SUBSTANTIVE DUE PROCESS: A HISTORY OF LIBERTY IN THE DUE PROCESS CLAUSE

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I. INTRODUCTION

The United States government has the power to create and enforce laws that regulate society. This power is generally presumed to be constitutional. However, "[t]here are limits to the extent to which the presumption of constitutionality can be pressed, especially where the liberty of the person is concerned ..." This limitation was demonstrated in 2003 when the United States Supreme Court struck down a Texas sodomy statute in *Lawrence v. Texas* pursuant to the theory of Substantive Due Process.²

In striking down the Texas statute, Justice Kennedy stated, "[l]iberty protects the person from unwarranted government intrusions into a dwelling or other private places. . . . Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct."³ This means there are certain areas of an individual’s life that the government has no right to intrude upon. Under the theory of Substantive Due Process, a court can step in via the Fourteenth Amendment’s Due Process Clause and provide substantive protection from government actions that violate an individual’s rights and liberties.⁴ This note explores Substantive Due Process by examining how it came into being and where it is going after *Lawrence v. Texas*.

II. THE HISTORY OF SUBSTANTIVE DUE PROCESS

The theory of Substantive Due Process derives from the Fourteenth Amendment’s Due Process clause. The Fourteenth Amendment was ratified after the end of the Civil War on July 9, 1868.⁵ The first sentence of the Fourteenth Amendment granted citizenship to all freed slaves.⁶ The

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3. *Id.* at 562.
4. "[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . ." U.S. Const. amend. XIV, § 1.
5. U.S. Const. amend. XIV, § 1.
6. "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside." *Id.* This sentence was aimed specifically at overturning the decision in *Dred Scott v. Sandford*, 60 U.S. 393 (1856).
second sentence contains three key provisions: 1) the Privileges and Immunities Clause,\textsuperscript{7} 2) the Due Process Clause,\textsuperscript{8} and 3) the Equal Protection Clause.\textsuperscript{9} This note focuses on the Due Process Clause.

Since its birth there has been much litigation over exactly what the Due Process Clause means and what rights and protections it affords. Eventually, three main types of Substantive Due Process cases emerged: 1) Incorporation cases, 2) Economic Substantive Due Process cases, and 3) Right of Privacy cases.\textsuperscript{10} Most of today's Substantive Due Process litigation, including \textit{Lawrence}, revolves around the Right of Privacy. However, it is instructional to have a basic understanding of the different types of litigation that have shaped the history of Substantive Due Process.

A. INCORPORATION THEORY

There has long been debate over what rights and liberties are afforded by the Constitution. Once a right or liberty is recognized, the question then becomes, “who can claim that right or liberty, and under what circumstances?” This was the problem faced with the Bill of Rights.\textsuperscript{11} The Bill of Rights explicitly guarantees many protections and rights to the People of the United States. However, an 1833 opinion by the Supreme Court in \textit{Barron v. City of Baltimore} hamstrung the effectiveness of the Bill of Rights.\textsuperscript{12} \textit{Barron} held the first eight amendments of the Bill of Rights only protected against actions by the federal government, not actions by state and local governments.\textsuperscript{13} The \textit{Barron} Court reasoned the Bill of

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\item \textsuperscript{7} “No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States . . .” U.S. Const. amend. XIV, § 1. It should be noted, however, that in the \textit{Slaughter-House Cases}, 83 U.S. 36, 79-83 (1873), the Supreme Court, for all intents and purposes, “gutted” this clause. The Court held the Privileges and Immunities Clause of the Fourteenth Amendment only conferred two substantive rights to the People: 1) the right to come to the seat of government to assert any claim he may have upon that government, and 2) the right to demand the care and protection of the Federal government when on the high seas or within the jurisdiction of a foreign government. The right to travel (within the United States) was added as a right granted by the Privileges and Immunities Clause in \textit{Saenz v. Roe}, 526 U.S. 489 (1999). In essence, however, the Privileges and Immunities Clause of the Fourteenth Amendment has been rendered ineffective.

\item \textsuperscript{8} U.S. Const. amend. XIV, § 1, \textit{supra} note 5. This clause is explained further in the note, p. 5.

\item \textsuperscript{9} “... nor deny to any person within its jurisdiction the equal protection of the laws.” U.S. Const. amend. XIV, § 1. It should be noted that “equal protection” is a very broad area of the law that encompasses civil rights and affirmative action. This paper will not explore this amazingly dense area of the law.

\item \textsuperscript{10} There has also been much litigation about “Procedural Due Process,” which the Supreme Court has interpreted to be guaranteed via the Fourteenth Amendment’s Due Process Clause. \textit{See}, \textit{e.g.}, \textit{Mathews v. Eldridge}, 424 U.S. 319 (1976); \textit{Goldberg v. Kelly}, 397 U.S. 254 (1970). This note, however, does not open that Pandora’s Box.

