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THE DEVELOPMENT OF A LEGAL "RIGHT TO PRIVACY" IN THE AMERICAN COURTS THROUGHOUT THE TWENTIETH CENTURY

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ABSTRACT

Many modern Americans perceive a "right to privacy" as a fundamental component of their basic constitutional rights. Though elements of privacy are perhaps evident in various constitutional amendments, neither the body of the Constitution nor the Bill of Rights features an explicit provision dealing with a "right to privacy" that, prior to its affirmation by the judiciary or legislature, could provide sufficient legal protection for violations of an individual's privacy. This essay details the development of a legal "right to privacy" from its inception in 1890 with Samuel Warren and Louis Brandeis's law review essay, "The Right to Privacy," to its formal recognition in 1965 by the Supreme Court in *Griswold v. Connecticut,* and finally to its most recent expansion in 2003 with *Lawrence v. Texas.* Though the "right to privacy" was initially conceived by Warren and Brandeis to act as a component of libel/slander law provisions, the American courts ultimately characterized the concept as dealing with the protection of personal liberty and autonomy, specifically in the form of sexual freedom.

Two main conclusions underscore the establishment, affirmation, and development of a "right to privacy" in the American courts throughout the twentieth century. First, the development of societal institutions and attitudes regarding privacy-related issues over this period of time contributed greatly to the consideration and subsequent recognition of the "right to privacy" in the court system. Second, the changing stance of the Supreme Court regarding the maintenance of a governmental separation of powers with respect to the status of the judiciary as an individual entity played a key role in shaping the conception of a legal "right to privacy." In other words, social change pushed forward recognition of a "right to privacy," and yet the institutional question of the formal legal role of the Supreme Court in the federal system, a

narrower yet influential issue, also shaped the judicial outcome. The legal articles and cases, as well as the larger social, political, and judicial themes that serve to emphasize their content, are all essential to the development of the modern perception of a “right to privacy.”

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Introduction

The “right to privacy” is a complex term that encompasses a wide variety of social issues and has come to provide individuals with legal remedies against invasions of privacy, primarily those dealing with individual expressions of sexuality. Though this right is not overtly enumerated in the Constitution, it has been established and subsequently refined by the American courts, primarily over the course of the twentieth century. The early concept of a “right to privacy” emerged through a variety of legal and legislative avenues, but was primarily established through case decisions, some of which expanded upon the Supreme Court’s original logic, and others which limited the scope of such a right. This essay seeks to provide a detailed timeline of the establishment and development of the “right to privacy” in the American legal tradition in order to better understand the social, political, and judicial changes that shaped its conceptualization.

The “right to privacy” did not emerge as a defense of marital and sexual privacy, but rather as a demand for informational and social privacy. When Louis Brandeis and Samuel Warren published their essay in 1890, entitled, “The Right to Privacy” in the Harvard Law Review, they could not have imagined the astounding impact their words would eventually have, not only on the legal community, but also on future generations of Americans. The first chapter of this thesis focuses on this essay and the impact it had on the legal tradition for years to come. Brandeis and Warren argued that each citizen deserved the “right to be let alone,” particularly in regards to the press’ invasive new forms of technology, which allowed the media to invade citizens’ privacy without the need for consent. They considered this particular action a violation

of one's right to informational property protection and called for an expansion of the current privacy law.

At the time, citizens had little legal ability to control any violations of privacy they experienced, as the only options for potential justice were rooted in libel/slander laws and actions of trespass. Both legal routes proved to be difficult to interpret with regard to privacy violations, and often were not fruitful in acquiring a beneficial outcome for the plaintiff.[1] Even in cases where the plaintiff won his case, the court examining the case often used a broad interpretation of the law to produce such an outcome, which did not always ensure that the violation of privacy at hand was truly compensated for. In *Moore v. New York Elevated Railroad Co.*, for instance, the New York Court of Appeals broadly interpreted a traditional trespass theory of recovery in an attempt to provide an adequate legal remedy for the plaintiff, who claimed that his privacy was violated by the erection of a train station platform that offered visual access to the rooms of his private home.[2] Though the plaintiff was provided with damages under the trespass theory of recovery, the Court was unable to provide damages on the basis of emotional distress due to the invasion of privacy, thus rendering the Court's compensation of damages incomplete.[3] Further, these legal categories often did not directly apply to the situations at hand, meaning that several instances of privacy violation were not accurately represented in the law itself. Most notably, the media/press found ways around libel/slander laws by acting outside of the textual limitations, and were thus able to invade citizens' privacy without facing the threat of legal prosecution.

The lack of privacy remedies available for judicial interpretation during the late nineteenth century also had an adverse effect on the press. In an attempt to provide expanded

[1] Irwin R. Kramer, "The Birth of Privacy Law: A Century since Warren and Brandeis," (Catholic University Law Review 39, no. 3 (Spring 1990)), p. 708.
[2] Ibid, p. 706.
[3] Ibid, p. 707.

remedies for individuals who were subject to the publication of offensive, but true, personal information, the courts established a broad interpretation of libel law that required the press to only print "the "whole truth" with uncompromising precision."[4] This in turn allowed individuals to sue the press over even the smallest inaccurate detail and procure damages, and was thus not an effective legal remedy. Warren and Brandeis essentially argue that these legal remedies were insufficient for the proper protection of privacy violations and an independent privacy tort should instead be established.

While Warren and Brandeis' article made a small impact in the years immediately following its release, their legal theory eventually inspired constitutional interpretations that changed Americans' perception of "privacy" fundamentally. Though the decision does not specifically cite Warren and Brandeis's article, the 1965 case of *Griswold v. Connecticut*, which concerned the prohibited distribution of information concerning contraception, establishes a constitutional "right to privacy." The second chapter focuses on how the *Griswold* case decision reflected a change in the Court's approach to privacy-related concerns, given its expansion of the Constitutional definition of "privacy," or lack thereof. The decision relied heavily on broad, substantive interpretations of several constitutional amendments—such as the First, Fourth, Fifth, and Ninth Amendments—that implied the protection of personal privacy and autonomy. This decision paved the way for similar cases such as *Roe v. Wade* and *Planned Parenthood v. Casey*, both of which are landmark cases that were instrumental in ensuring the right of women to make decisions related to contraception in a private sphere. These cases also addressed the interest of the state in the protection of life and emphasized the Court's attempt to maintain a reasonable separation of powers as they reviewed the statutory laws addressed.

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[4] Ibid, p. 707.

The conception of a legal "right to privacy" changed significantly with the Court's verdict in *Bowers v. Hardwick (1986),* the circumstances of which dealt with homosexual sodomy. While the Court ruled that the Georgia statute criminalizing sodomy was constitutional, the decision was later reversed in the 2003 *Lawrence v. Texas* decision, which is the focus of the third chapter. The *Lawrence* decision fundamentally redefined the way in which a "right to privacy" had previously been addressed in the Court, arguing that the right was actually about individual notions of liberty and autonomy rather than the protection of private, consensual sexual conduct.

Ultimately, the establishment, affirmation, and evolution of a constitutional "right to privacy" relied primarily on two factors: 1) the development of societal institutions and attitudes with reference to privacy-related issues, and 2) the Supreme Court's changing stance on how to properly maintain the governmental separation of powers while still adhering to the fundamental principles of the judiciary. While this essay will provide extensive analysis on the individual articles and cases that shaped the development of a legal "right to privacy" immensely, the two aforementioned factors ultimately exist at the core of this evolution and help to explain, on a fundamental level, how the "right to privacy" truly came to be.

Chapter I: Building the Foundation for a Legal “Right to Privacy”

SECTION I: INTRODUCTION

In their 1890 essay, entitled "The Right to Privacy," lawyers Samuel Warren and Louis Brandeis conclude by posing the question: "Shall the courts thus close the front entrance to constituted authority, and open wide the back door to idle or prurient curiosity?"[5] This metaphor concisely summarizes the main point of Warren and Brandeis' essay and in a broader context, details their frustration with the common law, the entire judicial system, and society as a whole. The essay itself was written as a response to the development of invasive forms of technology--specifically, instantaneous photographs--that were frequently used by the press and media to obtain personal information and imagery of well-known members of society without their permission. Though the term "instantaneous photography" was used frequently in the late nineteenth century, Colin Harding, Curator of Photographic Technology at the National Science and Media Museum, suggests that there was "surprisingly little discussion or agreement as to precisely what it meant."[6] His practical conception of the instantaneous photograph defines it as "any photograph which contained an element of movement or which was taken with an exposure of less than one second."[7]

Warren and Brandeis viewed this trend as concerning in several ways: as a vehicle for the spread of salacious gossip, as a normalization of invasive media techniques, and most

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[5] Samuel D. Warren and Louis D. Brandeis, "The Right to Privacy," *Harvard Law Review* 4, no. 5 (1890), 220.
[6] Colin Harding, "I Is For… Instantaneous: Capturing Movement for the First Time," (*National Science and Media Museum Blog* (blog), June 19, 2013), n. pag.
[7] Ibid, n. pag.

importantly, as a violation of an individual's inherent "right to privacy." This idea of a "right to privacy" is central to Warren and Brandeis' essay and their overall argument, which is that the common law has gradually established an individual's right to be "let alone" in their personal life. Given the development of instantaneous photography, Warren and Brandeis argue that the implementation of such invasive technologies calls for a legal expansion of the right to be "let alone" to specifically protect an individual's implied "right to privacy." The establishment of a "right to privacy" would primarily protect the thoughts, feelings, and actions of an individual that they choose to keep private from other individuals and from society as a whole. According to Warren and Brandeis, these protections would effectively close the loopholes present in existing common law--including libel/slander law--that allow the press and media to procure images and information about individuals without consent.

The quote also prompts discussion of the two opposing entities featured throughout the essay: "constituted authority" and "idle/prurient curiosity." Focusing on the former, "a constituted authority" represents the judges and various courts that make up the judicial system, and perhaps on a larger scale, the law itself. When Warren and Brandeis refer to the courts "clos[ing] the front entrance," they are alluding to the lack of legal guidance available in the common law regarding matters of privacy, which in turn limits the judicial system in terms of interpretation. These two components--or lack, thereof--effectively "close" the judicial system off by restricting their ability to regulate on matters of privacy and thus protect citizens from the "idle/prurient curiosity" referenced in the second part of the quote. By giving individuals little legal means to protect their private effects, the courts essentially allow news and media sources to freely access and expose an individual's private life through a legal "back door." Ultimately, through the use of analogy in their closing quote, Warren and Brandeis effectively prompt the

courts to consider whether continuing to limit individual rights to privacy is worth the resulting consequence of news and media sources invading individuals' personal lives without fear of legal repercussion.

SECTION II: "THE RIGHT TO PRIVACY" ESSAY: A CASE STUDY

A History of Privacy Rights

Warren and Brandeis' review begins with an analysis of the history of "privacy" rights in a legal sphere. They first state that privacy protection--particularly in terms of person and property--is a concept as fundamental as the common law itself.[8] A right to privacy ensures a right to life, and thus, protection of one's privacy is a crucial component of one's basic rights. Still, Warren and Brandeis argue that the idea of privacy is not adequately reflected in legal literature, especially given its relevance to citizens' everyday lives. The common law should "grow to meet the demands of society" and evolve to reflect the political, social, and economic needs of the public.[9] Throughout this constant evolutionary process, the common law must also address and recognize new rights when appropriate.

For instance, the legal concept of a "right to life" was initially addressed only in terms of physical property violations, such as trespassing. Warren and Brandeis address the evolution of this phrase in general terms, suggesting that in "very early times," these limited legal ramifications were a sufficient means of privacy protection for the general citizenry.[10] This "right" then evolved to address physical violations of self, particularly in reference to instances

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[8] Samuel D. Warren and Louis D. Brandeis, "The Right to Privacy," *Harvard Law Review* 4, no. 5 (1890), 193.
[9] Ibid, 193.
[10] Ibid, 193.

of battery, assault, or other similar cases of attack on another individual. At a "much later" time, Warren and Brandeis cite the development of the "law of nuisance," which protected an individual's right to prosecute another over issues of excessive and unpleasant noises, odors, and vibrations.[11] Over time, the phrase developed further within the common law to address and recognize the contribution of a man's "spiritual nature" to the establishment of a civilized life.[12] Broadly speaking, an individual's "spiritual nature" referred to their emotional and intellectual capabilities, both of which were not adequately addressed by the protections afforded in the common law at the time. The definition of a "civilized life" also took into account one's reputation in a social and political setting, which sparked the development of libel and slander laws.[13] Over time, the "right to life" also expanded to include marital and familial relations between a man and his wife, as those factors also contributed to the establishment of a reputation, and thus, a "civilized life." This expansion was very limited, however, as these issues were thought to be less impactful to one's reputation than instances of libel and/or slander could be. All of these developments extended far beyond the initial protection of a man's property, indicating that the law could and should be applied to intangible concepts relating to one's sense of personal autonomy.

Warren and Brandeis thus conclude that the eventual deference of the common law to men's internalized feelings and emotions was an "inevitable" development.[14] They argued that the advance of civilization as a whole sparked an intellectual and emotional revolution within society that often led to an individual reevaluation of values and beliefs. Men came to the

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[11] Samuel D. Warren and Louis D. Brandeis, "The Right to Privacy," *Harvard Law Review* 4, no. 5 (1890), 194.
[12] Ibid, 194.
[13] Ibid, 194.
[14] Samuel D. Warren and Louis D. Brandeis, "The Right to Privacy," *Harvard Law Review* 4, no. 5 (1890), 195.

realization that "only a part of the pain, pleasure, and profit of life lay in physical things," and as such, intangible sentiments and emotions "demanded legal recognition."[15] Based on their characterization of the common law as an agent of growth and change, Warren and Brandeis emphasized that this role enabled judges to expand legal protections without involving the legislature.

Given the official development of a "right to life" in terms of legal meaning, Brandeis and Warren continue by arguing that this term gradually evolved to include a concept inherent to the establishment of a civilized life: privacy. To support their argument, they cite the expansion of a "right to life" to include deference to one's sense of enjoyment and fulfilment, rather than simply protecting the idea of a "civilized life" in the eyes of society.[16] This newfound "right to life"--perhaps more aptly termed a "right to *enjoy* life"--also addresses the right of any individual to be "let alone."[17] This phrasing is clearly indicative of an assumed right to privacy that Brandeis and Warren consider to be a natural progression from the original concept of a "right to life." Similarly, they claim that the "right to liberty" addressed in the common law secures "extensive civil privileges" for citizens, which implies some level of inclusivity for concepts and "rights" not explicitly protected in a textual sense. Thus, Brandeis and Warren indicate that privacy protections are related to--if not indicative of--fundamental concepts addressed in the common law.

Warren and Brandeis' passion for securing the right "to be let alone" is primarily based in the development of new technologies that not only enable, but also encourage the violation of individuals' privacy. These new technologies primarily refer to instantaneous photographs,

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[15] Ibid, 195.
[16] Ibid, 195.
[17] Ibid, 195.

which the news and media were using to obtain images of individuals without any form of consent. Although they concede that the "narrower doctrine" under the common law previously provided a sufficient legal response to address violations of "contract or...confidence," Warren and Brandeis argue that the development of new technologies renders these protections inadequate.[18] Warren and Brandeis then propose that the use of these techniques to photograph unknowing citizens represents the media's invasion of "the sacred precincts of private and domestic life" for their own selfish profit.[19] They also assert that the use of these technologies could make the hypothetical idea that "what is whispered in the closet shall be proclaimed from the house-tops" a reality.[20] Warren and Brandeis viewed the spread of gossip as indecent, particularly when said gossip included information or photographs that were obtained in an immoral manner. Thus, they loathed the idea that media sources could easily violate individuals' privacy and potentially impact one's livelihood through the spread of personal information unknown to the general public.

They further argue that the development of invasive technologies allowed gossip to become more than just a practice, instead taking the form of a "trade, which is pursued with industry as well as effrontery."[21] According to Warren and Brandeis, even the kind of gossip that may be intentionally harmless is "potent for evil" when spread in such a manner because it "belittles and perverts" information to the public.[22] In turn, the constant supply of gossip fueled by media sources not only harms the subject, but also harms society as a whole. Brandeis and

[18] Samuel D. Warren and Louis D. Brandeis, "The Right to Privacy," *Harvard Law Review* 4, no. 5 (1890), 211.
[19] Samuel D. Warren and Louis D. Brandeis, "The Right to Privacy," *Harvard Law Review* 4, no. 5 (1890), 195.
[20] Ibid, 195.
[21] Samuel D. Warren and Louis D. Brandeis, "The Right to Privacy," *Harvard Law Review* 4, no. 5 (1890), 196.
[22] Ibid, 196.

Warren believed that exposure to such a despicable practice resulted in the lowering of societal standards and the demoralization of individuals in society as well. They felt that by nature, gossip appeals to the "weak side of human[s]" and decreases an individual's brain capability through its "triviality [which] destroys at once robustness of thought and delicacy of feeling."[23] Thus, any law or principle enacted to counteract the invasive methods of the news and media was of benefit to the general population in Warren and Brandeis' eyes.

Notably, the media's ability to violate individuals' privacy through the use of instantaneous photographs and other similar technologies came without much, if any legal retribution. Characterized by Warren and Brandeis as bearing a "superficial resemblance" to violations of libel and slander laws, invasions of privacy instead were subject to substantive forms of legal action that were largely dependent on circumstance.[24] Prior to the release of Warren and Brandeis' essay, legal avenues for individuals to prosecute the press were strictly limited to libel and slander laws. Given the intent of these laws to specifically protect individuals against the falsification of personal information and the subsequent destruction of one's reputation by media sources, other violations of privacy incurred by the press were not adequately addressed. Essentially, the common law "recognizes no principle upon which compensation can be granted for mere injury to the feelings," despite the painfulness that an invasion of privacy may bring about for an individual.[25] Ultimately, this means that if an invasion of privacy is not unlawful based strictly on the common law, it cannot be legally pursued on the grounds of mental or emotional damage.

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[23] Ibid, 196.
[24] Samuel D. Warren and Louis D. Brandeis, "The Right to Privacy," *Harvard Law Review* 4, no. 5 (1890), 197.
[25] Ibid, 197.

If an individual sought legal action against a press outlet, they had to prove in some way that the information used in reference to their name was in some way exaggerated or falsified for immoral purposes. Despite the fact that courts eventually initiated broad interpretations of libel and slander laws in an attempt to protect individuals' privacy, many specific cases could not legally fall under the realm of these laws. In regards to the development and usage of instantaneous photographs, this was the case. Although the photographs were taken by the media without consent from the individual being photographed, they did not technically violate libel and slander laws because they were not fabricated or falsified in any way. Despite the immorality of the action in itself, individuals could not prosecute press sources over this matter because the law did not address it either specifically or broadly.

Logically speaking, Warren and Brandeis' earlier assertion that the common law should be allowed to evolve and change based on societal development is integral to their argument throughout the remainder of the essay. They primarily argue that there exists a societal demand for protection against these invasive technologies, claiming that "for years," people have called for some kind of legal remedy that appropriately addresses the issues at hand.[26] In support of this argument, Warren and Brandeis claim that the advancement of civilization subjects the individual to a more complex and intense personal life, which in turn leads one to desire and value his own solitude and privacy.[27]

From "Property" to "Privacy": Examining Warren and Brandeis' Proposal to Reevaluate Common Law Provisions

[26] Samuel D. Warren and Louis D. Brandeis, "The Right to Privacy," *Harvard Law Review* 4, no. 5 (1890), 195.
[27] Samuel D. Warren and Louis D. Brandeis, "The Right to Privacy," *Harvard Law Review* 4, no. 5 (1890), 196.

In structuring the legal support for their argument in favor of a "right to be let alone," Warren and Brandeis first claim that the common law already provides each individual the "right of determining...to what extent his thoughts, sentiments, and emotions shall be communicated to others."[28] As such, an individual cannot be compelled by the government to discuss these personal effects unless bound by a legal oath during testimony in court. Warren and Brandeis then clarify that the same protection is afforded to all of these mental and emotional components regardless of the means in which they are expressed. Further, even if an individual chooses to communicate these sentiments with others, they also generally possess the ability to control the amount of publicity this information receives.[29] The only instance in which this right can be forfeited is when an individual publishes their work; in this case, the individual is simultaneously consenting to the communication of their thoughts/feelings through the decision to publish. Thus, Warren and Brandeis argue that the ability of an individual to selectively determine which of their thoughts and feelings are made public is a specific example of the overarching right to be "let alone" that is implicitly enumerated in the common law.[30]

This argument also calls into question whether or not thoughts and feelings can be properly characterized as a type of "property" given their intangible nature. "Property," as standardly defined by the Cambridge English Dictionary, refers to "a thing or things owned by someone; a possession or possessions."[31] This interpretation of "property" clearly includes tangible objects such as houses and parcels of land, but is ambiguous regarding intangible

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[28] Samuel D. Warren and Louis D. Brandeis, "The Right to Privacy," *Harvard Law Review* 4, no. 5 (1890), 198.
[29] Ibid, 198.
[30] Samuel D. Warren and Louis D. Brandeis, "The Right to Privacy," *Harvard Law Review* 4, no. 5 (1890), 205.
[31] *The Cambridge Dictionary Online, s.v.* "Property," accessed November 20, 2018, https://dictionary.cambridge.org/us/dictionary/english/property

objects, given its inclusion of the term “possession.” Evidently, a key component of whether or not a given item can be characterized as one’s “property” depends on if that item can simultaneously be characterized as one’s “possession.” In the case of intangible objects such as sentiments, the following thought process is applicable: an individual logically possesses and owns their personal thoughts and feelings, since these things are confined to the mind and cannot be communicated without some form of consent from the host. In turn, these sentiments must be characterized as “possessions” in a definitional sense.

Regarding what constitutes “property,” thoughts and feelings do align with the standard definition based on interpretation. In a legal sense, however, this connection is less valid. Although thoughts, feelings, and similar types of sentiment are “possessions” and thus a form of “property,” Warren and Brandeis exhibit concern over defining them as such in a legal sphere. They argue that characterizing these sentiments in the broader legal category of “property” is difficult because of how dissimilar thoughts, feelings, and emotions (as well as the art and literature that expresses these sentiments) are to physical, tangible objects, thus complicating legal interpretation. Despite the extensive scope of rights for tangible property items, pursuing legal action based on intangible objects would either lead to excessive substantive interpretations on the Judge’s part or an undesirable outcome for the plaintiff based on a lack of legal support.

The next logical course of action for dealing with intangible possessions would be to make an argument on the basis of violating one’s rights to intellectual property. Still, Brandeis and Warren claim, this field of legal prosecution is not encompassing enough to entirely protect individuals’ sentimental possessions. While intellectual property laws do technically protect individuals’ thoughts and feelings, this protection only applies to those sentiments expressed in a published material. Intellectual property laws are specifically designed to safeguard the

product(s) of an individual's intellectual creation in a public sphere, and as such, do not account for any feelings and emotions that have not been communicated to others. Warren and Brandeis' main argument is that an individual's personal sentiments deserve legal protection even if said individual chooses not to share these thoughts and feelings publicly. In other words, individuals deserve the ability to legally protect their implied right to privacy.

Addressing the Limitations of a Legal "Right to Privacy"

Despite their fervent advocacy for the expansion of privacy rights in a legal sense, Warren and Brandeis do concede that the establishment of such rights would inevitably have limitations in a social and judicial context. Warren and Brandeis primarily address the issue of public welfare in relation to privacy rights, admitting that it would be difficult to determine how to find a reasonable balance between the two without prior knowledge or experience with implementation. In response to this issue, Warren and Brandeis consider the usefulness of the "legal analogies" alluded to in libel/slander and intellectual property laws, arguing that the use of these similar concepts would guide the legal community in formulating laws specific to privacy rights. They then provide a list of hypothetical guidelines for implementation, discussing each in considerable detail and addressing various potential points of contention.

The first guideline states that adoption of a legal right to privacy "does not prohibit any publication of matter which is of public or general interest."[32] This statement purposefully addresses the conflict between public welfare and individual privacies by providing an instance in which the latter interest must be partially sacrificed in protection of the former interest. In order to determine a reasonable scope for this law, Warren and Brandeis suggest using relevant

[32] Samuel D. Warren and Louis D. Brandeis, "The Right to Privacy," *Harvard Law Review* 4, no. 5 (1890), 214.

libel/slander cases as a foundational tool. Given the amount of discussion and comprehension that case decisions require, analysis of subject matter would be incredibly beneficial in the process of enacting new laws.

In their analysis, Warren and Brandeis also resolve to determine how valid an individual's claim to privacy is in the context of society. Resolving this issue is integral to the success of Warren and Brandeis' argument because a strict or flexible interpretation of what constitutes a "valid" claim can subsequently affect the scope of privacy given to each individual by the law. In addressing this potential point of contention, Warren and Brandeis base their discussion on how "reasonable" a person's claim to privacy is based on several factors. Overall, they argue that the main concern of establishing a "right to privacy" is to provide protection for individuals whose private information is made public against their will, especially for those whose personal business is not of legitimate concern to society. Thus, instances of unwarranted invasions of privacy should not only be admonished, but also prevented by the law to the greatest extent.

Still, Warren and Brandeis concede, whether or not an individual can reasonably claim that their privacy is violated depends in part on circumstance. For instance, certain individuals who have "in varying degrees...renounced the right" to lead non-public lives may not be given the extent of privacy protection that is typically afforded to all citizens.[33] Warren and Brandeis specifically reference a candidate for political office as a key example of this discrepancy, in which case that individual's personal activities and interests may be of public interest during a campaign. Perhaps a more complex instance of determining how "reasonable" a claim of privacy violation is can be illustrated by the example of a first-class individual who is a well-known

[33] Samuel D. Warren and Louis D. Brandeis, "The Right to Privacy," *Harvard Law Review* 4, no. 5 (1890), 215.

member of society. Although the individual may claim that they deserve the same privacy protections as an average citizen because they do not share personal information publicly, the argument can also be made that given the individual's public status, other members of society have a legitimate interest in some of this information.[34] Warren and Brandeis elaborate to suggest that the level of protection should be determined in part on the kind of information being released, especially in a case where an argument can be made for both the individual and the public. If the aforementioned first-class individual suffers from a speech impediment, for instance, that information would be unnecessary for public knowledge and potentially harmful to the individual.[35] In the case of a candidate for office, however, these same characteristics could be of public interest. In many cases, the level of privacy protection is difficult to define based on Warren and Brandeis' standards alone; they concede that "no fixed formula can be used" to determine whether facts published about an individual are unjustly shared with the public.[36] Still, they conclude that the privacy of a given individual must be protected based on "whatever degree and in whatever connection" their life "has ceased to be private...before the publication under consideration has been made."[37] The publication of details about an individual's life should be restricted when they "concern [one's] private life, habits, acts and relations...and have no legitimate connection with [one's] fitness for...a public position."[38] Again, this definition is not exhaustive and often does not account for individual circumstances that may alter judgment of a given situation. Thus, determining whether or not a violation of privacy is deemed "reasonable" largely remains up to circumstance and interpretation.

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[34] Ibid, 215.
[35] Ibid, 215.
[36] Ibid, 215.
[37] Ibid, 215.
[38] Samuel D. Warren and Louis D. Brandeis, "The Right to Privacy," *Harvard Law Review* 4, no. 5 (1890), 216.

