1987

Bowers v. Hardwick: The Supreme Court Redefines Fundamental Rights Analysis

Jeffrey W. Soderberg

Follow this and additional works at: http://digitalcommons.law.villanova.edu/vlr

Part of the Constitutional Law Commons

Recommended Citation
Available at: http://digitalcommons.law.villanova.edu/vlr/vol32/iss1/6

This Note is brought to you for free and open access by Villanova University Charles Widger School of Law Digital Repository. It has been accepted for inclusion in Villanova Law Review by an authorized editor of Villanova University Charles Widger School of Law Digital Repository. For more information, please contact Benjamin.Carlson@law.villanova.edu.
1987]

**BOWERS v. HARDWICK: THE SUPREME COURT REDEFINES FUNDAMENTAL RIGHTS ANALYSIS**

I. INTRODUCTION

Since ratification of the fourteenth amendment to the United States Constitution, the Supreme Court has struggled to determine the scope of the amendment's generalized restrictions on the power of the states to regulate the activity of their citizenry. In the first hundred years of

1. The fourteenth amendment, section 1, provides in pertinent part:
   No State shall make or enforce any law which shall abridge the
   privileges or immunities of citizens of the United States; nor shall any
   State deprive any person of life, liberty, or property, without due pro-
   cess of law; nor deny to any person within its jurisdiction the equal
   protection of the laws.
   U.S. CONST. amend. XIV, § 1. The fourteenth amendment was one of three
   passed in the years following the Civil War. The states ratified the thirteenth
   amendment, abolishing involuntary servitude, in 1865. The fourteenth amend-
   ment was ratified in 1868, and the fifteenth amendment, establishing the right to
   vote regardless of race, was ratified in 1870. See L. Tribe, AMERICAN CONSTITU-

2. The struggle to define the liberty protected by the due process clause
   finds its roots in the tension between judicial restraint, with the Court's scope of
   review limited by the text of the Constitution and evidence of the Framer's in-
   tent, and the opposing concept of the Constitution as a living document, with
   the Court free to actively flesh out the document's open-ended clauses.
   Much scholarly work has been produced in an attempt to answer the ques-
   tion of how the Supreme Court should determine what the Constitution means.
   See, e.g., R. Berger, GOVERNMENT BY JUDICIARY (1977); A. Bickel, THE SUPREME
   COURT AND THE IDEA OF PROGRESS (1970); J. Choper, JUDICIAL REVIEW AND THE
   NATIONAL POLITICAL PROCESS (1980); A. Cox, THE ROLE OF THE SUPREME COURT
   IN AMERICAN GOVERNMENT (1976); R. Dworkin, TAKING RIGHTS SERIOUSLY
   (1977); J. Ely, DEMOCRACY AND DISTRUST (1980); M. Perry, THE CONSTITUTION,
   THE COURTS AND HUMAN RIGHTS (1982); Alexander, Painting Without Numbers:
   Noninterpretive Judicial Review, 8 U. DAYTON L. REV. 447 (1983); Berger, Michael
   Perry's Functional Justification for Judicial Activism, 8 U. DAYTON L. REV. 465 (1983);
   Bickel, THE ORIGINAL UNDERSTANDING AND THE SEGREGATION DECISION, 69 HARV.
   L. REV. 1 (1955); Bork, STYLES IN CONSTITUTIONAL THEORY, 26 S. TEX. L.J. 383 (1985);
   Brest, INTERPRETATION AND INTEREST, 34 STAN. L. REV. 765 (1982); Brest, THE MISCONCEIVED QUEST FOR
   THE ORIGINAL UNDERSTANDING, 60 B.U.L. REV. 204 (1980); Dworkin, THE FORUM OF
   PRINCIPLE, 56 N.Y.U. L. REV. 469 (1981); Fiss, CONVENTIONALISM, 58 S. CAL. L. REV. 177
   (1985); Fiss, OBJECTIVITY AND INTERPRETATION, 34 STAN. L. REV. 739 (1982); Gordon,
   HISTORICISM IN LEGAL SCHOLARSHIP, 90 YALE L.J. 1017 (1981); Grey, THE CONSTITUTION AS
   SCRIPTURE, 37 STAN. L. REV. 1 (1984); Grey, ORIGINS OF THE UNWRITTEN CONSTITUTION: FUNDAMEN-
   TAL LAW IN AMERICAN REVOLUTIONARY THOUGHT, 30 STAN. L. REV. 843 (1978); Grey,
   DO WE HAVE AN UNWRITTEN CONSTITUTION, 27 STAN. L. REV. 703 (1975); Levinson,
   LAW AS LITERATURE, 60 TEX. L. REV. 373 (1982); Levy, THE LEGACY REEXAMINED, 37 STAN.
   L. REV. 767 (1985); Maltz, MURDER IN THE CATHEDRAL—THE SUPREME COURT AS MORAL
   PROPHET, 8 U. DAYTON L. REV. 623 (1983); McIntosh, LEGAL HERMENEUTICS: A PHILOSOPHICAL
   CRITIQUE, 35 OKLA. L. REV. 1 (1982); Monaghan, OUR PERFECT CONSTITUTION, 56
   N.Y.U. L. REV. 353 (1981); Moore, A NATURAL LAW THEORY OF INTERPRETATION, 58 S.
   CAL. L. REV. 279 (1985); Munzer & Nickel, DOES THE CONSTITUTION MEAN WHAT IT AL-
fourteenth amendment jurisprudence, two distinct lines of cases emerged in the Court’s attempt to define the liberty protected by the due process clause. One line of cases focused on the liberty and due process interests implicated by state economic and social legislation, 3


3. The first interpretation of section 1 of the amendment came with the Supreme Court’s decision in the Slaughterhouse Cases, 83 U.S. 36 (1873). The decision involved a state-sanctioned monopoly on the slaughterhouse business in New Orleans, and the Court affirmed the Supreme Court of Louisiana’s ruling upholding the law creating the exclusive charter. Id. at 83. In applying the due process clause to the facts, the Court held that the restraint on the trade of the butchers of Louisiana, who were not allowed to engage in their craft within the New Orleans area, did not deprive them of property without due process of law. Id. at 80-81.

Twenty-five years later the Court began to define the liberties protected against state regulation by the due process clause, holding that the liberty to contract for insurance was protected under the fourteenth amendment. Allgeyer v. Louisiana, 165 U.S. 578 (1897). Allgeyer involved a citizen of Louisiana who wished to insure property in Louisiana through a foreign insurer that had not complied with Louisiana law. The contract was entered into beyond the limits of the state. The state wished to infringe on the citizen’s right to contract with the foreign insurer. Id. at 584-85, 588-89.

The Court ruled that the liberty protected by the fourteenth amendment “is deemed to embrace the right of the citizen . . . to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion the purposes above mentioned.” Id. at 589. The Court further stated that the extent of the legitimate exercise of the police power of the state “must be left for determination in each case as it arises.” Id. at 590.

The Court then embarked on a new course of judicial review, typified by the landmark case of Lochner v. New York, 198 U.S. 45 (1905). In Lochner, the Court invalidated a New York law limiting the maximum hours a baker could work, holding that the statute interfered with the freedom to contract, and stated that “[t]he general right to make a contract in relation to his business is part of the liberty of the individual protected by the Fourteenth Amendment of the Federal Constitution.” Id. at 58 (citing Allgeyer v. Louisiana, 165 U.S. 578 (1897)).

Justice Holmes dissented, reasoning that the Constitution was not intended to express a particular economic theory, regardless of the substance of the theory. Justice Holmes believed that the Constitution “is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and 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.” Id. at 76 (Holmes, J., dissenting).

Justice Holmes proposed a different mode of analysis:
and the other line of cases grappled with the dilemma of incorporation,

I think that the word liberty in the Fourteenth Amendment is perverted when it is held to prevent the natural outcome of a dominant opinion, unless it can be said that a rational and fair man necessarily would admit that the statute proposed would infringe fundamental principles as they have been understood by the traditions of our people and our law.

Id. at 76 (Holmes, J., dissenting).

The Court, during the era of economic substantive due process, invalidated both state and federal laws as violative of the due process clause of the fourteenth and fifth amendments, respectively. See, e.g., Coppage v. Kansas, 236 U.S. 1 (1915) (invalidating state law prohibiting anti-union employment contracts); Adair v. United States, 208 U.S. 161 (1908) (invalidating federal law prohibiting anti-union employment contracts). The Court did uphold some laws when the state demonstrated factually that the law was justified by a valid purpose. See, e.g., Bunting v. Oregon, 243 U.S. 426 (1917) (upholding state law limiting work hours for men in specific industries); Muller v. Oregon, 208 U.S. 412 (1908) (upholding state law regulating work hours for women).

The changing political and economic landscape of America in the 1930's set the stage for a shift in the direction of the Supreme Court's fourteenth amendment interpretation and led to a reversal of the Court's approach to judicial review under the due process clause. The Court had invalidated several New Deal federal economic measures which affected transactions within the domain of state power, generally under a narrow interpretation of the commerce power of Congress as established by article I, section 8 of the Constitution. The Court subsequently struck down a New York law creating a process for establishing minimum wage levels for women workers in the state in Morehead v. New York ex rel. Tipaldo, 298 U.S. 587 (1936).

Soon after Morehead, legislation was introduced in Congress which would have allowed the President to appoint an additional justice for each justice on the Court who had failed to retire after reaching the age of seventy and had served ten years on the Court. H.R. Doc. No. 142, 75th Cong., 1st Sess. (1937). This proposal, referred to popularly as Roosevelt's court packing plan, would have allowed a maximum of fifteen Supreme Court justices but was never enacted. For a discussion of the plan to alter the structure of the Supreme Court, see B. F. Wright, THE GROWTH OF AMERICAN CONSTITUTIONAL LAW, 200-08 (1967).

In the pivotal year of 1937, in West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937), the Supreme Court upheld a Washington law authorizing the fixing of minimum wages for women and minors, and overruled Adkins v. Children's Hospital, 261 U.S. 525 (1923) (invalidating similar law). Parrish, 300 U.S. at 400. The Court recognized that "freedom of contract is a qualified and not an absolute right." Id. at 392 (quoting Chicago, B. & Q. R. Co. v. McGuire, 219 U.S. 549, 567 (1911)). The Court further noted that the power to restrict freedom of contract could be exercised in the public interest regarding contracts between employer and employee. Id. at 392-93. See Chambers, The Big Switch: Justice Roberts and the Minimum Wage Cases, 10 LABOR HISTORY 44 (Winter, 1969).

The Supreme Court further altered the concept of substantive due process review in United States v. Carolene Products Co., 304 U.S. 144 (1938). The Court in Carolene rejected a due process challenge to the constitutionality of a federal law prohibiting the shipment in interstate commerce of "filled milk," milk compounded with fat or oil other than milk fat. Id. at 145-46. Regarding the rational basis for the law, the Court stated:

The existence of facts supporting the legislative judgment is to be presumed, for regulatory legislation affecting ordinary commercial transactions is not to be pronounced unconstitutional unless in light of the facts made known or generally assumed it is of such a character as to

Published by Villanova University Charles Widger School of Law Digital Repository, 1987
and focused on which protections of the Bill of Rights applied to limit
preclude the assumption that it rests upon some rational basis within
the knowledge and experience of the legislators.

Id. at 152.

The Supreme Court explicitly rejected the concept of economic substantive
due process review ten years later in Lincoln Federal Labor Union v. Northwestern
Iron & Metal Co., 335 U.S. 525 (1949). In Lincoln Federal, the Court
considered the constitutionality of a Nebraska constitutional amendment and a North
Carolina statute that essentially provided that no person in those states would be
denied an opportunity to secure or retain employment because of his membership
in a labor union. Id. at 527-28. The Supreme Court upheld the constitutionality
of the provisions at issue and noted that "[i]t his Court . . . has steadily
rejected the due process philosophy enunciated in the Adair-Coppage line of
cases." Id. at 536. The Court recognized a return to an "earlier constitutional
principle" under which "the due process clause is no longer to be so broadly
construed that the Congress and state legislatures are put in a straitjacket when
they attempt to suppress business and industrial conditions which they regard as
offensive to the public welfare." Id. at 536-37; see also Williamson v. Lee Optical
Co., 348 U.S. 483 (1955). In Williamson, the Court considered the constitution-
ality of an Oklahoma law regulating prescriptive optical care. Id. at 485 n.1.
The Court upheld the validity of the statute and seemed to go so far as to hypo-
thesize reasons establishing a rational basis for the law and stated that "[i]t is
enough that there is an evil at hand for correction, and that it might be thought
that the particular legislative measure was a rational way to correct it." Id. at
488.

