THE END OF SUBSTANTIVE DUE PROCESS?

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I. INTRODUCTION

The doctrine of substantive due process1 long has been controversial. The doctrine, which affords constitutional protection to individual rights claims without a clear textual warrant, has long prompted vigorous disputes

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1. There are, of course, two due process clauses. The fifth amendment provides, in part, that "[N]o person shall . . . be deprived of life, liberty, or property, without due process of law...." U.S. Const. amend. V. The fourteenth amendment provides, in part, that "[N]o state shall . . . deprive any person of life, liberty or property, without due process of law...." U.S. Const. amend. XIV, § 1. To avoid frequent references to both clauses, this Article will typically refer to "the" due process clause.

The doctrine of substantive due process arises in a number of contexts. The term most commonly is used in reference to the Court's practice of holding unconstitutional state statutes that violate a "liberty" interest the Court believes is protected by the clause, regardless of the manner in which the deprivation occurs. See, e.g., Roe v. Wade, 410 U.S. 113, 153 (1973); Lochner v. New York, 198 U.S. 45, 53 (1905). The term is also used in the "constitutional tort" context to apply to certain kinds of outrageous conduct by government actors, conduct not covered by a more specific constitutional provision. Although there are some obvious differences between these two situations (there is presumably a more clearly defined state interest in the former situation), courts and commentators have not differentiated between these two situations. See, e.g., Gumz v. Morissette, 772 F.2d 1395, 1404-09 (7th Cir. 1985) (Easterbrook, J., concurring), cert. denied, 475 U.S. 1123 (1986); Wells & Eaton, Substantive Due Process and the Scope of Constitutional Torts, 18 GA. L. REV. 201, 227 (1984) ("[T]he essential unity of [these] two variants of substantive due process remains.").

Another form of substantive due process arises in the incorporation context. See generally J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW §§ 10.2, 11.5-11.7 (3d ed. 1986) (discussing the issue and citing commentary). I will not address this issue in this article. Even if the Court were to abandon substantive due process, there are other ways to justify incorporation, most obviously through a reinterpretation of the "privileges or immunities" clause of the fourteenth amendment. See generally Kurland, The Privileges or Immunities Clause: "Its Hour Come Round at Last?", 1972 WASH. U.L.Q. 405. This article, therefore, adopts the same approach (at least with respect to terminology) as Professor Daniel O. Conkle's recent article: "When I refer to substantive due process, however, I am excluding this 'incorporation due process' and am referring instead to substantive constitutional doctrine grounded neither directly nor by virtue of 'incorporation' on any constitutional language more specific than the due process clause." Conkle, The Second Death of Substantive Due Process, 62 IND. L.J. 215, 218 n.22 (1987). I also will not address another "substantive" interpretation of due process: the equal protection guarantee the Court has read into the due process clause of the fifth amendment. See Bolling v. Sharpe, 347 U.S. 497, 500 (1954); see also J. ELY, DEMOCRACY AND DISTRUST 32-38 (1980) (suggesting that ninth amendment might support imposing equal protection obligation on federal government).
about the Supreme Court's role in exercising its power of judicial review. Of course, the type of conduct the doctrine has sheltered has changed greatly over the years. In an early incarnation, the doctrine of substantive due process largely protected economic rights. More recently, the Court has used the doctrine to create a constitutional "right of privacy" to protect access to contraceptives and a woman's decision to have an abortion. Perhaps Archibald Cox's assessment should be the last word on the topic: "The Court's persistent resort to notions of substantive due process for almost a century attests to the strengths of our natural law inheritance in constitutional adjudication, and I think it unwise as well as hopeless to resist it." Despite this counsel, there have been recent efforts to attack the doctrine, from both on and off the bench. Perhaps the failure of these efforts is, as Professor Cox suggested, inevitable. Nevertheless, recent events suggest that we might be at a major turning point in the debate. The retirement of Justice Lewis F. Powell, who cast the swing vote in a number of important substantive due process cases, has given the issue renewed practical importance.

The Supreme Court's decision in Bowers v. Hardwick has sparked much of the recent commentary. For example, one commentator recently suggested that, with the Court's decision in Bowers v. Hardwick, "the beginning of the second death of substantive due process may be underway." It is far from clear that the recent events augur such a fundamental shift. The Supreme Court's substantive due process decisions since Bowers do not indicate that a major shift has occurred, and the lower court decisions since Bowers do not reflect a major retrenchment in the scope of substantive due process. Yet, recent developments do suggest that a rethinking of the doctrine is in order.

The purpose of this Article is to assess the current situation and to offer some conclusions about the prospects for the doctrine of substantive due process. Part II of the Article outlines the recent history of the doctrine, focusing on whether the Court's substantive due process decisions prior to Bowers v. Hardwick supported the view that the constitutional "right to privacy" protected sexual freedom. Part III discusses the two significant substantive due process decisions of the Supreme Court's 1985 Term: Thorn-
The discussion highlights the deep divisions on the Court about the scope of substantive due process and about the role religious and moral principles properly may play in influencing secular legislation.

Part IV discusses the more recent developments, namely, the Supreme Court's most recent substantive due process decisions and lower courts' recent struggles with the scope of the doctrine. These recent developments indicate that there is currently little support for the view that Bowers signalled a major retrenchment in the scope of substantive due process. The Supreme Court's opinion in Bowers has had no discernible impact on the Supreme Court's more recent decisions in this area; in fact, Bowers has yet to be cited, much less relied upon, in any of the Supreme Court's more recent substantive due process decisions. The lower court decisions in this area also support the conclusion that Bowers is not currently regarded as a major turning point. Some courts have resisted further expansions of substantive due process; other courts, however, have extended the scope of the doctrine. The overwhelming message from the lower courts has been that very little has changed since the Supreme Court's decision in Bowers.

Part V discusses the implications of the current developments in two major contexts: the vitality of the Court's most prominent substantive due process decision, Roe v. Wade, and the prospects for substantive due process more generally. Part V suggests that the majority opinion in Bowers v. Hardwick may well have undermined Roe v. Wade. This is not to say, however, that it is likely Roe v. Wade will be overturned. As the Court has mentioned, adherence to stare decisis suggests that Roe v. Wade should survive. Yet, the Court never has adhered rigorously to stare decisis in its constitutional decisions, and, as Part V of this Article notes, there are particularly strong reasons for not applying stare decisis to preserve Roe v. Wade.

Part V also considers whether Bowers signals the end of substantive due process, and concludes that there is little support for this view. The Court is likely to continue to engage in the task of supplying substantive content to the due process clause on a relatively ad hoc basis. The Court will, however, continue to be sharply divided about the scope of the doctrine. The Court will also continue to be sharply divided about another controversial issue—the role religious and moral principles properly may play in influencing secular legislation. Part V discusses the opinions in Thornburgh and Bowers that have addressed this question and concludes with some general observations about the proper role religious and moral principles should have in debates about substantive due process.

Finally, Part VI discusses the desirability of completely abandoning the doctrine of substantive due process and endorses the position the Supreme Court adopted in 1963 in Ferguson v. Skrupa—that the Court should not

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engage in any substantive review, even rationality review, under the due process clause. There may be other bases for the Court's decisions in the substantive due process area, but there is insufficient justification for relying on the due process clause as the textual basis for these decisions.

II. The Modern Era of Substantive Due Process

The twists and turns of substantive due process have been chronicled often. This section outlines briefly the recent history of the doctrine. In the current climate (in which substantive due process is so well entrenched that all nine Justices recently joined in invalidating a state regulation on substantive due process grounds), it is easy to forget that the Supreme Court rejected all substantive review under the due process clause as recently as 1963. In Ferguson v. Skrupa, the Court upheld a Kansas statute prohibiting the practice of debt adjusting except as an incident to the practice of law. Justice Black, for eight members of the Court, firmly rejected any substantive review of legislation under the due process clause. As Justice Black stated:

The doctrine that prevailed in Lochner, Coppage, Adkins, Burns, and like cases—that due process authorizes courts to hold laws unconstitutional when they believe the legislature has acted un-


11. Of course, it might be argued that it is a mistake to view the Court's modern substantive due process decisions as an abrupt departure. Some have contended that "substantive due process never really died." Garfield, supra note 10, at 352; see also J. Nowak, R. Rotunda & J. Young, supra note 1, at § 11.7; L. Tribe, supra note 10, at § 11-1. There is certainly support for this view. As Professor Ira C. Lupu has stated: "The most recent reliances on Meyer v. Nebraska, 262 U.S. 390 (1923) and Pierce v. Society of Sisters, 268 U.S. 510 (1925)] ... have stressed their non-textual underpinnings of protected interests in family autonomy. The survival of those two cases in that form suggests that the only durable objection to the Lochner era's handiwork is that it generally selected the "wrong" values for protection." Lupu, Untangling the Strands of the Fourteenth Amendment, 77 Mich. L. Rev. 981, 988-89 (1979) (footnotes omitted). Although this view appears accurate in hindsight, it does not appear to describe accurately the Court's own account of its approach to substantive due process. As Professor Daniel O. Conkle has stated, "when the Supreme Court abandoned Lochner in the 1930's it was widely understood that the Court was abandoning substantive due process generally, and not merely the use of substantive due process in the protection of economic rights." Conkle, supra note 1, at 218-19 (footnote omitted). See Griswold v. Connecticut, 381 U.S. 479, 522-23 (Black, J., dissenting) (explaining that Court had completely renounced substantive due process); id. at 528 (Stewart, J., dissenting) (same).

wisely—has long since been discarded. We have returned to the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws. . . . It is now settled that states "have power to legislate against what are found to be injurious practices in their internal commercial and business affairs, so long as their laws do not run afoul of some specific federal constitutional prohibition, or of some valid federal law."15

Justice Harlan’s concurring opinion in Ferguson, which stated that the statute was constitutional because it bore "a rational relation to a constitutionally permissible objective,"16 made it clear that Justice Black’s majority opinion even rejected rationality review under the due process clause.

Justice Black’s victory was, of course, short-lived. In 1965, in Griswold v. Connecticut,17 the Court held unconstitutional a Connecticut statute that regulated the use of contraceptives by married couples.18 In Loving v. Virginia,19 the Court, in an alternative holding, invalidated Virginia’s miscegenation law on due process grounds because the law interfered with the freedom to marry, "one of the vital personal rights essential to the orderly pursuit of happiness by free men."20 In Stanley v. Georgia,21 the Court, in reversing a criminal conviction for possession of obscene films, relied, at least in part, on the right of privacy articulated in Griswold.22 In Stanley, the Court’s opinion contained broad assertions about the individual’s "right to satisfy his intellectual and emotional needs in the privacy of his home, . . ."23 and the lack of a state interest in "control[ling] the moral content . . ."

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16. Ferguson, 372 U.S. at 733 (Harlan, J., concurring in judgment).
18. Griswold v. Connecticut, 381 U.S. 479, 485-86 (1965). Of course, Justice Black dissented in Griswold. His dissent stated: "I like my privacy as well as the next one, but I am nevertheless compelled to admit that government has a right to invade it unless prohibited by some specific constitutional provision." 381 U.S. at 510 (Black, J., dissenting). Justice Black could find no warrant in the due process clause to support the Court’s authority "to invalidate any legislative act which the judges find irrational, unreasonable or offensive." Id. at 511 (Black, J., dissenting).
23. Id. at 565.
of a person's thoughts."\(^\text{24}\) In *Eisenstadt v. Baird*,\(^\text{25}\) the Court extended *Griswold* beyond the marriage relationship. Justice Brennan's opinion broadly asserted that "[i]f the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."\(^\text{26}\)

These cases did not, however, firmly endorse substantive due process. In *Griswold*, only Justices Harlan and White openly relied on substantive due process.\(^\text{27}\) As Justice Stewart stated in *Roe*, "[i]n view of what had been so recently said in *Skrupa*, the Court's opinion in *Griswold* understandably did its best to avoid reliance on the Due Process Clause of the Fourteenth Amendment as the ground for decision."\(^\text{28}\) Despite the broad language about the right to marry, *Loving* is better explained as an equal protection case, since much of the Court's discussion of due process emphasized equality concerns.\(^\text{29}\) Despite broad language about privacy, the Court's opinion in *Stanley* explicitly relied on the first amendment in concluding that Georgia could not make the private possession of obscene materials a crime.\(^\text{30}\) The Court's opinion in *Eisenstadt* purported to apply traditional equal protection analysis.\(^\text{31}\)

In 1973, however, the Supreme Court clearly affirmed its acceptance of substantive due process. In *Roe v. Wade*,\(^\text{32}\) the Court concluded that a right of privacy "founded in the Fourteenth Amendment's concept of personal liberty" does exist under the Constitution.\(^\text{33}\) The Court stated "that only personal rights that can be deemed 'fundamental' or 'implicit in the concept

\(^{24}\) Id. at 565-66.

\(^{25}\) 405 U.S. 438 (1972).


\(^{27}\) See Lupu, *supra* note 11, at 994 (discussing opinions of Justices White and Harlan).


\(^{29}\) For example, the Court stated: "The fourteenth amendment requires that the freedom of choice to marry not be restricted by invidious racial discriminations." *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (emphasis added).

\(^{30}\) See Stanley v. Georgia, 394 U.S. 557, 565 (1969) ("If the First Amendment means anything, it means that a State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch.").


\(^{32}\) 410 U.S. 113 (1973).

of ordered liberty,' are included in this guarantee of personal privacy." The Court rejected the claim "that one has an unlimited right to do with one's body as one pleases, . . ." but "the Court provide[d] neither an alternative definition [of the general constitutional right involved] nor an account of why it [thought] privacy [was] involved." The Roe Court did say that the right of personal privacy "has some extension to activities relating to marriage, procreation, contraception, family relationships, and child rearing and education . . ." In the end, the Court simply concluded that "[t]his right of privacy . . . is broad enough to encompass a woman's decision whether or not to terminate her pregnancy." After Roe, it became increasingly clear that the doctrine of substantive due process had been reestablished. The Supreme Court's debate about substantive due process shifted from an effort to defend the doctrine's legitimacy to an effort to define the doctrine's scope. The Court did not, however, define the underlying principle with any degree of precision. The Justices' opinions on the issue tended to vary from sweeping defenses of individual liberty, on the one hand, to relatively narrow judgments about the irrationality of legislative means, on the other. For example, Justice Douglas' concurring opinion in Roe and Doe v. Bolton contained broad assertions about individual autonomy. Similarly, Justice Marshall's opinion in Zablocki v. Redhead discussed at length the view "that the right to marry is of fundamental importance for all individuals." On the other hand, Justice White's opinions endorsing substantive due process were cast in far narrower terms. For example, in Griswold, Justice White's opinion conceded

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34. Id. at 152 (quoting Palko v. Connecticut, 302 U.S. 319, 323 (1937)).
35. Id. at 154.
37. Roe, 410 U.S. at 152-53 (citations omitted).
38. Id. at 153. The Court acknowledged that the existence of the fetus makes the abortion decision very different from the issues it faced in prior cases: "The pregnant woman cannot be isolated in her privacy. She carries an embryo and, later, a fetus, if one accepts the medical definitions of the developing young in the human uterus. . . . The situation is inherently different from marital intimacy, or bedroom possession of obscene material, or marriage, or procreation, or education, with which [prior cases] . . . were respectively concerned." Id. at 159. In the end, the presence of the fetus made very little difference. Even though the Court indicated that the state had some interest in protecting the fetus, Roe and Doe v. Bolton, 410 U.S. 179 (1973), effectively established a right to abortion on demand. See, e.g., Stone, Judges as Medical Decision Makers: Is the Cure Worse Than The Disease?, 33 CLEVE. ST. L. REV. 579, 580 (1984-85). Under the Court's abortion decisions, the fetus possesses no rights that the pregnant woman is bound to respect. Cf. Scott v. Sandford, 60 U.S. (19 How.) 393, 407 (1857). See also Knicely, The Thornburgh and Bowers Cases: Consequences for Roe v. Wade, 56 Miss. L.J. 267, 304, 312 (1986) (also analogizing Roe to Dred Scott decision).
that the state had a legitimate interest in discouraging "all forms of pro-
miscuous or illicit sexual relationships," but relied on the state's inability
to establish "how the ban on the use of contraceptives by married couples
in any way reinforces the State's ban on illicit sexual relationships," in
voting to invalidate the statute on due process grounds. Similarly, Justice
Stevens' opinion in Carey v. Population Services International, a case
involving restrictions on distributing contraceptives to minors, focused on
the irrationality of the legislature's means, not on a broad right of minors
to choose to engage in sexual relations. Perhaps the best evidence of the Supreme Court's failure to define the
principle underlying its "privacy" decisions is the debate about whether the
Court's decisions established a broad right of sexual autonomy. As Professor
Thomas Grey has explained, most commentators read the Court's "privacy"
decisions as "leading toward a constitutional right of sexual freedom." Certainly, the Court had never explicitly endorsed a broad right of sexual autonomy. For example, Justice Douglas' opinion in Griswold, which emphasized the "privacy surrounding the marriage relationship," did not set forth a broad right to sexual autonomy. The concurring opinion of Justice Goldberg, which relied in part on the ninth amendment, also continually emphasized the importance of the marital relationship, and rejected the position that the Court's decision interfered with a state's regulation of sexual promiscuity or misconduct. Justice Harlan's famous opinion in Poe v. Ullman, which he incorporated by reference in his concurring opinion in Griswold, also stressed the importance of the marital relationship. In Poe, Justice Harlan specifically stated that he did "not suggest that adultery, homosexuality, fornication and incest are immune from criminal enquiry, however privately practiced." The Court also undercut the broad implica-

43. Id.
44. Id.
46. Grey, supra note 31, at 85. See id. at 98-100 (surveying literature).
47. For example, in 1982, one commentator concluded: "The Supreme Court cases to date concerning sex, marriage, and the family do not support the view that there is a right to engage in any form of sexual expression so long as the actors are adults and the conduct is consensual and private." Katz, Sexual Morality and the Constitution: People v. Onofre, 46 ALB. L. REV. 311, 338 (1982). See also C. Rice, Legalizing Homosexual Conduct: The Role Of The Supreme Court In The Gay Rights Movement 12-16 (1984); Hafen, supra note 31, at 538.
49. Id. at 491, 495, 496, 497, 498, 499 (Goldberg, J., concurring).
50. Id. at 498-99 (Goldberg, J., concurring).
52. Griswold, 381 U.S. at 500 (Harlan, J., concurring in judgment).
54. Id. at 552 (Harlan, J., dissenting). See Gerety, Redefining Privacy, 12 HARV. C.R.-C.L. L. REV. 233, 279 (1977) (explaining that Justice Harlan limited his protection of sexual autonomy to sexual relations within marriage).
tions of Stanley v. Georgia. Of particular interest here was Chief Justice Burger’s majority opinion in Paris Adult Theatre I v. Slaton, which defended the community’s right to regulate morals in order to maintain a decent society. Paris did involve a statute proscribing the commercial exhibition of obscene materials in places of public accommodation. But, as Professor Grey has concluded, “these factors were barely mentioned, and no hope was held out that truly private and noncommercial sex would be treated differently.”

Perhaps the biggest obstacle to the view that the Supreme Court had established a broad right to sexual freedom was the Court’s decision in Doe v. Commonwealth’s Attorney, which summarily affirmed a decision rejecting a constitutional attack on Virginia’s sodomy statute. Thus, in Carey v. Population Services International, Justice Brennan, in an opinion suggesting that state regulation of the sexual activity of adults would need to further a compelling state interest, could only assert “that the Court has not definitively answered the difficult question whether and to what extent the Constitution prohibits state statutes regulating [private consensual sexual] behavior among adults.” Even this cautious assertion did not go unchallenged. Justice Rehnquist’s dissent responded: “While we have not ruled on every conceivable regulation affecting [private consensual sexual behavior among adults] . . . the facial constitutional validity of criminal statutes prohibiting certain consensual acts has been ‘definitively’ established.”