Following a lengthy explanation of the first suggestion, Warren and Brandeis proceed to discuss several additional limitations of a proposed "right to privacy" that are worth mentioning. Warren and Brandeis' second guideline specifies that an established "right to privacy" should not "prohibit the communication of any matter...when the publication is made under circumstances which would render it a privileged communication according to the law of slander and libel."[39] Essentially, this statement clarifies that a "right to privacy" is not applicable in any kind of court or assembly proceeding in which an individual's private effects must be published. Their third guideline distinguishes between oral and written publications of private matters, clarifying that privacy laws "would probably not grant any redress for the invasion of privacy by oral publication in the absence of special damage."[40] Warren and Brandeis further argue that the damage caused to an individual by way of oral publication would be relatively insignificant in comparison to that of written publication. Thus, in the additional interest of free speech concerns, Warren and Brandeis conclude that restricting oral publication of private matters is of less pertinence than is the restriction of other means of publication. Guideline four refers again to issues of publication and clearly states that an individual's "right to privacy" regarding their personal information "ceases upon the publication of the facts by the individual, or with his consent."[41] In their discussion of this guideline, Warren and Brandeis cite "the law of literary and artistic property" as a viable reference point for determining what characterizes a "publication" in a legal sense. They further clarify that instances of releasing personal information through restricted circulation is not an instance of "publication" and thus falls under an individual's privacy rights.

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[39] Ibid, p. 216.
[40] Samuel D. Warren and Louis D. Brandeis, "The Right to Privacy," *Harvard Law Review* 4, no. 5 (1890), p. 217.
[41] Ibid, p. 218.

The fifth guideline addresses another aspect of publication: whether or not the facts presented in a given publication can be considered "true." In the context of privacy rights, Warren and Brandeis argue that "the truth of the matter published does not afford a defence."[42] Their position on this issue relies on several points. Warren and Brandeis primarily suggest that the judicial branch should not focus their concerns on truth of the publications. Though they imply that this course of action would be difficult, given the role of truthfulness of accusations in the context of libel/slander law cases, they argue that avoiding the issue would be beneficial for various reasons. In a hypothetical case concerning privacy rights, the truth or falsehood of the matters discussed would be out of the court's jurisdiction, as they would be tasked with determining whether or not said publication is a violation of an individual's "right to privacy." They further clarify that the "truth" of claims in a publication can easily be addressed through examination under existing libel/slander laws. Finally, guideline six addresses issues of intent in regards to publication; Warren and Brandeis conclude that "the absence of 'malice' in the publisher does not afford a defence."[43] Given the knowledge that evidence of malicious intent is not a requisite for libel/slander cases, Warren and Brandeis thus argue that a lack of mal-intentioned motivations cannot reasonably be used as a defense mechanism in court proceedings. Regardless of whether or not the publisher's motivations were malicious, the result--unwarranted invasion of an individual's privacy--is the same and should be treated as such.

Moving Forward: Legal Remedies for Invasions of an Individual's "Right to Privacy"

To conclude their essay, Warren and Brandeis suggest a number of existing legal responses to instances of libel/slander that could be applicable to violations of a "right to privacy." They first suggest an action of tort in all relevant cases in order to provide the

[42] Ibid, 218.
[43] Ibid, 218.

prosecuting individual with some sort of tangible compensation. In a select number of cases, Warren and Brandeis argue that an injunction could also be necessary and useful. Although they concede that legislation would be necessary in order to involve criminal law in privacy proceedings, Warren and Brandeis claim that society's interest in establishing a "right to privacy" would ensure valid justification for the introduction of such legislation. Above all, however, Warren and Brandeis argue that the establishment of privacy rights must come from society's recognition of individual rights.

SECTION III: RESPONSE AND CRITICISM

Characterized by Bezanson as having a "continuing impact" on society that is "testament to the timeless quality of the idea of privacy," Warren and Brandeis's article continues to be praised by many students of the law for its contribution to the overall development of a legal "right to privacy."[44] The timelessness of the article, Bezanson argues, results from the "ingenious manner in which its authors drew on threads of past jurisprudence, constructing a legal concept of personality out of property doctrine, tort law, copyright law, and damage principles," and the ability of Warren and Brandeis to present privacy as a constantly evolving, fundamental component of culture, society, and the individual.[45]

While Warren and Brandeis's article is widely considered to be the starting point for the evolution of a constitutional "right to privacy" in the American legal tradition and is thus revered by many scholars, the arguments presented are arguably not without some fault. Describing the

[44] Randall P. Bezanson, "The Right to Privacy Revisited: Privacy, News, and Social Change, 1890-1990," (*California Law Review* 80, no. 5 (1992)), p. 1134.
[45] Ibid, p. 1134.

rhetoric used in the article as generally "lofty," legal scholar Harry Kalven, Jr. argues that despite their efforts, Warren and Brandeis cannot avoid and do not properly account for the ambiguity associated with the establishment of a "right to privacy."[46] Kalven contends that although "there can be no objection to the tactic of locating a broader principle behind the protection of intellectual, artistic, and literary property at common law," the creation of a legitimate privacy tort is difficult to adhere to in practice for two primary reasons.

First, while Kalven concedes that the article is "admirable" in its specification of limitations to the hypothetical right, he asserts that there is little effort made by Warren and Brandeis to address many potential issues beyond the realm of their suggestions, such as the basis of liability under this right as well as an assessment of whether the privileges asserted will actually cover all aspects of a "right to privacy."[47] Based on this criticism, Kalven asserts that Warren and Brandeis's description of the "mass communication" tort of privacy is specifically flawed for a number of reasons. Primarily, the tort has no viable "legal profile," meaning that there is no specification regarding the baseline for damages or liability, and no indication of what would constitute a prima facie case under the tort.[48] The lack of clarification regarding these factors, Kalven argues, would result in several practical and situational issues in a "right to privacy" case, with little to no tangible solution available.[49]

The second issue that Kalven identifies based on Warren and Brandeis's proposed tort of privacy is the issue of the "privilege" held by the media to serve the public interest by publishing relevant content. In their article, Warren and Brandeis essentially assert that "privacy inherits all

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[46] Harry Kalven, "Privacy in Tort Law: Were Warren and Brandeis Wrong?" *Law and Contemporary Problems* 31, no. 2 (1966), p. 328.
[47] Ibid, p. 331.
[48] Ibid, p. 333.
[49] Ibid, p. 334.

the privileges of libel and slander together with an additional privilege to publish…"matter which is of public or general interest.""[50] In this way, the tort of privacy differs from the tort of defamation because in the former case, the media typically has a legitimate interest in publishing private information, while in a defamation case, they do not. Warren and Brandeis of course argue that what constitutes a "legitimate interest" is based largely on circumstance, which is why the law should have a remedy for those instances where there is no easily identifiable "legitimate interest." Kalven's main question in this respect then, is "whether the claim of privilege is not so overpowering as virtually to swallow the tort."[51] To support his concern on this matter, Kalven references three cases--*Jenkins v. Dell Publishing Co., Metter v. Los Angeles Examiner,* and *Kelley v. Post Publishing Co.*--all of which were ruled in favor of the press for varying reasons and ultimately concerned the inherent "privilege" of publishing things within the public level of interest.[52]

SECTION IV: LEGAL IMPACT AND LEGACY

In terms of legacy, Warren and Brandeis's *Right to Privacy* article has been characterized by legal scholar Irwin R. Kramer as "the most influential law review article of all," with modern-day courts and legal scholars still citing it as an "authoritative source" on the beginnings of a constitutional "right to privacy."[53] On the most fundamental of levels, Warren and Brandeis's article provided a legal basis for the tort of privacy, which is now "firmly ingrained in the

[50] Ibid, p. 336.
[51] Ibid, p. 336.
[52] Ibid, p. 336-337.
[53] Irwin R. Kramer, "The Birth of Privacy Law: A Century since Warren and Brandeis," (Catholic University Law Review 39, no. 3 (Spring 1990)), p. 704.

common law of most states…[thus occupying] a prominent place in American legal literature and history."[54] While some legal scholars do criticize Warren and Brandeis's construction of the privacy tort, as is evidenced above, the legacy of "The Right to Privacy" essay is a undoubtedly powerful one.

Although a variant of the "right to privacy" established by Warren and Brandeis was not fully affirmed by the American courts until the *Griswold v. Connecticut* case of 1965, their essay did influence some of the lower courts in case decisions where the circumstances were perceived as being relevant to the proposed tort of privacy. The first major instance of courts addressing this right occurred in 1902 with the *Roberson v. Rochester Folding Box Co.* decision, which adjudicated on claims that the plaintiff's privacy was violated after the defendants used her portrait in a flour advertisement without her consent.[55] The woman's lawyers cited Warren and Brandeis's theory of a "right to privacy" as part of their legal reasoning, but were ultimately dismissed by the New York Court of Appeals as a result.[56] The Court of Appeals characterized the "right to privacy" established in Warren and Brandeis's article as encouraging large quantities of "litigation bordering on the absurd," which would adversely affect the judicial system as a whole.[57] Further, the Court of Appeals refused to consider or accept the "right to privacy" since it had not yet been addressed seriously in the legal system through precedent and thus bore the risk of "doing violence to settled principles of law by which the profession and the public have long been guided."[58] With regard to the proposed "right to privacy," the Court of Appeals in the *Roberson* majority concluded that the only feasible method of establishment for

[54] Ibid, p. 704.
[55] Ibid, p. 715.
[56] Ibid, p. 716.
[57] Ibid, p. 716.
[58] Ibid, p. 716.

such a right would be through privacy-specific legislation. The New York state legislature subsequently passed statutory legislation a year later following public criticism of the *Roberson* decision with provisions relating to the protection of privacy. These statutes established both a tort and misdemeanor for "any person, firm, or corporation to use another's name, portrait, or picture for commercial purposes without the subject's consent," providing a basic level of prosecution for violations of privacy.[59]

In 1905, the Supreme Court of Georgia unanimously recognized the "right to privacy" in its *Pavesich v. New England Life Insurance Co.* decision.[60] The circumstances of this case dealt with a man who claimed the New England Life Insurance company violated his "right to privacy" by using his personal information in a newspaper advertisement without his consent. While the *Roberson* majority refused to affirm the proposed right because of a lack of precedent, the Court deciding the *Pavesich* case wholly rejected this reasoning, criticizing the *Roberson* decision as "the result of an unconscious yielding to the feeling of conservatism which naturally arises in the mind of a judge who faces a proposition which is novel."[61] The Court further argued that the *Roberson* majority should not have so quickly refused to recognize a right that, for lack of a better phrasing, could not be proven by any sources to be a non-right. The *Pavesich* majority even went so far as to predict the success of a "right to privacy" in the future legal tradition, stating:

> "So thoroughly satisfied are we that the law recognizes, within proper limits, as a legal right, the right of privacy...that we venture to predict that the day will come that the American bar will marvel that a contrary view was even entertained by judges of eminence and ability."[62]

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[59] Ibid, p. 717.
[60] Ibid, p. 717.
[61] Ibid, p. 718.
[62] Ibid, p. 718.

Following the success of the *Pavesich* decision in affirming Warren and Brandeis's propositions, the "right to privacy" was subsequently recognized in several jurisdictions within years, including in New Jersey, Kentucky, Missouri, Kansas, and Rhode Island.[63] By 1919, though the "right to privacy" was gaining significant traction in the state courts, several unknown practical and legal components of the right still shed doubt on its success in the long run. Thus, in the years prior to the *Griswold* decision, the "right to privacy" was not associated with any specific realm of privacy invasions, perhaps because the courts were looking to avoid attempting to refine the privacy tort in any category given its ambiguous and complex nature. As such, cases like *Olmstead v. United States (1928),* which dealt with the constitutionality of wiretapping practices, made references to the "right of privacy." In this case, Justice Louis Brandeis dissented from the majority's decision to declare the wiretapping acts constitutional, notably citing and expanding upon the "right to be let alone" that he and Warren established in their article years earlier.[64] In 1942, *Skinner v. Oklahoma* cited "the right to have offspring" as evidence that an Oklahoma statute violated the Equal Protection Clause of the Fourteenth Amendment.[65] While the case did not explicitly mention Warren and Brandeis's "right to privacy" concept, the circumstances of the case and spirit of the decision bear resemblance to later "right to privacy" cases such as *Griswold v. Connecticut* and *Roe v. Wade*, which is why it is worth briefly mentioning. This is generally the state of the "right to privacy" when *State v. Nelson (1940)* and later, *Poe v. Ullman (1961)* are decided by the Supreme Court, refining the focus of privacy rights in general and paving the way for the *Griswold v. Connecticut* decision in 1965.

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[63] Stanley B. Rice, "The Right of Privacy," (*University of Pennsylvania Law Review and American Law Register* 68, no. 3 (1920)), p. 286.
[64] *Olmstead v. United States,* 277 U.S. 438 (1928), p. 478.
[65] *Skinner v. Oklahoma*, 316 U.S. 535 (1942), p. 535.

Chapter II: *Griswold v. Connecticut* and the Supreme Court's First Take on a Legal "Right to Privacy"

SECTION I: INTRODUCTION

The case of *Griswold v. Connecticut* addresses issues of constitutional interpretation, primarily in regards to the question of what constitutes an "implied right." The case decision also serves to protect and establish "penumbras" of constitutional protection and "zones" of privacy, both of which ultimately contribute to the modern-day understanding of an individual's "right to privacy." Additionally, the *Griswold case* questions the role of the Supreme Court in reversing specific legislative policies, specifically in regards to the extent to which the judiciary can intervene in such matters via a declaratory judgement. The case itself dealt with the administration of contraceptive devices by medical professionals to a married woman at a Planned Parenthood clinic in Connecticut. This action violated the Connecticut Statutes, passed in 1879 as a reaction to the federal Comstock Act, which prohibited the use of contraceptives and criminalized those who provided access to said contraceptives. The defendants were charged with the provision of information regarding contraceptives and the subsequent prescription of said contraceptives to a married woman. While the constitutionality of the Connecticut statutes was touched upon briefly in *State v. Nelson* and *Poe v. Ullman,* both case precedent to *Griswold v. Connecticut,* it was not fully examined and addressed until the *Griswold* decision. Ultimately, the Connecticut statutes in question were deemed unconstitutional based on the Supreme Court's judgement that the provisions of the law violated the appellants' "right to marital privacy." This decision was based on several complex concepts established by Justice William Douglas, who penned the Majority Decision of *Griswold v. Connecticut.* These concepts, albeit substantive,

shaped the legal perception of what constitutes a "right to privacy" and ensured the constitutional protection of various rights not specifically enumerated in the text of the Constitution.

SECTION II: SOCIAL, LEGISLATIVE, AND LEGAL PRECEDENT

Planned Parenthood and Griswold's *Social Origins*

While the social climate of mid-1960s America cannot reasonably be cited as the sole driving force behind the Court's decision in *Griswold v. Connecticut*, the efforts of reproductive and women's rights activists--particularly through Planned Parenthood--undoubtedly made a significant impact on the Court's ruling. Legal scholar Ryan C. Williams reaffirms this sentiment, saying that if the aforementioned factors were dominant in the Court's decision, then "it would be difficult to explain why a declaration of the Connecticut law's unconstitutionality did not occur until 1965" for several reasons.[66] First, the women's rights movement already had substantial traction in the campaign to overturn restrictive contraceptive laws, having been established several decades prior to the *Griswold* decision.[67] Williams cites the 1943 case of *Tileston v. Ullman* as an example of an orchestrated constitutional challenge to the Connecticut statutes addressed in *Griswold.*[68] Second, Williams argues that there was already considerable public opposition to the Connecticut statutes at a national level by the time of the *Griswold* decision.[69] Despite these factors, the impact of the women's rights movement on the *Griswold* decision is sizable and must be considered in analysis of the case overall.

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[66] Ryan C. Williams, "The Paths to Griswold," (Notre Dame Law Review 89, no. 5 (May 2014)), p. 2158.
[67] Ibid, p. 2158.
[68] Ibid, p. 2158.
[69] Ibid, p. 2158.

The mid-nineteenth century saw the beginning of the birth control movement, with the first campaign supporting the state legalization of contraception.[70] The campaign advocated for "voluntary motherhood" and was supported by suffragists Elizabeth Cady Stanton and Susan B. Anthony, who argued, perhaps impractically, that "husbands as well as wives should just do without sex altogether in order to control the size of their families."[71] The movement ultimately focused on a woman's "right to decline sex with her husband," rather than acting as an outright endorsement of contraception.[72] This campaign refocus was likely due to the stigmas and prejudices surrounding the public discussion or advocation of sexual intercourse in a society still uniformly committed to propriety.[73] Consequently, while women certainly used contraception during this time period, it was not socially acceptable, especially for discussion in a public sphere. Evidence suggesting the frequent practice of abortion procedures during this time further indicates that "women were clearly having children that they were unwilling to raise, and their use of infanticide and abortion could have potentially been reduced if preventative measures were available."[74]

The passing of the Comstock Law in 1873 subsequently had a "disastrous effect" on the pro-contraception movement, since the law effectively banned the use of the mail to distribute information about contraceptives.[75] This in essence criminalized the use of contraception and related information unless an individual could access these measures through a different source. As is addressed later in this essay, the federal Comstock Law inspired the passage of over

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[70] Sarah Primrose, "The Attack on Planned Parenthood: A Historical Analysis," (UCLA Women's Law Journal 19, no. 2 (Summer 2012)), p. 171.
[71] Ibid, p. 172.
[72] Ibid, p. 172.
[73] Ibid, p. 172.
[74] Ibid, p. 173.
[75] Ibid, p. 173.

twenty-four state versions of the law by 1885, thus putting extreme restrictions on the distribution and use of contraception nationwide.[76] In addition to these limitations, the American Medical Association promoted a harsh stance against abortion practices, thus making the demand and need for access to legal contraception even greater.[77]

1915 saw the rise of the "modern" birth control movement with Margaret Sanger heading its efforts.[78] Sanger was motivated to champion this movement as a result of her own personal experiences as a nurse, saying that she was determined "to seek out the root of evil, to do something to change the destiny of mothers whose miseries were vast as the sky."[79] From 1910-1920, the language of the movement changed when the term "birth control" was coined, subsequently indicating a change in leadership as well.[80] Sanger and other new leaders of the movement advocated feminist and socialist ideals, as well as an acknowledgement of the class injustice that resulted from restrictions on contraception.[81] In 1916, inspired by her experiences with the European birth control movement, Sanger opened the first American contraceptive clinic in Brooklyn, New York.[82] Though the clinic was shut down only days later and Sanger subsequently arrested, the operation proved to be popular while it was open, inspiring further action by the movement. In 1918, the New York Court of Appeals upheld Sanger's conviction and ruled narrowly for an "exception [allowing] doctors to prescribe contraceptives to married persons to prevent disease."[83] This interpretation primarily served to protect doctors in their efforts to prescribe contraception, but was still considered a win for Sanger and the movement.

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[76] Ibid, p. 174.
[77] Ibid, p. 174.
[78] Ibid, p. 175.
[79] Ibid, p. 177.
[80] Ibid, p. 177-178.
[81] Ibid, p. 178.
[82] Ibid, p. 180.
[83] Ibid, p. 181.

In 1932, Sanger again initiated a "test case" of sorts by requesting a package of contraceptive products to be sent to her from a Japanese physician, ultimately resulting in her prosecution and the case being taken to court.[84] In *United States v. One Package of Japanese Pessaries*, the Second Circuit Court of Appeals determined that the Comstock Laws should be relaxed at the federal level.[85]

The Great Depression and World War II era saw a shift in public discourse surrounding contraception and reproductive rights, with several studies finding the population to be receptive to the legalization of contraception.[86] In 1937, the American Medical Association formally recognized birth control as a "fundamental part of medical care," and by the beginning of World War II, thirty-six states had instituted public clinics with partial financial support from the government.[87] During this shift, the American Birth Control League changed its name to Planned Parenthood in 1942, symbolizing a refocus of the organization's goals to include "family planning" as a central concept and ultimately making the movement less radical in nature.[88]

The movement again reached a crucial point in the 1960s, during which a "new wave" of ideology emerged focusing on "reproductive rights" as a whole.[89] Notably, the Federal Drug Administration approved the first birth control pill in 1960, which gave women "an easy, relatively safe, and effective means of personally controlling their reproductive systems for the first time."[90] During this time however, twenty-eight states still had laws declaring the use of contraception by married couples to be illegal, and abortion practices had not made much

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[84] Ibid, p. 183.
[85] Ibid, p. 182.
[86] Ibid, p. 182.
[87] Ibid, p. 183.
[88] Ibid, p. 183.
[89] Ibid, p. 184.
[90] Ibid, p. 184.

progress in the journey to legitimacy.[91] This was essentially the state of the law with respect to contraception practices at the time that *Poe v. Ullman* was introduced to the Court by Planned Parenthood as a "test case," which ultimately led to the *Griswold v. Connecticut* decision in 1965.

The Barnum Act: A Historical Analysis of the Law's Origins, Enforcement, and Opposition

Griswold v. Connecticut specifically deals with the legality of the Connecticut statutes, a piece of legislation inspired by the federal Comstock Act restricting an individual's ability to distribute "obscene" materials, including--but not limited to--information regarding contraception and/or abortion. Passed in 1873, the law sought to regulate not only information regarding "obscene" topics, but also an individual's right to privacy in a reproductive sense. The push for regulatory legislation in this sphere of society came from Anthony Comstock, who was the head of the New York Society for the Suppression of Vice and a devout advocate for Victorian ideals of propriety and morality. Founded in 1802 in England, the Society for the Suppression of Vice was an organization dedicated to restricting the spread of immoral institutions and practices in society.[92] According to literature from the Society, examples of "vice" included using profane language, managing "disorderly public houses" such as brothels and gambling houses, and most prominently, the "publication of blasphemous, licentious, and obscene books and prints."[93] The establishment of the New York Society for the Suppression of Vice in 1873 indicated a continuation of the original Society's values in a different national climate.[94] The NYSSV primarily opposed the publication of obscene writings in the form of

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[91] Ibid, p. 185.
[92] M.J.D. Roberts, "The Society for the Suppression of Vice and Its Early Critics, 1802-1812," (*The Historical Journal* 26, no. 1 (1983)), p. 159.
[93] Ibid, p. 159.
[94] "History of Contraception, Anthony Comstock," n. Pag.

literary works, newspapers, and other informational texts. The Society's disdain for publications they deemed immoral played a key role in the eventual passing of the Comstock Law, which specifically restricted the distribution of writings of this nature via the U.S. Postal Service.

Comstock's interest in pursuing legislative action regarding regulations on publication reached a critical point following the distribution of a piece of literature deemed "obscene" in nature. In 1872, Victoria Woodhull, a suffragist and publisher of *Woodhull and Claflin's Weekly*, sent Comstock--then a U.S. Postal Inspector--an article revealing the affair of Reverend Henry Ward Beecher and Elizabeth Tilton, a matter which was of public concern given the prominence of the Reverend's teachings in society.[95] Outraged by the salacious nature of the writings, Comstock arranged for Woodhull's arrest based on her violation of state libel and slander laws.[96] Shortly thereafter, the NYSSV formed with Comstock at the head of the organization, and proceeded to lobby the federal government for more intense forms of regulation over publications distributed through the mail. Comstock lobbied vigorously for the passage of legislation over the course of a year, inspiring the phrase "comstockery" to describe his ideological leanings and dedication to the pursuit of societal morality.[97]

In 1873, the Comstock Act was passed as a federal statute, effectively restricting the ability of any individual to sell or send any publication deemed to be "obscene" by the federal government.[98] The definition of an "obscenity" in this context ranged from personal letters featuring sexual content, to contraceptive items, and even included objects intended for sexual use. Most notably, the enforcement of the Comstock Law restricted access to information about contraception and abortion, both of which were considered to be "obscene" objects based on the

[95] "The Comstock Law (1873): The Embryo Project Encyclopedia," n. Pag.
[96] Ibid.
[97] "History of Contraception, Anthony Comstock," n. Pag.
[98] Ibid.

newly enacted statute. Shortly thereafter, a set of statutes similar in content to that of the Comstock Act was passed in the state of Connecticut by State Senator P.T. Barnum, although these statutes criminalized "the distribution of information on contraception and abortion, and the use of "any drug, medicine, article, or instrument" for the purpose of preventing contraception."[99] The statute, commonly known as the "Barnum Act," featured two central clauses: one which prohibits an individual from obtaining information about or using contraceptive materials, and another that implicates any other individual who is involved in the process, primarily through the distribution of information or prescriptions.[100]

Given the nature of the Barnum Act's content, compliance with the primary and accessory statute in a societal setting was difficult to enforce for several reasons. In a non-commercial setting, enforcement of the law was not very feasible due to the private nature of contraceptive use. Since violation of the law in this context was typically on an individual basis and dealt with usage, any kind of indictment would likely be based on the limitations of the primary clause. Because contraceptive materials were typically kept in one's home, it would be illegal for an official to search for and subsequently implicate an individual for owning any kind of contraception without a valid warrant. Any attempt to indict an individual for the spread or possession of informational contraceptive knowledge was even more impractical, unless that individual publicly made their knowledge known. For instance, if an individual was publicly distributing pamphlets or handouts regarding contraceptive information, that would likely constitute a reasonable amount of clear evidence in violation of the statutes. Without proof of contraceptive use, however, the Connecticut statutes proved relatively futile. Generally, any non-

[99] Nancy Finlay, "Taking on the State: Griswold v. Connecticut," (Connecticut History. November 9, 2016), n. Pag.
[100] *Griswold v. Connecticut*, 381 U.S. 479 (1965), p. 480.

commercial use of contraception was not only difficult to implicate, but also difficult to discover in the first place due to the private nature of contraceptive use.

In a commercial setting, violations of the law were less difficult to identify, but rarely enforced nonetheless. Violations of the law in a commercial context typically related to the accessory clause of the Connecticut statutes as a result of businesses distributing information about or assisting individuals with contraceptive methods. Typically, commercial settings referred to medical institutions, such as private doctors, or public clinics. Unless the commercial entity in question publicly advertised information about contraceptive practices--primarily in the case of public birth control clinics--then a conviction was unlikely. The scope of the Connecticut statutes in practice is perhaps best described by legal scholar Robert Bork, who compared enforcement of the statutes to that of anti-gambling laws. According to Bork, while the laws may "cover all forms of gambling on their faces," they are realistically "enforced only against commercial gambling."[101] The same can be said of the Connecticut statutes, primarily because of their subject matter, but also as a result of the private nature of contraception in general. Bork characterizes the enforcement of the Connecticut statutes in a private setting as a "most unwise career decision" because of the unlikelihood that an actual conviction would be made against an individual on such contentious grounds. Again, the difficulty associated with obtaining tangible evidence proved to be the main issue with enforcement, which was why so few officials chose to pursue prosecution against individuals based solely on the merits of the Connecticut statutes. Whether the setting of a violation was commercial or not, the law was simply not worth enforcing in the eyes of many officials.

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[101] Robert Bork, *The Tempting of America: The Political Seduction of the Law*, (New York: Simon & Schuster, 1991), p. 96.