Williamson demonstrated the complete shift in the Court's approach to judi-
cial review of general economic and social legislation. In Lochner, the Court
looked behind the stated purpose of the legislature in enacting the statute and
considered what the true intent was. 198 U.S. at 64. In Williamson, the Court
stated that if it could imagine a purpose for the statute and it furthered that
purpose, the statute would not be held to violate the due process clause. Wil-
liamson thus signified a drastic shift in the process of judicial review of social and
economic legislation.

Ultimately, the Court's aggressive inquiry into the rational basis of state
laws regulating general social and economic matters shifted to a reluctance on
the part of the Court to sit as a "superlegislature to weigh the wisdom of legisla-
tion." Ferguson v. Skrupa, 372 U.S. 726, 731 (1963) (quoting Day-Brite Light-
ing, Inc. v. Missouri, 342 U.S. 421, 423 (1952)).

The Court in Ferguson upheld the constitutionality of a Kansas law restrict-
ing the practice of the business of debt adjustment. Id. at 731-33. The Court
recounted its previous use of the due process clause "to strike down laws which
were thought unreasonable, that is, unwise or incompatible with some particular
economic or social philosophy." Id. at 729. The Court noted that such a doc-
trine had "long since been discarded," and that the Court had "returned to the
original constitutional proposition that courts do not substitute their social and
economic beliefs for the judgment of legislative bodies." Id. at 730. This was the
approach set forth by Justice Holmes in his dissent in Lochner almost sixty years
earlier. 198 U.S. at 74-76 (Holmes, J., dissenting).

For a thorough discussion of the Supreme Court's struggle to define four-
teneth amendment liberty through substantive due process review, see Preston
& Mehlman, The Due Process Clause as a Limitation on the Reach of State Legislation:
An Historical and Analytical Examination of Substantive Due Process, 8 U. BALT. L. REV.
1 (1978). For a discussion of the relationship of substantive due process review
as exemplified in the privacy cases to the Court's earlier application of the doc-
trine, see Garfield, Privacy, Abortion, and Judicial Review: Haunted by the Ghost of
the states' power under the amendment.\(^4\)

In 1965, the Supreme Court began a process of redefining fundamental liberties\(^5\) protected by the fourteenth amendment, recognizing a

\(^4\) The Court considered the proper application of the guarantees contained in the Bill of Rights to state legislation under the fourteenth amendment's due process clause, and developed a rationale for determining which of these enumerated rights were fundamental and thus protected under the amendment. The Court described such fundamental rights as those which were "implicit in the concept of ordered liberty," and stated that the source of the fourteenth amendment protection of certain rights is "the belief that neither liberty nor justice would exist if they were sacrificed." Palko v. Connecticut, 302 U.S. 319, 325-26 (1937) (rejecting claim that double jeopardy clause was applicable against states under fourteenth amendment). But see Benton v. Maryland, 395 U.S. 784 (1969) (double jeopardy clause applied to states).


Regarding the due process clause of the fourteenth amendment, the Supreme Court has noted that "[i]n resolving conflicting claims concerning the meaning of this spacious language, the Court has looked increasingly to the Bill of Rights for guidance." Duncan v. Louisiana, 391 U.S. 145, 147-48 (1968).

5. While the Supreme Court did eventually retreat from the activism of the Lochner era, certain rights which were recognized by the Court during that era of active judicial review continued to receive protection under the amendment's due process clause. The Court did not overrule prior cases which protected the right to direct the upbringing and education of one's children. See, e.g., Pierce v. Society of Sisters, 268 U.S. 510 (1925) (invalidating state law requiring parents to send their children to public schools); Meyer v. Nebraska, 262 U.S. 390 (1923) (reversing conviction of teacher for violating state law against instruction of elementary school students in foreign language).

Additionally, the Court recognized a fundamental right of marriage and procreation in Skinner v. Oklahoma ex rel. Williamson, 316 U.S. 535 (1942). This case involved a sterilization statute aimed at recidivist felons, and the Court invalidated the statute on equal protection grounds. Id. at 536-38. The Skinner Court emphasized that the statute irreparably affected a basic liberty and applied strict scrutiny in holding that the law effected invidious discrimination. Id. at 541.

Additionally, the Court has recognized several areas of activity, not explicitly protected in the Constitution and not properly classified under the concept of privacy rights, as fundamental rights the regulation of which calls for strict judicial scrutiny. These rights include freedom of association, in NAACP v. Alabama ex rel. Patterson, 357 U.S. 449, 466 (1958) (reversing state civil contempt judgment for failure to disclose membership lists, when compelling disclosure of
constitutional right of privacy. The Court has since declared that certain areas of activity and decisionmaking are generally beyond the reach of legitimate governmental regulation and control.

In the recent case of Bowers v. Hardwick, the Court was faced with the question of whether a previously unrecognized area of activity and decisionmaking, the right to intimate association, fell within the protection of the constitutional right of privacy under current due process clause principles. This Note examines the analysis employed in the privacy cases and in Hardwick, and attempts to demonstrate the impact and meaning of the Hardwick rationale in light of the earlier cases. This Note submits that while claiming allegiance to current due process clause principles and to notions of judicial restraint, the majority in Hardwick redefines the process of fundamental rights analysis and creates such lists would infringe upon “free enjoyment of the right to associate”); the right to vote, in Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966) (invalidating state poll tax under fourteenth amendment’s equal protection clause); and the right to interstate travel, in Shapiro v. Thompson, 394 U.S. 618 (1969) (invalidating states’ prohibition of welfare benefits to residents of less than one year as violative of equal protection clause).

6. The Supreme Court’s recognition of non-enumerated rights as fundamental and within the scope of the liberty protected against state regulation by the due process clause took a giant step in 1965 with the landmark case of Griswold v. Connecticut, 381 U.S. 479 (1965). In Griswold, the Court invalidated a Connecticut law forbidding the use of contraceptives as unconstitutional when applied to married persons and their physicians. Id. at 485-86. The Court held that the state law violated the right of privacy inherent in the marital relationship.

7. Since Griswold, the Court has recognized such protected areas as marriage, in Loving v. Virginia, 388 U.S. 1 (1967) (invalidating miscegenation statute); procreative choice, in Roe v. Wade, 410 U.S. 113 (1973) (invalidating abortion restrictions), and Eisenstadt v. Baird, 405 U.S. 438 (1972) (invalidating restrictions on distribution of contraceptives); and the family, in Moore v. City of East Cleveland, 431 U.S. 494 (1977) (invalidating zoning ordinance which restrictively defined permissible family occupation of single dwelling).

8. The test formulated by the Court is essentially that regulation of a fundamental right must be justified by a compelling state interest, and must be narrowly drawn to achieve that interest. Roe v. Wade, 410 U.S. 113, 154-55 (1973).


10. In Hardwick, the Court faced the question of whether the fourteenth amendment protected the right to engage in adult, consensual, homosexual sodomy in the privacy of one’s home. Respondent Hardwick had successfully appealed the dismissal of his challenge to a Georgia sodomy statute in the United States Court of Appeals for the Eleventh Circuit. Bowers v. Hardwick, 106 S. Ct. at 2843 (citing Hardwick v. Bowers, 760 F.2d 1202 (11th Cir. 1985)).


12. The Hardwick Court rejected the claim that the Georgia sodomy statute violated Hardwick’s fundamental constitutional rights, and justified its decision by proclaiming its reluctance to expand the substantive scope of the due process clause. Hardwick, 106 S. Ct. at 2846.
ates a new test for the determination of what constitutes liberty under the fourteenth amendment. 13

II. BACKGROUND

The Zones of Protected Activity and Decisionmaking Recognized Under the Due Process Clause

In cases recognizing that certain conduct was protected from regulation absent a compelling state interest, under the fourteenth amendment, the Supreme Court has focused its inquiry on the abstract fundamental right implicated by the regulation of the conduct at issue, rather than on the specific conduct or activity itself. Even before the Court described the personal liberty protected by the due process clause as the right of privacy in Griswold v. Connecticut, 14 earlier decisions had sketched the contours of the fundamental rights deserving of protection through heightened judicial review. 15

The Court has recognized three main zones of protected activity and decisionmaking in its fundamental rights analysis under the due process clause. These areas include decisions regarding marriage, 16 the family, 17 and procreational choice. 18 This section examines the issues raised and resolved in the cases that have focused on the protection of such non-enumerated fundamental rights under the fourteenth amendment, and explores the reasoning of the Court in discovering and recognizing such basic rights under the Constitution.

13. This Note attempts to contrast the broad, rights-oriented approach of the Court's previous decisions recognizing protected areas of decisionmaking with the conduct-specific inquiry applied to consensual homosexual sodomy in Hardwick.

14. 381 U.S. 479 (1965). In Griswold, the Court noted that under the Constitution, "[v]arious guarantees create zones of privacy." Id. at 484.


A. Marriage

In the years following the demise of the economic substantive due process doctrine, the Court nevertheless continued to recognize non-enumerated rights as fundamental liberties protected under the fourteenth amendment. In one important case, Skinner v. Oklahoma ex rel. Williamson, the Court recognized a fundamental right of marriage and procreation implicated by a state law requiring sterilization of certain habitual felons.

In a subsequent landmark decision, the Court explicitly recognized the right of privacy inherent in the marital relationship in Griswold v. Connecticut. In Griswold, the Court ruled that a state law prohibiting the use of contraceptives was unconstitutional, in a case involving application of the law to married persons and their physicians. The Court held that several fundamental constitutional guarantees operated to create a zone of privacy and that the law violated the protected right of marital privacy. The Griswold Court clearly emphasized that the Con-
stitution protected a zone of marital privacy and focused on that abstrac-

Rights. . . . Marriage is . . . an association for as noble a purpose as any involved in our prior decisions.” Id. at 486. The Court further stated that the marital association was “intimate to the degree of being sacred.” Id.

Justice Goldberg, in his concurring opinion, emphasized the importance of the ninth amendment in reasoning that there are additional fundamental rights, not specifically enumerated in the Bill of Rights, protected from government infringement. Id. at 488 (Goldberg, J., concurring). Justice Goldberg stated: “The Ninth Amendment simply shows the intent of the Constitution’s authors that other fundamental personal rights should not be denied such protection or disparaged in any other way simply because they are not specifically listed in the first eight constitutional amendments.” Id. at 492 (Goldberg, J., concurring).

The ninth amendment provides: “The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the People.” U.S. Const. amend. IX. Justice Goldberg reasoned that the right of privacy in the marital relation was a fundamental, personal right retained by the people. 381 U.S. at 499 (Goldberg, J., concurring).

Justice Harlan wrote separately, concurring in the judgment, and rejected any notion that the due process clause of the fourteenth amendment incorporated precisely those rights established by the words or penumbras of the Bill of Rights. Id. at 500 (Harlan, J., concurring). Justice Harlan rejected the incorporation formula espoused by Justice Black in his dissent in Griswold, and reasoned that judicial restraint would not be served by limiting due process clause liberty to enumerated constitutional rights when the scope of those enumerated rights was subject to judicial interpretation. Id. at 501 (Harlan, J., concurring). The approach urged by Justice Harlan in interpreting the due process clause was insistence on respect for history, emphasis on basic values of our society, and recognition of the doctrines of separation of powers and federalism. Id. (Harlan, J., concurring).