The other opinions in Carey indicated a great deal of uncertainty about the extent to which the Court’s decisions protected freedom in matters of sexuality. For example, Justice White stated that he did not regard Justice Brennan’s opinion “as declaring unconstitutional any state law forbidding extramarital sexual relations.” Justice Powell stated that Justice Brennan’s opinion “quite unnecessarily extends the reach of cases like Griswold and Roe. Neither our precedents nor sound principles of constitutional analysis require state legislation to meet the exacting ‘compelling state interest’ standard whenever it implicates sexual freedom.” Justice Stevens stated

55. As Justice Stevens recently noted, “The Court has adopted a restrictive reading of Stanley, opining that it has no implications to the criminalization of the sale or distribution of obscenity.” Pope v. Illinois, 107 S. Ct. 1918, 1930 (1987) (Stevens, J., dissenting). See Hafen, supra note 31, at 518 (noting Court’s restrictive readings of Stanley); Grey, supra note 31, at 89 (same); Katz, supra note 47, at 336-37 (same).
56. 413 U.S. 49 (1973).
62. Id. at 718 n.2 (Rehnquist, J., dissenting) (citing Doe v. Commonwealth’s Attorney, 425 U.S. 901 (1976)).
63. Id. at 702 (White, J., concurring in part and concurring in result).
64. Id. at 705 (Powell, J., concurring in part and concurring in judgment).
that he "would not leave open the question whether there is a significant state interest in discouraging sexual activity among unmarried persons under 16 years of age. Indeed, I would describe as 'frivolous' appellees' argument that a minor has the constitutional right to put contraceptives to their intended use, notwithstanding the combined objection of both parents and the State."\(^6\)

In a series of later cases, the Court seemed consciously to avoid plenary review of cases involving broad "lifestyle" claims.\(^6\) Both the Court's avoidance of reviewing more expansive sexual freedom claims and the opinions dissenting from the Court's denials of review strongly suggest that a majority of the Court did not view its substantive due process cases as necessarily

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65. Id. at 713 (Stevens, J., concurring in part and concurring in judgment). See also Michael M. v. Superior Court, 450 U.S. 464, 497 (1981) (Stevens, J., dissenting) (stating that he had "no doubt about the validity of a state law prohibiting all unmarried teenagers from engaging in sexual intercourse. . .").

66. For example, in Hollenbaugh v. Carnegie Free Library, 578 F.2d 1374 (3d Cir.), cert. denied, 439 U.S. 1052 (1978), the Supreme Court denied certiorari in a case involving public employees who were discharged from their jobs for maintaining an adulterous relationship. Justice Marshall stated that "[p]etitioners' rights to pursue an open rather than a clandestine personal relationship and to rear their child together in this environment closely resemble the other aspects of personal privacy to which we have extended constitutional protection." Hollenbaugh, 439 U.S. at 1055 (Marshall, J., dissenting from denial of certiorari). In New York v. Onofre, 51 N.Y.2d 476, 415 N.E.2d 936, 434 N.Y.S.2d 947 (1980), cert. denied, 451 U.S. 987 (1981), the Court denied review (over three objections) of a decision that had held unconstitutional a New York statute prohibiting private homosexual conduct. In Whisenhunt v. Spradlin, 701 F.2d 470 (5th Cir.), cert. denied, 464 U.S. 965 (1983), Justice Brennan, who was joined by Justices Marshall and Blackmun, dissented from a denial of certiorari in a case involving public employees who had been suspended and demoted for "their nonmarital 'cohabitation.'" Whisenhunt, 464 U.S. at 967 (Brennan, J., dissenting from denial of certiorari). Justice Brennan explained that "[p]etitioners' lawful, off duty sexual conduct clearly implicated the fundamental constitutional right of privacy. Id. at 971 (Brennan, J., dissenting from denial of certiorari). Justice Brennan stated: "Without identifying the precise contours of this right, we have recognized that it includes a broad range of private choices involving family life and personal autonomy. . . . [O]ur cases reflect the view that constitutionally protected liberty includes freedom from governmental disclosure of or interference with certain kinds of intensely personal decisions. The intimate, consensual, and private relationship between petitioners involved the 'interest in avoiding disclosure of personal matters, and . . . the interest in independence in making certain kinds of important decisions,' that our cases have recognized as fundamental." Id. (Brennan, J., dissenting from denial of certiorari) (quoting Whalen v. Roe, 429 U.S. 589, 599-600 (1977)).

In 1984, in New York v. Uplinger, 467 U.S. 246 (1984), the Court dismissed a writ of certiorari as improvidently granted in a case involving the constitutionality of a New York statute prohibiting loitering "in a public place for the purpose of engaging, or soliciting another person to engage, in deviate sexual intercourse or other sexual behavior of a deviate nature." Uplinger, 467 U.S. at 247 (quoting New York statute). The Court's opinion stated "that this case provides an inappropriate vehicle for resolving the important constitutional issues raised by the parties." Id. at 249. Some lower courts had read the Court's disposition of Uplinger as indicating the unsettled status of state laws prohibiting consensual sodomy. Hardwick v. Bowers, 760 F.2d 1202, 1210 (11th Cir. 1985), rev'd, 478 U.S. 186 (1986). This interpretation of Uplinger did not go unchallenged. See id. at 1216 (Kravitch, J., concurring in part and dissenting in part).
endorsing a broad right to sexual autonomy or intimate association. For example, in 1985, in Rowland v. Mad River Local School District, Justice Brennan’s dissent from the denial of certiorari stated that “[w]hether constitutional rights are infringed in sexual preference cases, and whether some compelling state interest can be advanced to permit their infringement, are important questions that this Court has never addressed, and which have left the lower courts in some disarray.”

The Court’s failure clearly to settle the status of an individual’s right to sexual freedom led to a great deal of confusion in the lower courts. The Court of Appeals of New York’s decision in People v. Onofre and the District of Columbia Circuit’s decision in Dronenburg v. Zech provide an instructive contrast. In Onofre, which involved a constitutional challenge to a statute prohibiting private homosexual conduct, the New York Court of

68. Rowland v. Mad River Local School Dist., 470 U.S. 1009, 1015-16 (1985) (Brennan, J., dissenting from denial of certiorari). Later in the 1984 Term, another dissent from a denial of a petition for a writ of certiorari indicated yet again the unsettled status “regarding the contours of the right of privacy afforded individuals for sexual matters.” City of North Muskegon v. Briggs, 473 U.S. 909, 910 (1985) (White, J., dissenting from denial of certiorari). In Briggs, the lower courts concluded that disciplinary sanctions imposed on a police officer for engaging in extramarital sexual activity violated the police officer’s constitutional right of privacy. City of North Muskegon v. Briggs, 563 F. Supp. 1121 (W.D. Mich. 1983), aff’d without opinion, 769 F.2d 289 (6th Cir. 1985). Justice White’s dissent, which Chief Justice Burger and Justice Rehnquist joined, argued that the Court should have granted certiorari to address a conflict in the circuits. As Justice White stated, there exists “a broad[] disagreement among the lower courts over whether extramarital sexual activity, including allegedly unlawful adulterous activity is constitutionally protected in a way that forbids public employers from disciplining employees who engage in such activity.” Briggs, 473 U.S. at 910 (White, J., dissenting from denial of certiorari) (citing cases).
71. 741 F.2d 1388 (D.C. Cir. 1984).
Appeals read Stanley v. Georgia and Eisenstadt as creating a broad right of sexual autonomy. The court concluded that

[i]n light of [Stanley and Eisenstadt], protecting under the cloak of the right to privacy individual decisions as to indulgence in acts of sexual intimacy by unmarried persons and as to satisfaction of sexual desires by resort to material condemned as obscene by community standards when done in a cloistered setting, no rational basis appears for excluding from the same protection decisions—such as those made by defendants before us—to seek sexual gratification from what at least once was commonly regarded as 'deviant' conduct, so long as the decisions are voluntarily made by adults in a noncommercial, private setting.72

After finding that the right of privacy extended to consensual sodomy, the court considered and rejected New York's justifications for the statute, and accordingly, ruled the statute unconstitutional.

In Dronenburg, the United States Court of Appeals for the District of Columbia Circuit concluded: "'[W]e can find no constitutional right to engage in homosexual conduct..." The Dronenburg court considered Doe v. Commonwealth's Attorney74 to be binding, but the court also went on to say that it "would not extend the right of privacy created by the Supreme Court to cover [Dronenburg's] conduct here."75 The Dronenburg court reviewed the Supreme Court's privacy cases and concluded that they did not contain any unifying principle that the court might interpret to apply to Dronenburg's claim that private consensual homosexual activity was within the zone of privacy protected by the Supreme Court precedents. The court stated: "The Court has listed as illustrative of the right of privacy such matters as activities relating to marriage, procreation, contraception, family relationships, and child rearing and education. It need hardly be said that none of these covers a right to homosexual conduct."76 The Dronenburg court, quoting liberally from Justice White's dissent in Moore v. City of East Cleveland, concluded that a lower court should not create new constitutional rights.77 Since the Supreme Court had not "created a right which, fairly defined, cover[ed] the case before us... [and since] the Supreme Court [had not] specified a mode of analysis, a methodology, which, honestly

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75. Dronenburg, 741 F.2d at 1392.
76. Id. at 1395-96.
77. Id. at 1396 (quoting Moore v. City of E. Cleveland, 431 U.S. 494, 544 (1977) (White, J., dissenting).
applied, reach[ed] the case we must now decide,. . ."78 the D. C. Circuit rejected Dronenburg's claim that the right of privacy extended to homosexual conduct.79

The opinions in Onofre and Dronenburg illustrate the confusion about whether the Supreme Court's "privacy" decisions created a broad right of sexual freedom. Surely, as the D. C. Circuit acknowledged in Dronenburg, one could articulate a broad principle that both explained the Court's decisions and supported the constitutional claim advanced by Dronenburg.80 Yet, the Dronenburg court's construction that the Supreme Court had failed to explain the principle underlying its "privacy" decisions is clearly plausible.

As the Dronenburg court noted, the Supreme Court's substantive due process cases state "that only rights that are 'fundamental' or 'implicit in the concept of ordered liberty' are included in the right of privacy." But, as the Dronenburg court commented, "[t]hese formulations . . . are less prescriptions of a mode of reasoning than they are conclusions about particular rights enunciated." The Supreme Court's opinions in the substantive due process area typically cite illustrations of the conduct protected by the right of privacy, but the explanation for why such conduct is protected does not frequently proceed beyond such statements as Justice Stevens' comment in Whalen v. Roe that the "privacy" decisions protect "the interest in making certain kinds of important decisions."83

Certain opinions have attempted to provide an explanatory theory, although it seems apparent that a majority of the Court never clearly has endorsed any one theoretical approach. For example, in the 1973 abortion

78. Id. at 1396 n.5.
79. The Dronenburg case prompted a good deal of critical commentary. See, e.g., Saphire, Gay Rights and the Constitution: An Essay on Constitutional Theory, Practice, and Dronenburg v. Zech, 10 U. DAYTON L. REV. 767 (1985). In an opinion dissenting from the denial of a suggestion to rehear Dronenburg en banc, four judges on the D.C. Circuit stated: "Instead of conscientiously attempting to discern the principles underlying the Supreme Court's privacy decisions, the panel has in effect thrown up their hands and decided to confine those decisions to their facts. Such an approach to 'interpretation' is as clear an abdication of judicial responsibility as would be a decision upholding all privacy claims the Supreme Court had not expressly rejected." Dronenburg, 746 F.2d at 1580 (Robinson, C.J., Wald, Mikva, Edwards, JJ., dissenting from denial of rehearing).
80. Dronenburg, 741 F.2d at 1396.
81. Id.
82. Id.
cases, Justice Douglas advanced a broad view of the privacy right\textsuperscript{5} reminiscent of John Stuart Mill's classic liberal principle that "the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others."\textsuperscript{86} A majority of the Court, however, never has endorsed the view that the Constitution enacts Mill's \textit{On Liberty}\.\textsuperscript{87} As Professor Grey has noted, "[c]ommentators have read Mill, Hart and the libertarian tradition into the privacy cases ... with almost no encouragement by the Court."\textsuperscript{88}

The more recent opinion by Justice Brennan in \textit{Roberts v. United States Jaycees}\textsuperscript{89} seemed to build on, and even extend, Professor Kenneth Karst's views about the freedom of intimate association. Professor Karst had argued that the Court should recognize (and that in certain cases the Court already had recognized) a "freedom of intimate association," which should extend to any "close and familiar personal relationship with another that is in some significant way comparable to a marriage or family relationship."\textsuperscript{90} Justice Brennan's opinion in \textit{Roberts} seemed to go beyond this type of relationship, since Justice Brennan indicated that the freedom of intimate association protected by the Constitution would extend in varying degrees to a "broad range of human relationships" lying between the poles of the marriage relationship, on the one hand, to a "large business enterprise," on the other.\textsuperscript{91} As Professor William Marshall has noted, "the \textit{Roberts} Court's suggestion ... that a right of intimate association may be implicated by membership in private organizations is an expansion on previous cases."\textsuperscript{92} The more theoretical portions of Justice Brennan's opinion were, however, clearly dictum—the Court, after all, rejected the freedom of association claim.

In any event, it is difficult to read \textit{Roberts} as representing a willingness on the part of Justices White and Powell to endorse an extension of Professor Karst's theories. Justice White, it should be remembered, had commented on an earlier occasion that he could not "believe that the interest in residing

\textsuperscript{5} Doe v. Bolton, 410 U.S. 179, 213 (1973) (Douglas, J., concurring). "It is no accident that Justice Douglas was the most ardent and explicit champion of lifestyle freedom to sit on the Court. He left much in the way of stirring words and phrases, precious little in the way of analytic definition. The void seems unfortunate, because no constitutional issue has been more prone to loose platitude and sweeping assertion than the relationship of law to personal lifestyle choice." Wilkinson & White, \textit{Constitutional Protection for Personal Lifestyles}, 62 \textit{Cornell L. Rev.} 563, 564 (1977) (footnote omitted).

\textsuperscript{86} J. MILL, \textit{ON LIBERTY} 13 (Shields ed. 1956).

\textsuperscript{87} Perry, \textit{Substantive Due Process Revisited: Reflections on (and Beyond) Recent Cases}, 71 NW. U.L. Rev. 417, 434 (1976) (footnote omitted) ("[S]urely the United States Constitution no more enacts \textit{On Liberty} than it enacts Mr. Herbert Spencer's \textit{Social Statics}.")

\textsuperscript{88} Grey, \textit{supra} note 31, at 98.

\textsuperscript{89} 468 U.S. 609 (1984).

\textsuperscript{90} Karst, \textit{The Freedom of Intimate Association}, 89 \textit{Yale L.J.} 624, 629 (1980).


with more than one set of grandchildren is one that calls for any kind of heightened protection under the Due Process Clause. And, Justice Powell had not shown an inclination to develop broad explanatory theories. Justice Powell often emphasized that determining whether a substantive due process right exists requires a careful examination of the asserted interest to decide whether the liberty interest claimed "resemble[s] ... the fundamental interests that previously have been viewed as implicitly protected by the Constitution."

Perhaps the most persuasive explanation of the Supreme Court's substantive due process cases is that the Court seems intent on providing constitutional protection to conduct or relationships that carry the weight of tradition behind them. As Judge Starr wrote in his statement appended to the D.C. Circuit's order denying Dronenburg's suggestion for rehearing en banc:

> It simply cannot seriously be maintained under existing case law that the right of privacy extends beyond such traditionally protected areas as the home or beyond traditional relationships—the relationship of husband and wife, or parents to children, or other close relationships, including decisions in matters of childbearing—or that the analytical doctrines enunciated by the Court lead to the conclusion that government may not regulate sexually intimate consensual relationships.

What the Court has done in its substantive due process cases, according to this theory, is to "conscientiously search for long-term dominant community values that meet the test of fundamental rights. . . ."

This approach does not, however, explain, at least not very convincingly, the Court’s decision in *Roe v. Wade*. The Court’s decision in *Roe* did, however, attempt (albeit awkwardly) to make an historical argument in support of a fundamental right to an abortion, and it is possible to view *Roe* and the contraception cases as "simply family planning cases," which

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97. See Conkle, *supra* note 1, at 228.
focus on "the stability-centered concerns of moderate conservative family and population policy." Perhaps the difficulty of explaining Roe v. Wade in terms of a "tradition-centered" approach is further support for the D.C. Circuit's conclusion that the Supreme Court has been less concerned with specifying a "mode of reasoning," and more concerned with reaching, on a relatively ad hoc basis, "conclusions about particular rights enunciated."

III. THE 1985 TERM

In its 1985 Term, the Supreme Court decided two major substantive due process cases: Thornburgh v. American College of Obstetricians and Gynecologists and Bowers v. Hardwick. In Thornburgh, the Court invalidated most of Pennsylvania's Abortion Control Act. In Bowers, the Court, after finding that there was no fundamental constitutional right to homosexual sodomy, upheld the constitutionality of Georgia's sodomy statute. In many respects, neither decision came as a major surprise. Since Roe v. Wade, the Court has struck down with some regularity state statutes dealing with abortion. And, although some courts and commentators had read the Court's earlier substantive due process decisions as necessarily protecting a right of sexual autonomy, the Court had never gone so far. Although the decisions were not altogether unexpected, the opinions in the two cases were quite surprising. In these two cases, the Justices addressed forthrightly their approaches to such fundamental issues as the nature of constitutional interpretation, the validity and scope of noninterpretivism, and the proper role of religious and moral principles in influencing secular legislation. The Justices' answers to these questions, particularly in Bowers v. Hardwick, have led some observers to suggest that major changes may be underway. This Section sets forth briefly the background, and the Court's resolution, of each case.

A. Thornburgh v. American College of Obstetricians and Gynecologists

In Thornburgh, the Supreme Court considered yet another state law restricting abortion. The Court had reaffirmed the basic holding of Roe on a number of occasions over the next decade. In 1983, in Akron v. Akron Center for Reproductive Health, the Court explicitly reaffirmed Roe. Yet, Roe was regarded by some as a precarious precedent. For example, several commentators have noted that the Court's conclusion that the state has a compelling interest in protecting the fetus at the time of viability threatens

100. Id. at 90. See Hafen, supra note 31, at 533.
103. Id. at 420.
The Court’s approach seemed to leave open the possibility that advances in medical technology could eliminate entirely the right to an abortion. Other commentators have suggested that the Court’s decisions upholding governmental limits on abortion funding call into question the continued vitality of Roe. For example, Dean Harry Wellington has concluded:

The Connecticut welfare regulation [involved in *Maher v. Roe*] and the Hyde Amendment [at issue in *Harris v. McRae*] reflect an understanding of the moral ideals of the community different from the understanding that informs *Roe v. Wade*. By sustaining the constitutionality of these two provisions, the Court has undermined the foundation for the rules it announced in *Roe v. Wade*. It has implied that its earlier understanding of the moral ideals of the community was mistaken. *Roe v. Wade*, accordingly, should be seen as shaky precedent, and the Court should see itself as under an obligation to re-examine the breadth of that 1973 decision.106

Despite these concerns, it appeared likely, after the *Akron* Court’s 1983 reaffirmance of *Roe*, that *Roe* would only be reversed by either a constitutional amendment or a change in the Supreme Court’s personnel. And, in the next abortion cases to reach the Supreme Court, the parties defending state statutes limiting abortions did not contend that *Roe v. Wade* should be reversed. Despite the parties’ position, the Justice Department—in a widely criticized move107—filed an amicus brief asking the Court to overrule *Roe v. Wade*.108

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107. The Justice Department’s brief was savagely attacked in an amicus brief (which was submitted on behalf of 81 members of Congress) prepared by four Harvard Law School professors, including Laurence Tribe. The first paragraph of the brief set its tone: “The Government, in urging that *Roe v. Wade* be overturned, has taken an extraordinary and unprecedented step. For the first time in the history of the Solicitor General’s office, in a case in which the United States is not even a party, and in a case in which the issue was not presented by the parties, the Department of Justice has urged the repudiation of a liberty long since declared fundamental by this Court.” Amicus Brief of Senator Packwood, Representative Edwards, and Certain Other Members of Congress at 3, *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747 (1986) (No. 84-495). See Noonan, *Knee-Jerk*
The Supreme Court’s decision in *Thornburgh v. American College of Obstetricians and Gynecologists*, which was authored by Justice Blackmun,109

*Spsams on Roe v. Wade, 11 HUM. LIFE REV. 92, 92 (Fall 1985) (reprinting article from Los Angeles Times, August 8, 1985) (noting widespread criticism of Justice Department’s brief). Professor (now Judge) Noonan commented that the government’s “brief itself is a tract neither for nor against abortion or women’s rights. It could have been written by someone who is on either side of the abortion controversy. On the merits it is studiously neutral. To the rights of women it is respectful. What the brief is all about is the rule of law in a democracy governed by a constitution.” Id.