Discussing the issues associated with enforcement of the Connecticut statutes almost inevitably raises the question of why such a law even remained a part of the Connecticut legislature for so long if it proved to be relatively fruitless in practice. At the time of the *Griswold* case, around thirty-four other states and the federal government had some form of birth control legislation allowing legal access to contraceptive materials.[102] Only Connecticut and Massachusetts still upheld laws with strict regulatory policy regarding contraception.[103] Bork suggests that similar laws are upheld "as precatory statements" and "affirmations of principle," which he characterizes as "an improper use of law" because the laws are not being enforced by any party.[104] In this context, the law is essentially in disuse and should logically be made void as a result, but is not. While the Connecticut statutes certainly fit this description given the fact that they are grounded in traditional notions of propriety and were rarely enforced in practice, many opponents of the law did not want to see the law made void. Rather, opposing parties--such as members of the American Civil Liberties Union and the Planned Parenthood Federation of America, among others--sought to use the law as a vehicle to produce a test case that would ultimately determine the Court's position on contraception regulation.[105] The idea of a "test case," simply defined as a case used as a means to set precedent, is not an uncommon means of legal action; only a decade earlier than *Griswold*, *Brown v. Board of Education of Topeka* was used by the National Association for the Advancement of Colored People as a vehicle to evaluate the constitutionality of segregation in schools. A test case is typically introduced in the hopes that the Court will clarify an issue of contention in society; in *Brown v. Board,* the issue was

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[102] "Connecticut's Birth Control Law: Reviewing a State Statute under the Fourteenth Amendment," *The Yale Law Journal* 70, no. 2 (1960), p. 322.
[103] Ibid, p. 322.
[104] Ibid, p. 96.
[105] Ibid, p. 96.

segregation in educational facilities, and in *Griswold*, the issue was contraceptive regulation (although, on a larger scale, privacy rights remained central to the case).

Regarding the Connecticut statutes, a test case was perceived by some to be necessary for several reasons. First, the statutes were in major disuse, and an actual conviction based on violation of the law itself was incredibly unlikely, as is exemplified by the analysis above. Thus, the organizations who had an interest or stake in challenging the law could not rely on the law itself to bring about a feasible indictment that would eventually propel the case to the Supreme Court. This issue serves to characterize test cases further; in instances where violations of law are intentionally manipulated to form a case, there is typically no other natural means of bringing that issue to light in a legal context, since the law in question is either in disuse or is enforced improperly by officials.

Second, despite the Connecticut statutes' stagnant nature in a practical setting, the law still had many proponents who supported its values and limitations. For instance, the law was popular with many Catholic entities, such as the religious hierarchy and others who shared their values.[106] These groups represented one side in a larger cultural and societal dispute regarding whether or not the use of contraception was morally acceptable and subsequently, whether information about and access to contraceptive materials should be readily available in society. In response to the aforementioned prompt, religious groups such as the ones listed above believed that contraceptive materials should not be made available or used in any context, for that matter. Conversely, proponents of women's rights and health, as well as advocates for the expansion of civil liberties believed that access to contraception was an important part of modernizing the ideas of marriage and family in a rapidly evolving society. Thus, the Connecticut statutes

[106] Ibid, p. 96.

represented devolution in terms of morality and acted as a tangible manifestation of the backwards values that still dictated individual rights in many spheres of society. This was especially evident in the fact that the majority of the nation, including the federal government, produced legislation enabling the legal distribution of contraceptive materials. In the eyes of these groups, providing access to contraceptive materials and information regarding proper usage was a key part of ensuring that individuals--particularly women and individuals in a marriage--were able to make informed decisions regarding sexual health. The conflict between these two schools of thought further supported the argument in favor of using a test case, which many hoped would provide clarity on the regulation of contraception and perhaps more so, a declaration by the Court as to whose values were seen as "correct" in the eyes of the government.

Finally, the use of a test case regarding the legality of the Connecticut statutes ensured that the opposition was able to shape the narrative and circumstances of the violation itself. In cases that are not intentionally created as a vehicle for judicial change, the state of affairs surrounding the violation often cannot be controlled by outside parties, as those convictions occur in a real setting. In test cases, however, the circumstances of an arrest or violation are orchestrated by a group or organization who has an interest in getting the Court to evaluate a given law or larger issue through legal means. In the *Brown* case, for instance, the NAACP collaborated with the plaintiffs to ensure that they would all attempt to enroll in a traditionally all-white school and subsequently be denied, thus prompting legal action. In that case, the NAACP were able to manipulate the system of segregation to produce the desired outcome: a legitimate reason to pursue a lawsuit. The Connecticut statutes perhaps proved more difficult to violate, seeing as it was rarely enforced by officials and often produced little to no tangible evidence to support a conviction. Opponents of the law found it difficult to even ensure that the

test subjects would be arrested in violation of the law, and the pursuit of a successful vehicle was not without some failures.

Case Precedent: How the Failures of State v. Nelson and Poe v. Ullman Paved the Way for Griswold's Success

Given that the Connecticut statutes were passed in 1879, it stands to reason that the statute was challenged at some point in a legal context prior to the *Griswold* case decision almost a century later. In actuality, the Connecticut statutes were only disputed twice throughout its long history before *Griswold*: once in 1940 with *State v. Nelson* and again in 1961 with *Poe v. Ullman*. *State v. Nelson* was the only case based on prosecution in the Connecticut statutes' entire history; Frankfurter later refers to it as a test case, and although it is unclear if that characterization is factual or not, based on the actions of the Planned Parenthood organization around this time, it seems plausible that *State v. Nelson* was, in fact, a test case.[107] In this case, two doctors and a nurse were accused of "advising and assisting a married woman to use contraceptives in order to prevent pregnancy" and preserve her health, an action evidently in violation of the Connecticut statutes.[108] Despite the presence of demurrers who objected to the case information, the trial court found that the statute could not be interpreted to make an exception for contraceptive prescriptions based solely on the sustenance of an individual's "general health."[109] Further, without such an exception, the trial court ruled that the Connecticut statute was unconstitutional and violated the individual's right to due process.[110] The Supreme Court of Errors of Connecticut reviewed the case on appeal and reversed the decision, arguing

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[107] "Connecticut's Birth Control Law: Reviewing a State Statute under the Fourteenth Amendment," *The Yale Law Journal* 70, no. 2 (1960), p. 323.
[108] Ibid, p. 323.
[109] Ibid, p. 323.
[110] Ibid, p. 323.

that the lack of an exception for "general health" was not a viable argument against the use of the state's "police power."[111] The case decision also resulted in a state-wide shutdown of any existing birth control clinics, a move which sparked frustration among advocates of Planned Parenthood initiatives. Beyond generally limiting citizens' access to contraceptive information and materials, the move also adversely affected low-income families, whose access to birth control was now effectively limited.[112]

Notably, *State v. Nelson* recognized--but did not answer--the question of statutory construction in regards to what constituted an exception within the Connecticut statutes. Specifically, the question of whether or not a threat to one's health and wellbeing as a result of pregnancy is a viable exception to the Connecticut statutes' regulations was of interest, but ultimately was not required by the facts of the case to be answered entirely. That question would remain unanswered for over twenty years, until the case of *Poe v. Ullman* sought to reconsider those implications in a broader sphere.

The most prominent failed case related to the Connecticut statutes, however, is undoubtedly *Poe v. Ullman*, a case originating in Connecticut argued only four years before the *Griswold* case was decided in 1965. Although the case was not an intentional test case arranged by groups in opposition to the Connecticut statutes, the foundation of the case acted as an opportunity to challenge the Court regardless. The plaintiffs in this case consisted of a married couple, Paul and Pauline Poe, as well as a married woman, Jane Doe, both of whom sought access to contraceptive materials or information about contraception. Both Poe and Doe had several difficult experiences with pregnancy, including miscarriages, children born with

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[111] Ibid, p. 323.
[112] Barbara Sicherman, "Introduction: Griswold v. Connecticut," In *Connecticut History Review*, 54:256–60, (University of Illinois Press, 2015), p. 258-259.

congenital defects that resulted in their untimely death, and other potentially fatal medical issues. The two women consulted with a reputable obstetrician and gynecologist, Dr. Buxton, who recommended contraceptive measures as the safest method of avoiding any potential medical issues and further emotional distress. Despite the medically sound opinion of Dr. Buxton, the appellants were limited by the Connecticut statutes' provision that no information about contraception could be sent through the mail or distributed whatsoever. Most notably, while the plaintiffs actively made efforts to obtain and use contraceptive materials, neither party was ever actually arrested or convicted of violating the Connecticut statutes. Instead, the appellants pursued legal action against the Connecticut statutes preemptively, arguing that the law violated rights outlined in the Due Process Clause of the Fourteenth Amendment.

Given the similarities between the *Poe* and *Griswold* cases in terms of circumstance, the question of why one failed while the other ultimately succeeded is important to evaluate. In the context of this comparison, it is important to remember that both parties involved in the *Poe* case were in marital relationships, although Mrs. Doe chose to join the lawsuit alone and anonymously. This distinction ensures that the case did not fail simply because of traditional societal standards that value the institution of marriage, because both parties were married and subsequently did not contradict those ideals. Instead, the failure of *Poe* can primarily be attributed to what the Court perceived as a lack of justiciability. Essentially, the Court found that the case was not only based on a situation wherein none of the appellants were actually charged with violation of the law, giving them no legitimate legal standing, and that the case did not possess a sense of immediacy as a result. The appellants filed suit not based on actions taken by the appellee, State's Attorney Richard Ullman, but rather based on the knowledge that if they were to actively seek or distribute contraceptive materials and information, the appellee would be

forced to prosecute. In the Majority Opinion of the *Poe* case, Justice Felix Frankfurter clarifies that the appellants never accused the appellee of threatening prosecution, which Frankfurter believed "might alone raise serious questions of non-justiciability of [the] appellants' claims."[113] Frankfurter then concludes, "formal agreement that collides with plausibility is too fragile a foundation for indulging in constitutional adjudication."[114] Based on these two statements, it is evident that the majority of the Court believes that the claims of the appellants are not strong enough to justify legal action.

Frankfurter's argument also relies on the inactivity of the law itself to justify his claim of a lack of justiciability. He first points out that the Connecticut statutes have been in effect since 1879 and only one other case of prosecution has been initiated: *State v. Nelson.* In referencing this case, Frankfurter primarily highlights the similarities between that case and the *Poe* case, stating that the circumstances of the *Nelson* case "only prove the abstract character of what is before us."[115] With this statement, Frankfurter seeks to emphasize his concern regarding justiciability that is common in both cases as a result of a lack of enforcement. Additionally, Frankfurter argues that despite the fact that contraceptives are "commonly and notoriously" sold in Connecticut drug stores, "no prosecutions are recorded."[116] According to Frankfurter, if drug stores and other commercial entities can openly sell and subsequently distribute contraceptive products without prosecution, then there is no logical reason to suggest that individuals or married couples seeking similar products would be treated any differently by officials. This fact suggests that the appellants' concern regarding possibly being prosecuted by the appellee is questionable and not grounded in fact. Frankfurter solidifies his position on this matter with by

[113] *Poe v. Ullman*, 367 U.S. 497 (1961), p. 501.
[114] Ibid, p. 501.
[115] Ibid, p. 501.
[116] Ibid, p. 502.

citing another relevant case, *Nashville v. Browning*, which states that "deeply embedded traditional ways of carrying out state policy....or not carrying it out...are often tougher and truer law than the dead words of the written text."[117] With this statement, Frankfurter essentially argues that there is no cause for concern about officials prosecuting individuals or commercial entities who distribute or use contraceptive materials, solely because the Connecticut statutes had not been truly enforced since their conception. As a result, the lack of enforcement in practice is paramount to any specific restrictions that the Connecticut statutes impose on contraceptive distribution and usage. Frankfurter's position in this respect is perhaps best summarized by his strongly worded statements near the end of the Majority Decision:

> "The fact that Connecticut has not chosen to press the enforcement of this statute deprives these controversies of the immediacy which is an indispensable condition of constitutional adjudication. This Court cannot be umpire to debates concerning harmless, empty shadows. To find it necessary to pass on these statutes now, in order to protect appellants from the hazards of protection, would be to close our eyes to reality."[118]

He continues by elaborating on this sentiment in relation to the case, where he argues that the appellants' claim is not "grounded in a realistic fear of prosecution" and generally, is "chimerical" in nature.[119]

Frankfurter concludes by arguing that not only is the case not justiciable in a court setting, it is also not within the right of the Supreme Court to evaluate the case in general. This claim is based primarily on an inherent rejection of judicial activism, or "legislating from the bench." Frankfurter specifically references a belief that the Court only has the ability to adjudicate regarding the potential of striking down federal or state laws if those laws distinctly

[117] Ibid, p. 502.
[118] Ibid, p. 508.
[119] Ibid, p. 508.

threaten or inflict harm upon an individual.[120] Thus, in the circumstances surrounding *Poe v. Ullman,* the Court cannot legitimately claim jurisdiction because the appellants were not overtly threatened with prosecution or indicted in any sense. Frankfurter's concern is specifically with the abstract nature of the case, in which overturning the specific statute at hand would require a great deal of substantive reasoning to justify--an action that Frankfurter views as overstepping as a judicial entity, only acceptable as a "last resort."[121] Thus, Frankfurter argues that since the appellants in the *Poe* case could not reasonably prove the invalidity of the statute in its own right or exhibit any evidence of direct harm inflicted by way of enforcement, the judiciary cannot in good conscience validate their argument.

This argument is not necessarily surprising given Justice Frankfurter's personal judicial philosophy, which is rooted in a strong belief in judicial restraint and legislative deference. Thus, his concern about the *Poe* case's "lack of justiciability" makes sense with respect to his personal judicial beliefs. Perhaps more notably, Frankfurter's opinion and focus on justiciability is indicative of a greater issue present within the Court: the question of what the Court's role as a judicial body is and how much power it can wield without upsetting the balance between the separation of powers. In the *Poe* decision, Frankfurter argues a lack of justiciability because of the non-tangible circumstances of the case, but also because he feels that the Court does not have the right to adjudicate on purely "hypothetical" matters, especially concerning a statute with a history of nonenforcement. Thus, the issue of judicial limitations emphasized by Justice Frankfurter in the *Poe* decision consistently presents itself throughout the course of "right to privacy" decisions and ultimately acts as a crucial component in the legal rationale behind these cases.

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[120] Ibid, p. 504.
[121] Ibid, p. 506.

Dissents and Declaratory Judgements: Justice Douglas's Take on Poe v. Ullman

Notably, *Poe v. Ullman* also features three Dissenting Opinions, one of which is written by Justice William Douglas, author of the *Griswold* case Majority Opinion. Given the similar nature of the two cases, it is important to specifically analyze Justice Douglas's reasoning on the *Poe* case in depth so that it can be examined comparatively to his reasoning in the *Griswold* case. Douglas begins the Dissenting Opinion by stating that the conclusion reached by the Justices in the Majority Opinion regarding the justiciability of the case is "too transparent to require an extended reply."[122] With this statement, Douglas begins his argument, which is primarily that the Court should have taken into consideration the use of a declaratory judgement in the context of the *Poe* case. Douglas argues that not only is a declaratory judgement useful in determining the case, but also that it is necessary to properly evaluate the appellants' claims. Describing the tradition of the declaratory judgement as "an honored one," Douglas argues that the only prerequisites necessary for the Court to invoke a declaratory judgement are a question that is "appropriate for judicial determination," "touch[es] the legal relations of parties having adverse legal interests," and is "real and substantial" in nature.[123] As such, the idea that the appellants must provide distinct proof of a prosecutionary threat or action carried out is something Douglas feels is irrelevant in evaluating whether or not to use a declaratory judgement.

Douglas proceeds to argue that the appellants were right in their course of pursuing legal action, despite a lack of tangible evidence to support their case. Basing his reasoning on a statement from a Senate Report, Douglas restates that "it is often necessary, in the absence of a declaratory judgement procedure, to violate or purport to violate a statute in order to obtain a

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[122] Ibid, p. 510.
[123] Ibid, p. 510.

judicial determination of its meaning or validity."[124] While this quote was originally spoken in a legislative context, it exemplifies one of Douglas's primary points, which is that the Court should address reasonable concerns about the meaning or legitimacy of a given law or statute. In the case of *Poe v. Ullman*, Douglas claims that the circumstances for judicial determination are incredibly optimal. Both appellants faced potentially fatal health problems stemming from pregnancy and sought contraceptive advice, which they could not get from their physician without enabling him to commit a crime. Even if the appellants did not seek medical information regarding contraceptive practices, any use of contraception would still be illegal under the Connecticut statutes. Thus, Douglas argues, the knowledge of engaging in illegal behavior was rightfully enough to prevent the appellants from proceeding in their course of action. The reasoning of Justice Frankfurter suggests that despite these illegality of these actions in a statutory sense, the lack of enforcement in practice would render any concerns of prosecution invalid--unless the appellants presented tangible evidence of an implied threat. Douglas refutes this argument by highlighting that according to the State of Connecticut, "the State's Attorney intends to enforce the law by prosecuting offenses under the laws."[125] This information only serves to reinforce Douglas's point that the appellants' discretion was justified.

Further, Douglas argues that Frankfurter's assertion--that a "tacit agreement" regarding enforcement exists, thereby rendering fear of prosecution irrelevant--is misguided and overly optimistic. Douglas's reasoning is simple: a crime, regardless of how frequently it is enforced, is still a crime. Douglas poses a set of hypothetical situations to support his point, arguing that "no lawyer...would advise his clients to rely on that 'tacit agreement'" and "no police officer...would feel himself bound by that 'tacit agreement.'" Moreover, Douglas points out that citizens should

[124] Ibid, p. 510.
[125] Ibid, p. 510.

not have to make that choice or feel restricted because of the vagueness of a given law's boundaries. This possibility, Douglas states, "is not the choice [people] need have under the regime of the declaratory judgement and our constitutional system."[126] The decision supported by the majority, however, "leaves [people] no other alternatives," forcing them to pursue legal action just to understand the limitations of the legislative statutes they live under.

It follows that Douglas's argument in the above section could likely be refuted by way of Frankfurter's logic, which is that the Connecticut statutes were essentially null by the time of the *Poe* case. Douglas, however, anticipates this objection by providing evidence to the contrary. Stating that the Connecticut statutes are not indicative of "a law which is a dead letter," Douglas cites the fact that since 1940 and the *State v. Nelson* decision, the Connecticut legislature twice renewed the statutes during a general statutory revision process.[127] Additionally, Douglas references a number of criminal prosecution cases in minor courts that resulted from the illicit sale of contraceptives, all of which he points out the Majority Opinion failed to consider. As such, the laws evidently play some role in Connecticut society, perhaps if only to reflect the continued existence of traditional values held by many. Thus, Douglas concludes that the idea of the Connecticut statutes being of little relevance to a modern society is misinformed and blatantly false. Ultimately, Douglas points out a key flaw in Frankfurter's logic and suggests that in this case, ignorance on the part of the appellants could potentially be detrimental.

Douglas also addresses the constitutional validity of the Connecticut statutes, which he argues is rightly called into question by the provisions of the Due Process Clause. This particular argument is incredibly relevant in comparison to Douglas's *Griswold* opinion, primarily because it is a key part of the reasoning behind that decision as well. Douglas's opinion is essentially the

[126] Ibid, p. 513.
[127] Ibid, p. 512.

same: that the protections afforded to citizens under the Bill of Rights and specifically, the Due Process Clause of the Fourteenth Amendment, encompass more than the literal text allows. Douglas's position on this matter is perhaps most evident in the following set of statements:

> "The regime of a free society needs room for vast experimentation. Crises, emergencies, experience at the individual and community levels produce new insights; problems emerge in new dimensions; needs, once never imagined, appear. To stop experimentation and the testing of new decrees and controls is to deprive society of a needed versatility. Yet to say that a legislature may do anything not within a specific guarantee of the Constitution may be as crippling to a free society as to allow it to override specific guarantees."[128]

With this, it is clear that Douglas advocates a relatively broad interpretation of the Constitutional Amendments in the context of an evolving society, but simultaneously rejects the idea that the Court has the jurisdiction to invoke judicial activism and "legislate from the bench." In the same line of thinking that he promotes in the *Griswold* case, Douglas emphasizes the importance of understanding the difference between an expansion of the rights already guaranteed to citizens via the Bill of Rights and the creation of entirely new rights, justified only by the conceptualization of the Constitution as a "living document." The former is an example of what Douglas believes the Court should follow in instances where the case at hand does not specifically deal with a right overtly enumerated in the Constitutional text. Conversely, the latter is what Douglas views as an unjustified use of jurisdictional power by the judiciary and a course of action that threatens to invalidate the Court's legitimacy as a governing body.

SECTION III: *GRISWOLD v. CONNECTICUT*: A CASE STUDY

Case Details and Context of *Griswold v. Connecticut*

[128] Ibid, p. 518.

Four years after the dismissal of *Poe v. Ullman*, the Supreme Court was once more faced with the constitutional dilemma it perhaps sought to avoid: whether or not the Barnum Act violated the Fourteenth Amendment's Due Process clause. *Griswold v. Connecticut* originated as a test case primarily organized by Estelle Griswold, executive director of the Planned Parenthood League of Connecticut, and Dr. C. Lee Buxton, head of Yale University's Department of Obstetrics and Gynecology and Medical Director of Griswold's Planned Parenthood facility.[129] Griswold and Buxton, along with several other members of the Planned Parenthood and Yale faculties, believed that because of the lack of enforcement on a large scale, the only way to feasibly overturn the statutes was to initiate a test case. On November 1, 1961, Griswold and Buxton opened a birth control clinic in an attempt to spark prosecution from Connecticut officials.[130] This attempt was ultimately successful, as the two were arrested under the accessory clause of the Connecticut Statutes "for giving married persons information and medical advice on how to prevent contraception and, following examination, prescribing a contraceptive device or material for the wife's use."[131] These arrests and the shutdown of the clinic allowed Griswold and Buxton to file suit against the state of Connecticut for violating rights protected under the Fourteenth Amendment, helping initiate the test case that would eventually become a landmark decision.

The Majority Opinion: Penumbral Rights and The Expansion of a Legal "Right to Privacy"

The Majority Opinion of *Griswold v. Connecticut*, led by Justice William Douglas, relies heavily on a broad and arguably substantive constitutional interpretation of the concept of

[129] Barbara Sicherman, "Introduction: Griswold v. Connecticut," In *Connecticut History Review*, 54:256–60, (University of Illinois Press, 2015), p. 259.
[130] Ibid, p. 259.
[131] Syllabus of *Griswold v. Connecticut*, 381 U.S. 479 (1965).

"privacy." The decision is primarily based on two conclusions: 1) that the appellants are justified in asserting the constitutional rights of the married couple involved, and 2) that the Connecticut statute in question violates the right of "marital privacy" included in the "penumbra" of protection stemming from guaranteed constitutional rights. According to Douglas, these penumbral rights are thus indicative of a larger constitutional "right to privacy," the legitimacy of which is supported by several constitutional provisions in the Bill of Rights.

In presenting his argument, Douglas first challenges the legitimacy of the initial prosecution of the appellants regarding their compliance in distributing information and medical advice to married couples. According to Douglas, the appellants "gave information, instruction, and medical advice to *married persons* as to the means of preventing contraception," along with providing a prescription to the couple after a physical examination of the wife.[132] Douglas's emphasis on the term "married persons" is particularly noteworthy because it alludes to the difference between the privacy rights of a married person compared to those of a non-married person, thus creating a foundation for his eventual focus on the concept of "marital privacy." This distinction is particularly important to understanding Douglas's logic for a number of reasons:

First, the idea of marriage as an institution is a normalized societal concept considered sacred to many individuals, particularly during the time of the *Griswold* case. Douglas echoes this sentiment in his characterization of the marital union as "a coming together for better or for worse...and intimate to the degree of being sacred."[133] Thus, any invasion or violation of this traditional institution is assumedly cause for concern in a societal context. Given the importance of marital relationships in society and the legal relationship between a married couple that

[132] Ibid, p. 480.
[133] Ibid, p. 486.

entitles each individual to certain shared properties and possessions, it follows that married couples also possess a certain sphere of privacy inaccessible to those outside of the marriage. In a legal sense, a contract of marriage between two individuals changes their status in the eyes of the government; two individuals become one union and are treated as such--at least in most cases. This sphere of privacy legally includes ownership of property and governmental benefits, among other private legal matters, but is also relevant in a societal sense. Traditionally, married couples also vow to support one another both physically and emotionally throughout the course of their marriage and are thus entitled to a sphere of privacy regarding intimate marital details, at least from a societal understanding. Whether or not they choose to disclose these intimate details is typically understood to be at the discretion of the couple. This logic is the foundation of the concept of "marital privacy" that plays an instrumental role in Douglas's argument.

Second, the violation of a couple's right to "marital privacy" further implies a theoretical invasion of said couple's marital home. The physical property shared by a married couple is not only representative of their legal connection, but also of their union in a societal sense. Thus, the home of a married couple is just as sacred to the institution of marriage as is the emotional relationship between the two individuals involved. Since the marital home is a physical embodiment of a married couple's bond, any unwarranted intrusion of that property is thought to be a violation of the couple's sphere of privacy. Moreover, disclosing the intimate details of a married couple's relationship--such as whether or not they use contraception--in a public sphere is ultimately seen as a violation of the couple's metaphorical "home," despite the fact that no physical intrusion is necessarily involved. Douglas likens this invasion of privacy to a police search, asking if it would be legally or morally acceptable to allow the police to search the

"sacred precincts of marital bedrooms" if looking for "telltale signs of contraceptives."[134] Concluding that such a search would be "repulsive to the notions of privacy" central to the tradition of marriage, Douglas argues that any act that violates the implied sphere of privacy present in a marriage essentially violates the sanctity of a marital home and relationship.

Douglas's second point of interest in the argument concerns the constitutional validity of the Connecticut Statutes as applied by lower courts in the *Griswold* case. The relevant statutes involve limitations on not only the ability of an individual to procure and use contraceptive materials, but also prohibit the spread or distribution of materials related to contraception by other individuals. Sections 53-32 of the Connecticut Statutes states that a person who uses "any drug, medicinal article, or instrument for the purpose of preventing contraception shall be fined not less than fifty dollars or imprisoned not less than sixty days."[135] In simpler terms, this particular statute prohibits the use of contraceptive materials in any form regardless of circumstance. Sections 54-196 further elaborate on this restriction, stating that "any person who assists, abets, counsels, causes, hires, or commands another to commit any offense may be prosecuted and punished as if he were the principal offender."[136] This provision essentially implicates an individual who is in any way complacent with the use of contraceptive materials by another individual. "Complacency" in turn refers to a variety of actions on the part of an outside individual, such as purchasing contraceptive materials, providing relevant information about contraceptive methods, or prescribing the use of contraceptive materials in any form. Given the limitations presented by these sections, the Connecticut Statutes serve to completely restrict the

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[134] Ibid, p. 487.
[135] Ibid, p. 480.
[136] Ibid, p. 480.

use and spread of contraceptive materials, whether that refers to the physical contraceptive instrument or simply a pamphlet with information on contraceptive methods.