Justice Harlan’s concurring opinion in Griswold partially incorporated his oft-quoted dissent in an earlier case. Id. at 500 (Harlan, J., concurring) (citing Poe v. Ullman, 367 U.S. 497, 539-45 (1961) (Harlan, J., dissenting)). In Poe, Harlan stated that:

[T]he full scope of the liberty guaranteed by the Due Process Clause cannot be found in or limited by the precise terms of the specific guarantees elsewhere provided in the Constitution. This “liberty” is not a series of isolated points pricked out in terms of the taking of property; the freedom of speech, press, and religion; the right to keep and bear arms; the freedom from unreasonable searches and seizures; and so on. It is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints . . . and which also recognizes, what a reasonable and sensitive judgment must, that certain interests require particularly careful scrutiny of the state needs asserted to justify their abridgement.

Poe, 367 U.S. at 543 (Harlan, J., dissenting).

The Court considered in Poe the constitutional validity of Connecticut laws prohibiting the use of contraceptives, and held that the asserted claims for declaratory judgment did not present a justiciable case or controversy regarding the constitutionality of the laws. Id. at 509. Harlan disagreed with the judgment of dismissal, and reached the merits of the constitutional issue. Id. at 539 (Harlan, J., dissenting). While Harlan did not interpret the liberty protected under the due process clause as limited to rights enumerated in the Constitution, he did reason that certain historical principles operated to guide the Court in determining the scope of that liberty. Id. at 544 (Harlan, J., dissenting). Harlan argued that “[e]ach new claim to Constitutional protection must be considered against a background of Constitutional purposes, as they have been rationally perceived and historically developed.” Id. (Harlan, J., dissenting).
tion—marital privacy—rather than on the specific conduct restricted under the statute, which was the use of contraceptives.27

Further recognition of the protected constitutional right surrounding the marital relationship came in 1967, when the Court invalidated a Virginia miscegenation statute in Loving v. Virginia.28 In Loving, the Court ruled that the statute, which prohibited interracial marriage, infringed upon the fundamental right to marry. The Court held that the law violated the fourteenth amendment’s due process and equal protection clauses, since it deprived the petitioners of a basic civil right.29

Harlan distinguished the use of contraceptives from other activities prohibited by law, such as adultery, fornication, and homosexuality, since the criminal prohibition of contraceptive use allowed "the intrusion of the whole machinery of the criminal law into the very heart of marital privacy." Id. at 553 (Harlan, J., dissenting). The prohibition of the other activities, however, was considered by Harlan to be valid since they were "intimacies which the law has always forbidden and which can have no claim to social protection." Id. (Harlan, J., dissenting).

Harlan emphasized in Poe that protection of one's privacy, especially in the home, derived from the home's "pre-eminence as the seat of family life." Id. at 551 (Harlan, J., dissenting). Therefore, Harlan concluded, even if those other activities were practiced in the home, they were not constitutionally immune from criminal sanctions. Id. at 552 (Harlan, J., dissenting).

Harlan noted that the laws of this country prohibited contraceptive use beginning soon after the Civil War, but reasoned that enforcement of the Connecticut law, based on the state's moral judgment, intruded upon marital intimacy. Id. at 547-48 (Harlan, J., dissenting). Since marital intimacy was a fundamental aspect of liberty, including the "privacy of the home in its most basic sense," strict scrutiny was required. Id. at 548 (Harlan, J., dissenting).

Harlan's influential approach in Poe applied an historical analysis to the broad right of marital privacy, and found it a basic and fundamental right, regardless of the prevailing statutory prohibition of the use of contraceptives for the past one hundred years. Harlan distinguished other activities involving private, extra-marital sexuality, since these traditionally prohibited activities did not implicate any fundamental right similar in nature to marital privacy.

In Griswold, Justice White also wrote separately in concurrence, and emphasized that the statute prohibiting the use of contraceptives violated the due process clause because it invaded a protected area of privacy without any justifying, compelling, state interest. 381 U.S. at 503-04 (White, J., concurring).


28. 388 U.S. 1 (1967). The Lovings were convicted of violating a statute that made interracial marriage a felony. Id. at 2-4.

29. Id. at 11-12. The Court subjected the statute to strict scrutiny under the equal protection clause because it established a racial classification, and held that it served no compelling state purpose. Furthermore, the Court relied on Skinner v. Oklahoma ex rel. Williamson, 316 U.S. 535 (1942), and recognized that the freedom to marry was one of "the vital personal rights essential to the orderly pursuit of happiness by free men." 388 U.S. at 12. The Court noted that Virginia was one of sixteen states prohibiting and punishing marriage based
B. **Family**

The Court has similarly recognized that the due process clause protects conduct and activity which involves the rights inherent in the basic unit of our society, the family. The Court recognized the right of rearing and educating one's children as such a family-based right in several early cases, including *Pierce v. Society of Sisters*[^30] and *Meyer v. Nebraska*.[^31] Although the right protected in *Meyer* and *Pierce* was not specifically enumerated in the Constitution, the Court nevertheless reasoned that it deserved protection as a fundamental liberty under the fourteenth amendment.[^32] In *Meyer*, the Court characterized such liberty as the freedom "to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men,"[^33] and invalidated a state law prohibiting the teaching of a foreign language to primary school children.[^34] In *Pierce*, the Court employed a similar rationale to strike down a law requiring parents to send their children to public rather than private schools as an unconstitutional violation of the par-

---

[^31]: 262 U.S. 390 (1923). The Supreme Court of Nebraska had affirmed the conviction of a teacher for teaching German to a ten year old in violation of a state statute. *Id.* at 403.
[^32]: In *Meyer*, the Court characterized the right at issue as the right to direct the upbringing and education of one's children. *Id.* at 401. The Court reversed the teacher's conviction. *Id.* at 403. Similarly, in *Pierce*, the Court ruled that the fourteenth amendment protected the rights of a parent to raise a child, stating that "rights guaranteed by the Constitution may not be abridged by legislation which has no reasonable relation to some purpose within the competency of the state." 268 U.S. at 535.
[^33]: *Meyer*, 262 U.S. at 399.
[^34]: *Id.* at 403.
ents' right to rear their children, as the law bore no reasonable relationship to a valid purpose.\(^\text{35}\) The Supreme Court has discussed the definition of fourteenth amendment fundamental liberty in a family context more recently in Moore v. City of East Cleveland.\(^\text{36}\) Emphasizing the importance of the family as an institution in our society, the Moore plurality recognized a fundamental right implicated by a zoning ordinance which restricted the use of a single dwelling to a narrowly defined family unit.\(^\text{37}\) The Moore plurality recognized the sanctity of the family as a fundamental right because respect for the family unit was “deeply rooted in this Nation’s history and tradition.”\(^\text{38}\)

\(^{35}\) Pierce, 268 U.S. at 534-35.


\(^{37}\) Id. at 506 (plurality opinion). The Court invalidated the ordinance and reversed the conviction of the appellant, a grandmother. Id. The plurality opinion recognized that due process liberty is not limited to the precise terms of specific guarantees in the Constitution, but “is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints.” Id. at 502 (plurality opinion) (quoting Poe v. Ullman, 367 U.S. 497, 542-43 (Harlan, J., dissenting)). The plurality also recognized that “certain interests require particularly careful scrutiny of the state needs asserted to justify their abridgement.” Id. (plurality opinion) (quoting Poe v. Ullman, 367 U.S. 497, 542-43 (Harlan, J., dissenting)).

\(^{38}\) Id. at 503 (plurality opinion). The Moore plurality noted that no formula could determine which rights were fundamental, and recognized that limits on substantive due process come from “solid recognition of the basic values that underlie our society.” Id. (plurality opinion) (quoting Griswold v. Connecticut, 381 U.S. 479, 501 (Harlan, J., concurring)).


Furthermore, additional cases have considered implication of the family relationship as a fundamental right. See, e.g., Caban v. Mohammed, 441 U.S. 380 (1979) (invalidating state law allowing adoption of child without biological father’s consent where father acted as father to child). But see Quillio v. Walcott, 434 U.S. 246 (1978) (upholding state law requiring only biological mother’s consent to adoption when father did not act as father to child). See also Smith v. Organization of Foster Families for Equality and Reform, 431 U.S. 816 (1977) (distinguishing foster families from traditional family in terms of fundamental rights analysis); Prince v. Massachusetts, 321 U.S. 158 (1944) (upholding application of child labor laws to relative of child in case of public distribution of religious material; family not beyond regulation in public interest).

Moreover, the Court has recently characterized the personal affiliations protected in its earlier cases as involving attributes similar to those found in family relationships. Roberts v. United States Jaycees, 468 U.S. 609, 619-20 (1984). The Roberts Court described such attributes as “relative smallness, a high degree
The Supreme Court's recognition of this zone of activity and decisionmaking as a fundamental liberty under the fourteenth amendment began with *Skinner v. Oklahoma ex rel. Williamson.*[^39] In *Skinner,* the Court relied on the equal protection clause to invalidate a state law requiring sterilization of certain criminal recidivists.[^40] The *Skinner* Court recognized the right of marriage and procreation as one of the basic rights of man, "fundamental to the very existence and survival of the race."[^41]

The landmark case of *Griswold v. Connecticut,*[^42] while decided on the basis of marital privacy, clearly involved conduct which related to procreational decisionmaking, in the form of freedom to use contraceptives.[^43] The effect of the *Griswold* decision on the recognition of a protected zone of procreational decisionmaking was more fully explored in a later case involving a statute restricting the distribution of contraceptives, *Eisenstadt v. Baird.*[^44] The *Eisenstadt* Court characterized the right of privacy previously established in *Griswold* as the protection "from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."[^45]

The Supreme Court confronted the question whether the right to of selectivity in decisions to begin and maintain the affiliation, and exclusion from others in critical aspects of the relationship." *Id.* at 620. In *Roberts,* the Court considered and rejected a claim that the Jaycees' first and fourteenth amendment associational rights were violated by application of a state law requiring the Jaycees to accept women as full members. *Id.* at 620-21. For a discussion of *Roberts,* see infra notes 60-62 and accompanying text.


[^40]: *Id.* at 541-42. The Court ruled that the statute at issue failed under strict equal protection scrutiny because a criminal convicted of repeated offenses of chicken-stealing fell under the statute's sterilization classification while a repeatedly convicted embezzler did not. *Id.* at 538-39. The appellant had been convicted of stealing chickens and of robbery with firearms. *Id.* at 537.

[^41]: *Id.* at 541. Because the legislation affected a basic liberty, the Court ruled that strict scrutiny of the classification was essential to avoid invidious discrimination. *Id.*

[^42]: 381 U.S. 479 (1965).

[^43]: For a discussion of *Griswold,* see supra notes 22-27 and accompanying text.

[^44]: 405 U.S. 438 (1972). The *Eisenstadt* Court invalidated the Massachusetts state law as violative of the equal protection clause of the fourteenth amendment. *Id.* at 447.

[^45]: *Id.* at 453. The *Eisenstadt* Court held that the law, which limited distribution of contraceptives to married persons with a doctor's prescription, provided dissimilar treatment for married and unmarried persons who are similarly situated. *Id.* at 447 (citing *Mass. Gen. Laws Ann.* ch. 272, §§ 21, 21A (West 1966)).

Baird was convicted for exhibiting contraceptive items during a lecture on contraception to a Boston University student group and for giving a package of contraceptive foam to a woman at the close of the lecture. *Id.* at 440. The Massachusetts Supreme Judicial Court sustained the conviction for giving away the foam, and the Sheriff of Suffolk County appealed to the United States Supreme Court after the United States Court of Appeals for the First Circuit remanded
terminate one's pregnancy was protected by the due process clause in 
Roe v. Wade,\textsuperscript{46} and invalidated a restrictive abortion statute,\textsuperscript{47} holding that the fourteenth amendment's concept of personal liberty "is broad

the case to the district court which had denied Baird's petition for a writ of habeas corpus. \textit{Id.}

The Court reviewed the law on a rational basis standard, and concluded that there was no ground that rationally explained the different treatment afforded married and single persons under the statute. \textit{Id.} at 447. The Court did not address the issue of whether a compelling state interest was involved in light of an invasion of a fundamental right, because the statute failed to satisfy the lesser rational basis test and violated the guarantee of equal protection. \textit{Id.} at 447 n.7.