108. The Justice Department made two arguments in its brief that it contended justified abandoning *Roe*. First, the Department contended that the Court’s trimester “framework has proved inherently unworkable.” Brief for the United States as Amicus Curiae at 21, *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747 (1986) (No. 84-495). The Department repeated many of the arguments Justice O’Connor made in her dissent in *Akron*. The government explained that “the arbitrary nature of *Roe v. Wade’s* analytical framework is reflected in the increasingly complex line-drawing of its progeny, . . .” id. at 23, and concluded that “the result has been a set of judicially-crafted rules that has become more intricate and complex, taking courts further from what they do best and into the realm of what legislatures do best.” Id. at 20-21.

Second, the Justice Department contended “that the textual, historical and doctrinal basis of . . . [Roe] is so far flawed that [the] Court should overrule it and return the law to the condition in which it was before that case was decided.” Id. at 23-24. In discussing this second argument, the government first made the obvious point that “there is no explicit textual warrant in the Constitution for a right to an abortion.” Id. at 24. The government acknowledged that the words of the Constitution are not self-interpreting; then, in an effort to limit the judiciary’s discretion, stated that “constitutional interpretation retains the fullest measure of legitimacy when it is disciplined by fidelity to the framers’ intention as recorded by history, or, failing sufficient help from history, by the interpretive tradition of the legal community.” Id. at 24. The government then explained *Roe’s* vulnerability under this approach.

The Justice Department did not attack the entire notion of substantive due process. Instead, the Department suggested that “due process analysis, while it must recognize the need to go beyond scrutiny of the few relevant words of the Clause, must nevertheless seek a connection with the intentions of those who framed and ratified the constitutional text.” Id. at 25. Such an approach strongly suggests that “liberty” does not include the right to an abortion, since laws limiting abortions were prevalent in 1868. The government then discussed “tradition,” and concluded that “‘the compelling traditions of the legal profession,’ permit no extrapolation from the past to the Court’s conclusion in *Roe v. Wade.*” Id. at 27 (quoting *Rochin v. California*, 342 U.S. 165, 171 (1952)).

The Department then discussed “the inferential route, by which a specific constitutional text is seen to harbor the germ of a theory that establishes a general and fundamental right, . . .” Brief for the United States at 28, a position the brief ascribed to Justice Harlan’s dissent in *Poe v. Ullman*. Id. at 28 (citing Poe v. Ullman, 367 U.S. 497, 541-43 (1961) (Harlan, J., dissenting)). This approach, because it “is directly rooted in textually specified constitutional values, . . .” Brief for the United States at 28, does not afford the judiciary free rein. Under such a standard, according to the Department, *Roe* represents “an abrupt departure from the Court’s prior decisions.” Id. at 28 (footnote omitted). The government contended that the privacy cases on which *Roe* relied “were applications of accepted principles, whether of equal protection or of freedom of expression at the core of the First Amendment.” Id. at 28-29 (footnotes omitted).

The Department closed its discussion by invoking the ghost of *Lochner*. The brief did acknowledge the deeply-held beliefs of those who support *Roe*. This conviction, however, “is at best an intuition based in controversial moral and social theories of the good life and of an individual’s situation in society, theories ‘which a large part of the country does not entertain.’”
SUBSTANTIVE DUE PROCESS

rejected the Justice Department's suggestion that Roe should be reversed, although none of the opinions in the case mentioned the government's brief. In Thornburgh, the Court held unconstitutional six provisions of the Pennsylvania Abortion Control Act of 1982.\textsuperscript{110} The most interesting aspects of the Court's decision were what appeared to be indirect responses to the government's brief.

For the second time in three years, the Court specifically affirmed the general principles of Roe v. Wade.\textsuperscript{111} The Court acknowledged the persistent state and local efforts to regulate abortions and the widespread disagreement Roe had engendered, but concluded that "those disagreements . . . do not relieve us of our duty to apply the Constitution faithfully."\textsuperscript{112} Without directly engaging the Department's arguments about the proper scope of substantive due process, the Court concluded:

Our cases long have recognized that the Constitution embodies a promise that a certain private sphere of individual liberty will be kept largely beyond the reach of government. . . . That promise extends to women as well as to men. Few decisions are more personal and intimate, more properly private, or more basic to individual dignity and autonomy, than a woman's decision—with the guidance of her physician and within the limits specified in Roe—whether to end her pregnancy. A woman's right to make that choice freely is fundamental. Any other result, in our view, would protect inade-

\textsuperscript{110} Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747, 758 (1986). The Court addressed six provisions of the Pennsylvania statute: "§ 3205 ("informed consent"); § 3208 ("printed information"); § 3214(a) and (h) (reporting requirements); § 3211(a) (determination of viability); § 3210(b) (degree of care required in postviability abortions); and § 3210(c) (second-physician requirement)."

\textsuperscript{111} Thornburgh, 476 U.S. at 759.

\textsuperscript{112} Id. at 772.
quately a central part of the sphere of liberty that our law guarantees equally to all.\textsuperscript{113}

Chief Justice Burger filed a short dissent, in which he expressed reservations about the Court's abortion decisions: "[t]he Court's opinion today . . . plainly undermines [the] important principle [that Roe had rejected abortion on demand], and I regretfully conclude that some of the concerns of the dissenting Justices in Roe, as well as the concerns I expressed in my separate opinion, have now been realized."\textsuperscript{114} Chief Justice Burger briefly discussed some of the provisions of the Pennsylvania statute, and concluded: "In discovering constitutional infirmities in state regulations of abortion that are in accord with our history and tradition, we may have lured judges into 'roaming at large in the constitutional field.' . . . The soundness of our holding must be tested by the decisions that purport to follow them. If Danforth and today's holding really mean what they seem to say, I agree we should reexamine Roe."\textsuperscript{115}

Justice White's dissent, which was joined by Justice Rehnquist, made two basic arguments: (1) that the Court's venture in substantive due process that began with Roe "has been fundamentally misguided since its inception;"\textsuperscript{116} and (2) "that even accepting Roe v. Wade, the concerns underlying that decision by no means command or justify the results reached today."\textsuperscript{117}

Justice White began his argument that Roe should be overruled by making some preliminary remarks about constitutional interpretation.

\textsuperscript{113} Id. (citations omitted).
\textsuperscript{114} Id. at 782-783 (Burger, C.J., dissenting).
\textsuperscript{115} Id. at 785 (Burger, C.J., dissenting) (quoting Griswold v. Connecticut, 381 U.S. 479, 502 (1965) (Harlan, J., concurring)). It was not clear that Chief Justice Burger would have voted to overturn Roe. The former Chief Justice had never expressed his opposition to Roe's basic holding. For example, even in Thornburgh, the Chief Justice quoted the view he had expressed in 1977 that "[t]he Court's holdings in Roe . . . and Doe v. Bolton . . . simply require that a State not create an absolute barrier to a woman's decision to have an abortion." Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747, 782 (1986) (Burger, C.J., dissenting) (quoting Maher v. Roe, 432 U.S. 464, 481 (1977) (Burger, C.J., concurring)). The ambiguity of Chief Justice Burger's statement with respect to reexamining Roe is compounded because Chief Justice Burger had already communicated his decision to retire to President Reagan when the Court decided Thornburgh. According to press reports, Chief Justice Burger told President Reagan in May 1987, that he would resign at the end of the Term. See Reagan's Mr. Right, Time, June 30, 1986, at 25. The Court decided Thornburgh on June 11, 1986.

\textsuperscript{117} Id. (White, J., dissenting). Justice White concluded: "The decision today appears symptomatic of the Court's own insecurity over its handiwork in Roe v. Wade and the cases following that decision. Aware that in Roe it essentially created something out of nothing and that there are many in this country who hold that decision to be basically illegitimate, the Court responds defensively. Perceiving, in a statute implementing the State's legitimate policy of preferring childbirth to abortion, a threat to or criticism of the decision in Roe v. Wade, the majority indiscriminately strikes down statutory provisions that in no way contravene the right recognized in Roe. I do not share the warped point of view of the majority, nor can I follow the tortuous path the majority treads in proceeding to strike down the statute before us. I dissent." Id. at 813-814 (White, J., dissenting).
As its prior cases clearly show, however, this Court does not subscribe to the simplistic view that constitutional interpretation can possibly be limited to the 'plain meaning' of the Constitution's text or to the subjective intention of the framers. The Constitution is not a deed setting forth the precise metes and bounds of its subject matter; rather, it is a document announcing fundamental principles in value-laden terms that leave ample scope for the exercise of normative judgment by those charged with interpreting and applying it.\textsuperscript{118}

But Justice White expressed his concern that in exercising judgment the Court not, "in the name of identifying constitutional principles to which the people have consented in framing their Constitution, . . . impose its own controversial choices of value upon the people."\textsuperscript{119}

Justice White, after noting the need for the Court to exercise restraint in defining "fundamental liberties,"\textsuperscript{120} discussed two limiting approaches. "One approach has been to limit the class of fundamental liberties to those interests that are 'implicit in the concept of ordered liberty' such that 'neither liberty nor justice would exist if they were sacrificed.'"\textsuperscript{121} Another, broader approach is to define fundamental liberties as those that are 'deeply rooted in this nation's history and tradition.'\textsuperscript{122} Although he did not explicitly endorse these two approaches,\textsuperscript{123} Justice White concluded "that either of the basic definitions of fundamental liberties, taken seriously, indicates the illegitimacy of the Court's decision in \textit{Roe v. Wade}."\textsuperscript{124}

\begin{itemize}
  \item[\textsuperscript{118}]
  Id. at 789 (White, J., dissenting). Justice White's comment seemed to be an intentional rebuttal to Attorney General Meese's call for a return to a jurisprudence of original intention. See generally THE GREAT DEBATE: INTERPRETING OUR WRITTEN CONSTITUTION (Federalist Society, Occasional Paper No. 2, 1986) (collection of speeches, including two by Attorney General Meese outlining the Justice Department's approach to constitutional interpretation).
  \item[\textsuperscript{119}]
  \item[\textsuperscript{120}]
  Id. (White, J., dissenting). Justice White explained that the substantive scope of the due process clause is quite narrow: "State action impinging on individual interests need only be rational to survive scrutiny under the Due Process Clause, and the determination of rationality is to be made with a heavy dose of deference to the policy choices of the legislature." Id. at 789 (White, J., dissenting). Justice White even agreed "that a woman's ability to choose an abortion is a species of 'liberty' that is subject to the general protections of the Due Process Clause. [But, according to Justice White] . . . this liberty is [not] so 'fundamental' that restrictions upon it call into play anything more than the most minimal judicial scrutiny." Id. at 790 (White, J., dissenting).
  \item[\textsuperscript{121}]
  Id. (White, J., dissenting) (quoting Palko v. Connecticut, 302 U.S. 319, 325, 326 (1937)).
  \item[\textsuperscript{122}]
  Id. at 790-91 (White, J. dissenting) (quoting Moore v. City of E. Cleveland, 431 U.S. 494, 503 (1977) (opinion of Powell, J.).
  \item[\textsuperscript{123}]
  In fact, Justice White stated that he thought it was "debatable" whether these approaches would "prevent 'judges from roaming at large in the constitutional field. . . .'" Id. at 791 (White, J., dissenting) (quoting Griswold v. Connecticut, 381 U.S. 479, 502 (1965) (Harlan, J., concurring)).
  \item[\textsuperscript{124}]
  Id. (White, J., dissenting).
\end{itemize}
Before discussing these two approaches, Justice White first noted that the Court's other privacy decisions (even if each decision had been correctly decided) did not justify the conclusion that a woman's right to terminate a pregnancy should be regarded as "fundamental." For Justice White, the presence of the fetus means that the abortion "decision must be recognized as sui generis, different in kind from the others that the Court has protected under the rubric of personal or family privacy and autonomy." After rejecting the reliance on precedent to support Roe, Justice White observed that the abortion decision is neither "implicit in the concept of ordered liberty" nor "deeply rooted in this Nation's history and tradition." According to Justice White, therefore, the Court's decision to characterize abortion as a fundamental liberty does not involve "constitutional interpretation, but . . . the unrestrained imposition of its own, extraconstitutional value preferences."

Justice White also concluded that "[a] second, equally basic error infects the Court's decision in Roe v. Wade." According to Justice White, the state's interest in the fetus is compelling throughout pregnancy, both before and after viability. Justice White took issue with the view expressed in Justice Stevens' concurring opinion in Thornburgh that the conclusion that the state's interest in protecting fetal life is compelling throughout pregnancy rests on a theological argument. Justice White explained that "it is self-evident that neither the legislative decision to assert a state interest in fetal life before viability nor the judicial decision to recognize that interest as

125. Justice White had earlier stated that stare decisis should not be regarded as a bar to overruling Roe. Id. at 786-88 (White, J., dissenting). As Justice White noted, the Court has never rigidly adhered to stare decisis in constitutional cases. Id. at 787 (White, J., dissenting). And, according to Justice White, stare decisis should be even less binding when the Court has engaged in noninterpretive review: "decisions that find in the Constitution principles or values that cannot fairly be read into that document usurp the people's authority, for such decisions represent choices that the people have never made and that they cannot disavow through corrective legislation. For this reason, it is essential that this Court maintain the power to restore authority to its proper possessors by correcting constitutional decisions that, on reconsideration, are found to be mistaken." Id. (White, J., dissenting). In Justice White's view, "the time has come to recognize that Roe v. Wade . . . 'departs from a proper understanding' of the Constitution and to overrule it." Id. at 788 (White, J., dissenting) (quoting Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 557 (1985)).

126. Id. at 792 (White, J., dissenting) (footnote omitted). According to Justice White, because the abortion "decision involves the destruction of the fetus, . . . it [is] different in kind from the decision not to conceive in the first place. This difference does not go merely to the weight of the state interest in regulating abortion; it affects as well the characterization of the liberty interest itself." Id. at 792 n.2 (White, J., dissenting).

127. Id. at 793 (White, J., dissenting).

128. Id. at 794 (White, J., dissenting) (footnote omitted).

129. Id. (White, J., dissenting).

130. Id. at 795 (White, J., dissenting).

131. In rejecting Justice White's position that the state has a compelling interest in protecting the fetus throughout pregnancy, Justice Stevens stated: "I recognize that a powerful theological argument can be made for that position, but I believe our jurisdiction is limited to the evaluation of secular state interests." Id. at 778 (Stevens, J., concurring).
compelling constitutes an impermissible 'religious' decision merely because it coincides with the belief of one or more religions.'

Justice White also observed that the majority's decision "necessarily entails a negative resolution of the 'religious' issue of the humanity of the fetus," and that deference to the legislative choice is the most appropriate tack. Justice White would return the issue to the "will of the people, either as expressed through legislation or through the general principles they have already incorporated into the Constitution they have adopted."

B. Bowers v. Hardwick

Prior to Bowers v. Hardwick, the Supreme Court had never conclusively determined whether the right to privacy protected private, consensual homosexual activity. The Court's summary affirmance in Doe v. Commonwealth's Attorney had been criticized as "irresponsible" and "lawless." The lower courts' disagreements in this area and spirited academic commentary made it inevitable that the Court would give plenary consideration to the issue. The Supreme Court finally did so in Bowers v. Hardwick. In a 5-4 decision, the Court concluded that the Constitution does not confer a fundamental right to engage in homosexual sodomy and upheld the consti-

132. Id. at 795 n.4 (White, J., dissenting).
133. Id. at 795-96 n.4 (White, J., dissenting).
134. Id. at 796 (White, J., dissenting) (footnote omitted). Justice O'Connor's dissent, which was joined by Justice Rehnquist, did not join in Justice White's call for the reversal of Roe v. Wade. In fact, Justice O'Connor explicitly noted that "because Pennsylvania has not asked the Court to reconsider or overrule Roe v. Wade,... [she would] not address that question." Id. at 828 (O'Connor, J., dissenting) (citation omitted). Justice O'Connor did reiterate, however, her view that "[t]he State has compelling interests in ensuring maternal health and in protecting potential human life, and [that] these interests exist "throughout pregnancy." Id. (O'Connor, J., dissenting) (quoting Akron v. Akron Center for Reproductive Health, Inc., 462 U.S. 416, 461 (1983) (O'Connor, J., dissenting)). In considering the particular provisions involved in Thornburgh, Justice O'Connor applied the "unduly burdensome" standard she discussed in her dissenting opinion in Akron, and concluded that a preliminary injunction should not have been issued against enforcement of the provisions of the Pennsylvania abortion statute. Id. at 829-32 (O'Connor, J., dissenting).
135. G. GUNTER, supra note 41, at 559.
136. Michael Hardwick, who had been charged with violating the Georgia sodomy statute, brought suit challenging the constitutionality of the statute after the local district attorney decided not to present the matter of Hardwick's alleged criminal conduct to the grand jury. For a detailed account of the facts of the case, see Coleman, Disordered Liberty: Judicial Restrictions on the Rights of Privacy and Equality in Bowers v. Hardwick and Baker v. Wade, 12 T. MARSHALL L. Rev. 81, 88-92 (1986). Hardwick's suit was joined by John and Mary Doe, a married couple, who "claimed that they desired to engage in sexual activity proscribed by the statute but had been 'chilled and deterred' by the existence of the statute and the recent arrest of Hardwick." Hardwick v. Bowers, 760 F.2d 1202, 1204 (11th Cir. 1985). The Does' claim was dismissed for lack of standing, a ruling not challenged in the Supreme Court. "The only claim properly before the Court, therefore, is Hardwick's challenge to the Georgia statute as applied to consensual homosexual sodomy. We express no opinion on the constitutionality of the Georgia statute as applied to other acts of sodomy." Bowers v. Hardwick, 478 U.S. 19881, 186, 188 n.2 (1986). The Supreme Court did not discuss the ripeness issue.
stitutionality of the Georgia statute as applied to consensual homosexual sodomy.

Justice White's majority opinion, which was joined by Chief Justice Burger and Justices Powell, Rehnquist and O'Connor, first rejected the argument that the Supreme Court's privacy cases could be extended to include the right to engage in homosexual sodomy. The majority stated: "We think it evident that none of the rights announced in [the Court's prior privacy] cases bears any resemblance to the claimed constitutional right of homosexuals to engage in acts of sodomy that is asserted in this case."137 The Bowers Court specifically rejected the contention that these cases had established a right of sexual autonomy.138

Having rejected, rather summarily, the argument based on precedent, the majority opinion then considered whether it should "announce . . . a fundamental right to engage in homosexual sodomy."139 Although it acknowledged that the Court had given substantive content to the due process clauses of the Constitution, the majority discussed the Court's past efforts to "assure itself and the public that announcing rights not readily identifiable in the Constitution's text involves much more than the imposition of the Justices' own choice of values . . . ."140 The majority then referred to the two formulations of fundamental rights Justice White had discussed in his dissent in Thornburgh, namely, "those fundamental liberties that are 'implicit in the concept of ordered liberty,' such that 'neither liberty nor justice would exist if [they] were sacrificed,' . . ."141 and "those liberties that are 'deeply rooted in this Nation's history and tradition.'"142 It was obvious to the majority, which emphasized the age old proscriptions against such conduct, "that neither of these formulations would extend a fundamental right to homosexuals to engage in acts of consensual sodomy."143

The majority refused to go beyond these two formulations in defining the substantive content of the due process clause. "The Court is most

137. Bowers v. Hardwick, 478 U.S. 186, 190-91 (1986). The Supreme Court referred to eight prior "privacy" cases, and to the description of these cases in Carey v. Population Services International. The majority stated: "Pierce v. Society of Sisters and Meyer v. Nebraska were described as dealing with child rearing and education; Prince v. Massachusetts with family relationships; Skinner v. Oklahoma ex rel. Williamson with procreation; Loving v. Virginia with marriage; Griswold v. Connecticut and Eisenstadt v. Baird with contraception; and Roe v. Wade with abortion." Id. at 190 (citations omitted) (referring to Carey v. Population Servs. Int'l, 431 U.S. 671, 685 (1977)). According to the Court, "No connection between family, marriage, or procreation on the one hand and homosexual activity on the other has been demonstrated. . . ." Id. at 191. This language suggests that the Supreme Court adopted a position similar to that suggested by Dean Hafen, see infra notes 241-43 and accompanying text, although the Court did not explicitly adopt such an approach.