As applied to the *Griswold* case, the statute implicates the appellants as "accessories" according to Sections 54-196, forcing each appellant to pay $100 in fines. Lower courts, such as the Appellate Division of the Circuit Court and the Supreme Court of Errors affirmed the charge. In response, the appellants cited the Fourteenth Amendment as a legal defense. Specifically, they reference the Due Process clause, which is relevant to the application of the Connecticut statute provisions because it limits state power and control in reference to individual rights. The clause first restricts state legislative power by articulating that "no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States."[137] In a legal context, the phrase "privileges and immunities" typically refers to the fundamental rights possessed by a citizen, but is also vague in clarifying which rights are specifically protected under this clause. This distinction is particularly relevant to the *Griswold* case because a significant portion of Douglas' argument relies on a substantive interpretation of the "privileges and immunities" afforded to individuals. Constitutionally speaking, an individual's "privileges and immunities" are generally protected in the Fourth Amendment. The Due Process clause of the Fourteenth Amendment subsequently serves to further protect an individual's privileges and immunities by restricting the state's control over these rights, particularly in a legislative sense. The clause then proceeds to limit state judicial power by preventing states from "depriv[ing] any person of life, liberty, or property, without due process of law."[138] This section of the Due Process clause more specifically protects the fundamental rights of life, liberty, and property from unjustified state intrusion in a legal setting. Still, the phrasing of the clause is kept vague in

[137] "14th Amendment: Constitution, US Law, LII / Legal Information Institute."
[138] Ibid.

the sense that it is unclear what constitutes a deprival of rights by the state, leaving that definition open for legal interpretation. Again, the vague nature of this clause is beneficial for Douglas's purposes in challenging the validity of the Connecticut Statutes because it provides an opportunity for substantive interpretation.

Interestingly--and perhaps ironically--enough, Douglas remains adamant that the argument behind the *Griswold* Majority Decision is not based in substantive reasoning, despite evidence to the contrary. Prior to discussing the relationship between the case material and the Due Process clause, Douglas prefaces by responding to the use of substantive due process in similar cases and in a general sense. In a specific reference to precedent, Douglas states that "overtones of some arguments suggest that *Lochner v. New York* should be our guide. But we decline that invitation."[139] In a legal context, this statement is powerful, as the *Lochner* decision is typically remembered within the legal community as a notable example of substantive due process use. The *Lochner* decision essentially argued the existence of a right to freely make contracts based on the constitutional notion of liberty enumerated in the Fourteenth Amendment.[140] The decision was retrospectively viewed by many as an over-exertion of power by the Court using a substantive interpretation of the Fourteenth Amendment, a view that Douglas assumedly agrees with to some extent, given his refusal to ground his reasoning in a similar argument.

The aforementioned statement is also important in the context of the *Griswold* case because it subtly establishes Douglas's stated position on the use of substantive reasoning in cases concerning issues that affect an individual's livelihood. He continues to clarify that the Supreme Court "do[es] not sit as a super-legislature to determine the wisdom, need, and

[139] Ibid, p. 481-482.
[140] *Lochner v. New York*, 198 U.S. 45 (1905), p. 45.

propriety of laws that touch economic problems, business affairs, or social conditions."[141] With this statement, Douglas expands upon his original sentiment by rejecting the notion that the Court has the jurisdiction to "legislate from the bench," so to speak. Both of these statements reflect a desire on Douglas's part to present a clear position not only on the idea of substantive interpretation, but also on the concept of judicial activism as a whole. Despite the strong nature of Douglas's claims, however, he contradicts himself by presenting a large exception to the scope of jurisdiction he presents as fact. Douglas explains that the Connecticut statute in question "operates directly on an intimate relation of husband and wife and their physician's role in one aspect of that relation" and is thus inside the realm of the Court's jurisdiction to evaluate.[142] Based on Douglas's logic, marital relations do not fall under the realm of "social conditions," an area which Douglas feels the Court has no legitimate claim to consider. The below quotation provides some indication of his thought process:

> "The association of people is not mentioned in the Constitution nor in the Bill of Rights. The right to educate a child in a school of the parents' choice--whether public or private or parochial--is also not mentioned. Nor is the right to study any particular subject or any foreign language. Yet the First Amendment has been construed to include certain of those rights."[143]

With this comparison, Douglas seeks to emphasize that enumerated rights have frequently been expanded upon to include "implied rights," or those rights that are not specifically protected in the constitutional text, but are instead extensions of those that are guaranteed. As is referenced above, Douglas cites the protection of an individual's right to their educational preferences as evidence of this concept in practice.

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[141] Ibid, p. 482.
[142] Ibid, p. 482.
[143] Ibid, p. 482.

In the context of *Griswold v. Connecticut,* Douglas argues that the idea of "marital privacy" is actually one of these implied rights, drawn specifically from the Ninth Amendment of the Bill of Rights. This expansion, Douglas says--with additional support from an earlier case, *Snyder v. Massachusetts*--is primarily justified based on the text of the Due Process Clause and its protection of "those liberties that are 'so rooted in the traditions and conscience of our people as to be ranked as fundamental.'"[144] Thus, the concept of "liberty" as defined in the Due Process Clause is central to Douglas's justification of expanded rights in general. This definition is not particularly clear, but for Douglas's purposes, includes not only "freedom from bodily restraint, but also [for example,] the right...to marry, establish a home, and bring up children."[145] Beyond the scope of the Due Process Clause, Douglas also cites the Ninth Amendment as support for his argument, specifically in regards to the idea of "marital privacy." The relevant text of the Ninth Amendment reads: "The enumeration of the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people," a phrase which Douglas inevitably interprets as all-encompassing.[146] In specific defense of the right to marital privacy, Douglas argues, "to hold that a right so basic and fundamental and so deep-rooted in our society as the right of privacy in marriage may be infringed because that right is not guaranteed in so many words by the first eight Amendments...is to just ignore the Ninth Amendment."[147] Douglas continues by discussing the assumed intent of the Constitutional Framers--particularly James Madison--regarding the inclusion of the Ninth Amendment. This inclusion, Douglas argues, was intentionally done for the purpose of accounting for any rights not specifically enumerated in other Amendments or for those forgotten and unknown rights. Essentially, Douglas claims that

[144] Ibid, p. 487.
[145] Ibid, p. 488.
[146] Ibid, p. 484.
[147] Ibid, p. 491.

not only did the men who wrote the Constitution intend for the Ninth Amendment to be used as protection for implied rights, but also that the idea of marital privacy (and, more generally, the "right to privacy" as a whole) can reasonably be included in this secondary set of enumerations. Ultimately, Douglas argues that although certain fundamental rights—such as the protection of privacy in various spheres of life—are not explicitly mentioned in the Bill of Rights, they are still inevitably protected by the Constitution via the Due Process Clause and the Ninth Amendment.

While the contradiction between Douglas's stated and actual methods of jurisprudence is evident in several other aspects of the decision's text, his reliance on the Due Process clause is particularly telling. Using this clause as legal support frames the case in a broader context and to an extent, redefines the issue presented. As is evident in the phrases above, the text of the Due Process clause is relatively vague and provides an opportunity for substantive legal interpretations of what terms like "privileges and immunities," as well as "liberty" mean and to what extent a state's intrusion on individual freedoms is considered legally acceptable. Douglas uses these discrepancies to his advantage in rejecting the legality of the Connecticut statutes by arguing that the Due Process clause, along with the Ninth Amendment, acts as a "catch-all" for any implied rights not specifically enumerated to the people. The right to "marital privacy," Douglas claims, is very clearly an implied right protected by the Ninth Amendment because it is an institution that is "older than the Bill of Rights...than our political parties...than our school system."[148] In short, Douglas assumes there is no reason why privacy within marriage should not be protected under the umbrella of "implied rights," and then indicates why privacy as a whole should be protected as well.

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[148] Ibid, p. 486.

Douglas elaborates specifically on the concept of "privacy," stating that there are "zones of privacy" which the Connecticut statutes violated by restricting prescriptive and informative access to contraception. These "zones" stem from the constitutional guarantees enumerated in the Bill of Rights. For instance, the right of a homeowner to refuse the quartering of soldiers--as protected in the Third Amendment--represents a clear "zone of privacy."[149] Evidently, the concept of "marital privacy" is itself a "zone of privacy" by Douglas's logic, because although it is not specifically referenced in the constitutional text, it is allegedly encompassed by the Ninth Amendment. Additionally, Douglas claims, the Bill of Rights have "penumbras" that form from "emanations [of] those guarantees that help give them life and substance."[150] Following Douglas's complex logic, this means that each enumerated right in the Constitution has a "penumbra" of protection that is made up of various undefined "implied rights." These implied rights, as well as the guaranteed rights, then establish "zones of privacy" protected by both the Fourteenth and Ninth Amendments that entitle an individual to a general "right to privacy." In the case of *Griswold v. Connecticut,* the Connecticut statutes violate the implied "zone of marital privacy" by threatening prosecution of any married couple who seeks information about or purchases contraceptive materials. The statutes further violate this "zone of marital privacy" by implicating any person who distributes information regarding contraception, including medical advice or prescriptions. In essence, the Majority Opinion stresses the importance of privacy as an expansive right that is not solely limited to the protections specifically enumerated in the Constitutional text.

The Dissenting Opinions: Black, Stewart, and Potter's Arguments

[149] Ibid, p. 484.
[150] Ibid, p. 484.

In turn, Justice Black discusses the issue of the Majority Opinion's constitutionality heavily in his dissent. One of the first--and perhaps most significant--points of Justice Black's dissent is his differentiation between speech and action. In hypothetical terms, Black says that had the medical professionals at the clinic simply given their patients medical advice regarding contraceptive products and procedures that fit the patient's given situation, then there could be no legitimate reason "why their expressions of views would not be protected by the 1st and 14th Amendments, which guarantee freedom of speech."[151] In Black's opinion, such a hypothetical situation reflects the concept of speech and is therefore in compliance with the rights protected by the aforementioned Amendments. In this particular case, however, Black argues that the defendants were "active participants" in the provision of contraceptive products to patients and that although "some speech was used in carrying on that conduct – just as, in ordinary life, some speech accompanies most conduct," such a technicality does not justify "in holding that the 1st Amendment forbids the State to punish their conduct."[152] In essence, Black argues that even though the doctors were constitutionally valid in their efforts to give women contraceptive advice, their actions, which directly violated the present Connecticut law, invalidate their constitutional argument.

Black's second point is more complex in that it deals with the abstractions associated with constitutional text. Specifically, he references the frequent use of the word "privacy" as a means of defending or attacking a constitutional argument. Black's argument discusses the misuse of the literal text of the Constitution, saying that "one of the most effective ways of diluting or expanding a constitutionally guaranteed right is to substitute for the crucial word or

[151] Ibid, p. 508.
[152] Ibid, p. 508.

words of a constitutional guarantee…more or less flexible…or restricted in meaning."[153] Black goes on to say that the term "privacy" is a "broad, abstract and ambiguous concept" that can ultimately be interpreted in several different ways to produce a given constitutional argument.[154] For instance, Black uses the protection of citizens against "unreasonable search and seizure" detailed in the Fourth Amendment to exemplify a true breach of privacy as specified by the text of the Constitution; otherwise, he argues, the government has the right to invade a citizen's privacy. Based on his argument, Justice Black's jurisprudence can be characterized as incredibly textual and literalist since he believes that the right to privacy only extends to those situations specifically outlined in the Constitution. It can also be assumed that he strongly disagrees with the concept of substantive due process because he rejects the idea of defining "privacy" as a broad concept that can be interpreted based on a given situation.

Black also appears to be a proponent of judicial restraint given his argument against the Majority Opinion, which claims that both the Ninth Amendment and Due Process Clause are, simply put, a "claim for this Court…to invalidate any legislative act which the judges find irrational, unreasonable, or offensive."[155] This point illustrates Black's hesitancy to "legislate from the bench," so to speak, especially in cases of overturning legal precedent that has been passed by the legislature. Black also refers to the concept of original intent by arguing that the Framers would never have authorized such an excessive amount of jurisdiction on the judiciary's part, primarily because doing so would have upset the system of checks and balances. Black further clarifies that "this Court does have power, which it should exercise, to hold laws unconstitutional where they are forbidden by the Federal Constitution," but adds that the Court

[153] Ibid, p. 509.
[154] Ibid, p. 509.
[155] Ibid, p. 511.

cannot overturn a law based on the "belief that the legislative policies adopted are unreasonable, unwise, arbitrary, capricious or irrational."[156] Through these statements, Black expresses his disagreement with the Majority Opinion's manipulative usage of the Ninth Amendment and the Due Process Clause to obtain a decision that he believes reflects the personal will of the Justices rather than the will of the Constitution.

Justice Stewart's Dissenting Opinion, although similar to Justice Black's in the sense that it emphasizes judicial restraint and prioritizing the use of the Constitutional text over substantive interpretation, differs in its legal reasoning. Justice Stewart first states that the 1879 Connecticut statutes are "uncommonly silly" and "unenforceable" in terms of practicality, and proceeds to reject the law in terms of ethical and social standards as well.[157] He asserts, however, that it is not the Court's responsibility to determine "whether we think this law is unwise, or even asinine. We are asked to hold that it violates the United States Constitution."[158] Stewart then claims that the argument presented in the Majority Opinion is invalid because it refers to six separate Amendments but does not specify which violates the Connecticut law. Most prominently, he states that any argument using the Ninth Amendment as legal evidence is invalid. Stewart's assertion is based on the fact that the Bill of Rights was created to limit the power of the federal government and give non-enumerated powers to the citizens, but cannot be used to annul a law passed by the Connecticut legislature. Here, Stewart emphasizes the Constitutional text and also refers to the original intent of the Framers as being more important in the decision of a case than any other Judge or Justice's substantive interpretation. He finally argues that even though the law in question does not necessarily reflect the will of the current population, "it is not the function

[156] Ibid, p. 511.
[157] Ibid, p. 527.
[158] Ibid, p. 527.

of this Court to decide cases on the basis of community standards."[159] This statement reinforces his earlier argument that Court decisions should not be made with issues of morality and practicality in mind, and further, that those issues certainly should not take precedent over the literal text of the Constitution.

SECTION IV: RESPONSE AND CRITICISM

Legal scholar Robert G. Dixon, Jr. says that while the *Griswold* decision does little to "clarify the conceptual dimensions of the privacy concept," it in turn does "much to provide varied and flexible constitutional underpinnings for those situations which do not fit established categories neatly but still seem to rest on values thought to be vital."[160] This in turn left room for the "right of privacy" to be refined by future cases while simultaneously establishing a new classification of rights. Dixon's analysis of the *Griswold* case, however, was written in 1965, the same year that the case itself was decided, and as such has little understanding of the impact the decision would ultimately have on the legal implementation of a "right to privacy." As such, in the years following *Griswold*, the case has been examined by many scholars who have come to varying conclusions about the legal reasoning used.

Some legal scholars, like Bruce Fein, disagree fundamentally with the *Griswold* decision, considering it to not only be inherently flawed in its own right, but to also have produced successive cases that further threaten the balance of separate governmental powers. Writing in 1989, Fein ultimately argues that *Griswold* and its successive decisions "thrust the High Court

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[159] Ibid, p. 530.
[160] Robert G. Dixon, "The Griswold Penumbra: Constitutional Charter for an Expanded Law of Privacy?" (*Michigan Law Review* 64, no. 2 (1965)), p. 205.

into the political thicket of policy-making because the right of privacy expounded in *Griswold* was unanchored by either constitutional text or purpose."[161] This critical argument makes sense in the context of the late 1980s, primarily because of the conservative jurisprudence that characterized the Rehnquist Court at the time, indicating that opinion on the *Griswold* decision shifted over time based on normative standards. Fein first takes issue with Justice Douglas's assertion that "a relationship lying within the zone of privacy [is] created by several fundamental constitutional guarantees."[162] These "guarantees," Fein argues, are never clearly identified and invite the public to shed doubt on the decision overall, especially given the use of constitutional amendments that seemingly have no relation to the regulation of contraception.[163] Fein further questions the *Griswold* decision by criticizing Justice Douglas's reliance on the institution of marriage to support the establishment of a "right to privacy" in the context of the case. Douglas states in the Majority Opinion that the "right to privacy" predates the Bill of Rights, political parties, and school systems, leading Fein to assert that it is unclear why, if the right of privacy was so ingrained in society prior to the ratification of the Constitution, that right is not mentioned at all in its text.[164] Further, Fein asks, "if the right [to privacy] antedated the Bill of Rights and was unprotected in the original Constitution, how did it achieve constitutional sacredness?"[165] Here, Fein clearly criticizes Douglas for using substantive logic without fully interpreting the implications of the resultant reasoning used as justification. Fein ultimately characterizes the reasoning used in *Griswold* as "incomprehensible" and establishing the assumption that "a constitutional right may be discovered outside the Constitution if its verbal formulation is a

[161] Bruce Fein, "Griswold v. Connecticut: Wayward Decision-Making in the Supreme Court," (Ohio Northern University Law Review 16 (1989)), p. 551.
[162] Ibid, p. 553.
[163] Ibid, p. 554.
[164] Ibid, p. 554.
[165] Ibid, p. 554.

"second cousin" of an express constitutional guarantee," which he argues could ultimately apply to almost any proposed "right."[166]

Fein also argues that the Court's adjudication on the right of "marital privacy" was unnecessary and flawed in its own right. He suggests that the Court could have simply addressed the violation of the statute's accessory clause without turning to the right of "marital privacy," as the circumstances of the case did not involve the invasion of a marital home and the nature of the violation itself "did not undermine whatever marital intimacies the defendants enjoyed."[167] Further, Fein points out that Douglas failed to consider "whether aiding or abetting contraceptive use might be punishable even if use by marital couples was constitutionally protected" based on legal doctrine stating that "an acquittal of the principle is no bar to the prosecution of an alleged accomplice."[168] In the case of *Griswold*, this criticism is valid because of the nature of the Connecticut statute, which differentiates between criminalization of a primary violation and an accessory violation. With respect to the statutes in question, the issue of non-enforcement is also addressed, with Fein arguing that Connecticut "neither attempted nor contemplated" enforcement of the anti-contraceptive statutes against married couples, and lacked any legitimate reason to prosecute birth control clinics under the accessory clause.[169] Thus, Fein says that the state essentially lacked a "rational basis" for prosecution under any circumstances, which could have been used to the Court's advantage in overturning the conviction. Further, addressing the constitutionality of the statute in this way would also not have required the Court to address "marital privacy" in order to successfully overturn the convictions. Finally, Fein predicts that the Connecticut legislature would have inevitably overturned the statute without the intrusion of the

[166] Ibid, p. 554.
[167] Ibid, p. 555.
[168] Ibid, p. 554-555.
[169] Ibid, p. 556.

Court as a result of the strength of the women's movement and the frequency with which anti-abortion laws were being overturned at the time of *Griswold.*[170]

The lack of perceived foresight evident in the reasoning of the *Griswold* decision, Fein says, "parented a host of irreconcilable and ill-reasoned sequel decisions that arrogated elected officials' policy-making powers, undermined self-government, and fostered political inertness and inactivity."[171] Since the success of *Griswold* inevitably led to the rise of "right to privacy" cases addressed by the Court, Fein argues that the Court structured these decisions by "fashioning wholesale legislative policy" as a result of the insufficient constitutional grounds on which *Griswold* was established.[172] Fein goes on to criticize the Court's decisions in cases like *Stanley v. Georgia* and *Roe v. Wade* for adopting substantive forms of reasoning similar to that of *Griswold.* Overall, Fein primarily makes the argument that the Court did not adjudicate appropriately in the *Griswold* case with respect to the separation of powers and the role of the judiciary itself. Though he concedes that the legislature often makes imperfect policies, Fein nevertheless argues that the Court has no right to "step in" and refine existing laws or purport to establish new ones as a result of legislative incompetence. To conclude his assessment of *Griswold,* Fein compares the Court to "the nation's potent and omnipresent moral teacher," suggesting that "if the teacher displays constitutional lawlessness typified by *Griswold* and its privacy offspring," then its pupils must not be far behind.[173]

The opposing viewpoints of Dixon and Fein ultimately exhibit greater historical trends and implications concerning the evolution of the American legal tradition. The change in opinion regarding the *Griswold* case from Dixon to Fein is generally indicative of changing judicial and

[170] Ibid, p. 556.
[171] Ibid, p. 556.
[172] Ibid, p. 557.
[173] Ibid, p. 559.

social perspectives over time. Given the proximity of Dixon to the *Griswold* decision in terms of time as well as the liberal activist nature of the Warren Court, it is perhaps to be expected that he is optimistic about the promise of the *Griswold* decision even though he recognizes that it has not been fully defined yet in a legal context. Written over twenty years after Dixon's essay, Fein takes a much different, more critical standpoint in his analysis. Again, this is not only indicative of the distance, so to speak, between Fein's essay and the *Griswold* case, but also of the nature of the Court during the late 1980s. Though at the time of Fein's essay, only three years elapsed since the transition from the Burger to the Rehnquist Court, the seeds of conservatism had been sown in the Court's jurisprudence for years, arguably beginning with Nixon's anti-activist campaign and expanding with Reagan's "new federalism" movement. Political and judicial conservatism reigned supreme when Fein wrote his essay, and it is likely that he wrote from a conservative perspective because it was the dominant viewpoint in society and to a large extent, in the judiciary at the time. Beyond his disapproval of the *Griswold* decision as a whole, Fein is also highly critical of the Court's exertion of judicial activism and substantive due process, illustrating a larger point of contention between liberal and conservative scholars during the latter part of the twentieth century. Dixon, meanwhile, wrote his analysis under completely different circumstances: in the midst of the Warren Court era of liberal activism and in an arguably more "liberal" political sphere. Comparison of the two analytical reviews is thus not only indicative of the development of a critical approach to the *Griswold* decision over time, but also exemplifies a larger debate between liberal and conservative schools of judicial thought.

Analyzing the Successes and Failures of the Griswold Majority Opinion

The *Griswold* decision is ultimately complex, and cannot truly be characterized as entirely "wrong" or entirely "right" in a legal sense. Critics' claims that Douglas overstepped his

jurisdictional boundaries and used substantive reasoning to validate the Majority Decision are certainly valid for a number of reasons. Douglas primarily pushes the Court's jurisdictional restraints through the use of several phrases and terms to describe entirely new phenomenon never before discussed in a legal context. In particular, the "penumbras" of protection and "zones" of privacy are of interest because of their vague and overwhelmingly broad nature. Douglas briefly explains how these terms relate to the idea that individuals are entitled to more than the rights specifically outlined in the constitutional text, but does not ever truly expand on this idea beyond the realm of "marital privacy." The issue with these terms--as is the issue with much of Douglas's argument--is how to determine where the metaphorical "line" is between what is considered a right and not a right. Douglas continually argues that "implied rights" are simply the rights that are not specified in the constitutional text, but are instead encompassed by the "penumbra" of guaranteed rights, which in turn still makes them valid rights. Not only is this logic confusing and unnecessarily complex, it still does not sufficiently answer a simple question central to Douglas's theory: What characterizes an "implied" right? Perhaps Douglas would argue in response that "implied" rights must either clearly deviate from an already enumerated right, or be a right so clearly ingrained in society that it falls under the "penumbra" of the Ninth Amendment. Who is to say what defines a "clear deviation" from any given guaranteed right, or for that matter, what defines a "right ingrained in society"? These concepts are difficult to clearly define in a realistic sense, and the fact that they are given little support from the Constitution itself is cause for concern. Douglas's logic in this case is overtly substantive and relies heavily on broad assumptions of how enumerated rights expand to include other societal constructs of privacy and personal freedom that should be protected. This is not to say that the "right to marital privacy" is not valid, but rather that Douglas's means of justifying it is not. Whether or not

Douglas wanted to admit it, he exercised a form of judicial activism in his creation of the concept of legal "penumbras" and "zones of privacy" by using various Amendments to support those characterizations of rights. While not entirely comparable in severity to other instances of substantive due process at work, such as the *Lochner* case, the *Griswold* decision can undoubtedly be interpreted as relying on a broad interpretation of the Constitution for textual support. Although it seems that Justice Douglas did not intentionally invoke substantive due process in the Majority Opinion, given his attempt to use relevant parts of various Amendments to defend his argument, it can be argued that he inadvertently did so by defining "privacy" in a greater sphere than the Constitutional text allows.

Despite Douglas's use of substantive reasoning to support his decision, the Majority Decision of *Griswold* did provide a more informed and holistic interpretation of the Connecticut Statutes' constitutionality than did its predecessor in *Poe v. Ullman.* Given the discourse present in the text of the *Poe* decision and dissent, it is arguably evident that the Connecticut Statutes were not irrelevant, invalid, or reflective of a "tacit agreement" regarding its implementation in practice. While it is true that the statutes were enforced rarely, Douglas's use of evidence in his *Poe* dissent clearly contradicts the Majority Opinion's assumptive notion that they were never enforced at all and thus did not have cause for concern of prosecution. Douglas's central argument is thus that the statutes should be reevaluated under declaratory judgement in order to determine a more clear course of action for enforcement that is evident to both law enforcement/governmental officials and civilians. While Douglas merely presents this notion in his *Poe* dissent, he is able to make a tangible impact in the *Griswold* case as the author of the Majority Opinion. In this context, he fully evaluates the constitutionality of the Connecticut statutes and determines that they are illegitimate. Whether or not his conclusion is correct is

debatable, but it must be conceded that Douglas was successful in his attempt to evaluate the law's constitutionality in its entirety.

Despite all of the controversial aspects of the *Griswold* decision in a legal sense, the case also made an incredibly significant impact as legal precedent for issues of privacy. Regardless of the means of implementation, Douglas's introduction of "penumbras" of protection and "zones" of privacy arguably revolutionized the interpretation of privacy-related cases for years to come, while simultaneously providing expanded privacy rights for individuals within society.

SECTION V: SUCCESSIVE CASES AND LEGACY

Beyond the judicial implications presented by *Griswold* as a singular case, the legal reasoning used to establish a constitutional "right to privacy" ultimately inspired a string of Supreme Court case decisions bearing similarity to the outcome of *Griswold.* These case decisions not only broadened the spectrum of the "right to privacy" further, but also invalidated several instances of state legislation interpreted as violations of either the Due Process or Equal Protection Clauses of the Fourteenth Amendment. In the sphere of privacy rights established with support from these clauses, a sort of domino effect can be observed, particularly during the 1970s. This decade in particular saw the expansion of a "right to privacy" by the Court three separate times: *Eisenstadt v. Baird (1972), Roe v. Wade (1973), and Carey v. Population Services (1977).* Each of these notable cases provided new insight into the legal conception of a "right to privacy", ultimately suggesting that the conclusion reached by *Griswold* was only the tip of the iceberg. While the process of establishing these rights progressed rather quickly, the specific rights enumerated generally bore a close resemblance to that of *Griswold,* primarily

dealing with issues of contraception and abortion. While it is not necessary for the purposes of this essay to provide extensive analysis of these landmark decisions successive to that of *Griswold,* a brief examination of the components of each case is useful in examining the impact of the *Griswold* decision in a legal context.