The Court concluded that deterrence of illicit extramarital sex could not reasonably be recognized as the purpose of the law because that would require an assumption that Massachusetts had chosen pregnancy and the birth of an unwanted child as punishment for fornication, a misdemeanor under state law. Additionally, the law would have no deterrent effect on married persons who engaged in illicit sex with unmarried persons, since contraceptives were available to married persons under the law. \textit{Id.} at 448-49.

The Court also concluded that the law served no health purpose because it would either restrict access to even non-dangerous contraceptives for married persons, and be overbroad, or, if a true danger existed, fail to fulfill the need for a physician to prescribe contraceptive devices for unmarried persons, which devices were legally available to unmarried persons to prevent disease but not conception. \textit{Id.} at 450-52.

Regarding the law's validity as a prohibition of contraception, the Court first considered the assumption that under \textit{Griswold}, the distribution of contraceptives to married persons could not be prohibited. If so, the Court concluded, then "a ban on distribution to unmarried persons would be equally impermissible." \textit{Id.} at 453. Regarding the difference between the right of marital privacy in \textit{Griswold} and the right of privacy of unmarried persons, the Court stated: "If the right of privacy means anything, it is the right of the \textit{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." \textit{Id.} (emphasis in original). The Court continued its equal protection analysis by considering the alternative assumption that under \textit{Griswold} the state could prohibit the distribution of contraceptives. The Court reasoned that if such were the case, then the state could not outlaw distribution solely to unmarried persons, and not to married persons, as the evil would be the same in each case and the statute would be underinclusive. \textit{Id.} at 454. The Court declined to decide whether the right of individual access to contraceptives was a fundamental right, because it reasoned that the rights must be the same for both married and unmarried persons regardless of what those rights were. \textit{Id.} at 453.

46. 410 U.S. 113 (1973). Jane Roe was a pregnant, single, Texas woman who sought both a declaratory judgment that the Texas abortion statutes were unconstitutional, and an injunction against their enforcement by the District Attorney of Dallas County. \textit{Id.} at 120; see also Doe v. Bolton, 410 U.S. 179 (1973) (decided as companion case to \textit{Roe}).

47. The statute provided in relevant part:

\textbf{Abortion}

If any person shall designedly administer to a pregnant woman or knowingly procure to be administered with her consent any drug or medicine, or shall use towards her any violence or means whatever externally or internally applied, and thereby procure an abortion, he shall be confined in the penitentiary not less than two nor more than five years; if it be done without her consent, the punishment shall be doubled. By "abortion" is meant that the life of the fetus or embryo
enough to encompass a woman's decision whether or not to terminate her pregnancy." 48 The Court traced the recognition of a guarantee of certain areas or zones of privacy under the Constitution in its earlier decisions, 49 and held that regulation of a protected, fundamental 50 right shall be destroyed in the woman's womb or that a premature birth thereof be caused.

Furnishing the means
Whoever furnishes the means for procuring an abortion knowing the purpose intended is guilty as an accomplice.

Attempt at abortion
If the means used shall fail to produce an abortion, the offender is nevertheless guilty of an attempt to produce abortion, provided it be shown that such means were calculated to produce that result, and shall be fined not less than one hundred or more than one thousand dollars.

Murder in producing abortion
If the death of the mother is occasioned by an abortion so produced or by an attempt to effect the same it is murder.

By medical advice
Nothing in this chapter applies to an abortion procured or attempted by medical advice for the purpose of saving the life of the mother.

TEX. CIV. CODE ANN. §§ 4512.1-.4, .6 (Vernon 1972).

The Court declared that Jane Roe had standing to undertake the litigation, and that the termination of her 1970 pregnancy did not render her case moot at the appellate level. 410 U.S. at 125. However, the Court dismissed the complaint in intervention of a Texas physician seeking declaratory and injunctive relief in the same action while facing pending state charges for criminal abortion. Id. at 126-27. The Court also affirmed the dismissal of the complaint of a childless married couple as presenting only a speculative possibility of indirect injury and not an actual case or controversy, even though the wife had received medical advice that she should avoid pregnancy. Id. at 127-29.

The Court focused on the issue presented by Jane Roe, who sued on behalf of herself and other members of the class of women unable to legally obtain an abortion in Texas. Id. at 124-25.

48. 410 U.S. at 153. The Court sketched the development of the concept of the right of privacy, after conceding that "[t]he Constitution does not explicitly mention any right of privacy." Id. at 152 (emphasis added).


50. The Roe majority recognized the principle to be utilized in determining which personal rights were protected by the guarantee of personal privacy was whether the rights were "fundamental" or "implicit in the concept of ordered liberty." 410 U.S. at 152 (quoting Palko v. Connecticut, 302 U.S. 319, 325 (1937)). The Court reasoned that the right of privacy was "founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action." Id. at 153.

The Court did review the history of the legal status of abortion over the course of western civilization. Id. at 129-47. The Court noted that most of the state abortion statutes currently in force derived from statutes enacted at the time of the Civil War. Id. at 139.

Justice Rehnquist pointed out in his dissent, however, that by the time of the adoption of the fourteenth amendment, thirty-six states or territories had
could be justified only by a compelling state interest, and must be narrowly drawn to achieve that interest.

The Court has further elaborated on the extent of constitutional protection of the right to make decisions regarding contraception and procreation in a number of cases decided after Eisenstadt and Roe. Regarding abortion, the Court has held that the state cannot assign an absolute veto power over the right to terminate one's pregnancy to either the spouse or parent of the individual making the decision. Other restrictions on the right to have an abortion have been scrutinized under the standard of review for state regulation of a fundamental right.

laws limiting abortion. Id. at 174-75 & n.1 (Rehnquist, J., dissenting). Justice Rehnquist also noted that twenty-one of those laws still remained in force. Id. at 175-76 & n.2 (Rehnquist, J., dissenting).

51. Id. at 154-55. The Court stated:

The privacy right involved, therefore, cannot be said to be absolute. In fact, it is not clear to us that the claim asserted by some amici that one has an unlimited right to do with one's body as one pleases bears a close relationship to the right of privacy previously articulated in the Court's decisions.

52. Id. at 154. The majority in Roe set forth an approach that balanced the interest of the pregnant woman with the state's interest in protecting the woman's health and that of her unborn child, based on the progression of the pregnancy. Id. at 162-64. The Court's approach allowed only the pregnant woman and her doctor to control the abortion decision for the period until approximately the end of the first trimester; for the period subsequent to the end of the first trimester the state was free to regulate the procedure in a manner reasonably related to its interest in the health of the mother; and for the period subsequent to viability, the state was free to regulate or proscribe abortion to promote its interest in the potentiality of human life, except where abortion was necessary for the health or life of the mother. Id. at 164-65.

53. See Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52 (1976). In Danforth, the Supreme Court held that provisions of a state law which required spousal consent for married women, or parental consent for unmarried minor women, were unconstitutional. Id. at 69, 74. The Court ruled that the state could not assign a power to veto the abortion decision when it did not possess such a power itself during the first trimester according to Roe v. Wade, 410 U.S. 113 (1973). 428 U.S. at 69, 74. This holding exemplified the Court's post-Roe struggle to define the limits of permissible state regulation of the fundamental right to choose whether to terminate one's pregnancy. The Court also invalidated a provision of the law which prohibited the use of saline amniocentesis after twelve weeks of pregnancy as an arbitrary regulation designed to prevent the vast majority of abortions during this period, since the method was the one most commonly used. Id. at 78-79. However, the Court upheld provisions of the statute requiring reporting and recordkeeping as useful to the state's interest in promoting the mother's health. Id. at 79-81.

In a more recent case, the Court invalidated a state law requiring consent of both parents of a minor for an abortion, or notice to the parents of judicial proceedings brought by the minor to obtain a judge's permission in lieu of the parents' consent. Bellotti v. Baird, 443 U.S. 622 (1979) (plurality opinion).

The scope of the right of access to contraceptives was considered in later cases as well. In one of the contraceptive cases, Carey v. Population Services International, in which the Court invalidated a New York law limiting the distribution of non-medical contraceptives solely to adults who purchased them from licensed pharmacists, the Court emphasized the importance of the area of procreational decisionmaking as a fundamental right.

D. Intimate Association

In Bowers v. Hardwick, the dissenting opinion of four justices emphasized that the protected interest at issue in the case was the right of intimate association, "the fundamental interest all individuals have in controlling the nature of their intimate associations with others." This section briefly examines that right as touched upon by the Court's earlier privacy decisions and as analyzed by commentators.

In Roberts v. United States Jaycees, the Court discussed the constitutional protection of the "freedom of intimate association" recognized in its line of cases dealing with "certain kinds of highly personal relationships." The Court reasoned that its previous cases protected certain requiring informed consent, including review of specified informational material, provisions requiring a physician's report on the basis for his determination of non-viability, and provisions establishing special requirements for post-viability abortions were ruled unconstitutional. 106 S. Ct. at 2185.

Affirming its previous principles of fundamental rights analysis set forth in Roe, the Court stated: "[I]t should go without saying that the vitality of these constitutional principles cannot be allowed to yield simply because of disagreement with them." Id. at 2178 (quoting Brown v. Board of Educ., 349 U.S. 294, 300 (1955)). For a discussion of the issues involved in Thornburgh, see Note, The Third Circuit's Virtual Abrogation of the Pennsylvania Abortion Control Act of 1982—Outmoded Standards Threaten the Abortion Right, 30 VILL. L. REV. 840 (1985).

The Court stated that "the Constitution protects individual decisions in matters of childbearing from unjustified intrusion by the state." Id. at 687. The Court held only that state regulation burdening the right to decide whether to prevent or terminate pregnancy by limiting access to the means to do so had to meet the standard of a compelling interest. Id. at 688.

58. Id. at 688-89. The Court stated that "the constitutionally protected right of decision in matters of childbearing... is the underlying foundation of the holdings in Griswold, Eisenstadt v. Baird, and Roe v. Wade." 431 U.S. at 688-89.

57. Id. at 688-89. The Court stated that "the constitutionally protected right of decision in matters of childbearing... is the underlying foundation of the holdings in Griswold, Eisenstadt v. Baird, and Roe v. Wade." 431 U.S. at 688-89.


56. The Court stated that "the Constitution protects individual decisions in matters of childbearing from unjustified intrusion by the state." Id. at 687. The Court held only that state regulation burdening the right to decide whether to prevent or terminate pregnancy by limiting access to the means to do so had to meet the standard of a compelling interest. Id. at 688.

57. Id. at 688-89. The Court stated that "the constitutionally protected right of decision in matters of childbearing... is the underlying foundation of the holdings in Griswold, Eisenstadt v. Baird, and Roe v. Wade." 431 U.S. at 688-89.

58. Id. at 2841 (1986).
relationships from state interference in order to safeguard “the ability independently to define one’s identity that is central to any concept of liberty.” Furthermore, the Court has recently characterized the personal privacy protected under the due process clause as a broad association. Griswold, 381 U.S. at 483. The Griswold Court noted its protection of the peripheral right of freedom of association, derived from the penumbra of the first amendment, in NAACP v. Alabama ex rel. Patterson, 357 U.S. 449 (1958). 381 U.S. at 483. NAACP v. Alabama involved the recognition of the fundamental constitutional right of association in an appeal from a judgment of civil contempt based on the refusal of the NAACP to provide a list of its membership to the state of Alabama pursuant to a production order arising out of litigation involving Alabama’s statute for registration of a foreign corporation. 357 U.S. at 451, 462-63. From this prior protection of a penumbral right, the Griswold Court reasoned that “specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance.” Griswold, 381 U.S. at 484.

In Roberts, the Court traced its previous recognition of the freedom of association, and noted that two different aspects of associational rights had been protected. Roberts, 468 U.S. at 617. The Court noted that both intimate association and expressive association had been protected. Id. at 618.