139. Id.

140. Id.

141. Id. at 191-92 (quoting Palko v. Connecticut, 302 U.S. 319, 325, 326 (1937)).

142. Id. at 192 (quoting Moore v. City of E. Cleveland, 431 U.S. 494, 503 (1977) (opinion of Powell, J.)).

143. Id.
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."^{144} The right allegedly involved in *Bowers* did not justify expanding the substantive reach of the due process clause.^{145}

The Court then considered Hardwick’s argument that the Georgia statute did not have a rational basis. Hardwick had contended that the majority's moral views on homosexuality were an inadequate justification for the Georgia statute. The majority quickly rejected this argument: “The law . . . is constantly based on notions of morality, and if all laws representing essentially moral choices are to be invalidated under the Due Process Clause, the courts will be very busy indeed.”^{146}

Chief Justice Burger, who joined the Court’s opinion, also wrote a separate concurrence that emphasized that “[d]ecisions of individuals relating to homosexual conduct have been subject to state intervention throughout the history of Western Civilization.”^{147} According to the Chief Justice, “[t]o hold that the act of homosexual sodomy is somehow protected as a fundamental right would be to cast aside millennia of moral teaching.”^{148} Justice Powell, who joined in Justice White’s opinion, also wrote a concurring opinion suggesting that imposing the criminal penalties provided in the Georgia statute “would create a serious Eighth Amendment issue.”^{149} That issue was not, however, properly before the Court.^{150}

There were two dissenting opinions in *Hardwick*. Justice Blackmun’s dissent, which was joined by Justices Brennan, Marshall, and Stevens, made a full-scale attack on the majority opinion. In Justice Blackmun’s view, the

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144. *Id.* at 194.

145. Justice White also rejected Hardwick’s reliance on *Stanley v. Georgia*. *Id.* at 195-96. According to Justice White, *Stanley* “was firmly grounded in the First Amendment.” *Id.* at 195. In any event, “otherwise illegal conduct is not always immunized whenever it occurs in the home.” *Id.* Justice White concluded: “if [Hardwick’s] submission [that homosexual conduct should be regarded as a fundamental right as long as the conduct occurs in a private home] is limited to the voluntary sexual conduct between consenting adults, it would be difficult, except by fiat, to limit the claimed right to homosexual conduct while leaving exposed to prosecution adultery, incest, and other sexual crimes even though they are committed in the home. We are unwilling to start down that road.” *Id.* at 195-96.

146. *Id.* at 196. The Court did not consider the implications of other constitutional provisions, stating that “[r]espondent does not defend the judgment below based on the Ninth Amendment, the Equal Protection Clause or the Eighth Amendment.” *Id.* at 196 n.8.

147. *Id.* at 196 (Burger, C.J., concurring).

148. *Id.* at 197 (Burger, C.J., concurring).

149. *Id.* (Powell, J., concurring).

150. Justice Powell noted that Hardwick had “not been tried, much less convicted and sentenced.” *Id.* at 198 (Powell, J., concurring). Justice Powell also noted that “[t]he history of nonenforcement [of the Georgia statute] suggests the moribund character today of laws criminalizing this type of private, consensual conduct.” *Id.* at 198 n.2 (Powell, J., concurring). Justice Powell then seemed to question Hardwick’s strategy of seeking judicial affirmation of homosexual conduct. After noting that “[26 states have repealed similar statutes, . . . [Justice Powell concluded:] But the constitutional validity of the Georgia statute was put in issue by respondents, and for the reasons stated by the Court, I cannot say that conduct condemned for hundreds of years has now become a fundamental right.” *Id.* (Powell, J., concurring).
majority’s focus on whether the Constitution protects homosexual sodomy obscured the real issue at stake: “this case is about ‘the most comprehensive of rights and the right most valued by civilized men,’ namely, ‘the right to be let alone.’”\(^{151}\) According to Justice Blackmun, Hardwick’s claim should have been analyzed “in light of the values that underlie the constitutional right to privacy. If that right means anything, it means that, before Georgia can prosecute its citizens for making choices about the most intimate aspects of their lives, it must do more than assert that the choice they have made is an ‘abominable crime not fit to be named among Christians.’”\(^{152}\)

Justice Blackmun first objected to the majority’s focus on homosexual activity\(^{153}\) and the majority’s failure to consider the applicability of the eighth or ninth amendments or the equal protection clause.\(^{154}\) The bulk of Justice Blackmun’s dissent, however, was devoted to supporting his conclusion that the right of privacy protects private, consensual sexual activity. According to Justice Blackmun, “[t]he case before us implicates both the decisional and the spatial aspects of the right to privacy.”\(^{155}\)

In discussing the decisional aspect of the right to privacy, Justice Blackmun maintained that the Court’s prior substantive due process cases recognized an individual’s right to decide on the nature of his intimate associations, and that the majority’s failure to protect Hardwick’s choice was inconsistent with a proper understanding of those cases.\(^{156}\) Similarly, in Justice Blackmun’s view, the majority’s discussion of Stanley v. Georgia also failed “to consider the broad principles that have informed our treatment of privacy in specific cases.”\(^{157}\) According to Justice Blackmun, “the right of an individual to conduct intimate relationships in the intimacy of his or her own home seems to me to be the heart of the Constitution’s protection of privacy.”\(^{158}\)

Justice Blackmun also rejected the adequacy of the state’s justification.\(^{159}\) Justice Blackmun first rejected the state’s factual support for its contention that the acts made criminal “may have serious adverse consequences for ‘the

\(^{151}\) Id. at 199 (Blackmun, J., dissenting) (quoting Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting)).

\(^{152}\) Id. at 199-200 (Blackmun, J., dissenting) (quoting Herring v. State, 119 Ga. 709, 721, 46 S.E. 876, 882 (1904)).

\(^{153}\) Id. at 200 (Blackmun, J., dissenting). Justice Blackmun noted that the sodomy statute did not only apply to homosexual conduct. The state of Georgia defended the statute only as it applied to homosexual sodomy, see id. at 200-01 (Blackmun, J., dissenting), and the majority’s opinion only considered the validity of the “statute as applied to consensual homosexual sodomy.” Id. at 188 n.2.

\(^{154}\) Id. at 201-02 (Blackmun, J., dissenting).

\(^{155}\) Id. at 204 (Blackmun, J., dissenting).

\(^{156}\) Id. at 204-06 (Blackmun, J., dissenting).

\(^{157}\) Id. at 206 (Blackmun, J., dissenting).

\(^{158}\) Id. at 208 (Blackmun, J., dissenting).

\(^{159}\) Justice Blackmun stated: “[N]either of the two general justifications for [the Georgia statute] that petitioner has advanced warrants dismissing respondent’s challenge for failure to state a claim.” Id. (Blackmun, J., dissenting).
general public health and welfare. . . .”\textsuperscript{160} Second, Justice Blackmun rejected the legitimacy of the state’s argument that the sodomy statute helped Georgia “to maintain a decent society.”\textsuperscript{161} To Justice Blackmun, the religious and moral foundations for the statute were the occasion for great alarm: “far from buttressing his case, petitioner’s invocation of Leviticus, Romans, St. Thomas Aquinas, and sodomy’s heretical status during the Middle Ages undermines his suggestion that [the sodomy statute] represents a legitimate use of secular coercive power.”\textsuperscript{162} Religious intolerance, which Justice Blackmun suggested this case involved, is not a legitimate basis for regulating private\textsuperscript{163} conduct involving “no real interference with the rights of others. . . .”\textsuperscript{164}

IV. POST-BOWERS DEVELOPMENTS

A. Supreme Court Cases

During its 1986 Term, the Supreme Court decided several cases that raised substantive due process issues. None of these decisions is likely to be regarded as of major doctrinal significance. The cases do indicate, however, that—at least at the moment—\textit{Bowers} is not regarded as a major turning point. In fact, the Court did not cite \textit{Bowers} in any of the substantive due process cases in the 1986 Term.

In \textit{Turner v. Safley},\textsuperscript{165} the Court held that a Missouri prison regulation permitting inmates to marry only with the prison superintendent's permission,
which could only be given for "compelling reasons," violated the prisoners' constitutional right to marry.\(^{166}\) Although the Justices' split 5-4 over the proper standard of review,\(^{167}\) all nine Justices held that the marriage regulation violated the fundamental constitutional right to marry.

In *United States v. Salerno*,\(^{168}\) the Court rejected a substantive due process challenge to the provision of the Bail Reform Act of 1984 authorizing pretrial detention.\(^{169}\) In an opinion by Chief Justice Rehnquist, the Supreme Court acknowledged that the Court had long given substantive content to the due process clause. According to the Court, "*[s]o-called 'substantive due process' prevents the government from engaging in conduct that 'shocks the conscience,' or interferes with rights 'implicit in the concept of ordered liberty. . . .*"\(^{170}\)

In addressing the merits of the substantive due process issues involved, the *Salerno* Court first rejected the argument that pretrial detention constituted impermissible punishment prior to trial; according to the Court, "pretrial detention under the Bail Reform Act is regulatory, not penal. . . ."\(^{171}\) The Court then rejected the argument that the due process

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166. Justice O'Connor's majority opinion first defined the appropriate standard of review in prison cases: "when a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests." *Turner v. Safley*, 107 S. Ct. 2254, 2261 (1987). The *Safley* Court, which found that the fundamental right to marry recognized in *Zablocki* and *Loving* applied to prison inmates, *id.* at 2265, stated that the prison's "marriage restriction . . . does not satisfy the reasonable relationship standard, but rather constitutes an exaggerated response to petitioners' rehabilitation and security concerns." *Id.* at 2263. Justice O'Connor's opinion indicated that a higher standard of review might apply to the marriage regulation because the interests of nonprisoners were implicated, but concluded that the Court "need not reach this question, however, because even under the reasonable relationship test, the marriage regulation does not withstand scrutiny." *Id.* at 2266.

167. *Id.* at 2268 (Stevens, J., concurring in part and dissenting in part). Justice Stevens, whose opinion was joined by Justices Brennan, Marshall and Blackmun, objected to the majority's standard of review, but joined the portion of the majority's opinion striking down the marriage regulation "because the Court's invalidation of the marriage regulation does not rely on a rejection of a standard of review more stringent than the one announced in Part II [of the majority's opinion]." *Id.* at 2268 (Stevens, J., concurring in part and dissenting in part). In *O'Lone* v. Estate of Shabazz, 107 S. Ct. 2400 (1987), the Court also split over the standard applicable to prison inmates' claims that their constitutional rights had been violated. Compare *O'Lone*, 107 S. Ct. at 2404 (in which Chief Justice Rehnquist, writing for Justices White, Powell, O'Connor, and Scalia, restated *Turner v. Safley* standard) with *O'Lone*, 107 S. Ct. at 2407-10 (Brennan, J., dissenting) (advocating more rigorous scrutiny of prisoners' constitutional claims).


clause prevented pretrial detention as a regulatory measure, regardless of the strength of the government’s interest. The Court recognized the importance and fundamental nature of the liberty interest presented, but held that the government’s interest in crime prevention was sufficiently weighty to justify the restraint on individual liberty. According to the *Salerno* Court, the pretrial detention authorized by the Act was within “the well-established authority of the government, in special circumstances to restrain individual’s liberty prior to or even without criminal trial and conviction. . . .”172 Because Congress had carefully defined the situations in which detention would be permitted, the Court could not “categorically state that pretrial detention ‘offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.’”173

In *Board of Directors of Rotary International v. Rotary Club*,174 the Supreme Court rejected a constitutional challenge to the application of California’s antidiscrimination statute to a local Rotary Club. In *Rotary Club*, the Court applied the framework set forth in *Roberts v. United States Jaycees*,175 *Roberts*, in rejecting the constitutional arguments of Jaycees who wished to exclude women as full voting members, discussed the freedom of association arguments presented in two distinct senses: (1) a right to intimate or private association; and (2) a right of expressive association. While the Supreme Court in *Roberts* identified the first amendment as the source of the second aspect of freedom of association, the source of the right of intimate association was not precisely identified. The Court’s discussion in *Roberts* clearly indicated, however, that this right is an aspect of substantive due process.176 In *Rotary Club*, the Supreme Court discussed both aspects as rooted in the first amendment, but in discussing the freedom of private association, the Court referred to the Bill of Rights more generally and cited nearly all of the substantive due process cases.177 After considering the factors identified in *Roberts*,178 the Court in *Rotary Club* concluded that “[t]he evidence in this case indicates that the relationship among Rotary Club members is not the kind of intimate or private relation that warrants constitutional protection.”179

172. Id. at 2102.

173. Id. at 2103 (quoting Synder v. Massachusetts, 291 U.S. 97, 105 (1934)). *Salerno* was a 6-3 decision. Justice Marshall filed a dissent, in which Justice Brennan joined. Justice Stevens filed a separate dissent, which stated that Justice Marshall’s “conclusion [that the preventive detention statute violated both the eighth amendment and the due process clause], and not the Court’s, is faithful to the ‘. . . traditions of our people and our law.’” Id. at 2113 (Stevens, J., dissenting) (quoting *Lochner v. New York*, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting)).


178. See id. at 1946 (listing factors).

179. Id. at 1946. With respect to expressive association, the Court found that “the evidence
In Bowen v. Gilliard, the last of the substantive due process decisions from the 1986 Term, the Supreme Court rejected a constitutional challenge to an amendment to the AFDC program that required that a family's eligibility for benefits must reflect, with certain exceptions, the income of all parents, brothers, and sisters living in the same home. The Court concluded that that requirement did not violate the fifth amendment when "applied to require a family wishing to receive AFDC benefits to include within its unit a child for whom child support payments are being made by a noncustodial parent." In considering the due process challenge, the Bowen Court held that the statutory scheme satisfied the rational basis test. The Court rejected the argument "that some form of 'heightened scrutiny' [was] appropriate because the amendment interferes with a family's fundamental right to live in the type of family unit it chooses." The Bowen court acknowledged that the benefit scheme might affect families' living arrangements, but concluded that these "indirect effects," unlike the direct prohibitions involved in other substantive due process cases, did not warrant heightened scrutiny.

fails to demonstrate that admitting women to Rotary Clubs will affect in any significant way the existing members' ability to carry out their various purposes." Id. at 1947. Moreover, the Court concluded that "[e]ven if the [California antidiscrimination statute] does work some slight infringement on Rotary members' right of expressive association, that infringement is justified because it serves the State's compelling interest in eliminating discrimination against women." 107 S. Ct. at 1947. The Supreme Court had another opportunity to address the associational rights of private clubs during the 1987 Term. In New York State Club Ass'n v. City of New York, 108 S. Ct. 2225 (1988), the Court rejected a facial challenge to a New York City law that prohibited discrimination by certain private clubs. Relying on Roberts and Rotary Club, the Supreme Court concluded that the law was not unconstitutional in all its applications. 108 S. Ct. at 2233. The Court noted, however, that particular associations could bring individual suits to challenge the constitutionality of the New York City law. 108 S. Ct. at 2235.

180. Bowen v. Gilliard, 107 S. Ct. 3008 (1987). In many respects a Supreme Court decision from the 1987 Term, Lyng v. International Union, UAW, 108 S. Ct. 1184 (1988), is similar to Bowen v. Gilliard. In Lyng, the Court, in a 5-3 decision, held that an amendment to the Food Stamp Act of 1981 did not violate the Constitution. The amendment precluded a household from becoming eligible for food stamps during the time that a member of the household was on strike and also prohibited any increase in food stamp allotment because the income of the striking member had decreased. Compare Lyng v. International Union, UAW, 108 S. Ct. at 1189 (relying on rationale of Lyng v. Castillo, 477 U.S. 635 (1986) that rational basis review applied because impact of federal statute did not directly and substantially interfere with constitutionally protected rights) with Bowen v. Gilliard, 107 S. Ct. at 3018 (same).


182. The Court also considered and rejected a takings clause argument. Id. at 3018-21.

183. Id. at 3017 (footnote omitted). In the footnote omitted, the Court referred to an affidavit before the district court that stated that "one mother . . . had sent a child to live with the child's father in order to avoid the requirement of including that child, and the support received from the child's father, in the AFDC unit." Id. at 3017 n.16.

184. Id. at 3017 n.17. Justice Brennan's dissent objected to the Court's conclusion that the statute's effect on family living arrangements was only indirect. According to Justice Brennan, the interference with family living arrangements was direct and substantial, id. at 3029 (Brennan, J., dissenting), and thus warranted application of more than the rational basis test. Id. at 3029 n.21 (Brennan, J., dissenting).

185. Id. at 3017-18. The Court referred specifically to Moore and Zablocki. In Moore v.
B. Lower Court Cases

If the majority opinion in Bowers was meant to send a message that the Court had embarked on a major change in the doctrine of substantive due process, the message has largely been lost on the lower courts. The lower courts have, in general, been somewhat cautious in further expanding the scope of substantive due process. There have been several lower court opinions, however, that have extended the scope of the doctrine. A reading of the substantive due process cases since Bowers indicates that the courts have adopted a business-as-usual approach. The only real exceptions to this trend are several opinions by Judges Easterbrook and Posner of the United States Court of Appeals for the Seventh Circuit that have been highly critical of any substantive due process review. There is, however, no indication that these efforts have succeeded in gaining any adherents to this position.

Perhaps not surprisingly, Bowers has had its greatest impact on lower court decisions dealing with “public morality” issues. In these cases, the lower courts have, in general, read Bowers as a message to resist efforts to further expand the scope of substantive due process. For example, in Kukla v. Village of Antioch, the United States District Court for the Northern District of Illinois rejected a substantive due process claim brought by a male sergeant and a female dispatcher of the Village of Antioch’s police department who were fired for living together. The plaintiffs claimed “a

City of E. Cleveland, 431 U.S. 494 (1977), appellant Moore was convicted of violating an ordinance that limited the occupancy of a dwelling to members of a single family and defined “family” in such a way as to prohibit Mrs. Moore from living with her two grandsons, who were first cousins. In Zablocki v. Redhail, 434 U.S. 374 (1978), appellee Redhail was denied a marriage license under a Wisconsin statute that provided that any resident “having minor issue not in his custody and which he is under an obligation to support by any court order” could not marry without court approval. Under the law, court approval required proof that the applicant’s support obligations had been satisfied and that the children covered by the support order “are not then and are not likely thereafter to become public charges.” Zablocki v. Redhail, 434 U.S. 374, 375 (1978).

186. 647 F. Supp. 799 (N.D.II. 1986). In Fleisher v. City of Signal Hill, 829 F.2d 1491 (9th Cir. 1987), cert. denied, 108 S. Ct. 1225 (1988), the Ninth Circuit reached a result similar to that of the Kukla court. In Fleisher, a probationary police officer who had been discharged brought suit contending that his constitutional rights had been violated because one of the reasons for his discharge was his sexual conduct with a minor. In rejecting Fleisher’s argument, the Ninth Circuit relied in part on Bowers. The court concluded: “[W]e are unable to find that the right of privacy extends to sexual conduct that is concededly illegal, that implicates a police officer candidate’s ability to perform effectively as an officer, and that adversely affects a police department’s morale and community reputation.” 829 F.2d at 1499.