\item \textsuperscript{11} The First through the Tenth Amendments are commonly referred to as “The Bill of Rights.”

\item \textsuperscript{12} 32 U.S. 243 (1833).

\item \textsuperscript{13} \textit{Id.} at 247-48. It should be noted that the Ninth and Tenth Amendments do not provide any explicit right to the people of the United States. The Ninth Amendment states: “The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.” U.S. Const. amend. IX. The Tenth Amendment states: “The
Rights simply existed to ensure that a far distant federal government would not encroach on the liberty of the people who were already governed by a local and state government.14

The practical effect of *Barron* meant that a state or local government could pass a law, or initiate a state action, that would run roughshod over the Bill of Rights. Unless that law or action was at odds with that state’s Constitution, there was nothing an individual could do (outside of the political process) to receive protection from that state law or action. This is no longer the case today, so how did we come to understand that the Bill of Rights affords protection from both federal and state actions?

The idea that the first eight amendments safeguard against federal and state action was first mentioned in 1908 in *Twining v. State of N.J.*15 Throughout *Twining*, the Court toyed with the idea that a denial of the protection of the first eight amendments against state action would be a denial of due process of law. Ultimately, the *Twining* Court rejected this notion; however, a seed was planted in the Court’s garden.

In order to solve the problem of how to use the rights contained in the first eight amendments to protect against state actions, the Court ultimately decided to use a theory of Incorporation. The Due Process Clause of the Fourteenth Amendment guarantees that “no State shall deprive any person of life, liberty or property without due process of law.”16 Incorporation involves integrating the rights of the first eight amendments into the Due Process Clause of the Fourteenth Amendment, which in turn makes these rights applicable against the states.

Sixty years after *Twining*, the Court in *Duncan v. State of Louisiana*, stated that in order to determine when one of the rights of the first eight amendments is incorporated into the Due Process Clause of the Fourteenth Amendment, the Court must ask whether the “procedure . . . [is] necessary to an Anglo-American regime of ordered liberty . . .”17 In other words, is the right essential under the Anglo-American form of justice? If the right is essential (i.e., it is a right or liberty that has long been recognized as existing in America and Britain) and due process of law could not be met without that right, then that right is incorporated into the Fourteenth Amendment’s Due Process Clause. After *Duncan*, most of the rights guaranteed by the first eight amendments were incorporated into the Fourteenth Amendment’s Due Process Clause.18 Not all rights, however,

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15. 211 U.S. 78 (1908).
18. The Supreme Court has incorporated the following provisions of the first eight amendments via the Fourteenth Amendment: the First Amendment rights of speech, press, and religion (see *Fiske v. State of Kansas*, 274 U.S. 380 (1927)); the Fourth Amendment rights against unreasonable searches and seizures (see *Mapp v. Ohio*, 367 U.S. 643 (1961)); the Fifth Amendment right to not be compelled to self-incrimination (see *Malloy v. Hogan*, 378 U.S. 1
were incorporated. Incorporation demonstrates how constitutional law evolves, and how the Court creates ways to apply explicit rights to individuals. But, how does the Court grant the protection of rights that are not explicitly written in the Constitution? The next two areas of Substantive Due Process explore this conundrum.

B. ECONOMIC SUBSTANTIVE DUE PROCESS

Economic Substantive Due Process involves the Court using the theory of Substantive Due Process to limit government regulations on economic activities. In a typical case, the government would regulate an economic activity, and the individual would claim the government was intruding on his or her property interests under the theory that this was a violation of the Due Process Clause of the Fifth or Fourteenth Amendment. The Court would then step in and limit the government’s intrusion on this activity.

The most famous case involving the theory of Economic Substantive Due Process occurred in 1905 in *Lochner v. New York*. In *Lochner*, the Court struck down a New York labor statute that prohibited bakery workers from working more than sixty hours per week. New York argued that it was simply using its police power to protect the health and safety of its citizens. The Court rejected this argument and held that the regulation...
unduly interfered with the liberty of contract between the bakers and their employers.\textsuperscript{25}

The Court derived the economic theory of "liberty of contract" from the Due Process Clause of the Fourteenth Amendment. However, there is no liberty of contract provision to be found anywhere within the Fourteenth Amendment, nor is there any reference to liberty of contract anywhere in the Constitution.\textsuperscript{26} Nevertheless, the Court stated that "[t]he right to purchase or to sell labor is part of the liberty protected by this amendment . . ."\textsuperscript{27} Although the Court did recognize that a State had the right to interfere with liberty of contract under the State's police power to protect the health and safety of its citizens, the Court did not believe it to be justified in this instance.\textsuperscript{28} What the Court did was substitute its judgment for the New York legislature's judgment while at the same time inserting its own personal policy about economics into the Constitution.