The Jaycees had challenged a state law requiring them to admit women as full members and, therefore, the Roberts Court considered whether the associational rights of the Jaycees fit within the category of constitutionally protected association as an element of personal liberty. The Court held that the activity of the Jaycees lacked the characteristics that might protect its relationships under the constitutional freedom of intimate association. Id. at 621. The relevant factors to be considered in a determination of whether a relationship qualified for protection under the right of freedom of intimate association, according to the Roberts Court, included aspects common to highly personal relationships, such as “deep attachments and commitments to the necessarily few other individuals with whom one shares not only a special community of thoughts, experiences, and beliefs but also distinctively personal aspects of one’s life.” Id. at 620. The Court listed such attributes as “relative smallness, a high degree of selectivity in decisions to begin and maintain the affiliation, and seclusion from others in critical aspects of the relationship.” Id. The Court noted that only relationships with those sorts of attributes “are likely to reflect the considerations that have led to an understanding of freedom of association as an intrinsic element of personal liberty.” Id. The Roberts Court also rejected the Jaycees’ claim that their freedom of expressive association was violated by the state law requiring admission of women as regular members. Id. at 622-24.


The Supreme Court’s decision in Stanley v. Georgia involved the right of private possession of obscene materials in one’s home. The Court reversed a conviction for private possession of obscene matter, holding that the statute criminalizing such conduct violated the first and fourteenth amendments to the Constitution. Stanley, 394 U.S. at 568. The Court found that the right to receive ideas and information was fundamental to a free society, and noted that there was a right “to be free, except in very limited circumstances, from unwanted governmental intrusion into one’s privacy.” Id. at 564. The Court then considered the purposes of the framers of the Constitution and stated: “They conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men.” Id. (quot-
tional right, stating that "[o]ur 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."63

The Court itself has stated, before Bowers v. Hardwick,64 that the question of whether the right of privacy extends to consensual adult sexual activity was unresolved.65 A substantial number of commentators have considered that question by exploring and analyzing the Supreme Court's analysis of Stanley, see supra notes 96-97 & 115 and accompanying text.

Obscene material is not protected under the first amendment, according to Roth v. United States, 354 U.S. 476 (1957). The Stanley Court, however, distinguished Roth and its progeny as dealing with public possession or distribution of obscene material. Stanley, 394 U.S. at 563. The Court then held that the "mere private possession of obscene material" cannot constitutionally be made a crime. Id. at 568 (emphasis added). For a discussion of the Hardwick Court's analysis of Stanley, see infra notes 96-97 & 115 and accompanying text.


64. 106 S. Ct. 2841 (1986).

65. See Carey v. Population Servs. Int'l, 431 U.S. 678, 688 n.5 (1977). For a discussion of Carey, see supra notes 55-57 and accompanying text. In Carey, the Court considered a suggestion by Justice Powell in his concurring opinion that the reasoning advanced in the plurality opinion for invalidating the section of the statute prohibiting distribution of contraceptives to those under 16 years of age would subject all state regulation of adult sexual relations to strict judicial scrutiny. 431 U.S. at 703.

The Court stated in response: "[T]he 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' . . . and we do not purport to answer that question now." Id. at 688 n.5 (quoting Carey, 431 U.S. at 694 n.17 (plurality opinion)).


The Court discussed other aspects of the right of privacy established in its earlier decisions as including "the interest in independence in making certain kinds of important decisions." Carey, 431 U.S. at 684 (quoting Whalen v. Roe, 429 U.S. 589, 599-600 (1977)). The Court then listed the areas of decision involved in its previous cases, including personal decisions "relating to marriage, Loving v. Virginia, 388 U.S. 1, 12 (1967); procreation, Skinner v. Oklahoma ex rel. Williamson, 316 U.S. 535, 541-42 (1942); contraception, Eisenstadt v. Baird, 405 U.S. at 455-54; id. at 460, 463-65 (White, J., concurring in result); family relationships, Prince v. Massachusetts, 321 U.S. 158, 166 (1944); and child rearing and education, Pierce v. Society of Sisters, 268 U.S. 510, 535 (1925); Meyer v. Nebraska, 262 U.S. 390, 399 (1923))." Carey, 431 U.S. at 685 (quoting Roe v. Wade, 410 U.S. 113, 152-53 (1973)). The Court emphasized the importance of the decision whether to beget or bear a child as recognized in the earlier cases in the context of contraceptives, Griswold v. Connecticut, 381 U.S. 479 (1965); Eisenstadt v. Baird, 405 U.S. 438 (1972); and abortion, Roe v. Wade, 410 U.S.
Court's cases dealing with various zones of privacy protected under the fourteenth amendment. Some interpretations of the right of privacy by the commentators have focused on a characterization of the cases as recognizing a generalized right of individual autonomy in highly personal decisions and relationships, which supports an argument that the zone of intimate association is a fundamental right. On the other hand, other commentators have advocated a more limited right of autonomy in areas involving the creation and maintenance of a family.


67. One author argues that the substantive value protected in the Court's cases is the freedom of intimate association, which includes the right of personal sexual autonomy. Karst, The Freedom of Intimate Association, 89 YALE L.J. 624 (1980). Another author argues that the privacy decisions rest on sexual autonomy, the self-determination of the role of sexuality in one's life, and contends that sexual autonomy is a fundamental experience and right through which people define the meaning of their lives. Richards, Sexual Autonomy and the Constitutional Right to Privacy: A Case Study in Human Rights and the Unwritten Constitution, 30 HASTINGS L.J. 957 (1979).

According to one author who surveyed the literature on privacy published between 1965 and 1979, almost all of the authors found support in the privacy cases for the generalized right of individual autonomy, including sexual autonomy. Grey, Eros, Civilization and the Burger Court, 43 LAW & CONTEMP. PROBS. 83, 98-100 (Summer 1980).

68. One author argues that the privacy cases address rights peculiar to familial interests, and protect only those specific relational interests and not purely individual rights of autonomy. Hafen, The Constitutional Status of Marriage,
Before Hardwick, courts as well were divided on the issue of whether private, adult, consensual sexual activity was protected by the due process clause of the fourteenth amendment. Against this background, in Hardwick, the Court faced an issue which required that some illumination be cast on the scope, definition, and rationale of the constitutional right of privacy, a right that had its beginnings in "penumbras, formed by emanations," and which was characterized on one occasion by the Court as "defying categorical description."

III. BOWERS V. HARDWICK

In Hardwick, the Supreme Court held that enforcement of the Georgia sodomy statute at issue did not violate the fundamental constitutional rights of respondent Hardwick under the due process clause of the fourteenth amendment. The case arose when police arrested Hardwick after observing him engaging in sodomy with another adult male in the bedroom of his own home. Hardwick was charged with contacting a minor to facilitate illegal sexual acts.


70. 106 S. Ct. 2841 (1986).


73. The Georgia statute provides, in relevant part: "A person commits the offense of sodomy when he performs or submits to any sexual act involving the sex organs of one person and the mouth or anus of another." Ga. Code Ann. § 16-6-2(a) (1984).

74. 106 S. Ct. at 2843.

75. Id. at 2842. A police officer went to Hardwick's house on August 3, 1982, to serve a warrant on Hardwick for failure to pay a fine for public drunkenness. A man answering the door stated that he was unsure if Hardwick was home, but that the officer was free to check if he wanted to. The officer walked down the hall and observed, through the bedroom door which was ajar, Hard-
violating the state sodomy statute, but the district attorney decided not to pursue prosecution of the case after an initial hearing. 76 Hardwick brought suit in the United States District Court for the Northern District of Georgia, and sought a declaratory judgment that the Georgia sodomy statute was unconstitutional. 77 Relying on the Supreme Court's summary affirmance of Doe v. Commonwealth's Attorney for Richmond, 78 the dis-
wick and another man engaging in oral sex. The officer arrested both men and charged them with sodomy. N.Y. Times, July 1, 1986, at A19, col. 3.

76. 106 S. Ct. at 2842. The district attorney decided not to present the case to a grand jury after the hearing in municipal court, unless further evidence developed. Id. Hardwick's attorney, Ms. Kathleen Wilde, stated that "[w]e didn't know what he meant by further evidence, but that left Michael in never-never land. The charge of sodomy could be reinstated at any moment. That was the point at which he decided to challenge the law." N.Y. Times, July 1, 1986, at A19, col. 3.

77. Hardwick asserted that he regularly engaged in homosexual acts and would do so in the future. The Eleventh Circuit held that the past arrest of Hardwick and the threat of future prosecution combined to present a valid anticipatory challenge to the statute and agreed with the district court that Hardwick had standing to challenge its constitutionality. Hardwick v. Bowers, 760 F.2d 1202, 1206 (11th Cir. 1985).

A married couple joined the action, but the district court held that they had no standing to challenge the constitutionality of the statute, since they were not arrested or threatened with arrest or prosecution for violating the statute. 106 S. Ct. at 2842 n.2. The Does never claimed membership in a group that was likely to be prosecuted. The Eleventh Circuit affirmed the district court's dismissal of the Does' complaint for lack of standing. Hardwick v. Bowers, 760 F.2d 1202, 1206-07 (11th Cir. 1985).

78. 403 F. Supp. 1199 (E.D. Va. 1975), aff'd, 425 U.S. 901 (1976). In Doe, the United States District Court for the Eastern District of Virginia rejected the claims of the several adult, male homosexuals, holding that enforcement of a Virginia sodomy statute would not deny them constitutional rights under the fourteenth amendment's guarantees of due process, the first amendment's guarantee of freedom of expression, the first and ninth amendments' guarantees of privacy, or the eighth amendment's prohibition against cruel and unusual punishment. Id. at 1200. The Doe court distinguished the right claimed by the plaintiffs in that case from the right of privacy protected in Griswold v. Connecticut, 381 U.S. 479 (1965). 403 F. Supp. at 1200-01. The Doe court interpreted Griswold as conferring a right of marital privacy. Id. The district court especially relied on Justice Goldberg's concurrence in Griswold, in which he adopted Justice Harlan's dissenting statement in Poe v. Ullman, 367 U.S. 497, 553 (1961) (Harlan, J., dissenting):

Adultery, homosexuality and the like are sexual intimacies which the State forbids . . . but the intimacy of husband and wife is necessarily an essential and accepted feature of the institution of marriage, an institution which the State not only must allow, but which always and in every age it has fostered and protected. It is one thing when the State coercs its power either to forbid extra-marital sexuality . . . or to say who may marry, but it is quite another when, having acknowledged a marriage and the intimacies inherent in it, it undertakes to regulate by means of the criminal law the details of that intimacy.

Doe, 403 F. Supp. at 1201 (quoting Poe v. Ullman, 367 U.S. 497, 553 (Harlan, J., dissenting) (emphasis added)). The district court in Doe further held that the statute was rationally related to a legitimate state interest, as the prohibited conduct was likely to contribute to moral delinquency. Id. at 1202.
district court ruled that Hardwick had failed to state a claim upon which relief could be granted, and the court, therefore, dismissed the action. 79

On appeal, the United States Court of Appeals for the Eleventh Circuit reversed the ruling of the district court 80 and remanded the case for trial, at which time the state of Georgia would be required to prove that it had a compelling interest in regulating such conduct and that the statute was the most narrowly drawn means of doing so. 81 The Eleventh Circuit held that the Constitution prevents the states from interfering in decisions critical to personal autonomy in areas beyond the legitimate reach of civilized society. 82 Relying on the Supreme Court’s line of privacy cases, 83 the Eleventh Circuit stated that the Georgia statute vio-


80. 760 F.2d at 1210, 1213. The Eleventh Circuit reasoned that the precedential effect of Doe had to be carefully limited, because in a summary affirmance the Court does not state its reasons for the disposition of the case. The affirmance represents an approval of the lower court’s judgment, but not necessarily an approval of its reasoning. Id. at 1207. The Eleventh Circuit in Hardwick v. Bowers reasoned that Doe was an affirmance based on the plaintiffs’ lack of standing, and noted additionally that later doctrinal developments, including implications from the Court’s reasoning in Carey v. Population Services International, 431 U.S. 678 (1977), indicated that the constitutional questions presented in Hardwick v. Bowers were still unresolved. Hardwick v. Bowers, 760 F.2d at 1208-10. For a discussion of Doe, see Ludd, The Aftermath of Doe v. Commonwealth's Attorney: In Search of the Right to be Let Alone, 10 U. DAYTON L. REV. 705 (1985); Note, Summary Disposition of Supreme Court Appeals: The Significance of Limited Discretion and a Theory of Limited Precedent, 52 B.U.L. REV. 373 (1972); Note, Hardwick v. Bowers: An Attempt to Pull the Meaning of Doe v. Commonwealth’s Attorney Out of the Closet, 39 U. MIAMI L. REV. 973 (1985).