Other decisions in “public morality” cases also have refused to expand the scope of substantive due process. In Schochet v. State, 75 Md. App. 314, 541 A.2d 183 (Md. Ct. App. 1988), the court, in a 2-1 decision, held that a Maryland statute proscribing unnatural sexual practices did not violate the right of privacy as applied to a private act of fellatio between consenting, unmarried, heterosexual adults. The Schochet court, relying heavily on Bowers and repeatedly expressing its disinclination further to expand the scope of an unenumerated right, reviewed the Supreme Court’s privacy decisions and found that “[t]he argument . . . that the Supreme Court has created or recognized a constitutional right of privacy for consensual, adult, heterosexual fellatio simply cannot stand . . . .” Id. at 343, 541 A.2d at 197.
right to live together which they believe is protected by their freedom of
association, and a right to engage in private consensual sexual activity which
they believe is protected by their right to privacy.\textsuperscript{187} The court analyzed
both contentions as substantive due process claims. In deciding upon the
appropriate standard of review for the freedom of association claim, the
\textit{Kukla} court noted that "\textit{[o]nly traditional relationships with a cognizable
basis in law—those associated with marriage and family—receive maximum
protection. . . . For purposes of constitutional law, the choice to live together
without benefit of marriage is not a fundamental right. . . . [Thus,] [t]he
state cannot restrict [that choice] without a reason, but the reason need not
be compelling."	extsuperscript{188} With regard to the privacy claim, the court again found
that strict scrutiny was not appropriate. The court noted that the Supreme
Court in \textit{Bowers} had "made clear that not all forms of ‘private sexual
conduct between consenting adults’ are ‘constitutionally insulated from state
proscription.’\textsuperscript{189} The court found that intermediate scrutiny was appropriate,
and concluded that "on the balance produced by these facts,"\textsuperscript{190} the police
department had not violated the plaintiffs' constitutional rights.

In \textit{State v. Griffin},\textsuperscript{191} the Supreme Court of Louisiana upheld the
constitutionality of the state's public gambling statute. In so holding, the
\textit{Griffin} court applied the analysis set forth in Justice White's majority opinion
in \textit{Bowers} and concluded: "While wagering on games and contests may have
ancient roots, attempts to prohibit and suppress it are just as old. It can
hardly be said gambling is conduct ‘deeply rooted in this Nation's history
and traditions’ or ‘implicit in the concept of ordered liberty.’\textsuperscript{192} In \textit{State v.
Neal},\textsuperscript{193} the Supreme Court of Louisiana, in upholding the constitutionality
of Louisiana statutes prohibiting the solicitation of crimes against nature
and the solicitation of prostitution, summarily rejected the argument that it
should recognize "a right to privacy insulating all private sexual acts of
consenting adults."\textsuperscript{194} Citing \textit{Bowers}, the \textit{Neal} court stated: "The right to

\textsuperscript{188} \textit{Id.} at 807.
\textsuperscript{189} \textit{Id.} at 807 (quoting \textit{Bowers}, 478 U.S. 186, 191 (1986)).
\textsuperscript{190} \textit{Id.} at 811. In City of Ladue v. Horn, 720 S.W.2d 745 (Mo. Ct.
App. 1986), \textit{motion for transfer overruled}, 720 S.W.2d 745 (Mo. 1987), the Missouri Court of Appeals upheld the
constitutionality of a city ordinance that prohibited an unmarried couple from sharing the same
home. The court affirmed the lower court's decision to enjoin the defendants from occupying
their home in violation of the ordinance. The appellate court held that the ordinance did not
abridge a fundamental right because the defendants were not related either biologically or as a
result of a legal relationship, i.e., marriage. Although the court did not cite \textit{Bowers v. Hardwick},
the court's refusal to extend the fundamental right of privacy to protect the defendants' "interest
in choosing their own living arrangements. . . ." 720 S.W.2d at 749, reflects the same reluctance
to extend the right of privacy that Justice White expressed in \textit{Bowers}.
\textsuperscript{191} 495 So. 2d 1306 (La. 1986).
\textsuperscript{192} State v. Griffin, 495 So. 2d 1306, 1310 (La. 1986).
\textsuperscript{193} 500 So. 2d 374 (La. 1987).
\textsuperscript{194} State v. Neal, 500 So. 2d 374, 378 (La. 1987).
privacy does not shield all private sexual acts from state regulation, however.\textsuperscript{195}

In addition to these "public morality" cases, there have been other lower court cases since the Supreme Court's decision in \textit{Bowers} that have also been cautious in further expanding the scope of substantive due process. For example, in \textit{Grusendorf v. City of Oklahoma City},\textsuperscript{196} the United States Court of Appeals for the Tenth Circuit rejected a substantive due process challenge to the Oklahoma City Fire Department's rule that prohibited trainees from smoking cigarettes, either on or off duty, for a period of one year from the time they began to work. In considering the appropriate standard of review, the court stated: "We are not unmindful that the Supreme Court in \textit{Bowers v. Hardwick} cautioned that federal courts should not take an expansive view of their authority to discover new fundamental rights. . . ."\textsuperscript{197} Without much discussion, the court concluded "that cigarette smoking may be distinguished from the activities involving liberty or privacy that the Supreme Court has thus far recognized as fundamental rights. . . ."\textsuperscript{198} The court then evaluated, and ultimately rejected, the plaintiff's claim under the rational basis standard.\textsuperscript{199}

In \textit{People v. Kohrig},\textsuperscript{200} the Illinois Supreme Court rejected a substantive due process attack on an Illinois law requiring drivers and front-seat passengers to wear seat belts. The court highlighted Justice White's concerns about the propriety of unrestrained substantive review of laws under the due process clause.\textsuperscript{201} The court noted, moreover, that the alleged right to decide whether to wear a seat belt did not resemble the intimate decisions the Supreme Court had recognized deserve heightened constitutional protection.\textsuperscript{202} Applying the framework Justice White set forth in \textit{Bowers}, the court found that "the right to decide whether or not to wear a safety belt [was neither] 'implicit in the concept of ordered liberty' such that 'neither liberty nor justice would exist if [it] were sacrificed,' [nor] a liberty 'deeply rooted in this Nation's history or tradition.'"\textsuperscript{203} The court "reject[ed] any notion that

\begin{itemize}
  \item \textsuperscript{195} Id. at 378. Although it did note that the solicitations proscribed by the statutes challenged "generally occur in public, . . ." id. at 379, there was no indication that the "public" character of some of the acts prohibited by the statutes was essential to the court's conclusion that the fundamental right of privacy did not extend to the conduct for which the defendants sought protection.
  \item \textsuperscript{196} 816 F.2d 539 (10th Cir. 1987).
  \item \textsuperscript{197} Grusendorf v. City of Oklahoma City, 816 F.2d 539, 543 n.3 (10th Cir. 1987).
  \item \textsuperscript{198} Id. at 541.
  \item \textsuperscript{199} Id. at 543 (applying rational basis standard).
  \item \textsuperscript{200} 113 Ill. 2d 384, 498 N.E.2d 1158 (1986), appeal dismissed, 107 S. Ct. 1264 (1987).
  \item \textsuperscript{202} Kohrig, 113 Ill. 2d at 394-95, 498 N.E.2d at 1161.
  \item \textsuperscript{203} Id. at 395, 498 N.E.2d at 1161 (quoting Palko v. Connecticut, 302 U.S. 319, 325-26 (1937) and Moore v. City of E. Cleveland, 431 U.S. 493, 503 (1977)).
\end{itemize}
the right of privacy includes the right to 'do one's thing' on an express-
way. . . .' 204 Because it was "unwilling to graft onto the Constitution a
right of privacy to decide whether or not to wear a safety belt where there is
no textual basis or a clear historical precedent for such a right in the
language of the Constitution or the opinions of the Supreme Court," 205 the
court upheld the seat belt law under a rational basis test.206

In contrast to these decisions, several lower court cases arguably have
extended the scope of substantive due process. These decisions indicate that
the lower courts have not read Bowers as a message to restrict all facets of
the doctrine of substantive due process. For example, in High Tech Gays v.
Defense Industrial Security Clearance Office,207 the United States District
Court for the Northern District of California held that the Defense Depart-
ment’s policy of subjecting homosexuals applying for security clearances to
expanded investigations and mandatory adjudications violated both the equal
protection mandate of the fifth amendment and the first amendment.208

Distinguishing Bowers v. Hardwick, the court found that homosexual ac-
tivity—other than sodomy—was a fundamental right,209 and that, therefore,
the Defense Department’s policy should be subject to strict scrutiny.210

204. Kohrig, 113 Ill. 2d at 396, 498 N.E.2d at 1161.
205. Id. at 396, 498 N.E.2d at 1162.
206. Id. at 397-406, 498 N.E.2d at 1162-66 (applying rational basis standard).
208. The court first held that homosexuals were a "quasi-suspect" class. High Tech Gays
Webster, 822 F.2d 97, 101-104 (D.C. Cir. 1987) (homosexuals do not constitute suspect or
quasi-suspect class). As mentioned in the text, the court also held that the Defense Department’s
classifications disadvantaging homosexuals impinged upon their fundamental right to engage in
homosexual activity. High Tech Gays, 668 F. Supp. at 1370-72. The court’s analysis of the
"fundamental rights" branch of the equal protection inquiry is, of course, essentially the same
as substantive due process analysis. See Illinois Psychological Ass’n v. Falk, 818 F.2d 1337,
1342 (7th Cir.1987) (citation omitted) (noting that "the creation of ‘fundamental rights’ under
the equal protection clause . . . rest[s] on the same commitment to a broad-ranging judicial
creativity not confined by the words or origins of the Fourteenth Amendment as the cases that
use the term ‘substantive due process’ . . . "). See also J. NOWAK, R. ROTUNDA & J. YOUNG,
supra note 1, at § 11.7. The first amendment issue in High Tech Gays concerned the government’s
use of an individual’s membership in a gay organization to justify additional scrutiny and
adjudication.

209. The court said that Hardwick "simply did not address the issue of all homosexual
behind Hardwick and other Supreme Court right to privacy opinions provides that lesbians and
gay men have a fundamental right to engage in other types of homosexual activity that are not
traditionally proscribed as sodomy." Id. at 1371. Relying primarily on Justice Blackmun’s
dissent in Bowers, the court stated: "Protecting people's right to engage in such intimate sexual
relationships of their choosing is a [sic] essential element of American liberty because this aspect
of life occupies such an important part of all human beings' lives." Id. at 1372. According to
the court, "The fact that gay people engage in such intimacy in a different way than straight
people does not diminish the importance of intimacy in gay people's lives." Id.
210. Id. at 1368-70. In the end, the court concluded that its selection of a standard of
review would not affect its conclusion about the constitutionality of the government’s policy:
"[D]efendants' actions violate plaintiffs' rights under the equal protection clause under strict
Although the decision in *High Tech Gays* is perhaps the most extreme example of the narrow reading given to the Court's decision in *Bowers*, a number of other recent lower court decisions have expanded the scope of substantive due process. In *Rasmussen ex rel. Mitchell v. Fleming*, the Supreme Court of Arizona, after noting that "[t]he Supreme Court has yet to hold that the right to privacy encompasses the right to refuse medical treatment," held that "[t]he right to refuse medical treatment is a personal right sufficiently 'fundamental' or 'implicit in the concept of ordered liberty' to fall within the constitutionally protected zone of privacy contemplated by the Supreme Court." In *Smith v. City of Fontana*, the United States Court of Appeals for the Ninth Circuit found that the children of a man who was killed while in police custody could assert a substantive due process claim because they had been deprived of "the continued companionship and society of their father..." The court, although noting that "[t]he Supreme Court has yet to address whether and when the government's act of taking the life of one family member deprives other family members of a cognizable liberty interest in continued association with the decedent," concluded: "We now hold that this constitutional interest in familial companionship and society [which the Ninth Circuit had previously protected in reliance on Supreme Court precedent] logically extends to protect children from unwarranted state interference with their relationships with their parents."
In *Taylor ex rel. Walker v. Ledbetter*,218 the United States Court of Appeals for the Eleventh Circuit held that a foster child, whom her foster mother had abused, stated a substantive due process cause of action against state and county officials who allegedly had acted with gross negligence and deliberate indifference in placing the child in the foster home. Despite the absence of clear Supreme Court authority for such a claim, the court applied an *Estelle v. Gamble*219—analysis to a foster care situation.220 The court stated that

"[t]he fourteenth amendment, like the eighth amendment, 'must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.' With contemporary society's outrage at the exposure of defenseless children to gross mistreatment and abuse, it is time that the law give to these defenseless children at least the same protection afforded adults who are imprisoned as a result of their own misdeeds."221

Another decision that reflects the lower courts' willingness to extend substantive due process is *DeWeese v. Town of Palm Beach*.222 In *DeWeese*, the United States Court of Appeals for the Eleventh Circuit held unconstitutional an ordinance that prohibited men from jogging without clothing covering the upper portion of their bodies. Although it found that the Supreme Court, in *Kelley v. Johnson*,223 had foreclosed the argument that

us to do so." *Id.* at 9. Although the First Circuit did not cite *Bowers v. Hardwick*, the *Valdivieso Ortiz* opinion does reflect the same sort of caution to expanding the scope of substantive due process as Justice White's opinion in *Bowers*. See also *Harpole v. Arkansas Dep't. of Human Servs.*, 820 F.2d 923, 927-28 (8th Cir. 1987) (following *Valdivieso Ortiz v. Burgos* in case involving grandmother and grandchild).


219. 429 U.S. 97 (1976). In *Estelle*, the Court stated that prison officials who show deliberate indifference to a prisoner's serious physical condition violate the eighth amendment.

220. *Taylor ex rel. Walker v. Ledbetter*, 818 F.2d 791, 796 (11th Cir. 1987). The three dissenters stated that the majority opinion was unduly expansive. The dissenting opinion accused the majority of departing from the approach taken by other federal courts, which "have been careful to establish limits on the scope of *Estelle*-type liability, limits that are essential to retain the character of section 1983 as a remedy for violations of constitutional magnitude. . . ." *Id.* at 813 (Tjoflat, J., concurring in part and dissenting in part).


222. 812 F.2d 1365 (11th Cir. 1987).

223. 425 U.S. 238 (1976). In *Kelley v. Johnson*, the Court upheld the constitutionality of a police department's hair grooming regulations. The Court assumed that the freedom of choice in matters of personal appearance implicated a liberty interest protected by the fourteenth amendment. *Id.* at 244. The Court upheld, however, the regulation under a rational basis test. *Id.* at 247-49.
the right to choose one's clothing is a fundamental right, the court concluded that "it is clear that the . . . liberty interest in personal dress is . . . protected" by the fourteenth amendment from arbitrary state action. The court, therefore, judged the ordinance's constitutionality under the rational basis test. As the result indicates, the court's scrutiny appeared much greater than the scrutiny one would expect under traditional rational basis analysis. The district court, citing expert testimony, had, after all, upheld the rationality of the ordinance.

The only post-Bowers decisions in the lower courts that depart from the trends identified above are several opinions by Judges Easterbrook and Posner that have been highly critical of the whole notion of substantive due process. For example, in Chicago Board of Realtors, Inc. v. City of Chicago, which involved a challenge on economic substantive due process grounds to a Chicago ordinance regulating landlord-tenant relationships, Judge Posner wrote an opinion, joined by Judge Easterbrook, that contained harsh criticism of the entire notion of substantive due process. Judge Posner remarked that "the text [of the due process clause] is inhospitable to the concept of substantive due process; nor does the history of the Constitution support it." Judge Posner then endorsed a critique of substantive due process that Judge Easterbrook had written in a 1985 concurring opinion in Gumz v. Morrissette. This critique is worth quoting at some length:

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224. DeWeese v. Town of Palm Beach, 812 F.2d 1365, 1367 (11th Cir. 1987).
226. 819 F.2d 732 (7th Cir. 1987). In Chicago Board of Realtors v. City of Chicago, Judge Cudahy wrote the main opinion, in which Judges Posner and Easterbrook joined. Judge Cudahy's opinion affirmed the district court's denial of a motion for a preliminary injunction. The plaintiffs, "Chicago property owners or managers and organizations representing their interests," sought to enjoin enforcement of a Chicago ordinance that "recast[] the relative rights and obligations of most residential landlords and tenants in Chicago." Chicago Bd. of Realtors, Inc. v. City of Chicago, 819 F.2d 732, 734 (7th Cir. 1987). The plaintiffs invoked a number of "constitutional doctrines or provisions: the contract clause, procedural due process, the void-for-vagueness doctrine, substantive due process, equal protection, the takings clause and the commerce clause." Id. at 735. The district court "concluded that the plaintiffs had not shown the requisite reasonable likelihood of prevailing on the merits," and denied plaintiffs' request for a preliminary injunction. Id. at 735. Judge Posner's separate opinion stated that Judge Cudahy's opinion did not go far enough. It makes the rejection of the appeal seem easier than it is, by refusing to acknowledge the strong case that can be made for the unreasonableness of the ordinance. It does not explain how the district judge's denial of a preliminary injunction against such an interference with contract rights and economic freedom can be affirmed without violating the contract clause and the due process clause of the Constitution. So we are led to write separately, and since this separate opinion commands the support of two members of this panel, it is also a majority opinion.

Id. at 741 (opinion of Posner, J.).
227. Id. at 745 (opinion of Posner, J.).
228. Gumz v. Morrissette, 772 F.2d 1395 (7th Cir. 1985), cert. denied, 475 U.S. 1123 (1986). In Gumz v. Morrissette, the Seventh Circuit considered whether allegations that state
Substantive due process has been the foundation of some of the most unsuccessful inventions in constitutional law. . . . The Supreme Court regularly buries the doctrine, but it just as resolutely refuses to stay dead. . . . Substantive due process once was used to invalidate legislation affecting prices, wages, and hours, legislation the Court thought struck at the heart of freedom of contract. When enthusiasm for freedom of contract waned, the Court resurrected the same doctrine—with the same lack of textual and historical support—to protect a new constellation of values, this one having to do with family, procreation, and privacy. What unites the many lives of substantive due process is any action "deeply repulsive to the feelings of Supreme Court Justices." . . . Substantive due process is a shorthand for a judicial privilege to condemn things the judges do not like or cannot understand. The Constitution does not give such power to judges.\footnote{229}

There is no indication, however, that the efforts of Judges Easterbrook and Posner have gained any support among their colleagues on the bench.\footnote{230}

\footnote{229. Chicago Bd. of Realtors, Inc., 819 F.2d at 745 (quoting Gumz v. Morrisette, 772 F.2d at 1399-1402. The district court rejected a fourth amendment claim on the pleadings and the plaintiff did not contest the issue on appeal. Judge Easterbrook, in his concurring opinion, refused to join in the portion of the majority's opinion that analyzed the plaintiff's excessive force claim under the substantive due process theory. The opinion contained a lengthy critique of the whole notion of substantive due process, and concluded that excessive force claims should be analyzed exclusively under the fourth amendment. 772 F.2d at 1405-1408 (Easterbrook, J., concurring).