Eisenstadt v. Baird, for instance, was the first case to address the issue of contraceptive distribution following *Griswold,* and bore similarity to its predecessor in terms of circumstance, except for the use of unmarried persons as the subject for review. Decided by the Burger Court in a 6-1 decision (both Rehnquist and Powell were not yet sworn into office and thus could not participate), the *Eisenstadt* decision deviated from *Griswold* by finding the statute in question invalid under the Equal Protection Clause rather than the Due Process Clause of the Fourteenth Amendment. The Court thus declared the Massachusetts statute unconstitutional under the "rational basis test" of the Equal Protection Clause, finding the law to have no reasonable societal or health-related purpose. The deviation from the Due Process Clause may have been an attempt by the Burger Court to avoid the perhaps inevitable use of substantive reasoning to declare the law unconstitutional and the proposed rights valid, but also may simply have been the most obvious legal justification under the circumstances. Still, the homage to *Griswold's* line of reasoning is evident in the *Eisenstadt* decision, particularly in its attempt to bridge the disconnect between a marital "right to privacy" and an individual "right to privacy." Speaking for the majority, Justice Brennan states that "if the right of privacy means anything, it is the right of the *individual,* married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."[174] This kind of reasoning strongly reflects the ideas of personal autonomy and liberty that are so central to the

[174] *Eisenstadt v. Baird,* 405 U.S. 438 (1972), p. 405.

Griswold opinion and which ultimately become a hallmark of the "right to privacy" discussion as well. By expanding the right to contraception on an individual basis, the Court gave people of all classes and social statuses the ability to legally express a form of personal autonomy that could not have been achieved otherwise. Although the *Griswold* decision also had a major impact on this development by allowing the distribution of contraceptive products and information, thus broadening the "infrastructure of provision" for lower class married individuals, the *Eisenstadt* decision served to further provide for all citizens on a fundamental level by allowing this practice on an individual basis, thus affirming the personal autonomy of those citizens not included in the *Griswold* provisions.[175]

The *Griswold* and *Eisenstadt* decisions, while certainly prominent in their own rights, undoubtedly paved the way for perhaps one of the most notable--and arguably infamous--decisions of the twentieth century, *Roe v. Wade.* As in *Poe* and *Griswold,* the issue of justiciability is addressed in the *Roe* decision, with evidence of the anonymous subject's pregnancy status used to exhibit a tangible reason for judicial review of the Texas statute. The *Roe* decision relies heavily on the legal arguments used in the *Griswold* case, specifically the use of the Due Process Clause as justification for overturning the statue in question. Writing for the majority, Justice Blackmun affirms the "penumbras" of privacy established by *Griswold,* as well as the concept of "personal liberties" central to all of *Griswold's* successive cases.[176] Beyond the concept of personal autonomy, the majority justifies the proposed right through an extensive analysis of the history of abortion practices, concluding with the assertion that the desire and right to obtain a safe and legal abortion is valid for a variety of medical reasons. The

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[175] Cary Franklin, Griswold and the Public Dimension of the Right to Privacy, 124 Yale L.J. F. 332 (2015), n. Pag.
[176] *Roe v. Wade*, 410 U.S. 113 (1973), p. 129.

Roe decision also bears similarity to its precedent cases with the assertion that the statute in question does not reflect an entirely viable state interest. To be sure, the *Roe* decision cannot and does not rely on the Equal Protection Clause or the "rational basis" test at any point, primarily because the Court concludes that the state does have a legitimate interest, which is described as the protection of "the pregnant woman's health and the potentiality of human life, each of which interests grows and reaches a "compelling" point at various stages of the woman's approach to term."[177] In turn, the state can assert an interest when the purpose extends beyond protection of the pregnant woman alone, specifically at the point in the pregnancy where "potential life" is involved; thus, the woman's right to an abortion is not considered absolute.[178] Here, the Court is strategic in how it frames its expansion of the "right to privacy," even going so far as to say that it does not agree with the idea that a woman's right to do what she pleases with her body bears resemblance to any pre-established privacy rights.[179] Despite its use of a substantive interpretation of the Due Process Clause to establish the right to privately procure an abortion, the Court is firm in its assertion that this right is not unlimited by any means. This distinction is perhaps an effort by Blackmun to reaffirm the Court's position on the separation of powers issue with a clear deference to state interests as is applicable, and may be one of the reasons why the case concluded with a 7-2 decision with the majority including several of the more "conservative" Justices. Ultimately, the *Roe* decision reflects the first attempt by the Court at divergence from the path of *Griswold,* and although the right established by the Court is not absolute, it is still indicative of the progress made in the Court's journey to solidifying the legal definition of a "right to privacy."

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[177] *Roe v. Wade*, 410 U.S. 113 (1973), p. 114.
[178] *Roe v. Wade*, 410 U.S. 113 (1973), p. 150.
[179] *Roe v. Wade*, 410 U.S. 113 (1973), p. 154.

Only four years after the *Roe v. Wade* decision, the Court expanded upon the "right to privacy" standards set in *Griswold* yet again with the ruling in *Carey v. Population Services International.* Following *Roe's* deviation from the subject matter of *Griswold,* the circumstances of the *Carey* case reflect a return to form, so to speak, with the review of a New York statute prohibiting the sale or distribution of contraception to individuals under the age of sixteen. The decision itself focuses more broadly on the commercialized sale of contraceptive products to any individual, an issue not previously addressed in any of *Carey's* preceding cases. With respect to state involvement, the *Carey* decision analyzes the question of whether or not the state has a viable interest in restricting the access of contraceptives to minors on the basis of promoting morality. In response to this concern, the Court references a prior decision in *Planned Parenthood of Central Missouri v. Danforth,* which held that a state cannot impose a "blanket prohibition" or requirement on the choice of a minor to obtain an abortion.[180] As a result, Brennan concludes that the state's interests "are clearly more implicated by the abortion decision than by the decision to use a nonhazardous contraceptive," and further, that there is no evidence to support that state intervention on the matter would be beneficial to society.[181]

As in *Griswold* and *Eisenstadt,* the issue of legal access to resources is also central to the *Carey* decision and serves as another means of supporting a provisional infrastructure for individuals of all socioeconomic statuses. The issue of access, Brennan argues, is not relevant "because there is an independent fundamental "right of access to contraceptives," but because such access is essential to exercise of the constitutionally protected right of decision in matters of childbearing."[182] In the context of the *Carey* case's circumstances, the inability of an individual

[180] *Carey v. Population Services International,* 431 U.S. 678 (1977), p. 693.
[181] *Carey v. Population Services International,* 431 U.S. 678 (1977), p. 694.
[182] *Carey v. Population Services International,* 431 U.S. 678 (1977), p. 688.

to obtain contraceptive products from any retailer other than a licensed pharmacist ultimately limits the means of distribution--and subsequently, of access--for many people. Thus, the expression of a "right to privacy" with respect to the rights already established is dependent in part on accessibility. Justice Brennan also focuses heavily on the interpretation of the *Griswold* decision in the context of its successive cases and argues that the rights asserted in *Griswold* are more situationally broad than originally stated. In the context of *Griswold's* legacy, Brennan states, "the teaching of *Griswold* is that the Constitution protects individual decisions in matters of childbearing from unjustified intrusion by the State."[183] This is obviously not the conclusion reached in the *Griswold* decision, but is a statement indicative of how the concepts introduced in the opinion evolved into something far more substantial in the sphere of privacy rights.

The legacy of *Griswold v. Connecticut* is undoubtedly strong and notably influential on the verdict of Supreme Court cases in the 1970s. Beyond the three aforementioned landmark privacy cases, several other Court opinions drew inspiration from *Griswold's* vein of legal reasoning and enhanced the legal standing of a "right to privacy" significantly. These decisions are numerous and do not need to be discussed in extreme detail; however, two merit mentioning briefly: *Doe v. Bolton (1973),* the companion case to *Roe v. Wade*, which adjudicates on the practices and involvement of hospitals in abortion procedures, and as previously mentioned, *Planned Parenthood of Central Missouri v. Danforth (1976),* which limits state intrusion in the decision to undergo abortion procedures as a minor. While these cases deal with a different subject matter than that of *Griswold,* they illustrate the significance of the reasoning used in regards to an individual's sense of personal autonomy, and of course their constitutionally afforded "right to privacy." These concepts remain consistent in the legal reasoning of cases

[183] *Carey v. Population Services International,* 431 U.S. 678 (1977), p. 687.

derived from *Griswold* and are largely supported by the Court up until the *Bowers v. Hardwick* decision of 1986.

Chapter III: *Lawrence v. Texas* and the Supreme Court's Expansion of a "Right to Privacy

SECTION I: CASE PRECEDENT

Introduction

While *Griswold v. Connecticut* proved to be a primary source of precedent for the *Lawrence v. Texas* decision, the Court also evaluated the justiciability of a case even more closely related to the topic at hand: *Bowers v. Hardwick.* Decided by the Burger Court in 1986, the case specifically dealt with the validity of state laws criminalizing an individual's engagement in acts of consensual sodomy. Notably, the statute applied to both heterosexual and homosexual acts of sodomy and did not exclude acts occurring in a private home as being exempt from prosecution. The facts of the case state that in 1982, the defendant, Michael Hardwick, was charged with violating a Georgia statute criminalizing sodomy after a Georgia police officer inadvertently witnessed Hardwick and another man engaging in acts of a sexual nature.[184] The officer was permitted to enter Hardwick's home by way of a warrant, which he obtained after Hardwick had not shown up to court on a charge of public intoxication.[185] The officer then charged both Hardwick and his companion for violating the relevant Georgia statute. Hardwick then chose to pursue legal action against the state in federal court--despite being cleared of the original charges by the District Attorney--for two primary reasons. First, Hardwick claimed that the provisions of the antisodomy law put him "in imminent danger of arrest" given his status as a sexually active homosexual man, while simultaneously violating his "constitutional right to privacy."[186] Hardwick's second charge was submitted on behalf of an anonymous heterosexual couple, John and Mary Doe, who claimed that the statute violated their

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[184] *Bowers v. Hardwick*, 478 U.S. 186 (1986), p. 187.
[185] Melvin I. Urofsky, "Bowers v. Hardwick," (*Encyclopædia Britannica, inc.*, June 23, 2018), n. Pag.
[186] Ibid, n. Pag.

right to marital privacy in the home as established in *Griswold v. Connecticut.*[187] The former claim ultimately became the central issue addressed by the Supreme Court, as Hardwick's secondary charge was later declared by the Court to be non justiciable based on a lack of direct or potential injury resulting from implementation of the statute.

More broadly, the *Bowers* case deals with a specific area of privacy rights that had not yet been addressed by the Court at the time. According to the Burger Court, the issue central to *Bowers* was whether or not the Constitution "confers a fundamental right upon homosexuals to engage in sodomy...hence [invalidating] the laws of the many States that still make such conduct illegal."[188] While the accuracy of this claim is later disputed by the majority coalition in *Bowers'* succeeding case, *Lawrence v. Texas (2003),* the constitutionality of the act of consensual sodomy in a private setting is undoubtedly a relevant component of the debate. Similarly to the *Poe-Griswold* relationship, the new facet of the existing "right to privacy" addressed in *Bowers* was first decided and later reevaluated seventeen years later in *Lawrence v. Texas*. Thus, the same question faced in analysis of *Poe* and *Griswold* presents itself again: Why did the Court's opinion on the issue presented change? In considering this issue, it is important to not only compare the language and conclusions presented in each decision, but also to look past the legal circumstances of each case and consider other contributing factors. These factors may include--but are certainly not limited to--the varying jurisprudences of the Justices on the Burger and Rehnquist Courts, respectively, which served to impact the overall decision affirmed by the majority of the Court, as well as the societal attitudes regarding same sex relationships at the times of both cases.

Bowers v. Hardwick and the Legal Limitations of "Penumbral" Privacy

[187] Ibid, n. Pag.
[188] *Bowers v. Hardwick*, 478 U.S. 186 (1986), p. 190.

As is previously mentioned, the *Bowers* case represented the beginning of a new branch of "penumbral privacy," although the decision itself did not necessarily serve to affirm that. The Court thus granted certiorari regarding the question of whether or not the Georgia statute criminalizing acts of sodomy violated the fundamental rights of citizens to engage in such acts with protection from the "right to privacy" expanded upon by *Griswold v. Connecticut.* Justice White led the majority opinion, which disregarded this constitutional question as invalid. White first clarifies that the case could not reasonably require judgement on whether or not anti-sodomy laws are "wise or desirable," or whether a state has the legislative capability to "repeal" or "invalidate" these laws under state constitutional laws.[189] Rather, White states, the *Bowers* case deals with the question of whether or not the Constitution expresses or implies a fundamental right of citizens to engage in private acts of sodomy, thus rendering state-sponsored anti-sodomy laws unconstitutional. The overarching judicial issue, then, is not only a matter of whether or not private acts of sodomy are protected under one of the "zones of privacy" established by *Griswold* and then reaffirmed by other related cases, but also whether or not states have the right to criminalize such "private" acts in any capacity, and if so, to what extent?

White and the majority argue that in the context of *Bowers* and its relevant precedent, the freedom to engage in acts of sodomy cannot reasonably be characterized as an enumerated constitutional right, even as part of a "zone" or "penumbra" of privacy. The overall decision of the Majority to reverse the decision made by the Court of Appeals is grounded in several veins of legal reasoning. First, White argues that the protection of the specific right to partake in sodomy is not grounded in the Constitution in any capacity. With consideration of several cases of precedent that expand upon the "zones of privacy" established by the *Griswold* decision, White

[189] Ibid, p. 190.

claims it is "evident" that none of the rights established and subsequently protected in these cases are related to or imply the protection of an individual's right to engage in acts of sodomy.[190] A key facet of this argument is based on the concept that unlike issues of privacy relating to family and marriage, sodomy cannot reasonably be characterized as a liberty that is "deeply rooted in this Nation's history and tradition."[191] This characterization, White argues, is integral to the justification of expanded privacy rights in a judicial context. White further addresses the extensive history of sodomy as a criminal offense, which he cites as having "ancient roots" present even in the state laws present during the ratification of the Bill of Rights.[192] Thus, the connection between a proposed right to engage in sodomy and the various established rights to privacy is, according to White's reasoning, "at best, facetious."[193]

Second, the idea that the establishment of "zones" and "penumbras" of privacy suggests that there is some level of inherent "constitutional insulation" in cases of private and consensual sexual engagement, thus preventing any conduct of that nature to be free of state regulation is, in White's words, "unsupportable."[194] This idea, he argues, is at the forefront of the defendant's argument and is based on the assumption that because the Court extended the "right to privacy" to elements of family, marital, and individual relationships that concern sexual conduct in some context, that such a right must also protect the ability of an individual to engage in acts of sodomy. This assumption, White says, is ultimately rejected by the Court's opinion in *Carey v. Population Services International*, a decision which restricts the "right to privacy" established in *Griswold* by arguing that the protections provided by the Due Process Clause do not render

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[190] Ibid, p. 190-191.
[191] Ibid, p. 192.
[192] Ibid, p. 192.
[193] Ibid, p. 194.
[194] Ibid, p. 191.

"private" matters entirely exempt from state proscription.[195] Similarly, the assertion made by the respondent that there must be a "rational basis" for the Georgia anti-sodomy statute is rejected by White. The respondent argues that the perceived "rational basis" for the existence of the law is the immorality of homosexual sodomy, which he characterizes as "inadequate" as a legislative motivation.[196] White, however, dismisses this argument by countering that the law is based on "notions of morality" supported by the general public and thus cannot be declared unconstitutional simply because a given statute does not align with one individual's personal notion of what morality entails.[197]

At the heart of the Majority Opinion, however, is an argument that reflects not only the opinion of White himself regarding the manner in which the Court should adjudicate on matters of social concern, but also the continuation of the long standing debate in the Court regarding where the figurative "line" of justiciability lies. The position of White--as well as of the Justices who join the Majority Opinion in *Bowers*--regarding the justiciability of the case is clear. Framing his argument about the greater judicial responsibility of the Court in the context of evolving privacy rights, White is critical of the substantive reasoning used by several case precedents to establish a broad "right to privacy." His criticism is generally grounded in the emphasis placed on the Due Process Clause by the Court in its substantive expansion of the "right to privacy," which he views as an example of the Court essentially blurring the distinction between the separate governmental powers. Describing the language of the Due Process Clause as appearing to "focus only on the processes by which life, liberty, or property is taken," White suggests that the cases establishing a "right to privacy" are based on substantive interpretations

[195] Ibid, p. 190.
[196] Ibid, p. 196.
[197] Ibid, p. 196.

of this clause and in actuality "have little or no textual support in the constitutional language" for the protection of privacy from state legislation.[198] While White does accept these opinions as precedent, he also makes clear that the Court is unwilling to continue the expansion of fundamental rights in cases where there is no clear or implied relation to any previously enumerated rights. Here, White very clearly takes a stance on the Court's role in upholding the separation of governmental powers with his statement that "the Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution."[199] This practice, White says, should be combated with "great resistance," especially in those cases where the meaning of the Clause itself is distorted and redefined to some extent.[200] If no action is taken, the Court then is at risk of violating the separation of powers by "[taking] to itself further authority to govern the country without express constitutional authority."[201] These statements are powerful and exhibit that in some capacity, the Court's tolerance of the unrestricted expansion of a legal "right to privacy" had temporarily reached its limit.

Evidently, this conclusion does not hold true for all members of the Court, as the *Bowers* decision was split 5-4, with Justices Blackmun, Stevens, Brennan, and Marshall strongly dissenting. The Dissenting Opinion takes issue with a variety of points made in the Majority Opinion, including the validity of a legal relationship between the privacy rights previously established and the concept of a right to engage in acts of sodomy. Justice Blackmun, who leads the opinion, takes a different stance regarding the idea of what a "right to privacy" entails. Blackmun defines the "right to privacy" generally as "more than the mere aggregation of a

[198] Ibid, p. 191.
[199] Ibid, p. 194.
[200] Ibid, p. 195.
[201] Ibid, p. 195.

number of entitlements to engage in specific behavior," protected "not because [the rights] contribute, in some direct and material way, to the general public welfare, but because they form so central a part of an individual's life."[202] Thus, Blackmun concludes that the connection between familial and marital privacy rights with the proposed right to engage in sodomy lies not in being "deeply rooted" in the American societal tradition, but instead in an individual's level of self-definition. For instance, Blackmun says that the "right of privacy" associated with contraception was established "not because of demographic considerations or the Bible's command to be fruitful and multiply," but rather because "parenthood alters so dramatically an individual's self-definition."[203] This line of reasoning serves to establish a different way of considering the expansion of a legal "right to privacy" at a fundamental level, but also potentially provides an opportunity for more confusion regarding what constitutes a vital element of an individual's self-characterization.

Blackmun also takes issue with White's assertion that the Georgia statute has a "rational basis" for existing based on "notions of morality" established by the general populace. Where White argues that these "notions of morality" play a significant role in the creation of laws, Blackmun counters that just because certain societal groups disagree with an action--in this case, the participation of an individual in acts of sodomy--that does not give the state "license to impose [the group's] judgments on the entire citizenry."[204] This kind of consideration by the legislature could not be reasonably characterized as a valid exercise of the state's power on a "rational basis" with complete neutrality. Blackmun further asserts: "The Court cannot control such prejudices, but neither can it tolerate them. Private biases may be outside the reach of the

[202] Ibid, p. 204.
[203] Ibid, p. 205.
[204] Ibid, p. 211.

law, but the law cannot, directly or indirectly, give them effect."[205] To allow this to happen, Blackmun says, would be a distortion of the judiciary's purpose in a system of separate powers and would imply the constitutional justification of "the deprivation of a person's physical liberty."[206]

SECTION II: *LAWRENCE V. TEXAS*: A CASE STUDY

Although the Rehnquist Court addressed the expansion of a "right to privacy" with respect to abortion practices in several decisions, perhaps its most notable decision in the realm of privacy rights was *Lawrence v. Texas (2003),* which overruled the *Bowers v. Hardwick* decision restricting the "right to privacy" in the context of acts of sodomy. With a 6-3 verdict in favor of Lawrence, the case also enabled the expansion of a "right to privacy" to protect acts of adult consensual intimacy--including sodomy--in the home under the Due Process Clause. Notably, while the verdict does have a six person majority made up primarily of Justices from the "liberal" or "centrist" factions, it does not necessarily have a "strong" majority, with Justice O'Connor stating in her Concurring Opinion that she disagrees with the decision to overrule *Bowers,* a case she adjudicated on and affirmed during her time on the Burger Court.[207] Further, despite joining the majority, Justice O'Connor clearly states that she disagrees with the Court's use of the Due Process Clause to justify declaring the Texas statute unconstitutional, instead choosing to come to the same conclusion through use of the "rational basis" standard of the

[205] Ibid, p. 212.
[206] Ibid, p. 212.
[207] *Lawrence v. Texas,* 539 U.S. 558 (2003), p. 579.

Equal Protection Clause.[208] Justice O'Connor's support of the majority is thus only partial, and had the case dealt solely with the constitutionality of *Bowers,* it is evident that she would not have joined in overturning its verdict. With this in mind, it seems reasonable to assume that despite the verdict of *Lawrence* not actually being split 5-4, the majority that it relies on is not entirely solid and depends in part on circumstance.

Notably, the circumstances surrounding the *Lawrence* case bear a strong resemblance to that of its direct precedent case, *Bowers.* In both *Bowers* and *Lawrence,* the defendants were arrested for violating statutes criminalizing acts of sodomy in their respective states after being found by police engaging in said acts with individuals of the same sex. In both cases, the police officers were dispatched to the homes of Hardwick and Lawrence, with their right to enter the premises deemed legitimate by both Courts. Despite these similarities, the immediate circumstances of the *Bowers* and *Lawrence* do differ significantly in two respects. First, while both Hardwick and Lawrence were arrested for violating the statutes, Hardwick was not ultimately prosecuted, instead choosing to pursue legal action against the state in federal court. Lawrence, in contrast, was charged and prosecuted by the state of Texas for direct violation of the anti-sodomy statute, making his legal standing stronger than that of Hardwick's. Second--and perhaps of greater importance to analysis of the case--the Georgia statute contested in *Bowers* criminalized acts of sodomy committed by both heterosexual and homosexual couples, while the Texas statute relevant in *Lawrence* specifically prohibited acts of sodomy between same-sex couples.

The Court granted certiorari on the basis of three questions, all of which address issues of privacy in a similar context to that of *Griswold* while simultaneously introducing new

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[208] Ibid, p. 579.

circumstances that are relevant to judicial interpretation of the privacy "penumbras" outlined in *Griswold*. The first question asks the Court whether or not the Texas statute--referred to in this context as the "Texas Homosexual Conduct law"--is valid under the provisions of the Fourteenth Amendment.[209] Specifically, the Court is asked to consider the legal distinction made by the statute regarding the criminalization of certain sexual acts committed by same-sex couples, but not by different-sex couples and whether or not this separation of rights violates the Equal Protection Clause of the Fourteenth Amendment. The petitioners thus claim that the statute itself is inherently discriminatory based on sexual orientation alone, which cannot reasonably be considered a legitimate governmental concern.

The second question in particular expands upon the standards of privacy set in the *Griswold* decision by questioning whether or not the petitioners' convictions "for adult consensual sexual intimacy in the home violate their vital interests in liberty and privacy" protected under the Due Process Clause. Although the question primarily focuses on the potential violation of the "right to privacy" held by both individuals, it also calls on the Court to consider that violation in the context of circumstances different from those of the *Griswold* case which may impact their decision. Although the sexual orientation of the petitioners is not specifically referenced in the second question, they are essentially asking the Court to address whether or not intimacy in the home of same-sex couples is also protected under the "penumbras" of privacy established in *Griswold v. Connecticut.* This concern is valid because of the emphasis placed in the original decision on the right of "marital privacy," a protection which the Court claimed extends to the marital home as well. Whether or not that same kind of protection extends to non-

[209] Ibid, p. 564.

married couples of the same sex is reasonably relevant in this case, especially given the ambiguity of what the "penumbras" of privacy truly protect.

The final question posed in the writ of certiorari deals specifically with the *Bowers v. Hardwick* case and whether or not it is constitutionally legitimate in its own right. The Court does address this concern in the beginning of the Majority Opinion, stating that in order to determine whether the petitioners' constitutional concern regarding restrictions on their personal liberties enumerated under the Due Process Clause is valid, it is "necessary to reconsider the Court's holding in *Bowers.*"[210] The Court's willingness to review *Bowers* is due to a variety of factors addressed throughout the decision, including perceived inaccuracies regarding the history of anti-sodomy law in the United States as well as deterioration of the logic used to justify the Court's decision resulting from successive cases. Additionally, since the *Bowers* decision, several states passed laws recognizing same-sex unions, suggesting that societal and legal standards of morality were shifting and the Court had a legitimate reason to adjudicate on the case. As is addressed previously in discussion of a relatively "weak" majority, Justices O'Connor, Scalia, Rehnquist, and Thomas evidently disagree with the overturning of *Bowers*, indicating some level of conflict within the Court regarding its constitutionality and impact on successive cases.

With these three questions of constitutionality under consideration, Justice Kennedy begins the Majority Opinion by briefly reviewing the history of "a right to privacy" and the enhancement of personal liberties enumerated to individuals by the Due Process Clause. In this summary, Kennedy references *Griswold, Eisenstadt, Roe,* and *Carey* as precedent cases to *Bowers* and establishes that the decisions made in these cases were the "state of the law" in terms

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[210] Ibid, p. 564.

of privacy rights at the time of the *Bowers* decision.[211] The decision to include this brief review of precedent by Kennedy is likely an effort to emphasize the importance of these decisions with respect to the definitional development of "liberty" that is expressed in the Due Process Clause. The concept of liberty thus plays a significant role in the *Lawrence* decision, with Justice Kennedy and the majority arguing that the *Bowers* decision did not properly account for or "appreciate the extent of the liberty at stake."[212] This statement in particular is included as a direct response to the Burger Court's characterization of the issue at hand mentioned earlier in this Chapter, which Kennedy claims is substantive and oversimplified in nature.[213] Kennedy argues that the right proposed in *Bowers* and *Lawrence* cannot be strictly defined as a "right to engage in sexual conduct," for to do so would "demean the claim the individual put forward, just as it would demean a married couple were it to be said marriage is simply about the right to have sexual intercourse."[214] Instead, Kennedy suggests that the statutes criminalizing acts of sodomy restrict the individual's personal liberties and sense of autonomy in a broader context. Here, Kennedy's argument strongly reflects those of preceding "right to privacy" cases by claiming that the relationships conducted by individuals, as well as the decisions made affecting those relationships, are an integral and fundamental component of what it means to be a human in society. As a result, states should not seek to limit an individual's expression of their personal sense of autonomy in a private sphere unless there is an adverse and legitimate interest present requiring governmental intrusion. By the time of *Lawrence v. Texas*, this is essentially the argument central to the expansion of privacy rights, although it varies to an extent from case-to-case. Writing for the majority, Justice Kennedy makes this exact argument, saying that the

[211] Ibid, p. 564-566.
[212] Ibid, p. 567.
[213] Ibid, p. 566-567.
[214] Ibid, p. 567.

existence of constitutionally sound personal liberties "should counsel against attempts made by the State, or a court, to define the meaning of [a] relationship or to set its boundaries absent injury to a person or abuse of an institution the law protects."[215] In the circumstances of *Lawrence v. Texas* specifically, Kennedy concludes that there is no evidence of a legitimate interest "which can justify [the state's] intrusion into the personal and private life of the individual," such as a non-consensual relationship, involvement of a minor, or any form of unlawful public conduct.[216] Thus, the Court concludes that the Texas anti-sodomy statute violates the petitioners' right to privacy and liberty as enumerated by the Due Process Clause of the Fourteenth Amendment and should thus be overturned on that basis.