81. Hardwick v. Bowers, 760 F.2d at 1213. The court held that the statute infringed on the fundamental privacy rights of Hardwick and, therefore, that the justification of the state had to meet the compelling interest standard, rather than the minimal scrutiny of the rational basis standard. Id. at 1211.

82. Id. The court viewed the right of privacy established by the Supreme Court’s earlier decisions as a right of personal autonomy, including a right of intimate association not limited to marital or family contexts. Id. at 1211-12. For a discussion of the commentators who share this view of a broad based constitutional right of personal autonomy, see supra note 67.


83. The Eleventh Circuit noted the Supreme Court’s protection of important, non-procreational associational interests in Griswold v. Connecticut, 381 U.S. 479 (1965) (protecting sanctity of marital relationship), and Eisenstadt v. Baird, 405 U.S. 438 (1972) (protecting intimacy outside of marital relationship). Hardwick v. Bowers, 760 F.2d at 1211-12. The court stated that “[t]he intimate association protected against state interference does not exist in the marriage relationship alone” and noted that the sexual intimacy at issue served the same purpose as marriage for some persons. Id. at 1212. The Eleventh Circuit also relied on the protection of the privacy interest involved in activities occurring within the home in Stanley v. Georgia, 394 U.S. 557 (1969) (protecting private possession of obscene material). Hardwick v. Bowers, 760 F.2d at 1212.
lated Hardwick's fundamental rights, because the activity Hardwick engaged in was "quintessentially private and . . . at the heart of an intimate association beyond the proper reach of state regulation."^{84}

On certiorari, the Supreme Court first rejected the argument that any prior cases decided by the Court had recognized a constitutional right of privacy that extended to private, adult, consensual homosexual activity.^{85} The Court reasoned that its previous decisions establishing fundamental personal rights of privacy involved the specific areas of child rearing and education, family, marriage, and procreative choice.^{86} The Court distinguished the activity of homosexual sodomy^{87}


86. Id. at 2843-44. The Court relied on the characterization of its previous decisions announced in Carey v. Population Services International, 431 U.S. 678, 685 (1977). Hardwick, 106 S. Ct. at 2843. The Hardwick Court stated: Pierce v. Society of Sisters, 268 U.S. 510 (1925) and Meyer v. Nebraska, 262 U.S. 390 (1923), were described as dealing with child rearing and education; Prince v. Massachusetts, 321 U.S. 158 (1944), with family relationships; Skinner v. Oklahoma ex rel. Williamson, 316 U.S. 535 (1942), with procreation; Loving v. Virginia, 388 U.S. 1 (1967), with marriage; Griswold v. Connecticut, supra, and Eisenstadt v. Baird, supra, with contraception; and Roe v. Wade, 410 U.S. 113 (1973), with abortion. The latter three cases were interpreted as construing the Due Process Clause of the Fourteenth Amendment to confer a fundamental individual right to decide whether or not to beget or bear a child.

87. The Court focused solely on the issue of whether the Georgia sodomy statute was unconstitutional as applied to consensual homosexual sodomy. Hardwick, 106 S. Ct. at 2842 n.2. Hardwick was the sole respondent, and asserted that he was a homosexual who regularly engaged in consensual homosexual sodomy. Id. at 2842.

As a corollary to the case and controversy requirement, the Supreme Court has developed rules for limiting constitutional questions in cases over which it has jurisdiction, including a policy of self-restraint in which constitutional issues affecting legislation are not determined in broader terms than that required by
from the specific activities protected in its earlier cases, and rejected the claim "that these cases nevertheless stand for the proposition that any kind of private sexual conduct between consenting adults is constitutionally insulated from state proscription."

Having concluded that the case was not controlled by extant precedent, the Court discussed the principles it had used in determining which rights not readily identifiable in the Constitution qualify for heightened judicial protection under the due process clauses of the fifth and fourteenth amendments. The Court characterized such funda-

the precise facts to which the ruling is to be applied. See Rescue Army v. Municipal Court, 331 U.S. 549, 569 (1947) (citing Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 346-48 (1936) (Brandeis, J., concurring)).

Justice Blackmun found the majority's "obsessive focus on homosexual activity" unjustifiable. 106 S. Ct. at 2849 (Blackmun, J., dissenting). He pointed out that the sex or status of the persons engaging in sodomy was irrelevant according to the language of the state statute. Id. (Blackmun, J., dissenting). Justice Blackmun further noted that several Georgia Supreme Court decisions had failed to apply an earlier form of the statute to either gay or heterosexual sodomy. Id. at 2849 n.1 (Blackmun, J., dissenting). Georgia then enacted the current form of the statute, which more broadly prohibited sodomy by specific physical description and eliminated any reference to the sex of the persons involved. Id. at 2849 & n.1 (Blackmun, J., dissenting). For the text of the present Georgia statute, see supra note 73.

88. 106 S. Ct. at 2844. Justice Blackmun, in dissent, reasoned that the majority decided more than whether the right to engage in homosexual sodomy is a fundamental right; he concluded that the Court had refused to recognize "the fundamental interest all individuals have in controlling the nature of their intimate associations with others." Id. at 2852 (Blackmun, J., dissenting).


90. 106 S. Ct. at 2844. The Court essentially focused on whether the due process clause of the fourteenth amendment proscribed Georgia's restrictions on Hardwick's right to engage in consensual, homosexual sodomy. Id. The Court refused to consider whether the Georgia sodomy statute violated Hardwick's rights under the ninth amendment, the equal protection clause of the fourteenth amendment or the Eighth amendment, because Hardwick did not defend the judgment of the Eleventh Circuit on those grounds. Id. at 2846 n.8.

Justice Blackmun, in his dissenting opinion, argued that because the case was before the Court on the petitioner's motion to dismiss for failure to state a claim upon which relief can be granted, the Court was obligated to determine if any possible theory entitled respondent to relief. Id. at 2849 (Blackmun, J., dissenting). Justice Blackmun noted that homosexual activity could be considered as a condition, and that under the eighth amendment analysis in Robinson v. California, 370 U.S. 660 (1962) (holding eighth amendment prohibited punishing drug addict for his status), and Justice White's concurrence in Powell v. Texas, 392 U.S. 514, 550-51 n.2 (1968) (White, J., concurring) (stating key to inquiry is whether "volitional acts brought about the 'condition'"), the Constitution may bar punishment for activities attributable to homosexuality. 106 S. Ct. at 2850 n.2 (Blackmun, J., dissenting).

Justice Blackmun additionally noted that because the Georgia statute was gender-neutral, the state's exclusive interest in its application to homosexuals raised serious questions of discriminatory enforcement under the fourteenth
mental liberties as those "implicit in the concept of ordered liberty" or "deeply rooted in this Nation's history and tradition" and held, focusing on the specific conduct at issue, that the right to engage in homosexual sodomy did not conform to either of those principles.

amendment's equal protection clause. *Id.* (Blackmun, J., dissenting). Regarding whether homosexuals constituted a suspect class under equal protection analysis, Justice Blackmun noted that the equal protection claim might well be available without reaching that controversial question. *Id.* (Blackmun, J., dissenting) (citing Note, *The Constitutional Status of Sexual Orientation: Homosexuality as a Suspect Classification*, 98 HARV. L. REV. 1285 (1985) (arguing that "heightened scrutiny in cases involving discrimination against gays is justified by an analysis of the concerns that should and do lie behind our current conceptions of suspectness").

Justice Stevens, in dissent, first considered and rejected the idea that the gender-neutral Georgia statute could totally prohibit sodomy, concluding that under Griswold v. Connecticut, 381 U.S. 479 (1965), the state could not prohibit sodomy within marriage. *Id.* at 2858 (Stevens, J., dissenting). Justice Stevens additionally noted that the Georgia Attorney General conceded that point at oral argument. *Id.* at 2858 n.10 (Stevens, J., dissenting). Justice Stevens concluded that sodomy between unmarried, heterosexual adults would be constitutionally protected as well, under Eisenstadt v. Baird, 405 U.S. 438 (1972) (invalidating contraceptive distribution prohibition restricting access by unmarried persons). 106 S. Ct. at 2858 (Stevens, J., dissenting).

Justice Stevens then considered whether selective application of the sodomy statute would violate the equal protection clause. *Id.* (Stevens, J., dissenting). He noted that no justification existed for selective application of the law, and that the Georgia legislature only expressed a belief that all sodomy was immoral, as the sodomy law did not focus on homosexuals as a special classification. *Id.* at 2859 (Stevens, J., dissenting).

Justice Powell wrote separately in concurrence, and stated that a prison sentence for violation of the sodomy statute might implicate the eighth amendment prohibition of cruel and unusual punishment. He concluded, however, that since Hardwick had not been tried, convicted, or sentenced, the eighth amendment claim was not properly before the Court. *Id.* at 2847-48 (Powell, J., concurring).


92. 106 S. Ct. at 2844 (quoting Moore v. City of East Cleveland, 431 U.S. 494, 503 (1977) (plurality opinion)).

93. 106 S. Ct. at 2844-46. The Court analyzed the legal status accorded sodomy throughout history and stated that laws against sodomy "have ancient roots." *Id.* at 2844. The Court noted that sodomy was forbidden by the common law and by the laws of the original thirteen states as of 1791. *Id.* at 2844 & n.5. The Court further noted that in 1868, when the fourteenth amendment was ratified, thirty-two of the thirty-seven states had laws criminalizing sodomy. *Id.* at 2844-45 & n.6. The Court found that all the states criminalized sodomy as late as 1961, and that twenty-four states and the District of Columbia still did so. *Id.* at 2845-46 & n.7 (citing *Survey on the Constitutional Right to Privacy in the Context of Homosexual Activity*, 40 U. MIAMI L. REV. 521, 524 n.9 (1986) [hereinafter cited as *Survey*]).

The Court failed to mention, however, that of the twenty-four jurisdictions currently imposing criminal sanctions on sodomy, only six explicitly prohibit consensual, homosexual conduct. See *Survey*, supra at 525 n.10. The six states are: Arkansas, Kansas, Kentucky, Missouri, Nevada, and Texas. *Id.* The nineteen jurisdictions imposing criminal sanctions on any individuals who engage in oral or anal intercourse are Alabama, Arizona, District of Columbia, Florida, Georgia, Idaho, Louisiana, Maryland, Michigan, Minnesota, Mississippi,
Furthermore, Justice White stated for the majority that the Court "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."\textsuperscript{94} This danger called for a reluctance, according to the majority in \textit{Hardwick}, to give a broad reading to the liberty protected under the due process clause when presented with invitations to redefine the existing contours of the notion of penumbral rights.\textsuperscript{95}

The Court distinguished \textit{Stanley v. Georgia},\textsuperscript{96} stating that the right protected in \textit{Stanley} was clearly derived from the first amendment.\textsuperscript{97} The Court further reasoned that not all conduct illegal when it occurs outside the home is protected merely by virtue of occurring within the home.\textsuperscript{98} Finally, given that the right to engage in private, consensual

Montana, North Carolina, Oklahoma, Rhode Island, South Carolina, Tennessee, Utah, and Virginia. \textit{Id.} at 524 n.9 & 525 n.10. See generally \textit{Hardwick}, 106 S. Ct. at 2847 (tracing history of laws prohibiting sodomy from Roman law, through English Reformation, and up to Blackstone's \textit{Commentaries}) (Burger, C.J., concurring).

After this historical analysis, the Court characterized the claim that a right to engage in sodomy conformed to principles of due process clause analysis as "at best, facetious." \textit{Id.} at 2846.