230. There have been other opinions by Judges Posner and Easterbrook that have been critical of substantive due process. For example, in Illinois Psychological Ass'n v. Falk, Judge Posner referred to substantive due process as a "durable oxymoron." 818 F.2d 1337, 1342 (7th Cir. 1987). See also Coniston Corp. v. Village of Hoffman Estates, 844 F.2d 461, 465-66 (7th Cir. 1988) (opinion of Posner, J.). In Lester v. City of Chicago, the Seventh Circuit did adopt the portion of Judge Easterbrook's concurring opinion in Gumz v. Morrisette that rejected using substantive due process to analyze excessive force claims. 830 F.2d 706, 710 (7th Cir. 1987). See generally Freyermuth, Rethinking Excessive Force, 1987 Duke L.J. 692 (endorsing Lester). There is no indication, however, that the Seventh Circuit in Lester endorsed Judge Easterbrook's broader critique of substantive due process. Lester, 830 F.2d at 713 n.7. In State v. Meadows, the Ohio Supreme Court upheld the constitutionality of an Ohio statute that prohibited the in-home possession of child pornography. 28 Ohio St.3d 43, 503 N.E.2d 697 (1986), cert. denied, 107 S. Ct. 1581 (1987). Although the majority opinion did not discuss "privacy" issues, one of the concurring opinions did discuss the substantive due process issue involved. Justice Wright's concurring opinion, citing Bowers several times, and noting (with approval) that the Court in Bowers had "declined to take a more expansive view of its authority to discover new fundamental rights," endorsed Justice Black's views on "privacy," as expressed in dissent in Griswold v. Connecticut. See Meadows, 28 Ohio St.3d at 63, 503 N.E.2d at 712-13 (Wright, J., concurring). Justice Brown's concurring opinion in Meadows sharply criticized Justice Wright's "dissertation on the right of privacy," and noted that Justice Wright's views were "completely inconsistent" with "the mandate of the United States Supreme Court. . . ." Id. at 355, 503 N.E.2d at 714-15 (Brown, J., concurring).}
V. Implications

A. Impact on Abortion Cases

Before discussing the broader implications of the developments discussed in Parts III and IV for the doctrine of substantive due process, this Article considers the effect these developments may have on Roe v. Wade. In his majority opinion in Bowers, Justice White adopted the same approach he advanced in his dissenting opinion in Thornburgh. This approach seeks to limit the expansiveness of substantive due process. As outlined in these two opinions, Justice White's approach would limit "fundamental rights" to those included in one of two formulations: The "implicit in the concept of ordered liberty" formulation from Palko and the "deeply rooted in this Nation's history and tradition" formulation from Justice Powell's opinion in Moore v. City of East Cleveland. As Justice White explained in Thornburgh, neither formulation supports a woman's right to an abortion:

The Court's opinion in Roe itself convincingly refutes the notion that the abortion liberty is deeply rooted in the history or tradition of our people, as does the continuing and deep division of the people themselves over the question of abortion. As for the notion that choice in the matter of abortion is implicit in the concept of ordered liberty, it seems apparent to me that a free, egalitarian, and democratic society does not presuppose any particular rule or set of rules with respect to abortion. And again, the fact that many men and women of good will and high commitment to constitutional government place themselves on both sides of the abortion controversy strengthens my own conviction that the values animating the Constitution do not compel recognition of the abortion liberty as fundamental.

Justice White's conclusion with respect to "history and tradition" seems to be beyond dispute. The "balance struck by this country" throughout its history certainly did not support a right to abortion, as Justice Rehnquist noted in his dissent in Roe. A wealth of scholarship also supports this conclusion. As one commentator recently acknowledged, "When the Court

decided Roe in 1973, it could not plausibly be argued that the right to abortion was ‘deeply rooted in this Nation’s history and tradition.’” Justice White’s conclusion that “ordered liberty” does not presuppose any particular position on abortion is more troublesome. Some have argued eloquently that Roe is inconsistent with the first principles of our political order. But whether or not “ordered liberty” requires prohibiting abortion, Justice White’s conclusion that “ordered liberty” does not require legitimizing the decision to have an abortion appears sound.

If the approach to substantive due process advanced by Justice White in Bowers becomes the prevailing view, Roe v. Wade would have to be regarded as extraordinarily vulnerable. Bowers was a 5-4 decision, however, and it would be a mistake to regard the precedent as secure. With the

237. Conkle, supra note 1, at 228.


239. The 5-4 majority in Bowers was extremely fragile. Apparently, Justice Powell initially voted to hold the Georgia sodomy statute unconstitutional, but later changed his vote. See Conkle, supra note 1, at 238 n.131. The shakiness of the initial majority, the dissenters’ apparent intention to press for a change in position, see Bowers v. Hardwick, 478 U.S. 186, 214 (1986) (Blackmun, J., dissenting), and the severe scholarly criticism of the decision suggest that a reversal of Bowers would not be a major surprise. For examples of the critical commentary, see L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 15-21 (2d ed. 1988); Richards, Constitutional Legitimacy and Constitutional Privacy, 61 N.Y.U. L. Rev. 800 (1986); Stoddard, Bowers v. Hardwick: Precedent by Personal Predilection, 54 U.CHI. L. Rev. 648 (1987); The Supreme Court, 1985 Term—Leading Cases, 100 Harv. L. Rev. 100, 210-220 (1986); Note, Chipping Away at Bowers v. Hardwick: Making the Best of an Unfortunate Decision, 63 N.Y.U.L. Rev. 154 (1988); id. at 155 n.7 (citing commentary).


There is considerable uncertainty about Justice Kennedy’s views on substantive due process. He seems to accept the legitimacy of the doctrine. See generally S. Exec. Rep. No. 13, 100th Cong., 2d Sess. 16-22 (1988). His experience as a federal court of appeals judge indicates that he is likely to be cautious about giving the doctrine an expansive reading. See Beller v. Middendorf, 632 F.2d 788 (9th Cir. 1980), cert. denied sub nom. Beller v. Lehman, 452 U.S. 905 (1981). See generally Williams, The Opinions of Anthony Kennedy: No Time for Ideology, 74 A.B.A.J. 56 (March 1, 1988) (discussing debate about Kennedy’s views on substantive due process). As of this writing, Justice Kennedy has not participated in enough cases at the Supreme Court level to provide a basis to predict with any degree of confidence how he will approach either the basic constitutional issues involved in cases such as Bowers and Roe or the role of stare decisis in constitutional adjudication. There has, of course, been much speculation that
departure of Justice Powell, the swing vote in Bowers, the continued vitality of Bowers will likely depend on the position of Justice Powell's successor. Even if Bowers remains intact, however, it is far from certain that the Court will overturn the abortion cases. The situation prior to Justice Powell's resignation supports this conclusion.

Prior to Justice Powell's resignation, it seemed unlikely that Bowers would prompt the Court to reverse Roe v. Wade. This was true for at least two reasons. First, some would contend that the precise holding in Bowers, if considered apart from Justice White's effort to recast the doctrine of substantive due process, did not undermine the doctrinal support for Roe. As discussed above, there were those who, prior to Bowers, had argued that the Court's substantive due process decisions did not necessarily extend significant constitutional protection to homosexual sodomy. Presumably, a Justice who held such a view would not read Bowers to require reevaluating Roe.

For example, Dean Hafen has argued "that the right of privacy developed by the Court is intended to protect specific liberty interests related to marriage and childbearing more than it is to authorize a general right of personal autonomy." According to this theory, the Court has not protected sexual liberty for its own sake. Instead, the Court has confined the protections of the right to privacy "to certain relational interests." Furthermore, the relational interests the Court has protected extend only to the permanent relationships of marriage and kinship.

There is, then, a theoretical framework that explains both Griswold, Eisenstadt, and Roe v. Wade, on the one hand, and Bowers v. Hardwick on the other. Justice White's opinion in Bowers did not, however, adopt the framework of Dean Hafen, at least not explicitly. Justice White's approach seems to be more of a case-by-case approach to identifying fundamental rights. This approach takes as its point of departure the tradition-centered focus Justice Powell had long advanced. This tradition-centered approach is potentially more limited than the marriage/kinship approach of Dean Hafen because, as mentioned above, Justice White used the Court will overturn Roe during the 1988 Term. See N.Y. Times, Oct. 2, 1988, at 17, col. 1 ("Justice Harry A. Blackmun . . . said last month that he saw a 'very distinct possibility' that the Court would find a case this term to use as a vehicle for overruling" Roe.).


241. Hafen, supra note 31, at 533. See Heymann & Barzelay, The Forest and the Trees: Roe v. Wade and its Critics, 53 B.U.L. REV. 765, 774 (1973) (footnote omitted) ("[T]he Court would not be required to find that either all consensual sexual activity or the use of soft drugs was protected. To whatever degree such behavior may be socially harmless, it certainly does not produce the same kind of nearly irrevocable effects, nor spring from the same deep well of cultural values as do decisions about marriage, procreation, or child rearing.").


243. Id. Thus, prior to Bowers v. Hardwick, Dean Hafen had argued against affording constitutional protection to sexual relations outside marriage. Id. at 538-44.
his approach in contending that Roe should be overturned, while Dean Hafen's theory supports Bowers but does not necessarily undermine Roe. Thus, the decision in Bowers does not necessarily undermine Roe, although Justice White's analytical approach certainly would seem to have such an effect.

A second reason, although far less persuasive, is that Bowers did not necessarily call Roe and the subsequent abortion cases into question because these decisions are now sheltered by stare decisis. Justice Powell would likely have found this reason to be important, even if he became convinced that Roe had been wrongly decided. Justice Powell was, after all, the author of the Court's 1983 decision in City of Akron v. Akron Center for Reproductive Health, which explicitly invoked stare decisis in reaffirming Roe v. Wade.244 Thus, prior to Justice Powell's retirement, there was no indication that Bowers would lead to the early reversal of Roe, even though it is certainly possible to read the opinion Justice Powell joined in Bowers as undermining the doctrinal foundation for the Court's abortion decisions.

The Supreme Court's personnel is, however, going to change, and Justice White's approach to substantive due process, as set forth in Bowers, might well serve as a basis for overruling Roe.245 Of course, such a course of action would require the Court to address the stare decisis point made in Akron, but it is difficult to believe that the Court would view stare decisis as a substantial obstacle to the reversal of Roe. As Professor Maltz has stated: "It seems fair to say that if a majority of the Warren or Burger Court has considered a case wrongly decided, no constitutional precedent—new or old—has been safe."246 It seems unlikely that the Rehnquist Court will take a different view.

Even if one acknowledges that stare decisis has a role to play in constitutional adjudication,247 and the Court has often noted that stare decisis is of less importance when constitutional issues are involved,248 there are particularly strong reasons for not applying the doctrine in the abortion

245. See supra notes 139-43 and accompanying text.
247. Emphasizing the importance of the "writtenness" of the Constitution, several commentators have recently argued that stare decisis should have no role in constitutional adjudication. See, e.g., J. Giraudo, Realism, Positivism and Adherence to Stare Decisis: Has the Doctrine Outlived its Usefulness?, (unpublished manuscript) (copy on file with author); Note, The Power That Shall be Vested in a Precedent: Stare Decisis, the Constitution and the Supreme Court, 66 B.U.L. Rev. 345 (1986). See generally Rees, Cathedrals Without Walls: A View from the Outside (Book Review), 61 Tex. L. Rev. 347 (1982) (criticizing use of common law method, including method's respect for precedent, in interpreting our written Constitution).
Perhaps the most fundamental reason is that the Court's decision in *Roe v. Wade* prevents states from "protecting those who will be citizens if their lives are not ended in the womb." If this judgment, i.e., that the state does not have a compelling interest in protecting human life, were regarded as incorrect, it is difficult to imagine how the Court would be justified in not abandoning error. Although the values furthered by stare decisis, e.g., prompting stability, are surely important, any such interests pale in comparison to the interests on the other side.

B. An Assessment of the Current State of Affairs

One commentator has recently suggested "that *Bowers v. Hardwick* may represent the beginning of the second death of substantive due process." This is, of course, one possibility, and I will suggest in Part VI of this Article that the Court should adopt such a position. Nevertheless, I do not believe that *Bowers* suggests that the Court is likely to abandon completely the doctrine of substantive due process. The opinions in *Thornburgh* and *Bowers* have, however, clarified a number of basic disagreements among the Justices. For example, the opinions of Justices White and Blackmun in these two cases reveal a fundamental conflict about the proper approach to substantive due process. In addition, the opinions of Justice White, on the one hand, and Justice Stevens in *Thornburgh* and Justice Blackmun in *Bowers*, on the other, reveal a fundamental conflict about the proper role religious and moral principles should have in influencing secular legislation.


There seems to be no indication that the Court is likely to abandon substantive due process. Even Justice White's opinions in *Thornburgh* and *Bowers* reveal an acceptance of the doctrine. The approach these opinions advance would result in the Court continuing to supply substantive content

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249. *See Wardle, Rethinking Roe v. Wade, 1985 B.Y.U. L. Rev. 231, 251-57* (arguing that stare decisis poses no obstacle to Supreme Court's reconsidering *Roe*). Of course, rejecting *Roe v. Wade* would not necessarily threaten the Court's other substantive due process decisions. As Dean Hafen has stated: "[T]he *Roe* Court could logically have concluded that the state interest in protecting the unborn was strong enough to override a pregnant woman's right of privacy, without seriously challenging the parental and other family rights established in the line of cases stretching from *Meyer v. Nebraska* to *Eisenstadt.*" Hafen, *supra* note 31, at 533 n.341.

250. *Thornburgh*, 476 U.S. at 795 (White, J., dissenting). Although this particular quote is from the portion of Justice White's dissent that discusses the state's countervailing interest in protecting the fetus, this "state interest" is also relevant to the initial question of whether a fundamental right exists. *See id.* at 792 n.2 (White, J., dissenting). Dean Hafen made this general point in his Michigan Law Review article. Hafen, *supra* note 31, at 553-60. *See also* B. Siegan, *The Supreme Court's Constitution* 153 (1987) (footnote omitted) ("A woman desiring an abortion cannot be deemed to be seeking to exercise a natural liberty. The activity cannot be separated from the impact on life. The exercise of natural liberty does not comprehend the destruction of future or existing human life.").

to the due process clause on a relatively ad hoc basis. Justice White's approach would be more limited than Justice Blackmun's approach, but Justice White's approach clearly would retain some role for the Court. This section of the Article compares and criticizes these two basic approaches.

Justice White's opinions seem calculated to reject the more extreme view that there is no substantive content to the due process clause. In Bowers, Justice White did acknowledge that the language of the due process clause "appears to focus only on the processes by which life, liberty, or property is taken, [but noted that] the cases are legion in which those Clauses have been interpreted to have substantive content. . . ."\textsuperscript{252} In his dissent in Moore, Justice White noted "that the substantive content of the [Due Process] Clause is suggested neither by its language nor by its preconstitutional history,"\textsuperscript{253} but for him this simply counsels restraint, not abandonment.\textsuperscript{254} Even his Thornburgh dissent states:

I can certainly agree with the proposition—which I deem indisputable—that a woman's ability to choose an abortion is a species of 'liberty' that is subject to the general protections of the Due Process Clause. I cannot agree, however, that this liberty is so 'fundamental' that restrictions upon it call into play anything more than the most minimal judicial scrutiny.\textsuperscript{255}

Justice White has accepted the validity of some substantive review under the due process clause for quite some time. Although he joined Justice Black's opinion in Ferguson v. Skrupa, which seemed clearly to eliminate any substantive review, Justice White's dissent in Moore stated: "no case that I know of, including Ferguson v. Skrupa, has announced that there is some legislation with respect to which there no longer exists a means-ends test as a matter of substantive due process law."\textsuperscript{256} Although this interpretation of Ferguson surely would have surprised Justice Black, Justice White appears to be firmly committed to the legitimacy of some substantive review under the due process clause. Justice White has, in fact, voted to strike down statutes under the doctrine of substantive due process.\textsuperscript{257} For example, as Justice Stevens noted in Thornburgh, Justice White's concurring opinion

\begin{itemize}
\item \textsuperscript{252} Bowers v. Hardwick, 478 U.S. 186, 191 (1986).
\item \textsuperscript{253} Moore v. City of E. Cleveland, 431 U.S. 494, 543 (1977) (White, J., dissenting).
\item \textsuperscript{254} Id. at 544. In his opinion in Moore, Justice Powell stated: "[T]he history of the Lochner era counsels caution and restraint. But it does not counsel abandonment. . . ." Id. at 502 (Powell, J., plurality opinion).
\item \textsuperscript{255} Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747, 790 (1986) (White, J., dissenting). See also Moore, 431 U.S. at 541-52 (1977) (White, J., dissenting) (concluding that liberty interest had been properly asserted, but finding that, because interest involved did not warrant heightened scrutiny, statute being challenged easily passed substantive due process scrutiny).
\item \textsuperscript{256} Moore, 431 U.S. at 548 (White, J., dissenting) (citation omitted).
\end{itemize}
in *Griswold* supported invalidating the Connecticut law prohibiting the use of contraceptives on the basis of substantive due process.\(^{258}\)

Justice White's approach to substantive due process, as outlined in *Thornburgh* and *Bowers*, is a self-conscious attempt to restrain the Court. As Justice White stated in *Bowers*, "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."\(^{259}\) Accordingly, Justice White discussed two formulations the Court has used in defining fundamental rights. Justice White himself has grave doubts about whether such an approach successfully can confine the judiciary to its proper role. As he stated in his *Thornburgh* dissent, "[w]hether either of these approaches can, as Justice Harlan hoped, prevent 'judges from roaming at large in the constitutional field' is debatable."\(^{260}\) Justice White had earlier indicated his reservations about the "tradition" approach set forth by Justice Powell in *Moore*. In his dissent in *Moore*, Justice White stated:

Mr. Justice Powell would apparently construe the Due Process Clause to protect from all but quite important state regulatory interests any right or privilege that in his estimate is deeply rooted in the country's traditions. For me, this suggests a far too expansive charter for this Court and a far less meaningful and less confining guiding principle than Mr. Justice Stewart would use for serious substantive due process review. What the deeply rooted traditions of the country are is arguable; which of them deserve the protection of the Due Process Clause is even more debatable. The suggested view would broaden enormously the horizons of the Clause; and, if the interest involved here is any measure of what the States would be forbidden to regulate, the courts would be substantively weighing and very likely invalidating a wide range of measures that Congress and state legislatures think appropriate to respond to a changing economic and social order.\(^{261}\)

Justice White's reservations are difficult to overcome, even if one talks about tradition and consensus.\(^{262}\) As Professor Ely convincingly demon-
strained, "tradition doesn't really generate an answer, at least not an answer sufficiently unequivocal to justify overturning the contrary judgment of a legislative body." The problems with "consensus" or "conventional morality" are similar. As Professor Ely concluded, "by viewing society's values through one's own spectacles ... one can convince oneself that some invocable consensus supports almost any position a civilized person might want to see supported." Michael Perry, who at one time had advocated judicial enforcement of consensus values, stated in 1982 that

[j]ust as there is no singular American tradition sufficiently determinate to be of help to the Court in resolving particular human rights conflicts, and just as the concrete traditions that do exist are fragmented and point every which way, so too there are no consensus-theorists such as Professors Perry and Wellington. See Perry, supra note 87; Wellington, Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication, 83 Yale L.J. 221 (1973).

sual values sufficiently determinate to be of help to the Court, and
the values that do enjoy significant support are, in our pluralist
culture, fragmented and point in many different directions.266

The approach advanced by Justice White, whatever its limits, is very
different from Justice Blackmun's view as articulated in his opinions in
Thornburgh and Bowers. Justice Blackmun's view seems to be far less
concerned about constraining the Court. For example, Justice Blackmun
stated his guiding premise in this fashion: "Our cases long have recognized
that the Constitution embodies a promise that a certain private sphere of
individual liberty will be kept largely beyond the reach of government."267
Although the opinion invokes the Constitution, the precise connection be-
tween the text and the "promise" that Justice Blackmun discerns is never
explicitly identified. This is not surprising. The Constitution is silent about
"sexual intimacy."268 As Dean Hafen stated:

The silence of the Constitution on the entire subject of the family
does not tell us that marriage and family were unimportant to the
founders; it tells us, rather, that the Founders consciously accepted
the regulation of family life embodied in the civil legislation. They
did not view individual rights arising from family relationships—
though there were many—as political liberties needing protection by
the Bill of Rights.269

It is difficult to understand Justice Blackmun's reference to the Constitu-
tion.270 As Professor Grey states, "[i]f... the text when read in its
appropriate context supplies norms that guide decisions like Roe v. Wade,...
then the notion of what it means for a text to guide a decision has departed
very far from the common understandings of both lawyers and ordinary
people. To say that when judges decide cases like these they are getting all
their law from the Constitution itself is bound to mislead."271

266. M. Perry, supra note 263, at 94. Professor Lupu has argued that an approach
combining tradition and consensus can overcome the objections of Professors Ely and Perry.
See Lupu, supra note 11, at 1032-50; Lupu, Constitutional Theory and the Search for the
Workable Premise, 8 U. Dayton L. Rev. 579 (1983). For one critique of Professor Lupu's
Michigan Law Review article, see Malitz, Judicial Competence and Fundamental Rights (Cor-

267. Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747,
772 (1986); see also Bowers v. Hardwick, 478 U.S. 186, 203 (1986) (Blackmun, J., dissenting)
(quoting same passage).