As a secondary point, the Court addresses the *Bowers* majority's reliance on several historical inaccuracies regarding the prevalence of anti-sodomy laws and attitudes in America, specifically with reference to homosexual conduct. Justice Kennedy argues that this reliance is derived from the Burger Court's initial misinterpretation of the constitutional rights proposed in the *Bowers* case, which led the majority to conclude that anti-sodomy legislation has "ancient roots" in the American legal and legislative tradition.[217] For this reason, the majority in *Bowers* concludes that a fundamental "right to engage in sexual conduct," specifically acts of sodomy, cannot be reasonably characterized as vital to individual notions of liberty as protected by the Due Process Clause. Justice Kennedy argues in the *Lawrence* Majority Opinion that the "ancient tradition" of anti-sodomy legislation referenced by the Burger Court is not as straightforward as is implied in the *Bowers* decision for a number of reasons. First, Justice Kennedy clarifies that while anti-sodomy laws existed in the United States as early as colonial times, those laws did not

[215] Ibid, p. 567.
[216] Ibid, p. 578.
[217] Ibid, p. 567.

specifically discriminate against homosexual acts of sodomy, instead prohibiting sodomy relations between both different and same sex couples indiscriminately.[218] Of course, Justice Kennedy concedes, this is likely because homosexuality was not widely considered to be a separate and distinct category of sexuality until the late nineteenth century.[219] Further, there was little to no evidence that these anti-sodomy laws were enforced against consenting adults in a private setting, but rather that their purpose was to ensure legal protection for individuals who were assaulted or otherwise taken advantage of by way of sodomy.[220] Based on these findings, Justice Kennedy concludes that the presence of anti-sodomy laws in early American society are not necessarily indicative of public opinion regarding the immorality of homosexuality or acts of sodomy, but more so a general disapproval of recreational sex. Further, Justice Kennedy cites the fact that anti-sodomy laws specific to homosexual couples "did not develop until the last third of the 20th century," with the prosecution of acts of sodomy typically involving "conduct in a public place," and only nine states pursuing prosecution on these grounds in a criminal court since the development of the laws.[221] Justice Kennedy also cites evidence that the anti-sodomy laws still in place during the *Bowers* verdict, as well as those in place during the *Lawrence* decision, were largely unenforced, particularly with respect to consenting adults engaging in acts of sodomy in a private setting.[222] The societal meaning and practical enforcement of these laws, Justice Kennedy argues, hardly provide grounds for the *Bowers* majority to claim that the prosecution of homosexual sodomy in particular has "ancient roots" in the American legal discipline and thus cannot be protected under the Due Process Clause in any context.

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[218] Ibid, p. 568.
[219] Ibid, p. 568.
[220] Ibid, p. 569.
[221] Ibid, p. 570.
[222] Ibid, p. 573.

Beyond the historical inaccuracies that call the logic of the *Bowers* ruling into question, Justice Kennedy also argues that the holding of the case itself is deteriorated as a result of several successive cases that expand upon the "right to privacy" in ways that cast doubt upon the legitimacy of the ruling. In *Planned Parenthood v. Casey,* for instance, the court reaffirmed that the Fourteenth Amendment contains a concept of liberty where "the right to define one's own concept of existence" is central and further, that these beliefs "could not define the attributes of personhood were they formed under compulsion of the State."[223] The statements and the general rhetoric adopted in the *Casey* decision focus on the concept of individualized ideas of personal liberty, which directly contradicts with the assertion in *Bowers* that the Constitution does not protect the right of an individual to engage in private sexual acts, primarily because that right does not invoke the liberty expressed in the Fourteenth Amendment. The *Casey* decision quite clearly asserts the opposite view--that part of an individual's right to liberty is the expression of personal autonomy, which often includes private interpersonal relationships that can be defined in part by sexual conduct. Subsequently, the *Casey* decision casts doubt upon the ability of the *Bowers* decision to adequately provide for an individual's sense of liberty. Justice Kennedy also cites *Romer v. Evans (1996)* as evidence that the reasoning used in *Bowers* must be reconsidered. In the *Romer* case, the Court overturned a piece of Colorado legislation, coming to the conclusion that it was "born of an animosity toward the class of persons affected," had "no rational relation to a legitimate governmental purpose," and ultimately violated the Equal Protection Clause, presumably under the "rational basis" test.[224] While the circumstances of the *Romer* case did not directly deal with a violation of privacy as did *Bowers,* Justice Kennedy argues that the reasoning used in the decision nevertheless weakened the foundation of the

[223] *Planned Parenthood of Southeastern Pennsylvania v. Casey,* 505 U.S. 833 (1992), p. 851.
[224] *Lawrence v. Texas,* 539 U.S. 558 (2003), p. 574.

Bowers decision by rejecting the notion that the state can and should make legislation based on opinions regarding the morality of homosexuality held by the majority.

In the discussion of *Bowers'* deteriorated standing as a case, Justice Kennedy concludes by asserting that public criticism and disapproval of the decision has generally been "substantial and continuing," calling the doctrine of *stare decisis* into question regarding the *Bowers* verdict. While addressing that the role of precedent as exemplified by *stare decisis* is "essential" to ensuring the accordance of respect to decisions made by the Court, Justice Kennedy also argues that it is "not...an inexorable command" or "a mechanical form of adherence to the latest decision."[225] Instead, it is expected that the Court seriously consider the level of individual and societal reliance on the precedent being reviewed, as well as whether the reasons for overturning the decision are compelling enough. In the case of *Bowers*, Justice Kennedy says that there is minimal evidence of individual or societal reliance on the decision and further, that the decision itself causes "uncertainty" resulting from contradictions in terms of reasoning with related preceding and successive cases.[226] For all of these reasons, Justice Kennedy and the controlling majority in *Lawrence v. Texas* conclude that the Texas statute should be found unconstitutional and the *Bowers* decision overruled.

Notably, Justice Kennedy acknowledges the role of the judiciary several times throughout the text of the Majority Opinion. In the statement expressing caution against the state intervening in private relationships without a legitimate interest, Justice Kennedy also explicitly mentions boundaries set for the Court's role as a judicial body in examining cases of a similar nature. He makes clear that the Court, like the state, also does not have the power to regulate an individual's

[225] Ibid, p. 577.
[226] Ibid, p. 577.

choices in their personal relationships when no justiciable concern is present.[227] The Court expresses this same standard in reference to the issue of majority groups "defining" legislation that is subsequently challenged in the Court for issues of constitutionality. With reference to the Court's assertion in the *Bowers* decision that there is a "rational basis" for the Georgia anti-sodomy statute resulting from the majority of the electorate's beliefs that acts of sodomy are immoral, Justice Kennedy states that the obligation of the government "is to define the liberty of all, not to mandate [a particular group's] moral code."[228] The use of emphasis on the Court's role in a system of separate powers is consistent across "right to privacy" decisions, regardless of whether the decision itself further expands upon or limits privacy rights. It is of particular interest in this case for the reasons stated above, but also because of the Court's decision to overturn *Bowers v. Hardwick* against the doctrine of *stare decisis.*

The Dissenting Opinion: Justice Scalia's Take on Lawrence v. Texas

Given Justice Scalia's strict textualist and originalist beliefs, his concern with the Court's expression of power in the *Lawrence* Majority Opinion is not surprising. While Scalia does express his dissatisfaction with the Court's approach to the separation of powers issue, he seems to take greater issue with how the Court treats some of the longstanding legal principles that contribute to the structure of the judiciary. For instance, Scalia criticizes the Court's decision to invoke *stare decisis*, characterizing its interpretation as "manipulative" of the doctrine's fundamental meaning.[229] He focuses in particular on the Court's application of *stare decisis* in *Planned Parenthood v. Casey* when it was given the opportunity to overturn *Roe v. Wade,* suggesting that in the *Lawrence* decision, the Court is being selective in its adherence to the

[227] Ibid, p. 567.
[228] Ibid, p. 571.
[229] Ibid, p. 587.

accepted standards of interpretation. For several reasons, Scalia argues that the reasoning behind the *Bowers* and *Roe* decisions are similar in nature and thus should be adjudicated on as such. He bases this assessment on his understanding of a modern approach to the application of *stare decisis* in the form of a satisfactory "test" of sorts. This "test" is based on three components, which if satisfied by the case in question, allow the Court to overrule precedent; these components are defined as follows:

> "(1) [if] its foundations have been "eroded" by subsequent decisions…(2) [if] it has been subject to "substantial and continuing criticism...and (3) [if] it has not induced "individual or societal reliance" that counsels against overturning."[230]

Scalia then suggests that while *Bowers* may fulfill some or all of these requirements, the reasoning of and reception to the *Roe* decision "satisfies these conditions to at least the same degree," which is a problematic and inconsistent approach to application of *stare decisis.*[231]

With regard to the first factor, Scalia says that although the majority in *Lawrence* is correct in suggesting that *Romer v. Evans (1996)* "eroded" the judicial legitimacy of *Bowers*, the same can be said for *Washington v. Gluckberg* with respect to the *Roe* decision.[232] In the *Washington* decision, the Court held that "*only* fundamental rights which are "deeply rooted in this Nation's history and tradition" qualify for anything other than rational basis scrutiny under the doctrine of "substantive due process.""[233] Scalia implies with the citation of this statement that the right to procure an abortion is not a fundamental right--or at least, has not been reasonably proven as such--and thus should be held to the standards of the "rational basis" test. Given the reasoning of the Court in *Roe* and *Casey,* Scalia argues that the assertion in *Washington v. Gluckberg* "eroded" the right to an abortion that is established in *Roe.* Scalia then

[230] Ibid, p. 587.
[231] Ibid, p. 587.
[232] Ibid, p. 588.
[233] Ibid, p. 588.

discusses the Court's application of the second "factor," saying that although the Court cites the *Bowers* decision as being subject to "substantial and continuing" non-historical criticism, it is unclear as to what those criticisms specifically entail.[234] Further, he argues that the *Roe* decision also faced substantial criticism that can be equated to the level of criticism cited in the *Lawrence* Majority Opinion, thus weakening the argument that *Bowers* should reasonably be overruled while *Roe* is affirmed.

Scalia finally addresses the third "factor" and suggests that there is a substantial amount of "individual and societal reliance" on the principles central to *Bowers,* contrary to what the majority suggests.[235] Describing this level of reliance as "overwhelming," Scalia says that the "rational basis" for legislation in the context of sodomy is based on "countless judicial decisions and legislative enactments [which] have relied on the ancient proposition [of a] governing majority's belief that certain sexual behavior is "immoral and unacceptable.""[236] Further, the decision in *Bowers* provided validation for the establishment of state laws promoting morality in several areas--including, but not limited to bigamy, same-sex marriage, and prostitution--all of which would be deemed questionable based on the *Lawrence* decision.[237] Scalia essentially argues that the Court does not make any attempt to exclude these laws from reconsideration, or at the very least specify which kinds of laws will remain valid following the overruling of the reasoning in *Bowers.* Scalia concludes his argument by saying that this lack of foresight by the Court in overturning *Bowers* will result in a "massive disruption of the current social order," though the same cannot be said about overruling *Roe.*[238] If the ruling in *Roe* were hypothetically

[234] Ibid, p. 588.
[235] Ibid, p. 589.
[236] Ibid, p. 589.
[237] Ibid, p. 590.
[238] Ibid, p. 591.

overturned, Scalia suggests that abortion practices would simply revert to being regulated on a state-by-state basis, undermining the assumption that overruling *Roe* would lead to the illegality of abortions on a national level.[239] Ultimately, Scalia suggests a level of disconnect between the Court's interpretations of the doctrine in *Casey* and *Lawrence* by arguing that "when *stare decisis* meant preservation of judicially invented abortion rights, the widespread criticism of *Roe* was strong reason to *affirm* it...today, however, the widespread opposition to *Bowers*...is offered as a reason in favor of *overruling* it."[240] The various arguments he uses to support his overall argument generally express disapproval of the Court's approach in inconsistently interpreting *stare decisis* in such a way that the Court's decisions do not defer to the legislature when necessary. Though Scalia does address the faults of the *Bowers* decision to an extent, he also makes a clear effort to criticize the *Roe* decision as fundamentally flawed, suggesting that the *Roe* decision is ultimately more problematic than the *Bowers* decision and should be reconsidered by the Court.

The second section of Scalia's Dissenting Opinion deals with the legality of the *Bowers* decision in its own right, particularly with reference to the Due Process Clause. Scalia first argues that the "right to liberty" protected by the Due Process Clause and repeatedly cited by Justice Kennedy does not exist. While Scalia concedes that the Texas statute in question "undoubtedly imposes constraints on liberty," he also says that the Due Process Clause "expressly allows states to deprive their citizens of "liberty" so long as "due process of law" is provided."[241] The only exception lies in the case of "fundamental rights," which are protected by the use of substantive due process, but which must also be reasonably defined as "deeply rooted

[239] Ibid, p. 591.
[240] Ibid, p. 587.
[241] Ibid, p. 592.

in this Nation's history and tradition."[242] At this point in Scalia's argument there is an evident disconnect between the majority's conception of what the "fundamental right" at stake in *Bowers*--and resultedly, in *Lawrence*--is and Scalia's perception. While the majority claims that the protection of individual liberty is the "fundamental right" in question, Scalia upholds the *Bowers* majority's assertion that the "right to homosexual sodomy" is of central concern. With this in mind, Scalia continues his argument by claiming that the majority lacks "boldness" by refusing to address or affirm the "right to homosexual sodomy" as being fundamental and thus justifying the use of substantive due process.[243] Further, Scalia claims that this right cannot be characterized as "fundamental" for the same line of reasoning used by the *Bowers* majority--because the longstanding history of anti-sodomy laws in the United States ensures that a "right to homosexual sodomy" is not in any way ingrained in tradition or society. Scalia cites the criminalization of sodomy--whether specific to same or different-sex couples--as enough evidence to support the argument that such a right cannot truly be "fundamental" in nature. Perhaps most prominently, Scalia criticizes the Court's assertion that the laws and traditions of the past half century are most relevant because they display an "emerging awareness" of constitutional notions of individual liberty, particularly in relation to sex-related matters.[244] Beyond citing evidence of the continued criminalization of sex-related matters by state legislatures, Scalia concludes that a right based on "emerging awareness" in any context cannot equate to a "fundamental right," which must be deeply rooted in tradition according to definition.[245]

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[242] Ibid, p. 593.
[243] Ibid, p. 594.
[244] Ibid, p. 597.
[245] Ibid, p. 598.

Scalia's third point deals with the Court's assertion that the Texas statute does not have a "rational basis" under the Equal Protection Clause, a conclusion which he says "is so out of accord with our jurisprudence...that it requires little discussion."[246] The purpose of the Texas statute--and of the Georgia statute addressed in *Bowers*--is to dissuade citizens from engaging in sexual acts deemed to be "immoral and unacceptable" based on the standards of the majority of the electorate.[247] While the majority in *Lawrence* views this as an irrational and illegitimate basis for state intrusion on individual rights, Scalia again argues that this judgement will inadvertently render many other acts of legislation based on standards of morality useless.[248]

Scalia concludes his dissent by criticizing the Court's willingness to "[sign] on to the so-called homosexual agenda," which he views as the Court "taking sides in the culture war" and "departing from its role of assuring, as neutral observer, that the democratic rules of engagement are observed."[249] This criticism is largely derived from the *Lawrence* majority's brief discussion of how the criminalization of homosexual sodomy and general conduct is "an invitation to subject homosexual persons to discrimination both in the public and in the private spheres."[250] In response to this claim, Scalia argues that the Court is not upholding its neutral role and in pursuing the "homosexual agenda," is actually catering to a culture that is not "mainstream" in nature.[251] This kind of behavior, Scalia says, is indicative of the Court's desire to overstep its judicial boundaries in an effort to push democratic change. According to Scalia, the limitations of the Texas statute are "well within the range of traditional democratic action," and should be repealed by the people if they are perceived to be oppressive rather than "necessary and

[246] Ibid, p. 599.
[247] Ibid, p. 599.
[248] Ibid, p. 599.
[249] Ibid, p. 602.
[250] Ibid, p. 602.
[251] Ibid, p. 602-603.

proper."[252] With this argument, Justice Scalia clearly expresses concern with the Court's consideration of the separation of powers tradition, specifically noting that "it is the premise of our system that [judgments regarding the validity of state laws] are to be made by the people, and not imposed by a governing caste that knows best."[253]

With the various components of his argument in mind, it is clear that Scalia primarily takes issue with the way the Court presents itself in the context of separate powers and the judicial tradition as a whole. He argues that the Court's ruling in *Lawrence* is inconsistent with the doctrine of *stare decisis,* that it misrepresents the definition of a "fundamental right," and finally that the Court's decision will ultimately have adverse effects on the implementation of morality-based legislature in the future. To some extent, he also expresses dissatisfaction with the Court's consideration of "outside agendas" with claims that the *Lawrence* decision was framed to cater to groups such as the LGBT rights movement, among others. While this criticism--and the many others concerning homosexual rights included in the dissent--may be indicative of Scalia's personal beliefs regarding homosexuality, it is more clearly a reflection of his judicial philosophy and position on how the Court should behave. Based on his well-documented textualist and originalist beliefs, it is perhaps to be expected that Scalia advocated a position of deference and overall, of restraint, in a case concerning a constitutional right derived from substantive origins.

[252] Ibid, p. 603.
[253] Ibid, p. 603-604.

SECTION III: RESPONSE AND CRITICISM

Given the complex and substantive nature of *Lawrence v. Texas* as an individual decision, it is not surprising that legal scholars have differing and often conflicting viewpoints on the reasoning used in the case and its expected societal impact. This section will briefly analyze two articles written by legal scholars about the *Lawrence* decision, one of which generally agrees with the legal reasoning employed, and the other article presenting a more critical viewpoint. Notably, both articles were written in 2004, only a year after the *Lawrence* case was decided, indicating little time-related "distance" between the decision and the articles' analysis of that decision. It is also important to note that the two articles articulate very different viewpoints but were both written in the context of a relatively conservative political and judicial era. The former, written by legal scholar Laurence H. Tribe, primarily concludes that the *Lawrence* decision presented a new approach to substantive due process and successfully advocated for marginalized groups by affirming the constitutional protection of individual liberty. This standpoint is perhaps expected from Tribe, as he represented Michael Hardwick in *Bowers v. Hardwick* and has worked with the National Gay Task Force to help overturn state laws perceived as discriminatory towards homosexuals.[254] The latter article presents a highly critical analysis of the *Lawrence* decision written by Nelson Lund and John O. McGinnis, which focuses on the unrestrained use of substantive due process and the majority's distortion of the Court's role as the judiciary. Again, the position of Lund and McGinnis is not particularly surprising given their respective judicial beliefs; Lund has written several articles emphasizing textualism and judicial restraint, while McGinnis has released books and other writings defending the

[254] Jackie M. Blount, *Fit to Teach: Same-Sex Desire, Gender, and School Work in the Twentieth Century*, (State University of New York Press), p. 160.

originalist theory. While both articles are clearly biased either in favor of or against the *Lawrence* decision, they also address valid points for both sides of the argument in a relatively controversial case.

In "Lawrence v. Texas: The "Fundamental Right" That Dare Not Speak Its Name," Laurence Tribe argues that "*Lawrence*, more than any other decision in the Supreme Court's history, both presupposed and advanced an explicitly equality-based and relationally situated theory of substantive liberty" to create an unprecedented constitutional concept.[255] Through this action, the Court made a conscious decision to reject the notion that substantive due process precedential decisions can be compiled into a "fixed list defined by tradition," instead characterizing them as "reflections of a deeper pattern involving the allocation of decisionmaking roles."[256] This pattern, Tribe suggests, "must be constructed as much as it is discovered," meaning that the Court understands that the contribution of each decision to the overall development of substantive due process is not fully understood at the time of said decision.[257] Because the *Lawrence* decision questioned the fundamental logic behind *Bowers*--specifically, by redefining the "fundamental right" assessed in *Bowers*--it subsequently "altered the historical trajectory of substantive due process and thus of liberty."[258] Thus, Tribe's primary argument is that the "core contribution" of the *Lawrence v. Texas* decision is "the manner in which the Court framed the question of how best to provide content to substantive due process rights."[259]

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[255]Laurence H Tribe, "Lawrence V. Texas: The "Fundamental Right" That Dare Not Speak Its Name," *Harvard Law Review* 117, no. 6 (2004): 1893-955, p. 1898.
[256] Ibid, p. 1899.
[257] Ibid, p. 1899.
[258] Ibid, p. 1899.
[259] Ibid, p. 1900.

Tribe begins his assessment of the *Lawrence* decision by analyzing what he perceives as Justice Kennedy's central thesis, which states:

> "Equality of treatment and the due process right to demand respect for conduct protected by the substantive guarantee of liberty are linked in important respects...and a decision on the latter point advances both interests."[260]

With this statement in mind, Tribe identifies two primary concepts highlighted in Kennedy's thesis that also serve to define much of the reasoning in the *Lawrence* decision. The first of these concepts deals with the fundamental issue, or "vice" in the Texas statute's prohibition of same-sex sodomy. Tribe argues that the principal "vice" was the statute's "stigmatization of intimate personal relationships between people of the same sex," as opposed to the dangers of sustaining a moribund law or the attempt to "punish" homosexuals for engaging in sexual activity.[261] In response to this "vice," the Court stated that these relationships should be protected under the law in the same way that various types of relationships between heterosexual couples are, essentially focusing on "the centrality of the relationship in which intimate conduct occurs."[262] Thus, the Court rejected the idea that the proposed "fundamental right" dealt specifically with the nature of the intimate conduct, which was the central holding in *Bowers*, and instead classified sexual acts as a mere component of the greater personal bond between two people. The Court also emphasised that the definition of a "relationship" varies and should not be regulated by any branch of the government without a "rational basis" for doing so. Even relationships that "[lack] any semblance of permanence or exclusivity," as is the case in the circumstances of *Lawrence,* are recognized by the Court as being an expression of liberty.[263] Tribe argues that if the Court had not specified the protection of these types of relationships, then the state would

[260] Ibid, p. 1903.
[261] Ibid, p. 1903-1904.
[262] Ibid, p. 1904.
[263] Ibid, p. 1904.

have had the ability to determine what defines a meaningful relationship, among other factors, and would ultimately have "drained those relationships of their unique significance as expressions of self-government."[264] The second central concept deals with the stigmatization of same-sex relationships and sexual activity, which Tribe argues is "concretized and aggravated by the [Texas statute's] denunciation as criminal of virtually the only ways of consummating sexual intimacy possible in such relationships."[265] Further, the *Bowers* decision perpetuated the longstanding societal and cultural notion that sodomy is strongly associated with--if not equivalent to--homosexual intercourse.[266] Thus, the Texas statute and the decision in *Bowers* served to marginalize same-sex couples by criminalizing acts central to their lifestyle and the way in which they define relationships, which is why Tribe concludes that the Court was right in its decision to overrule *Bowers*.

Tribe concludes by asserting that although the *Lawrence* decision is complex in nature, at its heart is "an understanding that liberty is centered in equal respect and dignity for both conventional and unconventional human relationships."[267] In much of the article, Tribe argues that the Court's use of substantive due process in *Lawrence* was unprecedented and unconventional but simultaneously necessary in order to provide citizens with an affirmation of their right to personal liberties and autonomy in the face of legislation that further stigmatized already marginalized groups. Tribe also concludes that by presenting substantive due process as a tool used not to establish a list of "fundamental rights," but rather to protect the broader relationships which define those rights, the Court ultimately redefined the concept itself as constantly evolving. Generally, Tribe seems to approve of the Court's use of substantive due

[264] Ibid, p. 1905.
[265] Ibid, p. 1905.
[266] Ibid, p. 1905.
[267] Ibid, p. 1955.

process and the legal reasoning it used to support the decision to expand individual liberties and rights.

Conversely, Nelson Lund and John O. McGinnis's article, "*Lawrence v. Texas* and Judicial Hubris" presents a different view of the judicial concepts presented in the *Lawrence* case and how the Court addressed them, as is evidenced by its title. Describing the *Lawrence* decision as "[displaying] a dismissive contempt for both the Constitution and the work of prior Courts," Lund and McGinnis express clear disapproval for the reasoning used by Justice Kennedy and the majority of the Court in overturning the Texas statute.[268] Notably, Lund and McGinnis state early on in the article that they "have no sympathy for the statute that the Court struck down," but disagree regardless with the kind of "judicial improvisation" used by the *Lawrence* majority.[269]

Lund and McGinnis first discuss the use of substantive due process by the Court in several notable cases, arguing that such a concept "[provides] a textual thunderbolt that Olympian judges can hurl at any law that offends them," a statement which is proven through analysis of these cases.[270] They subsequently cite cases like *Dred Scott v. Sanford,* the *Slaughter-House Cases,* and *Lochner v. New York* as early examples of the Court's misuse and misinterpretation of substantive due process. The issue that the Court never addressed in these early cases, Lund and McGinnis argue, "was the need to articulate some principled basis, having some real connection to the Constitution, for distinguishing constitutionally tolerable legislative adjustments from those which are beyond the pale."[271] Following the "Lochner era," the Court

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[268] Nelson Lund and John O. McGinnis, "Lawrence v. Texas and Judicial Hubris," (*Michigan Law Review* 102, no. 7 (2004)), p. 1557.
[269] Ibid, p. 1557.
[270] Ibid, p. 1560.
[271] Ibid, p. 1565.

then established limits for the use of substantive due process in *United States v. Carolene Products* by creating three categories for the Court to use in decisions restricting the state under the Bill of Rights, which are listed as follows:

> "1) challenges to laws that on their face fall within a specific constitutional prohibition, including the Bill of Rights guarantees "incorporated" into the Fourteenth Amendment by substantive due process, 2) challenges to laws that distort the political process by creating obstacles to the repeal of undesirable legislation, and 3) challenges to laws disadvantaging "discrete and insular minorities."[272]

Lund and McGinnis characterize these categories as being "as close as the Court had ever come to creating a disciplined framework for the development of substantive due process," and they were implemented relatively faithfully by the Court up until *Griswold v. Connecticut.*[273] Once the *Griswold* decision reverted to the less structured form of substantive due process, with decisions like *Roe v. Wade* following suit, Lund and McGinnis argue that the concept "now put the Court in the vanguard of social change" as a form of "liberation jurisprudence."[274] *Bowers v. Hardwick* in turn then declined to adhere to the policy of substantive due process that had been normalized in the context of "right to privacy" cases, instead offering the potential of "leaving existing due process precedents in place, while refusing to extend the logic of those precedents into new areas of application."[275] The unanimous verdict in *Washington v. Glucksberg* only served to confirm the restrictions on substantive due process set in place by *Bowers*, but Lund and McGinnis conclude that despite these efforts, the *Griswold-Roe* line of cases continued to act as an "insuperable obstacle," ensuring that the doctrine itself could never represent anything

[272] Ibid, p. 1566.
[273] Ibid, p. 1567.
[274] Ibid, p. 1570.
[275] Ibid, p. 1571-1572.

other than "judicial policymaking."[276] The development of substantive due process to a "point of no return," so to speak, is a crucial component of what Lund and McGinnis argue characterizes the "poorly reasoned" *Lawrence* decision.[277]

Lund and McGinnis first identify issues of interpretation in the *Lawrence* decision that are related to its use of substantive due process. The language used by Justice Kennedy in composing the Majority Opinion is characterized as vague by Lund and McGinnis, who question what the broad concepts of liberty and existence so heavily relied on in the legal reasoning even mean in a constitutional context. They conclude that Kennedy is purporting to establish three propositions:

> "1) [that] Supreme Court precedents protect the freedom to make certain choices about matters relating to sex; 2) [that] people are free to think whatever they want to think about existence, meaning, the universe, and the mystery of human life; and 3) [that] the First Amendment sharply limits the power of government to attempt to compel beliefs about these matters."[278]

The latter two of these three propositions, however, are concluded by Lund and McGinnis to be irrelevant to the subject matter of *Lawrence* unless an extreme form of substantive due process is used to relate acts of sodomy to existence and other similar concepts. This relationship is of course one of the primary components of Kennedy's argument, and as such, is said by Lund and McGinnis to have "[demolished] all those aspects of substantive due process doctrine through which previous Courts had sought to give it an intelligible and law-like character."[279] Further, they take issue with the Court's "bizarre reformulation" of the "fundamental right" cited in *Bowers*, arguing that the "right to engage in sexual activity" would not be interpreted by the Court in a way that would simultaneously demean the relationship of the subjects in question, as

[276] Ibid, p. 1573.
[277] Ibid, p. 1614.
[278] Ibid, p. 1577.
[279] Ibid, p. 1578.

the *Lawrence* majority suggests would be a possibility. This effort by the Court to redefine the "fundamental right" addressed in the *Bowers* decision is subsequently viewed by Lund and McGinnis as representative of the devolution of the substantive due process doctrine to merely a "tool through which the Court can simply impose on the nation its own visions of human freedom, the meaning of the universe, and the mystery of human life."[280] Lund and McGinnis essentially argue that it is not the Court's place to make vague statements and unjustified assertions under the guise of upholding substantive due process.