In dissent, Justice Blackmun stated that the length of time a law commanded majority support did not necessarily confirm its constitutionality. \textit{Id.} at 2854 (Blackmun, J., dissenting). He wrote:

[It] is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past. \textit{Id.} at 2848 (quoting Holmes, \textit{The Path of the Law}, 10 HARV. L. REV. 457, 469 (1897)) (Blackmun, J., dissenting).

\textsuperscript{94} \textit{Id.} at 2846. Justice White noted that the judicial activism marked by substantive due process review was largely repudiated after the conflict between President Roosevelt and the Court in the 1930s. \textit{Id.} For a discussion of the Supreme Court's pre-1937 interpretation of due process liberty, see supra note 3 and accompanying text.

\textsuperscript{95} 106 S. Ct. at 2846. The Court stated that expansion of the substantive scope of the fifth and fourteenth amendments' due process clauses should be resisted, especially if it calls for a redefinition of fundamental rights. "Otherwise, the Judiciary necessarily takes to itself further authority to govern the country without express constitutional authority." \textit{Id.}


\textsuperscript{97} 106 S. Ct. at 2846. The Court emphasized that \textit{Stanley} was grounded in a specific provision of the Constitution and that it protected the right to possess and read books or films in one's home. \textit{Id.} The Court stated that the right to engage in sodomy had no such support in any provision of the Constitution. \textit{Id.}

Justice Blackmun disagreed with the Court's reading of \textit{Stanley}. \textit{Id.} at 2852 (Blackmun, J., dissenting). Justice Blackmun reasoned that the \textit{Stanley} Court relied on the fourth amendment as much as the first amendment, as it emphasized the special protection of an individual in his home. \textit{Id.} at 2852-53 (Blackmun, J., dissenting).

\textsuperscript{98} 106 S. Ct. at 2846. The Court reasoned that if voluntary sexual conduct between adults was constitutionally protected when it took place in private, no
sodomy is not a fundamental right, the Court ruled that the presumed majority sentiment that homosexuality is immoral was an adequate and rational basis to support the Georgia statute.99

IV. ANALYSIS

The reasoning of the majority in Bowers v. Hardwick100 can be viewed as essentially embodying a two-step process of analysis. The Court reasoned as follows:

(1)(A) The prior cases construing the fourteenth amendment’s protection of non-enumerated rights have definitively established fundamental rights only in the areas of marriage, the family, and procreative choice.

(B) The right to engage in consensual, homosexual sodomy is not a right which involves the areas of marriage, the family, or procreative choice.

(C) Therefore, the prior cases have not definitively established a fundamental right to engage in consensual, homosexual sodomy.

(2)(A) Only those non-enumerated rights implicit in the concept of ordered liberty or rooted in the history and tradition of the nation are fundamental rights qualifying for heightened judicial protection under the fourteenth amendment’s due process clause.

(B) The right to engage in consensual, homosexual sodomy is not implicit in the concept of ordered liberty or rooted in the history and tradition of the nation.

(C) Therefore, the right to engage in consensual, homosexual sodomy is not a fundamental right qualifying for heightened judicial protection under the due process clause.

The majority’s reasoning began with a characterization of its earlier privacy cases as establishing the right of privacy in only certain specific, protected zones of personal decisionmaking and activity.101 The majority’s brief analysis of the privacy cases focused on the specific areas protected, failing to state an explicit principle or concept which would link simple distinction could be made regarding the protection of adultery, incest, and other sex offenses. Id.

99. Id. Reasoning that the law “is constantly based on notions of morality,” the Court concluded that moral choices properly served as the basis for many laws. Id. This question was not actually at issue in Hardwick, however, since the case came before the Court after the Eleventh Circuit reversed the district court’s judgment granting a motion to dismiss for failure to state a claim, and remanded to the district court to determine if a compelling state interest justified the law. The issue before the Court, then, was whether the Eleventh Circuit applied the proper standard of review.

100. 106 S. Ct. 2841 (1986).

the factual situations involved. Thus, the Supreme Court in *Hardwick*
reasoned that its previous cases established a right of privacy protecting
personal autonomy in the limited areas of marriage, family, and procrea-
tion, and rejected the notion that its cases had established protection of
personal autonomy in the area of non-marital, private, consensual, adult
sexual conduct. 102

The majority's characterization of the cases which "construed the
Constitution to confer a right of privacy" 103 involved a narrow reading
of the cases and strictly limited the holdings of those cases to the factual
scenarios involved. However, such a narrow reading of the cases, limit-
ing the reach of the previously defined right of privacy, is supported
by the reasoning and language of the earlier decisions. 104 For example,
*Griswold*, 105 which dealt with a married couple's right to use contracep-
tives necessarily shielded certain adult, non-procreational sexual activity
from state regulation. Even then, however, only intimate activity which
took place within the bounds of a marital relationship was protected. 106
Even in *Eisenstadt v. Baird*, 107 in which the Court invalidated a law re-
stricting access to contraceptives as applied to unmarried persons on
equal protection grounds, 108 the Court did not hold that unmarried per-
sons had a fundamental right to use contraceptives, only that "whatever
the rights of the individual to access to contraceptives may be, the rights
must be the same for the unmarried and the married alike." 109 Thus,
even if one argues that, read broadly, *Griswold* protects the entire range
of intimate marital conduct, within the zone of marital privacy, the Court

102. 106 S. Ct. at 2844. For a discussion of the question of whether this
issue had been resolved by the Court's earlier cases, see supra note 65 and
accompanying text.

103. 106 S. Ct. at 2843.

104. See, e.g., *Loving v. Virginia*, 388 U.S. 1 (1967) (freedom to marry one
of "vital personal rights essential to the orderly pursuit of happiness by free
man"); *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942) (sterilization
law involved "basic civil right of man" and "marriage and procreation are funda-
mental to the very existence and survival of the race"); *Pierce v. Society of Sis-
ters*, 268 U.S. 510 (1925) (right of child rearing protected); *Meyer v. Nebraska*,
262 U.S. 390 (1923) (emphasizing rights involved in directing upbringing of
children but mentioning no right of privacy in sexual conduct).

105. 381 U.S. 479 (1965). For a discussion of *Griswold*, see supra notes 22-
27 & 42-43 and accompanying text.

106. In *Griswold*, the Court considered the constitutional protection of "a
relationship lying within the zone of privacy created by several fundamental con-
stitutional guarantees." 381 U.S. at 485. The Court held that the relationship
of marriage was within the zone of privacy protected by the Constitution, and
emphasized that the right of privacy surrounding the marriage relationship was
older than the Bill of Rights and involved an association "intimate to the degree
of being sacred." Id. at 486.

107. 405 U.S. 438 (1972). For a discussion of *Eisenstadt*, see supra notes 44-
45 and accompanying text.

108. 405 U.S. at 454-55.

109. Id. at 453.
in *Eisenstadt* did not give *Griswold* such a reading.\textsuperscript{110}

The *Eisenstadt* Court, in interpreting the right of privacy established in *Griswold*, never claimed that *Griswold* protected all forms of marital sexual intimacy. In fact, the majority in *Eisenstadt* refused to decide whether *Griswold* protected the rights of access to contraceptives at all. Therefore, it seems unreasonable to claim that *Eisenstadt* must be read as establishing a right of privacy regarding intimate sexual conduct between unmarried adults through its extension of *Griswold*'s protection to unmarried as well as married individuals. The clear focus in *Eisenstadt* was on the equal right of unmarried and married individuals to have access to contraceptives, whatever those rights may be.\textsuperscript{111}

While the Court's decision to protect the right of an unmarried Texas woman to abortion in *Roe v. Wade*\textsuperscript{112} could be seen as implicit protection of extra-marital sex, the Court clearly distanced the decision whether to bear a child from the decision whether to engage in sexual activity.\textsuperscript{113} The entire focus in *Roe* was on the area of procreational choice, not on the area of sexual intimacy.

In sum, the line of cases establishing and defining the right of privacy may reasonably be interpreted as definitively creating a right of privacy only in certain specific areas of choice or activity. The Court's conclusion that the line of privacy cases decided before *Hardwick* does not clearly establish that "any kind of private sexual conduct between consenting adults is constitutionally insulated from state proscription"\textsuperscript{114} is supportable by a reasonable analysis of the prior cases.\textsuperscript{115}

\textsuperscript{110} *Eisenstadt* simply declared that if the right of choice regarding "whether to bear or beget a child" was protected in *Griswold*, then that protected right was equally applicable to the individual, married or single. *Id.*

\textsuperscript{111} *Id.*

\textsuperscript{112} 410 U.S. 113 (1973). For a discussion of *Roe*, see supra notes 46–52 and accompanying text.

\textsuperscript{113} The Court briefly considered the deterrent of illicit, extra-marital sexual conduct as a possible justification for the state abortion restrictions, but concluded that no court or commentator had taken that argument seriously and noted that the appellee, Texas, did not advance this argument. 410 U.S. at 148.

\textsuperscript{114} *Hardwick*, 106 S. Ct. at 2844.

\textsuperscript{115} The Court's major premise in its first syllogism, involving characterization of the privacy precedent, is reasonable. The Court's minor premise in that first argument, in which homosexual sodomy is characterized as not involving marriage, family or procreation, is also reasonable. The Court's conclusion in its first argument, that the right to engage in homosexual sodomy is not clearly or definitively established by its earlier cases, is, therefore, justifiably reached.

However, an alternative characterization of the privacy precedent could be advanced, relying on the language of *Roberts v. United States Jaycees*, 468 U.S. 609 (1984) (characterizing right protected as "freedom of intimate association" and recognizing protected personal relationships which share attributes of type found in family relationship). For a discussion of *Roberts*, see supra notes 38 & 60–62 and accompanying text.

Justice Blackmun argued for a broader characterization of the privacy cases in his dissent in *Hardwick*, and saw the cases as recognizing a "private sphere of
The next step in the Court's analysis in *Hardwick*, assuming that the court's earlier privacy decisions did not require the recognition of the right to engage in homosexual sodomy as a fundamental constitutional right, was to consider whether those cases precluded the recognition of such a right. An alternative formulation of this question is whether the principles and reasoning of the Court's earlier privacy cases permitted a logical extension of the protected zones of privacy previously announced to the zone at issue in this case, the area of intimate sexual association.

The Court sought to identify the principles governing its application of the due process clause in previous cases which had recognized substantive rights with "little or no textual support in the constitutional language." The stated premise in the Court's analysis was that only those non-enumerated rights "implicit in the concept of ordered liberty," or "deeply rooted in this Nation's history and tradition" individual liberty" beyond state control. *Hardwick*, 106 S. Ct. at 2850 (Blackmun, J., dissenting) (quoting *Thornburgh v. American College of Obstetricians and Gynecologists*, 106 S. Ct. 2169, 2184 (1986)). For a discussion of *Thornburgh*, see supra notes 54 & 63 and accompanying text.

The *Hardwick* majority, however, failed to include, in its list of previous decisions recognizing fundamental rights not specifically enumerated in the Constitution, the important case of *Stanley v. Georgia*, 394 U.S. 557 (1969). The exclusion of *Stanley* from the list of cases was a critical part of the first syllogism in the Court's analysis, because if *Stanley* were considered as one of the Court's non-enumerated rights decisions the narrow characterization of those decisions by the *Hardwick* Court would be inconsistent with the holding and rationale of *Stanley*.

The opinion of the Court in *Stanley* does include an acknowledgement of the fundamental "right to be free, except in very limited circumstances, from unwanted governmental intrusions into one's privacy." *Id.* at 564. This language tends to support a reading of *Stanley* as a privacy case based on more than rights specifically enumerated in the Constitution. The main thrust of the *Stanley* majority, however, is that the first amendment protects the right of the individual to possess printed or filmed material in his home, and that this enumerated right is the source of the fundamental liberty protected from state proscription by the fourteenth amendment. *Stanley* emphasized the privacy aspect of the home in distinguishing the protected status of possession of obscene material in one's home from the unprotected status of public possession or distribution of obscene material under the first amendment. *Id.* at 567-68. The Court's conclusion in *Hardwick* that *Stanley* was grounded in the first amendment is reasonable. For a discussion of *Stanley*, see supra notes 62 & 96-97 and accompanying text.