269. Hafen, supra note 31, at 571.

270. A lack of candor is one possibility. See Bork, The Struggle Over the Role of the
Court, Nat'l Rev., Sept. 17, 1982, at 1139 (referring to lack of candor of noninterpretivist
scholars); Kurland, Curia Regis: Some Comments on the Divine Right of Kings and Courts
particular focus on Court's lack of candor). For a more general discussion of the importance
of judicial candor, see Shapiro, In Defense of Judicial Candor, 100 Harv. L. Rev. 731 (1987).

A more careful examination of Justice Blackmun’s opinion in *Bowers* makes this point clear. In his dissent in *Bowers*, Justice Blackmun appeared to adopt the principle Professor Grey had earlier stated that the Court had pointedly not endorsed, i.e., “some contemporary version of John Stuart Mill’s principle of liberty . . . [namely,] that the only legitimate reason for state coercion is to prevent harm to others.”

Justice Blackmun’s description of the Court’s prior substantive due process cases indicates, as Richard Neuhaus has commented, that Justice Blackmun views the governing principle as “unbridled individualism.” Justice Blackmun explicitly invoked H.L.A. Hart, who had espoused a version of Mill’s principle, and concluded that “[t]his case involves no real interference with the rights of others, for the mere knowledge that other individuals do not adhere to one’s value system cannot be a legally cognizable interest, . . . let alone an interest that can justify invading the houses, hearts, and minds of citizens who choose to live their lives differently.”

Justice Blackmun’s position is not new; although it is safe to say it is highly controversial. What is at least somewhat new is the position that the due process clause constitutionalizes Mill’s *On Liberty*. Some may view Justice Blackmun’s position as politically desirable; I would conclude, however, that it is “mislead[ing]” to imply that the due process clause provides support for sexual libertarianism.

The opinions in *Thornburgh* and *Bowers* have highlighted basic disagreement among the Justices about the proper scope of substantive due process. There is no evidence from these two cases, however, suggesting that the Court is likely to adopt the approach advanced by prominent critics of substantive due process, such as Justice Black, Robert Bork, and Hans Linde. Thus, even if Justice White’s view in *Thornburgh* and *Bowers*,

272. Grey, supra note 31, at 84.

273. Neuhaus, God Save This Vulnerable Court, NAT’L REV., Aug. 15, 1986, at 40. Justice Blackmun concluded that the Court has protected rights associated with the family “not because they contribute, in some direct and material way, to the general public welfare, but because they form so central a part of an individual’s life.” *Bowers* v. Hardwick, 478 U.S. 186, 204 (1986) (Blackmun, J., dissenting). As Richard Neuhaus concluded, “Seldom has the classical concern for the ‘common good’ been rejected so explicitly.” Neuhaus, supra.


275. See *Grey, supra* note 31, at 84.


277. See generally R. Rodas, LAW AND LIBERATION 153-185 (1986) (arguing for retaining traditional laws against fornication, adultery, and deviant sexual conduct); Hafen, supra note 31, at 538-44 (arguing against fundamental constitutional right of sexual privacy for unmarried).


279. Grey, supra note 271, at 5.

which is clearly a less expansive approach to substantive due process than Justice Blackmun's, became the dominant position, the Court would likely continue its now traditional role of supplying substantive content to the due process clause on a relatively ad hoc basis.

This position—that *Bowers* does not represent a major jurisprudential shift—is supported by the Court's recent decisions in the substantive due process area. None of the Court's recent substantive due process decisions even cites, much less discusses or relies on *Bowers*. *Turner v. Safley* is perhaps the best indication that the Court does not regard *Bowers* as having accomplished a major change in the doctrine of substantive due process. In *Turner*, all nine Justices voted to strike down a Missouri regulation restricting prison inmates' ability to marry. Although the Court's three other substantive due process cases from the 1986 Term (*United States v. Salerno*, *Board of Directors of Rotary International v. Rotary Club* and *Bowen v. Gilliard*) all rejected substantive due process claims, the opinions do not suggest that any major change is in the offing. The Court appears to be engaging in what is now a traditional role—making relatively ad hoc judgments about the substantive content of the due process clause. There is no one on the Court who argues in support of Justice Black's position, not even Chief Justice Rehnquist.

The lower court decisions since *Bowers* seem to be consistent with this assessment. Although the lower courts have been somewhat cautious in further expanding the scope of substantive due process since *Bowers*, the cases reflect what can properly be termed a business-as-usual approach. There have been a number of lower court cases endorsing substantive due process arguments, even in situations where accepting the argument might well be regarded as requiring an extension of Supreme Court precedents.

*Bowers* is probably best regarded as the Court's reluctance to take what the public, if not the academic community, would have regarded as a major expansion of the scope of constitutional rights. As Dean Kaufman has stated: "The decision in *Bowers v. Hardwick* can best be understood as reflecting the Court's judgment that value changes in our society over the past twenty-five years had not sufficiently established a long-term change such that the right of consenting adults to commit sodomy in private ought to be recognized as having constitutional status." Under this reading, *Bowers* is not a major

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Some First Amendment Problems, 47 Ind. L.J. 1, 11 (1971) ("[S]ubstantive due process . . . is and always has been an improper doctrine."); Linde, Due Process of Lawmaking, 55 Neb. L. Rev. 197 (1976); Linde, supra note 14.
retreat from the task of supplying substantive content to the due process clause. Although this may change, it does not seem likely that a major shift is imminent. It would certainly be a surprise, although not an impossibility, to see the Justices abandon a position they took as recently as Turner v. Safley. Any later, more fundamental change would more likely be the result of further changes in Court personnel rather than a necessary implication of a doctrinal shift suggested in the opinions in Bowers.

2. The Controversy About The Proper Role Religious And Moral Principles Should Have In Influencing Secular Legislation.

The opinions in Thornburgh and Bowers also reveal a basic disagreement among the Justices about the extent to which religious and moral principles may influence secular legislation. The exchange between Justices White and Stevens on this issue in Thornburgh and the opinions of Justices White and Blackmun in Bowers reveal that the Justices have very different views on this question, which has long affected disputes in the area of substantive due process.286

It is fair to say that there is a great dispute about the extent to which religious and moral principles properly may influence legislation. To some, concluding that a particular decision is religious is the same as concluding that the decision is protected by the right of privacy. According to this theory, characterizing a decision as religious is tantamount to concluding that the subject is not the proper concern of the state, and therefore, within the zone of individual privacy protected by the Constitution.287 There is,
however, hardly unanimity on this question. The continuing debates on this topic in the context of issues such as artificial reproductive techniques suggest that this broader issue will remain a source of much controversy. This section of the Article discusses the recent contributions to this debate of the opinions in *Thornburgh* and *Bowers*.

In his concurring opinion in *Thornburgh*, Justice Stevens discussed Justice White's position that the state's interest in protecting the unborn child is compelling during the entire period of pregnancy and concluded: "Again, I recognize that a powerful theological argument can be made for that position, but I believe our jurisdiction is limited to the evaluation of secular state interests." Justice Stevens later stated that "unless the religious view that a fetus is a 'person' is adopted . . . there is a fundamental and well-recognized difference between a fetus and a human being; indeed, if there is not such a difference, the permissibility of terminating the life of a fetus could scarcely be left to the will of the state legislatures." In a footnote in his dissent, Justice White responded to the arguments of Justice Stevens:

> [I]t is self-evident that neither the legislative decision to assert a state interest in fetal life before viability nor the judicial decision to recognize that interest as compelling constitutes an impermissible 'religious' decision merely because it coincides with the belief of one or more religions. Certainly the fact that the prohibition of murder coincides with one of the Ten Commandments does not render a State's interest in its murder statutes less than compelling, nor are


290. Id. at 779 (Stevens, J., concurring) (footnote omitted).
legislative and judicial decisions concerning the use of the death penalty tainted by their correspondence to varying religious views on that subject. The simple matter is that in determining whether to assert an interest in fetal life, a State cannot avoid taking a position that will correspond to some religious beliefs and contradict others. The same is true to some extent with respect to the choice this Court faces in characterizing an asserted state interest in fetal life, for denying that such an interest is a 'compelling' one necessarily entails a negative resolution of the 'religious' issue of the humanity of the fetus, whereas accepting the State's interest as compelling reflects at least tolerance for a state decision that is congruent with the equally 'religious' position that human life begins at conception.\(^{291}\)

This debate about the proper role of religious and moral principles continued in \textit{Bowers v. Hardwick}. In concluding that the fundamental right of privacy did not extend to homosexual sodomy, Justice White noted that "'[p]roscriptions against that conduct have ancient roots.'"\(^{292}\) In applying the rational basis test, Justice White denied that it was somehow impermissible for the Georgia statute in question to reflect a moral judgment about homosexual sodomy. Justice White stated:

\begin{quote}
The law . . . is constantly based on notions of morality, and if all laws representing essentially moral choices are to be invalidated under the Due Process Clause, the courts will be very busy indeed. Even respondent makes no such claim, but insists that majority sentiments about the morality of homosexuality should be declared inadequate. We do not agree, and are unpersuaded that the sodomy laws of some 25 States should be invalidated on this basis.\(^{293}\)
\end{quote}

Chief Justice Burger's separate concurrence was more explicit about invoking the religious influence on the law being challenged in support of its constitutionality. The Chief Justice stated that "'[d]ecisions of individuals relating to homosexual conduct have been subject to state intervention throughout the history of Western Civilization. Condemnation of those practices is firmly rooted in Judeo-Christian moral and ethical standards.'"\(^{294}\)

Justice Blackmun viewed the traditional condemnation of homosexual acts in a very different fashion. He claimed that "'[t]he assertion that 'traditional Judeo-Christian values proscribe' the conduct involved . . . cannot provide an adequate justification for [the statute]. . . . The legitimacy of secular legislation depends instead on whether the State can advance some justification for its law beyond its conformity to religious doctrine.'"\(^{295}\) Justice

\(^{291}\) \textit{Id.} at 795-96 n.4 (White, J., dissenting).
\(^{293}\) \textit{Id.} at 196 (footnote omitted).
\(^{294}\) \textit{Id.} (Burger, C.J., concurring).
\(^{295}\) \textit{Id.} at 211 (Blackmun, J., dissenting) (quoting Brief for Petitioner at 20).
Blackmun did not view the traditional religious condemnation of sodomy as a justification for the Georgia statute: "far from buttressing his case, petitioner's invocation of Leviticus, Romans, St. Thomas Aquinas, and sodomy's heretical status during the Middle Ages undermines his suggestion that [the statute] represents a legitimate use of secular coercive power. A State can no more punish private behavior because of religious intolerance than it can punish such behavior because of racial animus." 296

The disagreement apparent in the opinions in Thornburgh and Bowers about the proper role of religiously based values in influencing legislation is symptomatic of an ongoing controversy. For example, Professor Henkin has contended that criminal prohibitions on obscenity and consensual adult homosexual relations are unconstitutional because they rest only on religious values. 297 At one time, Professor Tribe argued that laws restricting abortion were unconstitutional because they were based on religious principles. 298 Professor Tribe has since abandoned this position, 299 and the Supreme Court has rejected the view that the Hyde Amendment, which restricted the use of federal funds to reimburse the cost of abortions, violated the establishment clause because the statute allegedly "incorporate[d] into law the doctrines of the Roman Catholic Church concerning the sinfulness of abortion and the time at which life commences." 300 There are those, however, who contend that Professor Tribe's initial position is correct, 301 and the "separation of church and state" metaphor is frequently invoked whenever religious groups advocate their views on controversial legislation. For example, in an article discussing a recent Vatican document on procreation, the New York Times

296. Id. at 211-12 (Blackmun, J., dissenting) (footnote omitted). The footnote omitted from the text stated: "The theological nature of the origin of Anglo-American antisodomy statutes is patent. It was not until 1533 that sodomy was made a secular offense in England. 25 Hen. VIII, ch. 6. Until that time, the offense was, in Sir James Stephen's words, 'merely ecclesiastical.' 2 J. Stephen, A History of the Criminal Law of England 429-430 (1883). Pollock and Maitland similarly observed that '[t]he crime against nature . . . was so closely connected with heresy that the vulgar had but one name for both.' 2 F. Pollock and F. Maitland, The History of English Law 554 (1985). The transfer of jurisdiction over prosecutions for sodomy to the secular courts seems primarily due to the alteration of ecclesiastical jurisdiction attendant on England's break with the Roman Catholic Church, rather than to any new understanding of the sovereign's interest in preventing or punishing the behavior involved. Cf. E. Coke, Institutes, ch. 10 (4th ed. 1797)." Bowers, 478 U.S. at 212 n.6 (Blackmun, J., dissenting).


300. Harris v. McRae, 448 U.S. 297, 319 (1980). In Harris v. McRae, the Court stated: "[W]e are convinced that the fact that the funding restrictions in the Hyde Amendment may coincide with the religious tenets of the Roman Catholic Church does not, without more, contravene the Establishment Clause." Id. at 319-20.

noted that "legal scholars said a challenge to Vatican-inspired legislation on the First Amendment doctrine of separation of church and state also could be raised."

The Supreme Court's recent discussions of these issues obviously will not end the controversy. Justice White's opinion in *Thornburgh*, however, does contain an important insight which should serve as a starting point for further debate on the topic. Justice White's dissent suggests the flaws in the argument that the state should remain "neutral" on issues on which there are diverse, often religiously motivated views. According to Justice White's approach, for example, it is a serious mistake to regard *Roe v. Wade* as advancing a neutral position on the issue of abortion. The issue—what are the appropriate social limits on individual choice—"must be decided one way or the other..." As Francis Canavan has stated: "the decision to leave certain moral issues to individual choice is a public moral judgment. Public decisions to leave certain matters to individual consciences may be and often are wise and right, but neutral they are not."

Justice Blackmun's position in his *Bowers* dissent seems to be that the state cannot legislate morality, at least not when the moral position has been influenced by religious convictions. As Hadley Arkes has stated, however, it is not true "that we must never 'legislate morality.' When the matter is understood in its proper strictness, we would have to say that we may 'legislate only' morality." Justice Blackmun's view ignores that "the polity engages in moral teaching through the law." To decide that a right to engage in homosexual acts is within the constitutional right of privacy is not to remain neutral about the conduct. Rather, that decision "would be a public declaration that in the eyes of society and its laws, sexual preferences are merely that—personal and subjective preferences of no objective validity

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305. H. Arkes, supra note 238, at 27 (emphasis in original). See Rostow, The Enforcement of Morals, 1960 CAMBRIDGE L.J. 174, 197 ("Men often say that one cannot legislate morality. I should say that we legislate hardly anything else.").

and no public importance. That view may arguably be the correct one, but
it is not a neutral refusal to hold any view at all."

One may read Justice Blackmun's view to preclude only public acknow-
ledgment of religiously-based moral views. This should not be a comforting
thought. The view that religiously-based morals cannot legitimately influence
legislation has been persuasively criticized in recent years. Perhaps the
most persuasive critique is that the exclusion of religiously-based morality
from the province of the law is not really possible. This hostility to "religion"
ultimately results in enshrining a competing orthodoxy—an orthodoxy of
secularism. This result is neither required by the Constitution nor consistent
with our tradition's respect for the public claims of religion.

There is an unbreakable connection between religion, morality, and
law. The attempt to deny the connection, by denying that religiously
motivated moral views properly can influence legislation, ignores the religious
origins of our legal tradition and ultimately threatens the freedoms that
such a view is ostensibly designed to protect. Such an attempt denies
religious individuals a full opportunity to participate in the political process,
and replaces a religiously-based public morality not with state neutrality, but
with another form of public morality. As Francis Canavan has stated:

When discussing the welfare of human beings in the here and now
we are not limited to the vision of man and his good that happens
to be held by those who call themselves secular humanists. Secular

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307. Canavan, supra note 304, at 33.
308. See, e.g., R. Neuhaus, The Naked Public Square (1984); Bradley, Dogmatomachy—
others have noted, there is a great deal of irony to the current arguments that the "religious
right" should be barred from legislating its "religious" views on issues such as abortion and
homosexual conduct. "20 years ago the same argument was used by the political right to
criticize the religious left for its participation in the civil rights, anti-war, and anti-poverty
movements." Gedicks & Hendrix, supra note 288, at 1597 n.81.
309. See R. Neuhaus, supra note 308, at 82, 86, 126; Bradley, supra note 308, at 295;
Canavan, supra note 304, at 34-37.
310. See, e.g., Bradley, supra note 308, at 275-77.
311. See generally B. Mitchell, Law, Morality, and Religion in a Secular Society
(1967); R. Neuhaus, supra note 308, at 248-264; Religion, Morality and Law (A. Harding
ed. 1956). As Professor Giannella noted: "[O]ur substantive criminal law, as well as our criminal
procedure, is inextricably entwined with religiously-based moral values." Giannella, Religious
Liberty, Nonestablishment, and Doctrinal Development: Part I. The Religious Liberty Guarantee,
80 Harv. L. Rev. 1381, 1404 (1967).
312. The religious origins of our legal tradition have been explored at length in the recent
work of Professor Harold Berman. See H. Berman, Law and Revolution: The Formation
of The Western Legal Tradition (1983); Berman, The Crisis of Legal Education in America,
569 (1984); Berman, Religious Foundations of Law in the West: An Historical Perspective, 1
J.L. & Religion 3 (1983). For a review of Berman's book, Law and Revolution, see Myers,
Book Review, 31 Am. J. Juris. 186 (1986). See also id. at 200 nn. 95-96 (citing other reviews
of Berman's book).
313. See R. Bork, Tradition and Morality in Constitutional Law 4-5 (1984); R.
Neuhaus, supra note 308, at 82.
humanism is not the least common denominator of all American beliefs about human welfare. It is but one sectarian view among many, and any American is free to believe that he derives from his religion a richer, fuller and more truly human image of man. He is also free to use it as a basis for the views he advocates on public policy.\(^\text{314}\)

This is obviously not to say that the state may coerce religious belief or worship.\(^\text{315}\) The state necessarily, however, takes a moral view in addressing the basic issues of social life, and religiously based moral views should be an integral part of the resolution of such questions. Justice White's view in *Thornburgh* and *Bowers* seems to support the public role of religiously based morality. The sharp division on the Court, however, should serve as a reminder that this role is far from universally accepted, and, in fact, is threatened by the position articulated by Justice Blackmun.

VI. *SHOULD BOWERS BE THE END OF SUBSTANTIVE DUE PROCESS?*

Although I think it is premature to conclude that the Supreme Court is likely to abandon substantive due process, the recent developments provide an appropriate occasion for considering whether the Court should take such a step. There are many who believe that *Bowers* and *Thornburgh* are irreconcilable.\(^\text{316}\) Professor Conkle has stated that *Bowers* "stands as a decision that severely undermines the doctrinal integrity of substantive due process, and therefore the legitimacy of the Court's decisionmaking in this area."\(^\text{317}\) There are, of course, those who believe that *Bowers* can be reconciled with the Court's earlier substantive due process decisions, including the five Justices who comprised the majority in *Bowers*.\(^\text{318}\) Nevertheless, recent events in the substantive due process field and the retirement of Justice Powell do provide an appropriate occasion for a rethinking of the entire enterprise.

Despite the continuing accumulation of cases giving substantive content to the due process clause, "the submerged constitutional premises, unlike common law, remain in place to be rediscovered."\(^\text{319}\) As Justice Frankfurter has stated, "the ultimate touchstone of constitutionality is the Constitution

\(^{314}\) Canavan, *supra* note 304, at 36.

\(^{315}\) *See generally* Finnis, *supra* note 304, at 453; Garvey, *A Comment on Religious Convictions and Lawmaking* (Correspondence), 84 Mich. L. Rev. 1288, 1294 (1986).