Lund and McGinnis next turn to the Court's decision to overrule *Bowers v. Hardwick* and criticize its reasoning for doing so, arguing that the majority of the claims made by the majority are either vague or false in nature. For instance, they suggest that the Court "refuses to make express use of [the] categories" used to determine the existence of a "fundamental right" in the *Lawrence* case, thus "leaving its standard of review indeterminate."[281] Further, they take issue with the Court's reliance on the idea of an "emerging awareness" taking precedence over a clearly defined and deeply rooted legal tradition in order to justify protection of the rights in question. While Lund and McGinnis do concede that there was some semblance of an "emerging awareness" in the American Law Institute's 1955 recommendation for states to change their laws criminalizing private sexual conduct, around half of the states still had sodomy laws intact at the time of the *Bowers* decision, thereby rendering that characterization invalid.[282] While Lund and McGinnis cite a few other perceived inconsistencies in the *Lawrence* majority's rationale for overruling *Bowers,* the aforementioned reasons are perhaps of most relevance to their overall argument.

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[280] Ibid, p. 1582.
[281] Ibid, p. 1578.
[282] Ibid, p. 1580.

The central issue for Lund and McGinnis with respect to these criticisms--and arguably, the *Lawrence* decision in its entirety--is what they perceive to be a lack of tangible legal reasoning used for justification of the principles the Majority Decision affirms. Subsequently, the Court's justification of the *Lawrence* decision as a whole, supported primarily by the doctrine of substantive due process, is viewed by Lund and McGinnis as an overreach of the Court's powers as a judiciary that above all else, is not faithful to precedent or to the text of the Constitution. They suggest near the beginning of the article that the *Lawrence* majority could have concluded that the "right to privacy" decisions are fundamentally about the "right to sexual freedom," which would have encapsulated the *Griswold, Roe,* and *Lawrence* decisions reasonably, or simply used the Equal Protection Clause to conduct rational basis review of the Texas statute.[283] Ultimately, however, the Court chose to support its expansion of privacy rights by establishing rights and concepts that Lund and McGinnis claim cannot reasonably be rooted in the Constitutional text. Later in the article, Lund and McGinnis argue that these provisions established without constitutional justification in the *Lawrence* decision will likely lead to the imposition of "substantial costs" on the American people and on the legal tradition as a whole.[284] Again, this is not a surprising viewpoint given Lund and McGinnis's respective adherence to the judicial theories of textualism and originalism, which generally call for a form of judicial restraint.

Ultimately, the two legal review articles discussed above conflict on a fundamental level, but primarily disagree on two points: 1) that the *Lawrence* majority's use of substantive due process is justified, and 2) that the Court exerts a reasonable amount of power as a judicial body in determining the outcome and legal reasoning of the *Lawrence* case. Where Tribe argues that

[283] Ibid, p. 1574.
[284] Ibid, p. 1598.

the Court establishes a new, beneficial interpretation of the substantive due process doctrine, Lund and McGinnis argue the opposite: that the Court is further manipulating the doctrine to satisfy their own needs without regard for the Constitution. Further, Tribe suggests that the Court's use of substantive due process is justified because it is used for the expansion of personal liberties and notions of autonomy, which affirm the rights of marginalized groups previously unsupported by the Court. Conversely, Lund and McGinnis state that the broad concept of "liberty" established is a judicially-created right based entirely on substantive due process, and further, that the Court makes no effort to prove the existence of a "fundamental right" relative to the case that is rooted in precedent and tradition. With reference to the second point, Tribe primarily argues that the Court's decision in *Lawrence* is made within its rights as a judiciary body and is ultimately made for the benefit of people's privacy rights. Lund and McGinnis evidently disagree on a fundamental level, repeatedly asserting that in deciding *Lawrence* using substantive due process, the Court completely overstepped its judicial boundary and subsequently made no effort to maintain a reasonable separation of powers.

SECTION IV: CONCLUSION

As in the case of *Griswold*, it is difficult to truly characterize the Court's complex decision in *Lawrence v. Texas* as a resounding success or failure. The *Lawrence* decision addressed and redefined numerous concepts, such as the idea of "fundamental rights," personal expressions of individualism and autonomy, and even the doctrine of substantive due process. The *Bowers* case represented a deviation in terms of subject material for "right to privacy" cases and simultaneously an attempt by the Court to limit the trend of expanding privacy rights

through the use of substantive due process. At its core, the *Lawrence* decision rejected the conclusions reached in *Bowers* and argued that the "right to privacy" is inherently about an individual's own conception of how they want to live their life, including the private or public relationships they choose to establish in their journey of self-discovery. *Lawrence* embraced the concept of substantive due process and used it as a tool to establish this new idea of a "right to privacy" that ultimately provided constitutional protection for marginalized groups. Whether or not this was the "correct" legal course of action in providing for these groups of people is of course debatable.

Conclusion

Analysis of relevant legal articles and Supreme Court cases reveals several conclusions about the development of a constitutional "right to privacy" in the American legal tradition:

First--and perhaps most obviously--the "right to privacy" as defined in a legal sphere is about more than simply wanting to be "let alone"; it is emblematic of individual notions of liberty, autonomy, and freedom that allow people to define themselves and their relationships with others, all of which contributes to a greater understanding of the human experience. In the context of a "right to privacy," the Court has specifically referenced reproductive rights and elements of sexuality as small but crucial components used to construct an individual's conception of himself or herself. Having the ability to make personal decisions and build intimate relationships with respect to these elements in a private setting came to be a fundamental component of the constitutional "right to privacy." These things are perhaps not what the proposed "right to privacy" was initially intended to protect, but are ultimately indicative of what it came to embody as a result of the Court's interpretation of the "right to privacy" established in the Warren and Brandeis article to focus on cases dealing with elements of sexuality.

Second, the Court has generally concluded that an individual's constitutional "right to privacy" should not be infringed upon by the legislature or the judiciary unless either party has a legitimate interest in doing so. Of course, what constitutes a "legitimate interest" is not necessarily concrete and is primarily determined on a case-to-case basis through the use of either substantive due process or the "rational basis" test. Further, it is evident that many Justices who make up the Court throughout the process of establishing a "right to privacy" do not agree with

the idea that such a right is grounded in the Constitution in the first place, and as such, do not see many of the statutes in question as violating any individual right. Still, the idea of constitutional insulation against government violation of individual privacies is generally consistent throughout the development of a legal "right to privacy." Even in cases where the Court does not rule in favor of expanding privacy rights, it still acknowledges the importance of protecting individual liberties by determining that the statute in question is legitimate in its infringement of personal autonomy and is not simply imposing restrictions on individuals without a "rational basis."

Third, societal development plays a relatively significant role in the establishment of a "right to privacy." Privacy cases concerning reproductive rights would likely not have been addressed in the Court when they were without the efforts of Planned Parenthood initiatives to encourage and normalize the use of contraceptives, among other things. In the years prior to *Griswold v. Connecticut,* the idea of a constitutional "right to privacy" with respect to reproductive rights was not feasible, as is evidenced by the failed "test cases" pushed by Planned Parenthood. This of course was due in part to the Court's internal struggle with maintaining a separation of powers, but also had to do on a larger scale with the level of societal acceptance of contraception practices. The Court likely would not have granted a writ of certiorari to a case that its members felt was not justiciable or societally relevant in some sense.

Fourth, and perhaps most prominently, the development of a constitutional "right to privacy" was significantly affected by the Court's conceptions of its powers and limitations on an both an internal and external basis. Internally, the Court had to consider long-standing judicial traditions and theories and subsequently figure out how or if the "right to privacy" could emerge without violating the Constitution itself. This was clearly a concern for the Court, as is evident in Justice Douglas's use of several constitutional amendments to justify the establishment of a

"right to privacy" in *Griswold* without invoking substantive due process. Externally, the Court needed to maintain a reasonable separation of powers between the judicial and legislative branches while still considering individual rights. This concern is at the heart of every "right to privacy" decision and played a major role in shaping the Court's approach to expanding privacy rights in general. These internal and external concerns indicate and exemplify a larger struggle within the Court to properly define its role in an ever-changing society, which remains a component of the judicial experience to this day. To an extent, then, the development of a constitutional "right to privacy" serves as an indication of the simultaneous development of judicial attitudes regarding the Court's role in society. Cases like *Griswold* and *Lawrence* are perhaps indicative of the Court's willingness to expand its role in some regard, while a case like *Bowers v. Hardwick,* for instance, is a clear attempt by the Court to exhibit restraint.

All of these conclusions are ultimately derived from the two central components addressed in the introductory section of this thesis and serve to affirm the notion that the "right to privacy" which has come to be considered a fundamental provision of the Constitution, did not emerge quickly or without struggle. At its core, the development of a "right to privacy" serves to represent a larger evolution of social attitudes, judicial beliefs, and above all else, notions of liberty and personal autonomy that define what it means to be a human being.

Appendix: Supreme Court Biographies

SECTION I: COURT BIOGRAPHIES

The Warren Court

Lasting from 1953-1969, the Warren Court and its rulings are characterized as having "changed not only American law, but also American society," helping to lead the so-called "civil rights revolution" to greater heights.[285] The Warren Court was born into the "conformist" 1950s, which was characterized by a "storm" of problems: high levels of anxiety over the Cold War and subsequent Red Scare, the end of the Korean War, and the divisionary impact of Jim Crow laws still significant.[286] Conformity acted as the "calm in the storm," so to speak, encouraging idyllic suburban lifestyles for middle-class white families to forget about the bigger issues plaguing the nation. Though the nation as a whole saw higher life expectancy rates, more educational opportunities, and low unemployment rates, the same could not be said for minorities.[287] Though the Civil Rights movement made some progress during the fifties, it also needed tangible support from the government. The Warren Court essentially acted as the form of support that the legislature did not provide.

The sudden death of Chief Justice Fred Vinson in 1953 gave President Dwight Eisenhower the opportunity to shape the Court significantly; as such, he appointed Earl Warren, a moderate Republican who seemed like a reliable leader for the Court.[288] As the Chief Justice, Warren led the Court with "his demeanor...warmth...and clear convictions," and a "results-

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[285] Peter Charles Hoffer, Williamjames Hull Hoffer, and N.E.H. Hull, "The Warren Court, 1953–1969," In *The Supreme Court: An Essential History, Second Edition*, 333-68, (University Press of Kansas, 2018), p. 333.
[286] Ibid, p. 333-334.
[287] Ibid, p. 334.
[288] Ibid, p. 335.

oriented" perspective, which helped him "[gain] his colleagues' admiration."[289] Over time, he also developed an "equitable view of the Constitution and the role of judging," thus resulting in several of the Court's key decisions involving equitable remedies.[290] Though the makeup of the Warren Court changed throughout its sixteen year tenure, the composition of the Court from 1960-1969 is most relevant to understand in detailing a legal "right to privacy." Justices Black, Frankfurter, Douglas, and Clark were appointed to the Warren Court prior to Earl Warren's appointment, and were split relatively equally in terms of ideology--Black and Douglas both voted liberally, Frankfurter conservatively and Clark generally voting either conservatively or moderately. The addition of John Marshall Harlan II in 1955 shifted the balance to the right, as he was famously strict with his judicial philosophy of restraint, more often than not putting him in the conservative camp. William Brennan's 1956 appointment had the complete opposite effect, as Brennan became a consistent member of the liberal coalition on the Court, while the appointment of Charles Whittaker a year later did little to shift the balance, as he generally acted as the "swing vote" in most cases, though he did lean conservative in the context of the Court. Eisenhower's final appointee, Potter Stewart, typically voted in the conservative faction during his time on the Court, though he was perhaps more moderate in the context of the early 1960s Warren Court. This was the ideological composition of the Court at the time of the *Poe v. Ullman* decision, and though it shifted slightly by the time of *Griswold* with the addition of Byron White and Arthur Goldberg to replace Frankfurter and Whittaker, respectively.

Retrospectively speaking, the Warren Court generally held two primary concerns over the course of its tenure: 1) establishing and maintaining a "robust democracy," and 2) understanding

[289] Ibid, p. 337.
[290] Ibid, p. 337.

and using the Court's ability and role in the government to improve conditions for the disadvantaged.[291] These concerns underscored the Court's "forays into new constitutional territory," which shaped public opinion on topics like desegregation, law enforcement, and most notably for the purposes of this essay, privacy. Though the Warren Court only adjudicated on two prominent "right to privacy" cases, its resulting decisions in both *Poe v. Ullman*, and more notably, in *Griswold v. Connecticut,* ultimately impacted the development of privacy rights for decades to come.

The Burger Court

Given the judicial activism exhibited by the Warren Court for over a decade, the assumption made by many--that the "rights revolution" spearheaded by the Warren Court would inevitably lead to a period of judicial "consolidation and retrenchment"--is certainly reasonable.[292] With the failure of then-President Lyndon B. Johnson to successfully nominate a replacement for Chief Justice Earl Warren upon his retirement in 1968, the shift in power following the 1969 presidential election gave new President Richard Nixon the opportunity to appoint a new Chief Justice whose jurisprudence and ideological beliefs aligned more closely with that of his own. Nixon, a conservative Republican, rejected the high degree of judicial activism exerted by the Warren Court during its tenure, even dedicating a part of his presidential campaign to denouncing the jurisprudential precedent set by the Warren Court.[293] Further, Johnson's failed appointment of Abe Fortas to the position of Chief Justice brought to light

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[291] Ibid, p. 368.
[292] Peter Charles Hoffer, Williamjames Hull Hoffer, and N.E.H. Hull, "The Burger Court, 1969–1986." In The Supreme Court: An Essential History, Second Edition, 369-407, (University Press of Kansas, 2018), p. 374.
[293] Ibid, p. 369.

several concerning financial decisions made by the then-Associate Justice. Fortas' confirmation was thus blocked by the Senate, and he later resigned from his position as Associate Justice only a year later following similar accusations of financial corruption. Fortas' resignation and the subsequent opening of two seats on the Court gave Nixon the ability to not only impact the way that the Court functioned as a judicial body, but to also shape the fundamental ideological structure of the Court, thereby resulting in the potential for a major change in jurisprudence.

Unfortunately for Nixon, the "conservative counter-revolution" he desired to see in the Court did not come to fruition according to his expectations.[294] After several poor nomination attempts for both positions, Warren Burger and Harry Blackmun were confirmed as the new Chief Justice and Associate Justice of the Supreme Court, respectively. Many legal scholars have found it difficult to characterize the Burger Court's tenure as altogether consistent or restrained in nature, despite Nixon having nominated a total of four Justices to the Court prior to his resignation in 1974. Despite Nixon's best efforts, however, the makeup of the Burger Court, while perhaps conservative leaning on its face, was in reality inconsistent. Of the Nixon nominees, only William Rehnquist's jurisprudence proved consistent with Nixon's conservative aims; both Burger and Lewis Powell were later characterized as "conservative centrists," while Harry Blackmun made a tangible ideological switch from conservative to liberal during his tenure.[295] The nominations of John Paul Stevens and Sandra Day O'Connor by Presidents Ford and Reagan respectively did not do much to alter the balance further, as Stevens proved to be a libertarian or in the liberal block on most decisions, and while O' Connor was predominantly conservative in her jurisprudence, she voted liberally or moderately in a number of cases during

[294] Ibid, p. 369.
[295] Ibid, p. 369.

her time on the Court.[296] The Justices appointed prior to the establishment of the Warren Court--William Brennan, Thurgood Marshall, and Byron White--remained relatively consistent in their jurisprudences, with the former two skewing liberal and the latter typically conservative.

By the time of the *Bowers* case, the Burger Court was mixed in terms of individual ideology and was also relatively inconsistent on a jurisprudential basis. In addressing the former issue, it seems that any issues of inconsistent jurisprudence on an individual level are not applicable in the context of the *Bowers* decision. The decision was ultimately split 5-4 with the majority composed of the Justices typically characterized as "conservative": White, Burger, O'Connor, Powell, and Rehnquist. In this sense, the *Bowers* case highlights the ideological divide present in most of the Burger Court's decisions and does not suggest that any of the Justices, whether affirming or dissenting, deviated strongly from their public ideological affiliation.

The Rehnquist Court

As the relative liberalism of the 1960s and 1970s gradually transitioned into the mainstream conservatism of the 1980s, Nixon's "silent majority"--of which Rehnquist was an active participant--became Reagan's "moral majority," indicating the possibility of a similar change developing in the Court.[297] One major component of Reagan's presidency--the idea of a "new federalism" campaign calling for large scale devolution and greater deference to states--was arguably reflected in the Rehnquist Court's jurisprudence.[298] With President Reagan's dual appointment of conservative Chief Justice William Rehnquist and strict textualist Associate

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[296] Ibid, p. 369.
[297] Peter Charles Hoffer, Williamjames Hull Hoffer, and N.E.H. Hull, "The Rehnquist Court, 1986–2005." In *The Supreme Court: An Essential History, Second Edition*, 408-42, (University Press of Kansas, 2018), p. 409.
[298] Ibid, p. 409.

Justice Antonin Scalia in 1986, the future of the Court seemed to lean conservative in comparison to that of its predecessors.

Initially, the Rehnquist Court had seven additional holdovers from the Burger era: William Brennan, Byron White, Thurgood Marshall, Harry Blackmun, Lewis Powell, John Paul Stevens, and Sandra Day O'Connor, making the ideological balance more centrist in nature, as many of the Justices had liberal or conservative tendencies but ultimately voted moderately in many cases. With the retirement of Justice Powell in 1987, President Reagan struggled to find an adequate replacement, with his first two nominees failing to complete the Senate nomination process.[299] His third attempt at the nomination with Anthony Kennedy was ultimately successful, though Kennedy famously became a "swing vote" on the Court. The composition of the Rehnquist Court did not change again until 1990 with the George H.W. Bush-era appointment of David Souter, who was thought to be a reliable conservative but actually ended up skewing liberal. President Bush's next appointment in 1991, Clarence Thomas, conversely joined the conservative faction, often voting with Scalia due to similar judicial philosophies. Though these changes left the Rehnquist Court relatively conservative as a whole, the 1993 and 1994 appointments of Ruth Bader Ginsburg and Stephen Breyer, respectively, helped keep the liberal faction of the Court intact.

With respect to privacy-related cases, the Rehnquist Court was often divided in its affirmation of the "right to privacy," upholding the right in *Planned Parenthood v. Casey, Stenberg v. Carhart, Lawrence v. Texas,* and *Stenberg v. Carhart,* the only notable exception being *Webster v. Reproductive Health Services,* in which the majority voted against reaffirmation of the right. With the exception of *Lawrence v. Texas,* several of these decisions in favor of the

[299] Ibid, p. 410.

"right to privacy" also arguably limited the scope of the right itself, placing greater legal restrictions on

SECTION II: CHIEF JUSTICE BIOGRAPHIES

Earl Warren (Warren Court)

Appointed by President Dwight Eisenhower in 1953, Chief Justice Earl Warren's "personality, experiences, philosophy, and political talents gave the Court's output its unique combination of liberalism through compromise."[300] Though Warren was a registered Republican, a political leaning which perhaps tends to be associated with judicial conservatism, his judicial philosophy was that of a liberal activist. Prior to his career on the Court, Warren was active in politics, acting as the Attorney General for California and then the Governor of California, having had no prior judge experience before his appointment.[301]

During his time on the Court, Warren became somewhat of a "symbol for many young people of their own rebellion against the social, political, and economic deformities of their American life."[302] Warren's judicial approach was perhaps difficult to define and is misconceived by many as being strictly "results-oriented" and lacking "intellectual rigor or consistency."[303] In practice, Warren's views were generally grounded in the concept of equity,

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[300] Peter Charles Hoffer, Williamjames Hull Hoffer, and N.E.H. Hull, "The Warren Court, 1953–1969," In *The Supreme Court: An Essential History, Second Edition*, 333-68, (University Press of Kansas, 2018), p. 335.
[301] Ibid, p. 336.
[302] Michael E. Parrish, "Earl Warren and the American Judicial Tradition," (*American Bar Foundation Research Journal* 7, no. 4 (1982)), p. 1180.
[303] Ibid, p. 1181.

which extended to the overall practices of the Court as a result.[304] In the context of privacy cases, Warren voted to establish the constitutional "right to privacy" in *Griswold v. Connecticut*, and dissented in *Poe v. Ullman.*

Warren Burger (Burger Court)

Appointed in 1969 by President Richard Nixon, Warren Burger was thought to be a conservative Chief Justice who could reverse the "rights revolution" exerted by the preceding Warren Court and establish a Court grounded in judicial restraint. Characterized as a "law and order" conservative and proponent of judicial restraint, Burger's leadership style and ideological leanings seemed to mirror that of Nixon, at least initially.

In practice, however, Burger's jurisprudence and leadership style was inconsistent in comparison with what Nixon and other conservatives expected. Perhaps his greatest accomplishment during his time as Chief Justice was his improvement of the Court's administrative practices. In terms of judicial philosophy, Burger often made decisions on a case-by-case basis and lacked the charisma of his predecessor, characterized as having had a "hard time delegating responsibility and compromising with others."[305] Burger often joined the Majority Opinion even when he did not personally agree with the legal reasoning highlighted in a given decision, perhaps in an attempt to publicly establish himself as a leader on the Court, or to control the narrative presented by the text of the opinion. This resulted in Burger's public support of decisions deemed too liberal or moderate for the Nixon Administration and the conservative agenda in general, including *Roe v. Wade.* With respect to privacy-related cases,

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[304] Peter Charles Hoffer, Williamjames Hull Hoffer, and N.E.H. Hull, "The Warren Court, 1953–1969," In *The Supreme Court: An Essential History, Second Edition*, 333-68, (University Press of Kansas, 2018), p. 333.

[305] David M. O'Brien, "The Supreme Court: From Warren to Burger to Rehnquist," (*PS* 20, no. 1 (1987)), p. 14-15.

however, *Roe* was the only decision in which Burger joined to affirm the "right to privacy"; he dissented in *Eisenstadt v. Baird, Carey v. Population Services,* and voted in the majority for *Bowers v. Hardwick.*

William Rehnquist (Burger, Rehnquist Courts)

Characterized as "candid, consistent, and conservative," in nature, William H. Rehnquist's time on the Supreme Court as both an Associate and Chief Justice perhaps can be most accurately summarized as complex.[306] Prior to his time on the Court, Rehnquist attended Stanford University, clerked for Justice Robert H. Jackson, and acted as Assistant Attorney General to the Nixon Administration.[307] Following his 1972 nomination to the Supreme Court by President Nixon, Rehnquist faced a controversial nomination process in the Senate resulting from his distinct views on civil rights, executive powers, and perhaps most notably, his infamous memorandum to Justice Jackson advocating for the reaffirmation of *Plessy v. Ferguson* during consideration of the the landmark case *Brown v. Board of Education of Topeka* in 1952.[308] [309] Still, the Senate ultimately confirmed Rehnquist 68-26, and he joined the Burger Court as an unabashed conservative who believed that the Court should "preserve order, secure fundamental liberties, and show a healthy respect for the other branches' decisions."[310] As an Associate Justice, Rehnquist is characterized as "a hybrid, with some characteristics of the judicial

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[306] Peter Charles Hoffer, Williamjames Hull Hoffer, and N.E.H. Hull, "The Burger Court, 1969–1986." In The Supreme Court: An Essential History, Second Edition, 369-407, (University Press of Kansas, 2018), p. 374.
[307] Ibid, p. 374.
[308] Ibid, p. 375.
[309] Adam Liptak, "Memo Adds to Doubt on Rehnquist's Denials," (*The New York Times*), March 19, 2012, n. Pag.
[310] Peter Charles Hoffer, Williamjames Hull Hoffer, and N.E.H. Hull, "The Burger Court, 1969–1986." In The Supreme Court: An Essential History, Second Edition, 369-407, (University Press of Kansas, 2018), p. 375.

conservative [and some of] the judicial activist."[311] Nevertheless, he proved to vote reliably with the typically "conservative" faction of the Burger Court in most cases. With respect to the "right to privacy" cases reviewed during his time on the Burger Court--*Roe v. Wade, Carey v. Population Services International,* and *Bowers v. Hardwick*--Justice Rehnquist in all cases voted against the expansion of privacy rights even when he proved severely outspoken in his decision to do so. Rehnquist served as an Associate Justice on the Burger Court for fifteen years before succeeding Warren Burger as Chief Justice of the Supreme Court.

Following Rehnquist's 1986 confirmation hearing, Attorney General Edwin Meese characterized the newly-appointed Chief Justice as "dedicated to the rule of law and to the role of judges as prescribed in the Constitution; that is, to apply the law as it is written...not to make the law according to their own beliefs...biases...or policy preferences."[312] As Chief Justice, Rehnquist's voting record with respect to "right to privacy" cases did not change; he voted in the majority of *Webster v. Reproductive Health Services*, which limited the expansion of privacy rights, and dissented in *Planned Parenthood v. Casey*, *Stenberg v. Carhart,* and *Lawrence v. Texas.*

SECTION III: ASSOCIATE JUSTICE BIOGRAPHIES

Hugo Black (Warren Court)

[311] Robert E. Riggs and Thomas D. Proffitt, "The Judicial Philosophy of Justice Rehnquist,"(*Akron Law Review*: Vol. 16 : Iss. 4, Article 1 (1983)), p. 599-600.
[312] Peter Charles Hoffer, Williamjames Hull Hoffer, and N.E.H. Hull, "The Rehnquist Court, 1986–2005." In *The Supreme Court: An Essential History, Second Edition,* 408-42, (University Press of Kansas, 2018), p. 408.