117. *Id.* (quoting *Palko v. Connecticut*, 302 U.S. 319, 325 (1937)). In *Palko*, the Court applied this characterization of fundamental liberty in determining that the double jeopardy clause of the fifth amendment was not applicable to the states under the fourteenth amendment's due process clause. 302 U.S. at 322. The specific holding of *Palko* was overruled by Benton v. Maryland, 395 U.S. 784 (1969). The Supreme Court also quoted this definitional principle of fundamental personal rights analysis in *Roe v. Wade*, 410 U.S. 113, 152 (1973). For a discussion of *Roe*, see supra notes 46-52 and accompanying text.

were fundamental rights worthy of "heightened judicial protection" under the fourteenth amendment's due process clause.119

This formulation of fundamental rights analysis principles is a valid step in the Court's reasoning. The minor premise in the Court's second syllogism, however, involved a more difficult application of these principles to the right asserted by respondent Hardwick. A reasonable approach to this problem should include not only the quotation of the same principles that governed the earlier non-enumerated fundamental rights decisions, but an application of those general principles in a manner consistent with their application in the earlier cases. Therefore, the Hardwick majority's application of fundamental rights analysis principles must be carefully examined.

The Hardwick majority began its evaluation of the right to engage in consensual homosexual sodomy by reviewing the history of the legal status of sodomy in the United States. Noting that sodomy had been outlawed by a majority of the states until very recently,120 the Court concluded that the right to engage in sodomy was not consistent with the principles announced as the basis for recognizing a fundamental right under the due process clause.121 The Court then reasoned that recognition of non-enumerated fundamental rights under the fourteenth amendment beyond the category defined by the announced principles drew the Court near to the bounds of its constitutional authority, and concluded that the right asserted by Hardwick was not a fundamental constitutional right.122

The essential problem in the Hardwick majority's analysis is in its application of the principles of fundamental rights analysis to the right asserted by respondent Hardwick. The Court, in applying and defining those general principles, focused on the historical legal status of the specific conduct involved, rather than on the more general right implicated by the state's proscription of that conduct. In doing so, the Court applied those principles in a manner inconsistent with the application of those general principles in its earlier cases, including the landmark decisions of Griswold123 and Roe.124

In Griswold, the Court's decision was based on the more general right of marital privacy implicated by a ban on the use of contraceptives,125 not on an historical analysis of the legal status of the specific

119. Hardwick, 106 S. Ct. at 2844.
120. Id. at 2844-46. For a discussion of the Court's historical analysis, see supra note 93 and accompanying text.
121. 106 S. Ct. at 2846.
122. Id.
125. Griswold, 381 U.S. at 485-86.
In *Roe*, the Court's decision was based on the broader right of procreational choice infringed by a near total ban on abortion, not on an historical analysis of abortion's legal status in America. The *Hardwick* majority's analysis, on the other hand, clearly emphasized the legal status of sodomy throughout our nation's history. The Court emphasized the dates of the ratification of the Bill of Rights and the fourteenth amendment as important reference points in evaluation of the status of the conduct as a fundamental right, and appeared to ignore any recent trend toward reversal of the earlier prohibition of the specific conduct.

The Court's functional definition of fundamental rights principles under the fourteenth amendment in *Hardwick*, if it were applied to the facts of several of the Court's earlier decisions, would produce results opposite those reached in the earlier cases. For example, in *Griswold*, the specific conduct involved was the use of contraceptives. The advertisement, distribution, and use of contraceptives, however, was regulated by federal statute as early as 1873. Under the *Hardwick* analysis, the right to use contraceptives would not be "implicit in the concept of ordered liberty," and thus not a protected, fundamental right. Similarly, the Court's decision in *Loving v. Virginia*, invalidating a state miscegenation statute on equal protection and due process grounds, is inconsistent with the test applied in *Hardwick*. Miscegenation was prohibited by law in America as early as 1661, and by the time of the ratification of the fourteenth amendment, thirty-three states had miscegenation statutes in force. Any assertion by the *Loving* Court that the right to marry across racial boundaries was historically accorded pro-

127. The Court did, however, trace the development of laws regulating abortion, noting that "the restrictive criminal abortion laws in effect in a majority of States today are of relatively recent vintage." *Id.* at 129, 130-47.
128. See *Hardwick*, 106 S. Ct. at 2844-46.
129. 381 U.S. 479 (1965) (holding marital privacy in context of contraception protected by Constitution).
132. 388 U.S. 1 (1967). For a discussion of *Loving*, see *supra* notes 28-29 and accompanying text. Justice Blackmun, in his dissent in *Hardwick*, noted that in *Loving* the state relied on a religious justification for its miscegenation law, and noted that the lower court in *Loving* had stated that God had created separate races of men and placed them on separate continents. *Hardwick*, 106 S. Ct. at 2854 n.5 (Blackmun, J., dissenting).
133. This hypothetical analysis of *Loving* focuses on the recognition of marriage as a fundamental right under the Court's due process clause analysis, and not on the equal protection prong of *Loving*.
tected legal status would have been unsupportable, and thus under the Hardwick historical conduct-specific analysis the conduct would have failed to achieve fundamental right status.

The Court's landmark decision in Roe v. Wade would likewise fail the Hardwick test. Historical review of the legal status of abortion in the United States would reveal that in 1868 thirty-six states or territories had enacted laws limiting abortion. Thus, another major decision of the Court would have resulted in the opposite conclusion if the Hardwick mode of application of fundamental rights principles had been employed.

The Hardwick analysis can be viewed as creating a double-tiered test for non-enumerated fundamental privacy rights analysis under the fourteenth amendment's due process clause. First, the factual scenario in which the right is asserted is compared against the specific zones in which a fundamental privacy right has been recognized. Only those rights involving essentially identical factual situations as those previously recognized are accorded fundamental rights status under the rationale of the Court.

A different, more stringent test is applied to any right claimed to be fundamental which is not asserted in a factual scenario essentially identical to the previously recognized zones of privacy. This test involves an historical analysis of the legal status of the specific conduct involved, and conduct which has generally been legally prohibited or restricted in the past cannot reach the level of a fundamental constitutional right qualifying for heightened judicial protection. The approach taken in Hardwick results in the continued protection of fundamental, non-enumerated rights which have already been established, while any right asserted in a different factual context is subject to a more difficult standard which focuses on the historical acceptance of such conduct. This approach results in the freezing of fundamental rights under the due process clause to those interest-specific areas already recognized and those specific activities which historically have enjoyed legally-accepted status.

The result of the Hardwick majority's approach can be appreciated more clearly when it is compared with the process of abstraction and analysis employed in previous fundamental rights cases. The traditional analysis of a non-enumerated fundamental rights claim under the due process clause involves a three-step process of abstraction. The specific conduct which was prohibited by the challenged statute lies within zone one, the "zone of specific behavior," the primary step in the process of

136. Id. at 175-77 (Rehnquist, J., dissenting).
137. See Hardwick, 106 S. Ct. at 2854 (Blackmun, J., dissenting) (arguing that length of time majority holds convictions cannot withdraw legislation from Court's scrutiny).
NOTE

analysis. This zone requires no abstraction and signifies the specific conduct exercised by the citizen.

Next, the conduct from zone one is abstracted to the next level, in which the basic value implicated by the exercise of the conduct is considered. This second zone is the "zone of protected values." The right or value in zone two is then tested for its validity as a fundamental right under the due process clause, by applying the principles in the third zone to the zone two value. This third zone is the "zone of protected liberty," and the zone two value is considered in the light of these principles to determine whether the value comports with these principles, and if so, the value is construed as a fundamental right under the due process clause.

The operation of this mode of analysis can be illustrated by a diagram of the rights asserted in previous non-enumerated fundamental rights cases considered by the Court and the level of abstraction involved in decisions to protect those rights under the Constitution.

The specific behavior at issue in these cases was considered in light of the broader value implicated by exercise of that behavior. That value was considered in light of the broader principles which defined the scope of non-enumerated due process liberties or fundamental rights. The Hardwick majority appeared to recognize this process when it accepted the characterization of the earlier privacy cases in Carey as involving the zone two values of marriage, family, and procreation. Furthermore, the Hardwick Court recognized the broader zone three principles, which govern the analysis of the values to determine whether the asserted right is a fundamental right, as a means to "identify the nature of the rights qualifying for heightened judicial protection."

138. Id. at 2843-44.
139. Id. at 2844.
The *Hardwick* majority concluded that the asserted right to engage in homosexual sodomy did not implicate any of the values heretofore accepted as zone two protected values. The Court then subjected the zone one conduct, homosexual sodomy, to analysis under zone three principles, bypassing the customary process of abstraction to a zone two value. In doing so, the Court created the appearance of a new conduct-specific standard of due process review since no zone one value had previously been subjected to a pure zone three analysis. The *Hardwick* majority, therefore, deviated from the traditional pattern of analysis, as illustrated here:

The impact of the *Hardwick* majority’s failure to follow the traditional pattern of fundamental rights analysis is that the Court avoided confronting the critical question of whether a zone two value, perhaps intimate association, was implicated by the behavior engaged in by Hardwick and whether that value qualified as a fundamental right under the liberty principles of zone three.

The *Hardwick* majority justified its analysis by pointing to the conflict between the Court and the Executive in the 1930’s, which was arguably a factor in the abandonment of the doctrine of economic substantive due process. The *Hardwick* majority cautioned against

140. Justice Blackmun stated in *Hardwick* that “the right to privacy is more than the mere aggregation of a number of entitlements to engage in specific behavior.” *Id.* at 2852 (Blackmun, J., dissenting). He further stated:

This case is no more about “a fundamental right to engage in homosexual sodomy,” as the Court purports to declare, . . . than Stanley v. Georgia . . . was about a fundamental right to watch obscene movies, or Katz v. United States . . . was about a fundamental right to place inter-state bets from a telephone booth. Rather, this case is about “the most comprehensive of rights and the right most valued by civilized men,” namely, “the right to be let alone.”

*Id.* at 2848 (Blackmun, J., dissenting) (quoting *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting)) (citations omitted).

141. For a discussion of this conflict and the period of economic substantive due process review, see supra note 3 and accompanying text.
redefining the category of rights deemed fundamental.142 The conduct-specific historical analysis employed in Hardwick, however, appears to come close to doing just that.

The Hardwick majority sought to ensure that the recognition of rights not specifically enumerated in the Constitution involved "more than the imposition of the Justices' own choice of values on the States and the Federal Government."143 The determination of the existence of fundamental rights under the due process clause involves a choice of whether an asserted right is such a fundamental liberty that any law which interferes with the exercise of that right must be justified by a compelling interest.144

It is submitted that a controlling principle should be established to define and unify the fundamental right of privacy. Any assessment of an asserted right should include an evaluation of the values implicated in the exercise of that right and the similarity of those values to the essential values protected by the right of privacy. A fundamental rights analysis based on specific value-oriented principles, whether the approach be based on a principle of procreational and familial values or on a principle embodying values of personal autonomy in matters of intimate association, would result in a clearer, more useful body of constitutional law.

Even more general principles of analysis could be applied consistently, if a specific analytical process consistent with previous decisions were set forth to determine which rights are indeed fundamental liberties protected by the fourteenth amendment.

V. Conclusion

No longer will fundamental rights jurisprudence represent the growth and development of our societal values. Those values are now frozen in time. The Hardwick decision marks the Court's refusal to continue the process of abstracting the conduct-specific question at issue to the broader value implicated by state regulation of the activity. In this, the decision is unfortunate. Analytically and functionally, the Court has called a halt to the reasoned maturation of fundamental rights jurisprudence. In this, the decision is tragic.

A determination whether a right "not readily identifiable in the Constitution's text,"145 is a fundamental liberty should involve more than "the Justices' own choice of values."146 Consistency in the processes employed in analysis of those rights and values, and a coherent principle defining the scope of non-enumerated fundamental rights under the due process clause of the fourteenth amendment could only

142. Hardwick, 106 S. Ct. at 2846.
143. Id. at 2844.
144. Id.
145. Id.
146. Id.
result in a clearer understanding of the meaning of constitutionally protected liberty.

Jeffrey W. Soderberg