\(^{317}\) Conkle, *supra* note 1, at 241.

\(^{318}\) *See, e.g.*, Kaufman, *supra* note 96; Hafen, *supra* note 31, at 538-44 (arguing, prior to *Bowers*, that Court's privacy cases—even if rightly decided—did not necessarily extend to sexual relations outside marriage).

\(^{319}\) Linde, *supra* note 280, at 198.
itself and not what [the Court has] said about it.” 320 In the Court’s substantive due process decisions, very little attention is paid to the Constitution. Typically, there is a passing reference to the “majestic guarantees”321 of the clause, and then the Court “interprets” its own precedents. Since this Article considers the legitimacy of the whole notion of substantive due process, a resort to the text is necessary. This suggestion is usually made tepidly322 (although I do not think such caution is needed), because textualists are subjected to impassioned denunciations in the scholarly literature.323 Yet, the Court has always regarded resort to the Constitution as an essential precondition to any conclusion that a legislature has acted beyond the scope of its authority. Accordingly, I join with Professor Currie in “[b]eginning with the conviction that the Constitution is a law binding the judges no less than the other officials whose actions the court[s] undertake to review. That is what the Constitution itself says, and the Constitution is the source from which federal courts derive their powers. It is also the express basis on which the Supreme Court has claimed the power of judicial review.” 324

The text of the due process clause does speak of life, liberty, and property, but the language “appears to focus only on the processes by which [any of these rights] is taken. . . .”325 As John Ely has stated “‘substantive due process’ is a contradiction in terms. . . .”326 Some have focused on the word “law” as a source of substantive values.327 As Professor Tribe has


322. Professor (now Justice) Linde made the suggestion some years ago in this fashion: “[F]ar be it from me to say that a text is informative when so many, for so long, have found it to be only evocative.” Linde, supra note 280, at 237. Despite the tentativeness of this statement, Linde certainly thought that a recurrence to the text was essential.


324. D. CURRIE, THE CONSTITUTION IN THE SUPREME COURT: THE FIRST HUNDRED YEARS 1789-1888 xii (1985) (footnotes omitted). See American Jewish Congress v. City of Chicago, 827 F.2d 120, 140 (7th Cir. 1987) (Easterbrook, J., dissenting) (“The power of judges to ‘say what the law is’ comes from a belief that there is law to declare. That belief can be sustained only when we honor the limits on the original decisions, for they are every bit as important as the ends in view. To pursue the ends at the expense of the limits is to reject the text we purport to enforce, to make law depend on the will of the interpreter rather than the decision of the author, and to call into question judges’ authority to have the final word on debatable issues of public life.”).


327. See, e.g., Ratner, supra note 287, at 1071.
stated: "the words that follow 'due process' are 'of law,' and the word 'law' seems to have been the textual point of departure for substantive due process." According to Professor Tribe, "'Due process of law' was elaborated through a theory of legislation founded upon ideals of separation of powers." Although this separation of powers approach has some support in the history of the due process clause, "it must be recognized that the substantive limits on legislative power justified by the pre-fourteenth amendment context were quite narrow." As Professor Whitten has concluded: "due process did not empower the courts 'to override legislation on . . . policy grounds . . . ." Thus, even if the text of the due process of law clause suggests that it has some limited substantive content, the text does not appear to support the Court's current view that the clause authorizes the Court to fashion a general category of "super-protected right[s]. . . ." The original understanding does not take us any closer to viewing the due process clause as a general, substantive restraint on legislation. As Professor (now Justice) Linde concluded, "the constitution-makers, at the time of the fourteenth amendment as much as at the time of the fifth, gave the term 'due process' no more than a procedural connotation." This view clearly commands the vast majority of scholarly support. There were, of course, some contrary indications prior to the adoption of the fourteenth amendment.
amendment, but there is very little evidence that the due process clause was viewed as a general warrant for the Court to invalidate statutes that it viewed as "arbitrary" or "irrational." In fact, the relatively minor importance of the due process clause prior to the late 1800s strongly suggests that the provision was not intended to authorize the courts to assume the wide-ranging tasks the Court frequently undertakes.

In providing substantive content to the due process clause, the Court necessarily looks outside the Constitution. The task has been to search for sources that will adequately constrain the Court. Even the most "activist" decisions and the most "activist" Justices reject the idea that the Justices are authorized simply to enforce their own personal values. Yet, the various

335. See e.g., Scott v. Sandford, 60 U.S. (19 How.) 393, 450 (1857); Wynehamer v. People, 13 N.Y. 378 (1856). See J. Ely, supra note 1, at 15-16 (discussing these two cases); Sienig, Rehabilitating Lochner, 22 SAN DIEGO L. REV. 453, 487-88, 491 (1985) (same). See also Graham, Procedure to Substance—Extra-Judicial Rise of Due Process, 1830-1860, 40 CALIF. L. REV. 483 (1952) (discussing extra judicial uses of substantive due process, primarily by abolitionists). In a recent book, Professor Strong argues that the due process clause has substantive content. F. Strong, supra note 14. According to Professor Strong, substantive due process "embraced two cores of meaning: anti-expropriation of property interests and anti-monopoly in economic enterprise." Id. at 79. Professor Strong concludes, however, that the substantive content of the due process clause does not extend beyond its recognized historical meaning, and that, therefore, the clause contains no warrant for substantive protection of civil and personal rights. Id. at 109-113.

336. See, e.g., J. Ely, supra note 1, at 18; Linde, supra note 14, at 160-63; Whitten, supra note 330, at 795.

337. See, e.g., R. Berger, supra note 334, at 201; W. Crosskey, supra note 334, at 1111; C. Wolfe, supra note 334, at 134.

338. For example, Justice Blackmun's opinion in Roe v. Wade began by invoking this passage from Justice Holmes' dissent in Lochner: "'[The Constitution] is made for people of fundamentally differing views, and the accident of our finding certain opinions natural or familiar or novel and even shocking ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States.'" Roe v. Wade, 410 U.S. 113, 117 (1973) (quoting Lochner v. New York, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting)). It is surely debatable whether Justice Blackmun followed this admonition. See F. Strong, supra note 14, at 111; Epstein, supra note 303, at 168 (footnote omitted) ("Anyone can quote Holmes in Lochner v. New York. But not everyone can apply the Holmes doctrine when his views are not embodied in the legislation under review."). In Thornburgh, Justice Blackmun, after noting the bitter disputes over the Court's decision in Roe, took pains to appeal to our fundamental charter: "[T]hose disagreements . . . do not now relieve us of our duty to apply the Constitution faithfully." Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747, 772 (1986). Justice Brennan has noted that "Justices are not platonic guardians appointed to wield authority according to their personal moral predilections." Brennan, The Constitution of the United States: Contemporary Ratification, 43 NAT'L LAW GUILD PRAC. 1, 3 (1986). See Van Patten, The Partisan Battle Over the Constitution: Meese's Jurisprudence of Original Intention and Brennan's Theory of Contemporary Ratification, 70 MARQ. L. REV. 389, 418-20 (1987) (suggesting that Justice Brennan does not always follow this position). The Hamiltonian vision that the judiciary has "neither FORCE nor WILL, but merely judgment . . ." THE FEDERALIST NO. 78, at 465 (A. Hamilton) (C. Rossiter ed. 1961), retains a powerful normative appeal. See e.g., G. McDowell, The Constitution and Contemporary Constitutional Theory 40-43 (1985); Berger, New Theories of "Interpretation": The Activist Flight from the Constitution, 47 OHIO ST. L.J. 1, 3-8 (1986); Bork, supra...
approaches to supplying substantive content to the due process clause—from Justice White's more limited view to Justice Blackmun's more free-wheeling approach—seem inevitably to violate the premise recently endorsed by Justice Brennan, i.e., that the Justices cannot simply impose "their personal moral predilections." As Judge Bork has stated: "The nature of the non-interpretive enterprise is such that its theories must end in constitutional nihilism and the imposition of the judge's merely personal values on the rest of us."339

Moreover, the approaches that seek to impose values from outside the due process clause all lack legitimacy. As Judge Bork has stated:

But there is an objection to non-interpretivism that seems to me more basic, because it would undercut that philosophy even if it were offered in a form sufficiently rigorous to guide and constrain judges. The question non-interpretivism can never answer is what legitimate authority a judge possesses to rule society when he has no law to apply.340

Constitutionalism implies that the way a polity goes about protecting fundamental rights from the vagaries of the political process is to incorporate them into the Constitution.341 As Professor Ely stated in his early critique of Roe, "A neutral and durable principle may be a thing of beauty and a joy forever. But if it lacks connection with any value the Constitution marks as special, it is not a constitutional principle and the Court has no business imposing it."342

The basic problem with substantive due process is its lack of connection with the Constitution. The due process clause simply does not tell the Court.


341. As Professor Ely stated: "If one wanted to freeze a tradition, the sensible course would be to write it down." J. Ely, supra note 1, at 62 (footnote omitted). See Monaghan, supra note 334, at 375-76 (footnotes omitted) (emphasis in original) ("The root premise is that the Supreme Court, like other branches of government, is constrained by the written constitution. Our legal grundnorm has been that the body politic can at a specific point in time definitively order relationships, and that such an ordering is binding on all organs of government until changed by amendment.").

342. Ely, supra note 36, at 949. At times in his Thornburgh dissent, Justice White seemed to endorse this view, see Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747, 796-97 & n.5 (1986) (White, J., dissenting), although he continues to envision a role (however limited) for substantive due process.
how to begin its reasoning about the category of "fundamental" rights to
be protected. Of course, the argument could be made that "[t]he Justices
who sought a priori limitations on government might have asserted that truth
to be self-evident . . . [or] deemed it implied in the Constitution without
being written there. . . ."343 The awkwardness has been in tying these broader
theoretical approaches to the due process clause. In the absence of persuasive
authority for using the due process clause as a point of departure for the
creation of fundamental rights, perhaps it is time for the Court to return to
the view that any substantive review under the due process clause is illegit-
imate. This view—that any substantive review under the due process clause
is unwarranted—is not novel, but there is value in restating the position.344

The Court should return to the position that Justice Black advanced for
eight members of the Court in Ferguson v. Skrupa. As Hans Linde has
stated, 345 this position involves the rejection of all substantive review,
including rationality review, under the due process clause (and the equal
protection clause, for that matter).346 Linde's summary is worth quoting at
some length:

there is no general constitutional obligation on government to behave
'reasonably,' or to avoid 'arbitrary' action. . . . 'Arbitrary' and
'capricious' are not constitutional terms. When the Constitution
makes 'reasonableness' or other degrees of judgment into constitu-
tional criteria, it says so. Apart from such deliberately stated criteria,
the Constitution is blessedly free of the programmatic preaching and
pious instructions to government that characterize the later con-
tinental tradition of written constitutions. Governments had acted with
human frailty before the Constitution was written and could be
expected to do so in the future. Hope lay in the divided and
representative structure of authority and in specific constitutional
prohibitions. Short of a violation of such a specific prohibition,
however, government is not commanded to act 'reasonably,' nor
judges to keep it so.347

Perhaps the constant repetition of the rational basis formula348 and the
seeming innocuousness of the requirement make Linde's proposal so sur-

343. Henkin, supra note 334, at 1414 (footnote omitted).
344. John Ely concluded his Yale Law Journal article on Roe v. Wade with an observation
that motivates this essay: "I hope that [the position that the Court has no business imposing
values that lack connection with the Constitution] will seem obvious to the point of banality.
Yet those of us to whom it does seem obvious have seldom troubled to say so. And because
we have not, we must share in the blame for this decision." Ely, supra note 36, at 949 (footnote
omitted).
345. See generally Linde, supra note 280; Linde, supra note 14.
346. See also Barrett, The Rational Basis Standard for Equal Protection Review of Ordinary
Legislative Classifications, 68 Ky. L.J. 845 (1979-80) (rejecting rational basis review in equal
protection context).
347. Linde, supra note 14, at 167 (footnote omitted).
348. In an important article, Professor Nagel explains how the Court's constant resort to
"formulas" tends to deflect focus from the text of the Constitution itself. See Nagel, The
prising. Yet, the persuasiveness of his position and the Court’s continuing inability to convince anyone that its substantive due process decisions “involve[] much more than the imposition of the Justices’ own choice of values” suggests that the Court should return to the position adopted in Ferguson v. Skrupa and reject all substantive review.

This does not mean that there is no role for judicial review. This position simply ties judicial review to the Constitution. As Hans Linde put it, “What is in dispute . . . is the practice of reasoning backwards from a theory of judicial review to a theory of constitutional norms, the practice of judicial review premised on nothing more than a theory of judicial review itself.” And, just as there is no constitutional norm that legislation must satisfy a “rational basis” standard, there is no constitutional norm, at least not the due process clause, supporting the Court’s role in creating fundamental rights that are not traceable to the Constitution. There are substantive norms in the Constitution, the contract and takings clauses for example, but there is nothing in the due process clause about “intimate association” or “sexual gratification.” In the absence of such guidance, the judiciary simply has no basis to intervene.

As Hans Linde put it in an oft-cited (but apparently little appreciated) article:

Thus, throughout all disputes over competing theories of interpretation, the judicial responsibility begins and ends with determining the present scope and meaning of a decision that the nation, at an earlier time, articulated and enacted into constitutional text—a different responsibility from that of explaining why society would benefit from a judicial change in the common law.

This view typically is regarded as extraordinarily naive. One of the reasons this charge is leveled is that interpretivism allegedly ignores the inherent

350. Linde, supra note 280, at 252.
351. See Berger, “Law of the Land” Reconsidered, 74 NW. U. L. Rev. 1, 29 (1979) (“There is no basis in the pre-1787 historical materials for the proposition that ‘due process of law’ comprehended judicial power to test legislation for reasonableness.”).
352. See Katz, supra note 47, at 362 (“[H]owever appealing sexual libertarianism may be as a matter of political theory, it has not been recognized by the Supreme Court as a constitutional restraint on the state’s legislative power.”).
353. Linde, Judges, Critics, and the Realist Tradition, 82 YALE L.J. 227, 254 (1972). Justice Linde himself has complained that scholars who have criticized his writings have not really addressed his fundamental arguments. In a 1983 speech, Linde stated: “In another lecture some years ago, I argued that laws need not be rational means toward some specific end. This drew a number of responses defending judicial review for rationality as a good thing. These responses, however, missed the crucial point, the point that most constitutions impose no obligation on lawmakers or on the people themselves to enact only rational laws. A decision to set aside legislation should have some constitutional grounds beyond being a useful judicial function.” Linde, E Pluribus-Constitutional Theory and State Courts, 18 GA. L. Rev. 165, 187-88 (1984) (footnotes omitted) (Linde was referring to his Due Process Of Lawmaking article, supra note 280).
ambiguity of language. Most theories of interpretivism, however, do acknowledge the complexity of the process of interpretation; these theories simply claim that if there is uncertainty about whether a particular statute violates a particular provision of the Constitution, the judiciary has no basis to overturn the legislative judgment. 354 Unless the Court can conclude that a statute is inconsistent with a principle the Constitution marks as fundamental, the Court has no basis to conclude that the statute is unconstitutional.355 The statute may be "uncommonly silly"356 or terribly misguided, but unless the statute runs afoul of one of the "the principles the Framers put into the Constitution"357 the statute is not unconstitutional.

Another argument against Linde's approach to substantive due process is that it is meaningless. Other provisions in the Constitution allegedly authorize the federal judiciary to define fundamental rights not derivable from the Constitution. Thus, there has been a revival of interest in the ninth amendment.358 Curiously, this scholarship relies on a form of interpretivism.

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354. See Bork, supra note 280, at 8; McConnell, On Reading the Constitution, 73 CORNELL L. REV. 359, 361 (1988). Contrary to popular beliefs, the interpretivist approach does acknowledge the complexity of the process of interpretation. See Perry, Interpretivism, Freedom of Expression, and Equal Protection, 42 OHIO ST. L.J. 261, 280 (1980) ("Nor will it do to attack interpretivism by confusing it with what is essentially a straw man, 'literalism,' and then demonstrating the obvious infirmity of the latter."). An opinion in Ollman v. Evans by Judge Bork provides an illustration of the complexity of the interpretivist approach. 750 F.2d 970 (D.C. Cir. 1984) (en banc), cert. denied, 471 U.S. 1127 (1985). There, Judge Bork stated: "Judges given stewardship of a constitutional provision—such as the first amendment—whose core is known but whose outer reach and contours are ill-defined, face the never-ending task of discerning the meaning of the provision from one case to the next. There would be little need for judges—and certainly no office for a philosophy of judging—if the boundaries of every constitutional provision were self-evident. They are not. In a case like this, it is the task of the judge in this generation to discern how the framers' values, defined in the context of the world they knew, apply to the world we know." Id. at 995 (Bork, J., concurring). See also Bork, The Constitution, Original Intent, and Economic Rights, 23 SAN DIEGO L. REV. 823, 826-27 (1986).

355. See Marbury v. Madison, 5 U.S. (1 Cranch) 137, 176-78 (1803).


The argument seems to be that although the Constitution is full of "majestic generalities" whose meaning remains yet to be created, there is, at least, one provision with ascertainable meaning, and that provision authorizes the courts to fashion new constitutional rights. This argument may well be supportable, but surely it is necessary to specify the precise source for this expansive judicial role. Identifying the source of this authority serves the essential purpose of identifying how the Court should begin its reasoning process. Resort to the due process clause does not accomplish this task.

As Professor Currie has noted, our constitutional history has been marked by an "incessant quest for the judicial holy grail." Surely those who adopt Professor Grey's view that the Constitution delegates to the Court the power to enforce fundamental rights not identified by the text are under an obligation to explain when they have "at last long . . . discovered a clause that lets [courts] strike down any law [they] do not like." Quite simply, the due process clause is not the judicial holy grail.

VII. CONCLUSION

The Supreme Court's decision in Bowers v. Hardwick has prompted considerable academic speculation about the future of substantive due process. Some commentators even have speculated that "the beginning of the second death of substantive due process may be underway." Subsequent judicial developments have given little support to the view that Bowers suggests that a major retrenchment is forthcoming. The Supreme Court has given no indication that it is prepared to abandon substantive due process. The Supreme Court has not relied on, or even cited, Bowers in its more recent substantive due process decisions. These substantive due process decisions indicate that the Court is continuing to supply substantive content to the due process clause on a relatively ad hoc basis. The lower court decisions in this area also support the same conclusion: although the precise

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359. D. Currie, supra note 324, at 347.
360. Grey, supra note 271, at 5.
361. D. Currie, supra note 324, at 347 (footnote omitted).
362. Conkle, supra note 1, at 216.
363. The Supreme Court has only cited Bowers on one occasion. In Webster v. Doe, 108 S. Ct. 2047 (1988), an employee who had been discharged from the CIA brought suit against the Director of the CIA claiming that he had been fired because of his homosexuality. The Supreme Court found that the Director's decision was not subject to judicial review under the Administrative Procedure Act, but concluded that the employee's constitutional claims were judicially reviewable. In his brief before the United States Supreme Court, the Director asserted that the employer had not presented a colorable constitutional claim. The Supreme Court, per Chief Justice Rehnquist, responded to this assertion in this fashion: "Petitioner relies on our decision in Bowers v. Hardwick to support this view. This question was not presented in the petition for certiorari, and we decline to consider it at this stage of the litigation." Webster v. Doe, 108 S. Ct. 2047, 2054 n.9 (1988).
contours of substantive due process are likely to be uncertain, the doctrine itself is firmly entrenched.

Although there has been very little change in the doctrine of substantive due process, and although little change appears to be imminent, this Article considered whether the Court should rethink the role it has undertaken in this context. The Article concluded with an endorsement of the view that the Supreme Court accepted in Ferguson v. Skrupa—that is, that the Court should not engage in any substantive review, even rationality review, under the due process clause. There may be other bases for the decisions the Court has rendered in the name of substantive due process, the ninth amendment being one possibility, but there is insufficient justification for relying on the due process clause as the textual anchor for such decisions.