be confronted with one's accusers</td>
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<td>No</td>
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<td>DE, NC, VA</td>
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<tr>
<td>Right to an impartial jury</td>
<td>EBR</td>
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<td>Right to examine evidence in one's favor</td>
<td>No</td>
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<td>Freedom from being compelled to give evidence against oneself</td>
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<td>Freedom from excessive bail</td>
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<td>Right to safety</td>
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<td>No</td>
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<td>MA, PA, VA</td>
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<tr>
<td>Right to happiness</td>
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<td>Right to free elections</td>
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<td>Right to emigrate from one state to another</td>
<td>No</td>
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<td>Right to form a new state in vacant territories</td>
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<td>Right to uniform government</td>
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<td>Freedom from excessive fines</td>
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<td>Freedom from searches and seizures without warrant</td>
<td>No</td>
<td>No</td>
<td>BR</td>
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<td>DE, MA, MD, NC, PA, VA</td>
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</tbody>
</table>

*EBR: English Bill of Rights, MC: Magna Carta, FC: Federal Constitution, BR: Bill of Rights*
<table>
<thead>
<tr>
<th>Right</th>
<th>English Common Law (EBR, MC, No)</th>
<th>Declaration of Colonial Rights (Yes or No)</th>
<th>US Constitution (FC, BR, No)</th>
<th>State Constitution (0-13)</th>
<th>States</th>
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<tbody>
<tr>
<td>Freedom from quartering soldiers without consent from</td>
<td>EBR</td>
<td>No</td>
<td>BR</td>
<td>3</td>
<td>DE, MA, MD</td>
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<td>Freedom from standing armies in times of peace</td>
<td>EBR</td>
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<td>DE, MA, MD, NC, PA, VA</td>
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<tr>
<td>Right to a well regulated militia</td>
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<tr>
<td>Right to an impartial judge</td>
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<td>Right to the common law of England</td>
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<td>Freedom from slavery</td>
<td>No</td>
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<td>Right to public schools</td>
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<td>Right to plead one's own case</td>
<td>MC</td>
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<td>CT, GA, MA, PA</td>
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<td>Right to the writ of habeas</td>
<td>No</td>
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<td>FC</td>
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<td>GA, MA</td>
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<tr>
<td>Freedom of the press</td>
<td>No</td>
<td>No</td>
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<tr>
<td>Right to transport goods</td>
<td>MC</td>
<td>No</td>
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<td>Right to exercise the trade of fishing</td>
<td>No</td>
<td>No</td>
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<td>Freedom from poll taxes</td>
<td>No</td>
<td>No</td>
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<td>Freedom from ex post facto</td>
<td>No</td>
<td>No</td>
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<td>Freedom from martial law</td>
<td>No</td>
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<td>Freedom from monopolies</td>
<td>No</td>
<td>No</td>
<td>No</td>
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<td>MD, NC</td>
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<td>Right to invest their legislature with power to authorize and require public worship and public Protestant teachers</td>
<td>No</td>
<td>No</td>
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<td>MA</td>
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<td>Right to invest their legislature with authority to require compulsory attendance to instruction by Protestant teachers at certain times of the year</td>
<td>No</td>
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<td>MA</td>
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<td>Freedom from the establishment of any one</td>
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<td>BR</td>
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<tr>
<td>Right to return their public officers to their private life</td>
<td>No</td>
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<td>MA, NY, PA, VA</td>
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<tr>
<td>Right to require of legislatures exact and constant observation of them</td>
<td>No</td>
<td>No</td>
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<td>MA, NC, PA</td>
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<td>Freedom of assembly</td>
<td>No</td>
<td>Yes</td>
<td>BR</td>
<td>3</td>
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<td>Freedom of speech</td>
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<td>No</td>
<td>BR</td>
<td>2</td>
<td>MA, PA</td>
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<td>Right to consult for their common good</td>
<td>No</td>
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<td>No</td>
<td>1</td>
<td>PA</td>
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<td>Right to instruct their representatives</td>
<td>No</td>
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<td>PA</td>
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<td>Right to have a trial held in close proximity to where the alleged crime occurred</td>
<td>No</td>
<td>Yes</td>
<td>FC</td>
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<td>None</td>
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<tr>
<td>Right to marriage without disparagement</td>
<td>MC</td>
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<td>No</td>
<td>0</td>
<td>None</td>
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<tr>
<td>Right to liberties and free</td>
<td>MC</td>
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<td>0</td>
<td>None</td>
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<tr>
<td>Right to a writ of assize</td>
<td>MC</td>
<td>No</td>
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<td>None</td>
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<tr>
<td>Freedom from writ of scire in cases where a free man to lose his court</td>
<td>MC</td>
<td>No</td>
<td>No</td>
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<td>None</td>
</tr>
</tbody>
</table>

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References