Serving for thirty-four years on the Supreme Court as an Associate Justice, Hugo Black was the first of President Franklin Roosevelt's appointees to the Court in an effort to encourage "federal activism in economic, political, and social spheres."[313] Prior to his career on the Court, Black served as the Senator of Alabama from 1926 to 1937 and was also a member of the Ku Klux Klan, which complicated his Court appointment process due to the "nationwide outburst" regarding his former membership, along with initial skepticism from his judicial colleagues resulting from his lack of prior judicial experience.[314] Nevertheless, Black's time on the Court was characterized by an absolute belief in the literal meaning of the Constitution, particularly with reference to the Bill of Rights.[315] Black also maintained a surprisingly liberal voting record on issues, joining to strike down legal school segregation in the landmark case of *Brown v. Board of Education of Topeka (1954)* and to outlaw readings of official prayers in public school in *Engel v. Vitale (1962),* among other decisions.[316] In the context of the "right to privacy," Black adjudicated in two prominent cases while on the Warren Court: *Poe v. Ullman* and *Griswold v. Connecticut,* voting in the minority of both decisions. In *Poe,* Black dissented due to a belief that the constitutional questions addressed in the case "should be reached and

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[313]Virginia Van Der Veer, "Black, Hugo: (1886–1971) U.S. Senator and Supreme Court Justice," In *The New Encyclopedia of Southern Culture: Volume 10: Law and Politics*, edited by Ely W. James and Bradley G. Bond, by Wilson Charles Reagan, (University of North Carolina Press, 2008), p. 79.

[314] Ibid, p. 79.

[315] Peter Charles Hoffer, Williamjames Hull Hoffer, and N.E.H. Hull, "The Hughes Court, 1930–1941," In *The Supreme Court: An Essential History, Second Edition*, 252-78, (University Press of Kansas, 2018), p. 266.

[316] Virginia Van Der Veer, "Black, Hugo: (1886–1971) U.S. Senator and Supreme Court Justice," In *The New Encyclopedia of Southern Culture: Volume 10: Law and Politics*, edited by Ely W. James and Bradley G. Bond, by Wilson Charles Reagan, (University of North Carolina Press, 2008), p. 79-81.

decided."[317] In *Griswold,* however, Black argued in his dissent that there was no constitutional basis for a "right to privacy," a position that clearly aligns with his dedication to judicial restraint.

Felix Frankfurter (Warren Court)

After several years as a professor at Harvard Law School, Felix Frankfurter was appointed to the Supreme Court in 1939 by President Franklin Roosevelt, where he remained until his retirement in 1962.[318] As an Associate Justice on the Hughes, Stone, Vinson, and Warren Courts, Frankfurter was an advocate for the concepts of judicial restraint and legislative deference, qualities which are clearly reflected in the reasoning of the Majority Opinion he wrote for *Poe v. Ullman.* Described as having a "mercurial" temperament, Frankfurter's relationship with his fellow Justices is of particular interest due to the "Jekyll and Hyde [personalities]" he tended to adopt interchangeably throughout his time on the Court.[319] While he could be "quick to praise," particularly when it came to the policies of President Roosevelt or of his fellow Justices Holmes, Jackson, and Harlan, he could conversely be "quick...to find fault with those who disagreed with him," such as Justice Black, with whom Frankfurter had a longstanding rivalry.[320] Nevertheless, Frankfurter's legacy is that of a reliable conservative whose belief in the doctrine of judicial restraint with respect to the Court never wavered.

William O. Douglas (Warren, Burger Courts)

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[317] *Poe v. Ullman,* 367 U.S. 497 (1961), p. 509.

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[319] Peter Charles Hoffer, Williamjames Hull Hoffer, and N.E.H. Hull, "The Hughes Court, 1930–1941," In *The Supreme Court: An Essential History, Second Edition*, 252-78, (University Press of Kansas, 2018), p. 267.

[320] Ibid, p. 267.

Another of President Roosevelt's appointees, William Douglas was elevated to the Court in 1939 following a career a law professor at both Yale and Columbia, and then later as the head of the Securities Exchange Commission.[321] He remained on the Court as an Associate Justice for thirty-six years, serving on the Hughes, Stone, Vinson, Warren, and Burger Courts. Known as a "brilliant writer" and reliable liberal Justice on the Court, Douglas was an advocate for civil liberties and civil rights, characterized as being "at his best in finding novel and clever ways to expand the meaning of equality."[322] This characterization is consistent with Douglas's approach to the "right to privacy" cases he adjudicated on, including *Poe v. Ullman, Griswold v. Connecticut, Eisenstadt v. Baird,* and *Roe v. Wade*. In all of these cases, he voted to expand upon the "right to privacy," writing the primary Dissenting Opinion in *Poe* and the Majority Opinion in *Griswold.*

Tom Clark (Warren Court)

The first of President Harry Truman's Supreme Court appointees in 1949, Tom Clark spent his career prior to his appointment in governmental service, most notably in the Department of Justice and as Attorney General of the United States.[323] Clark also spent several years before his career on the Court campaigning against the spread of Communism, and in his early years as Associate Justice on the Vinson Court voted consistently against the extension of civil liberties to dissidents.[324] In his years on the Warren Court, however, Clark proved to vote

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[321] Ibid, p. 268.
[322] Peter Charles Hoffer, Williamjames Hull Hoffer, and N.E.H. Hull, "The Warren Court, 1953–1969," In *The Supreme Court: An Essential History, Second Edition*, 333-68, (University Press of Kansas, 2018), p. 355.
[323] Peter Charles Hoffer, Williamjames Hull Hoffer, and N.E.H. Hull, "The Vinson Court, 1946–1952," In *The Supreme Court: An Essential History, Second Edition*, 306-32, (University Press of Kansas, 2018), p. 308-309.
[324] Ibid, p. 309.

conservatively on some issues and liberally on others, characterized by scholars as "dedicated to the work of judging, not ideology."[325] True to this characterization, Clark voted for the dismissal of *Poe v. Ullman* for its lack of justiciability, and later for the expansion of privacy rights in *Griswold v. Connecticut.*

John Marshall Harlan II (Warren Court)

John Marshall Harlan II was appointed to the Supreme Court in 1955 by President Dwight Eisenhower following a lengthy career as a prosecutor and legal counsel for a variety of city, state, and federal offices, also spending a few months as a judge on the Second Circuit Court of Appeals immediately before his appointment.[326] Characterized as a "lawyer of the highest quality...with conservative instincts and broad sympathies," Harlan soon became known for his skill in crafting opinions, of which he wrote over 600 during his time on the Warren and Burger Courts.[327] He also reliably advocated for judicial restraint, federalism, and legislative deference and "exercised great influence" among his colleagues, despite dissenting from the majority in a significant amount of the cases he adjudicated on.[328] In the context of a "right to privacy," Harlan voted for the expansion of privacy rights in both *Poe v. Ullman* and *Griswold v. Connecticut.*

William Brennan (Warren, Burger, Rehnquist Courts)

Nominated to the Court in 1956 by President Eisenhower as an effort to show bipartisanship during an election year, William Brennan came to exert "an immense amount

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[325] Frances Howell Rudko, *Truman's Court: A Study in Judicial Restraint*, (Westport, Conn: Greenwood Press 1988), p. 91.
[326] Peter Charles Hoffer, Williamjames Hull Hoffer, and N.E.H. Hull, "The Warren Court, 1953–1969," In *The Supreme Court: An Essential History, Second Edition*, 333-68, (University Press of Kansas, 2018), p. 337-338.
[327] Ibid, p. 338.
[328] Ibid, p. 338.

influence over American law" during the thirty-four years he spent serving as an Associate Justice on the Warren, Burger, and Rehnquist Courts.[329] Prior to his time on the Supreme Court, Brennan served in the army and later was appointed to the New Jersey State Supreme Court up until his appointment.[330] Despite being a consistent member of the liberal faction on the Court, Brennan was largely admired for a variety of qualities, including "his grasp of the nub of legal issues...his vision, and...his ability to bring together majorities around the extension and protection of civil liberties and civil rights."[331] Brennan advocated for the idea of a "living Constitution" and cautioned against the overuse of judicial restraint and legislative deference, a judicial philosophy that is reflected in his support of an expanded "right to privacy." With respect to privacy rights, Brennan adjudicated on *Griswold v. Connecticut, Eisenstadt v. Baird, Roe v. Wade, Carey v. Population Services International, Bowers v. Hardwick,* and *Webster v. Reproductive Health Services,* advocating in each for the expansion of constitutional conceptions of privacy.

Charles Whittaker (Warren Court)

As President Eisenhower's fourth judicial appointment on the Warren Court in 1957, Charles Whittaker was chosen as a conservative to balance the ratio of an ideologically divided Court but ultimately became known as a "swing vote" Justice.[332] Despite being a capable trial lawyer and judge with qualities of "hard work, drive, and concentration" prior to his time on the Court, Whittaker believed himself to be "above his level of competence," provoking severe anxiety that would eventually lead to his resignation in 1962 on the recommendation of his

[329] Ibid, p. 338.
[330] Ibid, p. 339.
[331] Ibid, p. 339.
[332] Ibid, p. 339-340.

doctors.[333] As a Justice, Whittaker did not have much of a tangible judicial philosophy and in the context of a "right to privacy," voted with the majority in *Poe v. Ullman* before resigning.

Potter Stewart (Warren, Burger Court)

Appointed to the Court in 1959 as President Eisenhower's fifth and final appointee, Potter Stewart developed a reputation as a "conservative pragmatist" who "defied labels."[334] Before his time on the Warren and Burger Courts, Stewart served in World War II and later spent five years as a judge on the Sixth Circuit Court of Appeals leading up to his nomination.[335] Stewart's conservatism and judicial philosophy was difficult to define because of his views on various fundamental issues; for instance, he exhibited legislative deference and judicial restraint frequently, but also expressed a willingness to consider more substantive forms of reasoning when necessary.[336] In the context of a "right to privacy," Stewart voted on several notable cases including *Poe v. Ullman, Griswold v. Connecticut, Eisenstadt v. Baird, Roe v. Wade, and Carey v. Population Services International.* With the exception of his vote in the *Griswold* decision, Stewart consistently moved to expand the "right to privacy" in the context of the aforementioned cases.

Byron White (Warren, Burger, Rehnquist Courts)

Characterized as "admirable in person, tough-minded and realistic in his thinking, and pragmatic in his view of the law," Byron White proved to be a Justice grounded in realism and intellectualism during his time on the Warren, Burger, and Rehnquist Courts.[337] The first of President John F. Kennedy's appointees in 1962, White was previously a jack of all trades,

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[333] Ibid, p. 340.
[334] Ibid, p. 340.
[335] Ibid, p. 340.
[336] Ibid, p. 340.
[337] Ibid, p. 341-342.

holding careers as an NFL athlete, a decorated intelligence officer in World War II, and a corporate lawyer.[338] As a Justice, White abided by the "neutral principles" philosophy, which dictated that "only fair procedures and a commitment to the legal process should govern the outcome of a case," and disagreed strongly with the practice of substantive due process advocated for by some of his colleagues.[339] With reference to "right to privacy" cases, White notably wrote the Majority Opinion in *Bowers v. Hardwick,* a strong Dissenting Opinion in *Roe v. Wade,* and adjudicated on *Eisenstadt v. Baird, Carey v. Population Services International, Webster v. Reproductive Health Services,* and *Planned Parenthood v. Casey.*

Arthur Goldberg (Warren Court)

President Kennedy's second and last judicial appointment to the Court was Arthur Goldberg in 1962, who remained on the Court until resigning in 1965 to act as the United States Ambassador to the United Nations.[340] Prior to his appointment, Goldberg ran his own labor law practice and worked in various positions advocating for labor rights, even working as President Kennedy's Secretary of Labor for a short period of time.[341] As a Justice, his judicial philosophy was characterized by a desire to reach "fair decisions to disputes that increased opportunities for historically disadvantaged groups" which at times required the expansion of constitutional rights.[342] Goldberg adjudicated on only one "right to privacy" case, *Griswold v. Connecticut,* but delivered a notable concurring opinion defending the expansion of privacy rights using the Ninth Amendment as legal support.

Thurgood Marshall (Warren, Burger, Rehnquist Courts)

[338] Ibid, p. 342.
[339] Ibid, p. 342.
[340] Ibid, p. 342-343.
[341] Ibid, p. 343.
[342] Ibid, p. 343.

As President Lyndon B. Johnson's second appointee to the Warren Court in 1967, Thurgood Marshall "broke the color barrier on the Court" by becoming the first black Justice in the history of the Supreme Court.[343] Nicknamed "Mr. Civil Rights" for his dedication to advocating for minorities in society, Marshall worked his way up from destitute poverty to become part of the NAACP's litigation team before being appointed by President Kennedy to the Second Circuit Court of Appeals, where he worked as a Judge up until his Supreme Court nomination.[344] As a Justice on the Warren Court, Marshall "helped advance the causes of the weak, the underprivileged, and the vulnerable," writing with "real authority on injustice" resulting from his personal experiences with racism.[345] Although his extremely liberal jurisprudence in the face of an increasingly conservative Court often left him in the minority throughout his judicial career, Marshall remained consistent in his convictions and beliefs.[346] Prior to his retirement in 1991, Marshall adjudicated on a number of notable "right to privacy" cases, including *Eisenstadt v. Baird, Roe v. Wade, Carey v. Population Services International, Bowers v. Hardwick, and Webster v. Reproductive Health Services*, each time voting to expand privacy rights.

Harry Blackmun (Burger, Rehnquist Courts)

Characterized as "a people's justice" due to his "modest, genuinely warm and self-effacing" nature, Harry Blackmun was appointed to the Supreme Court in 1970 by President

[343] Ibid, p. 345.
[344] Ibid, p. 345.
[345] Ibid, p. 345.
[346] Ibid, p. 346.

Richard Nixon after a unanimous confirmation vote in the Senate.[347] He attended Harvard Law School before becoming resident council for the Mayo Clinic and working as a Judge on the Eighth Circuit Court of Appeals prior to his appointment.[348] On the Court, Blackmun was "a quick study" who "also listened to public opinion, his family, and his friends" when making decisions.[349] Judicially speaking, Blackmun primarily advocated for judicial restraint and adjudicating with the separation of powers in mind, and although he entered the Court as a conservative, his judicial philosophy noticeably appeared to grow more liberal over his years of tenure.[350] By the time of his retirement in 1994, Blackmun established himself as a key player in the establishment of a legal "right to privacy," writing the Majority Opinion for *Roe v. Wade* and other notable opinions in *Bowers v. Hardwick, Webster v. Reproductive Health Services,* and *Planned Parenthood v. Casey.*

Lewis Powell (Burger Court)

As President Nixon's second successful appointment to the Supreme Court in 1972, Lewis Powell soon came to be known as a reliable conservative, though one who was open to and capable of compromise on many issues.[351] Following his graduation from Harvard Law School, Powell briefly served in the Army Air Corps' intelligence unit before practicing law as a private attorney and later acting as the president of the American Bar Association.[352] Powell's judicial philosophy advocated for judicial restraint and legislative deference, and supported the

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[347] Peter Charles Hoffer, Williamjames Hull Hoffer, and N.E.H. Hull, "The Burger Court, 1969–1986," In *The Supreme Court: An Essential History, Second Edition*, 369-407, (University Press of Kansas, 2018), p. 372.
[348] Ibid, p. 373.
[349] Ibid, p. 372.
[350] Ibid, p. 375.
[351] Ibid, p. 373.
[352] Ibid, p. 373.

"strict scrutiny of legislation that appeared to disfavor the poor, whether in education, abortion rights, or other contexts."[353] He adjudicated on three major "right to privacy" cases during his time on the Burger Court: *Roe v. Wade, Carey v. Population Services International*, and *Bowers v. Hardwick.* In the former two cases, Powell voted for the expansion of privacy rights, but against the same outcome in *Bowers.*

John Paul Stevens (Burger, Rehnquist, Roberts Courts)

Appointed to the Court in 1975 by President Gerald Ford, John Paul Stevens was thought to be an "uncontroversial" nominee who could act as a moderate force on the Court.[354] Stevens was previously a private practice lawyer with his own firm before being appointed to the Seventh Circuit Court of Appeals by President Nixon in 1970.[355] As an Associate Justice, Stevens was quickly characterized as a "maverick," following his own school of judicial thought that favored restraint, establishing a balance between competing interests, and a "process-oriented technique."[356] As the Court became increasingly conservative, Stevens in turn became more liberal in nature. In the many "right to privacy" decisions he reviewed--including *Carey v. Population Services International, Bowers v. Hardwick, Webster v. Reproductive Health Services, Planned Parenthood v. Casey, Stenberg v. Carhart, Lawrence v. Texas, and Gonzalez v. Carhart,* Stevens voted consistently in favor of expanding the constitutional "right to privacy."

Sandra Day O'Connor (Burger, Rehnquist Courts)

President Ronald Reagan's 1981 appointment of Sandra Day O'Connor to the Burger Court made history while simultaneously fulfilling a campaign promise made to female voters--

[353] Ibid, p. 373.
[354] Ibid, p. 375.
[355] Ibid, p. 376.
[356] Ibid, p. 376.

"that [Reagan's] first appointee to the Court would be a woman."[357] As the first woman on the Supreme Court, O'Connor made a significant impact not only on the Court's demographic, but also on the Court's approach to adjudication. In terms of judicial ideology, O'Connor was at first considered conservative, but eventually proved to be moderate on many issues, making her a "swing vote" in the context of both the Burger and Rehnquist Courts.[358] Most notably, she developed a "process-oriented stance" on many social issues, including that of the "right to privacy," though this did not ensure her unwavering support of expanding privacy rights.[359] In practice, her process-oriented stance was just that, as she voted in support of the "right to privacy" in cases like *Planned Parenthood v. Casey, Stenberg v. Carhart,* and *Lawrence v. Texas,* but against its expansion in *Bowers v. Hardwick* and *Webster v. Reproductive Health Services.*

Antonin Scalia (Rehnquist, Roberts Courts)

Appointed by President Reagan in 1986 following the elevation of then-Associate Justice William Rehnquist to the Chief Justice position, Antonin Scalia established a legacy during his years on the Court of consistency and conservatism. Prior to his appointment, Scalia worked as a law professor, in the Department of Justice, and finally as a Judge on the District of Columbia Circuit Court of Appeals.[360] In terms of judicial philosophy, Scalia consistently advocated for a "plain sense, plain meaning" rule of interpretation, acting as a strong originalist and textualist

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[357] Ibid, p. 376.
[358] Ibid, p. 376.
[359] Ibid, p. 377.
[360] Peter Charles Hoffer, Williamjames Hull Hoffer, and N.E.H. Hull, "The Rehnquist Court, 1986–2005," In *The Supreme Court: An Essential History, Second Edition,* 408-42, (University Press of Kansas, 2018), p. 410.

anchor for the Court throughout his tenure.[361] As such, Scalia expressed his disagreement with the expansion of a constitutional "right to privacy" in several relevant cases, including *Webster v. Reproductive Health Services, Planned Parenthood v. Casey, Stenberg v. Carhart,* and *Lawrence v. Texas.* Notably, although he did not adjudicate on *Roe v. Wade,* Scalia has referenced the rights enumerated in the *Roe* decision various times in other "right to privacy" dissents, arguing that the case should be reviewed and subsequently overturned.

Anthony Kennedy (Rehnquist, Roberts Courts)

Following two failed judicial nominations in 1987, President Reagan appointed Anthony Kennedy to the Court one year later with unanimous support from the Senate.[362] Kennedy previously worked as a corporate lawyer in his family's law firm before being appointed as a Judge for the Ninth Circuit Court of Appeals, where he served until his Court nomination.[363] As a member of the Court, Kennedy became known as a "swing vote" on many issues, generally voting conservatively on national security and criminal rights but liberally on minority and women's rights.[364] In terms of judicial philosophy, Kennedy was known for being "the foremost advocate of the Court's primacy in determining the meaning of the Constitution" and advocated for deciding cases on an individual basis rather than strictly adhering to ideological standards.[365] Thus, Kennedy's voting record with regard to privacy rights is mixed; he voted with the liberal wing of the Court in favor of affirming the "right to privacy" in *Planned Parenthood v. Casey* and notably wrote the Majority Opinion for *Lawrence v. Texas,* but also joined the conservative faction in *Stenberg v. Carhart* and *Gonzalez v. Carhart.*

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[361] Ibid, p. 410.
[362] Ibid, p. 411.
[363] Ibid, p. 411.
[364] Ibid, p. 411.
[365] Ibid, p. 411.

Clarence Thomas (Rehnquist, Roberts Courts)

Appointed by President George H.W. Bush in 1991, Clarence Thomas reflected the Republican Party's "accommodation with the disparate groups that opposed the rights revolution," though his career path was undoubtedly "paved by the Warren and Burger Courts' decisions on race and affirmative action."[366] Prior to his appointment, Thomas acted as the Chair of the Equal Employment Opportunity Commission for the Reagan Administration and then briefly as a Judge on the District of Columbia Circuit Court of Appeals.[367] On the Court, Thomas proved to be a strict conservative who often agreed philosophically with Justice Scalia and advocated for the theories of textualism and originalism. With reference to "right to privacy" cases, Justice Thomas consistently voted against the affirmation of privacy rights on textualist or deferential grounds in *Planned Parenthood v. Casey, Stenberg v. Carhart, Lawrence v. Texas, Gonzalez v. Carhart, and Whole Woman's Health v. Hellerstedt.* He still serves on the Supreme Court to date.

David Souter (Rehnquist, Roberts Courts)

Described prior to his nomination as a "moderate conservative" and "supreme judicial craftsman," the 1991 appointment of David Souter by President Bush proved to be an easy process.[368] He acted as a Justice for the New Hampshire Supreme Court and then as a Judge for the First Circuit Court of Appeals prior to his tenure on the Court and "left little to no paper trail in any of his state legal posts," making him relatively unknown at the time of his nomination.[369] During his time on the Court, however, Souter proved to be a "maverick" in that he gradually

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[366] Ibid, p. 411-412.
[367] Ibid, p. 412.
[368] Ibid, p. 412.
[369] Ibid, p. 412.

shifted from voting in the conservative/moderate wing to siding with the liberal faction on a consistent basis.[370] His judicial philosophy is difficult to define, but as a liberal jurist, he advocated on several occasions for the interpretation of the Constitution as a "living document" with respect to precedent, suggesting that he advocated for activism or restraint on a situational basis. [371] Souter voted consistently for the expansion of privacy rights in cases such as *Planned Parenthood v. Casey, Stenberg v. Carhart, and Lawrence v. Texas.*

Ruth Bader Ginsburg (Rehnquist, Roberts Courts)

As the first of President Bill Clinton's judicial appointees in 1993, Ruth Bader Ginsburg would become known during her time on the Court as a fierce advocate for women's rights and gender equality.[372] Ginsburg worked as a law professor at Columbia University and Rutgers University for several years before joining the District of Columbia Circuit Court in 1980 as a Judge, facing many gender-related obstacles in her journey to make a name for herself in the legal community.[373] Though Ginsburg consistently votes with the liberal faction of the Court on most issues, she has characterized herself as "cautious" in her judicial philosophy, stating in a lecture at the New York University School of Law that to her, "measured motions seem...right...for constitutional as well as common law adjudication. Doctrinal limbs too swiftly shaped, experience teaches, may prove unstable."[374] In the context of "right to privacy" cases, Ginsburg has voted consistently to reaffirm the concept in cases such as *Stenberg v. Carhart, Lawrence v. Texas, Gonzalez v. Carhart,* and *Whole Woman's Health v. Hellerstedt.*

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[370] Ibid, p. 412.
[371] Ibid, p. 438.
[372] Ibid, p. 412-413.
[373] Ibid, p. 413-414.
[374] "The Supreme Court; In Her Own Words: Ruth Bader Ginsburg," (*The New York Times*, June 15, 1993, sec. U.S.), n. Pag.

Stephen Breyer (Rehnquist, Roberts Courts)

Appointed in 1994 as the second of President Clinton's nominees, Stephen Breyer brought a pragmatic and open-minded approach to the Court, making his Senate appointment process relatively easy.[375] Formerly a judge for the First Circuit Court of Appeals over the course of a decade, Breyer possessed the skill, knowledge, and experience necessary to play a key role on the Court. Indeed, he ultimately became a key member of the liberal faction on the Court, citing six interpretive tools as his means of deciding cases: text, history, tradition, precedent, and with reference to a statute, its purpose and consequences.[376] Breyer has consistently voted in favor of reaffirming a "right to privacy" in cases such as *Stenberg v. Carhart, Lawrence v. Texas, Gonzalez v. Carhart,* and most recently, *Whole Woman's Health v. Hellerstedt.*

[375] Ibid, p. 414.
[376] Dahlia Lithwick, "Scalia and Breyer Sell Very Different Constitutional Worldviews," (Slate Magazine: December 6, 2006), n. Pag.

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ACADEMIC VITA

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Education

The Pennsylvania State University, University Park
Schreyer Honors College
B.A., History 2019
B.A., Political Science 2019

Paterno Fellows Program 2015-2019

Awards and Honors

Dean's List Recipient 2015-2019

Member of Phi Alpha Delta Law Fraternity 2017-2019

Member of Phi Alpha Theta Honors History Fraternity 2018-2019

Activities

Penn State Dance Marathon: Dancer Relations Captain 2018-2019
OPPerations/Rules & Regulations Inter-Committee Liaison

- Restructured, reorganized, and managed a system of inventory for widespread use at THON events
- Coordinated inter-Committee educational initiatives and events
- Led and educated a Committee of 35 Committee Members on a weekly basis
- Monitored the health and safety of over 700 student dancer participants at THON 2019

Penn State Homecoming: Donor Relations Captain 2018
Donor Development Captain

- Procured and tracked donations to Homecoming from corporate and community donors
- Acted as the main liaison between donors and Homecoming volunteers

Penn State Dance Marathon: Dancer Relations Committee Member 2016-2018
"Weekend Warrior"/Second-in-Command

- Monitored the health and safety of over 700 student dancer participants at THON 2018
- Organized and executed strategies to ensure dancers' safe entrance and exit to the Bryce Jordan Center

Penn State Dance Marathon: Rules & Regulations Committee Member 2015-2016

Gear Chair

- Designed, ordered, and organized merchandise for Committee use
- Enforced and implemented rules designed for the safety of spectators at THON 2016

Alpha Omicron Pi Sorority 2018-2019
Website Chair

- Updated and managed the Epsilon Alpha chapter's primary website to reflect on and share its accomplishments with other AOII chapters and alumni

Alpha Omicron Pi Sorority 2017-2018
Greek Sing Chair

- Organized and choreographed a musical for performance at a show supporting the Penn State Greek Community
- Led and directed a group of over 30 sorority and fraternity members in weekly practices