After the \textit{Lochner} decision, the Court entered into what is now commonly referred to as the "Lochner era."\textsuperscript{29} During this time, the Court routinely struck down economic regulations under Substantive Due Process. It is thought that the \textit{Lochner} Court struck down at least two hundred economic regulations citing Substantive Due Process.\textsuperscript{30} However, even though the Court used Substantive Due Process to strike down a great many laws, it sustained just as many regulations as it struck down.\textsuperscript{31}

The Lochner era came to an end in 1934.\textsuperscript{32} Ironically, the case that signaled its end was another case involving the state of New York. In \textit{Nebbia v. People of New York}, the Court upheld a New York law that regulated the minimum and maximum prices of milk.\textsuperscript{33} Under the \textit{Lochner} Court, this law would have been struck down because it interfered with the liberty of contract that was protected by Substantive Due Process. However, the \textit{Nebbia} Court made an abrupt departure from the theory of

\textsuperscript{25} \textit{Id.} at 63.

\textsuperscript{26} As Justice Holmes points out in his dissent, the Constitution does not explicitly protect any economic right. \textit{Id.} at 65 (recognizing the exception of the "Takings Clause"). He also believed that the majority "perverted" the term "liberty" by using it in the manner they did, and he implied this was simply a case of judicial activism. \textit{Id.}

\textsuperscript{27} \textit{Id.} at 53.

\textsuperscript{28} \textit{Id.}

\textsuperscript{29} The Lochner era existed from 1905 to the mid-1930s.


\textsuperscript{32} Its end came about because of the economic realities of The Great Depression and President Roosevelt's court packing threats. \textit{See ROBERT BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 57-58 (Free Press 1990).}

\textsuperscript{33} 291 U.S. 502 (1934).
Economic Substantive Due Process. The Court stated:

The general rule [as applied to when a state may regulate economics] is that [use of property and freedom of contract] shall be free of governmental interference. But neither property rights nor contract rights are absolute. . . . The guaranty of due process . . . demands only that the law shall not be unreasonable, arbitrary or capricious, and that the means selected shall have a real and substantial relation to the object sought to be attained. . . . The Constitution does not guarantee the unrestricted privilege to engage in a business or to conduct it as one pleases.34

This means that there is no "liberty of contract" any longer, nor are any economic rights protected by the Due Process clause. After Nebbia, the theory of Economic Substantive Due Process was officially dead.35

Finally, the Court held that it is within the power of the legislature to make economic regulations. The Court stated, "price control, like any other form of regulation, is unconstitutional only if arbitrary, discriminatory, or demonstrably irrelevant to the policy the Legislature is free to adopt, and hence an unnecessary and unwarranted interference with individual liberty."36 This means that a state economic regulation only violates Due Process if it is completely irrational, arbitrary, or discriminatory on its face. Since Nebbia, the Court has never struck down a state economic regulation based on a Due Process violation. As the Court once noted, "[t]he day is gone when this Court uses the Due Process Clause . . . to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought."37

C. RIGHT OF PRIVACY

Since the Nebbia Court killed Lochner's Economic Substantive Due Process, does that mean Substantive Due Process is dead in its entirety? Not quite. Even after Nebbia, a key idea of Substantive Due Process remained: it could provide constitutional protection for rights and liberties that were not enumerated in the Constitution. The Court recognizes certain "implied fundamental rights" as being protected by the Constitution, but not

34. Id. at 523-28.
35. It remains so today. See infra p. 9.
37. See Williamson v. Lee Optical, 348 U.S. 483, 488 (1955). This is because the Court does not want to substitute its view of economics for that of the legislator. In retrospect, the Lochner decision was seen by many to be a prime example of judicial activism. Sunstein, supra note 35, at 874. It has been viewed as a wrong decision and even to this day, when a Justice on the Court (usually in a dissenting opinion) feels another Justice on the Court is substituting their views on economics for that of the Legislator, they will accuse the other Justices of "Lochnerizing" the law. See Mary Cornelia Porter, Lochner and Company: Revisionism Revisited, In Liberty, Property, and Government: Constitutional Interpretation Before the New Deal 12-17 (Ellen F. Paul & Howard Dickman eds., 1989) (summarizing instances of Justices claiming other Justices were Lochnerizing).
enumerate. It is natural to believe there are rights a society possesses that are fundamental to its existence. However, a problem arises when an individual claims the protection of these implied fundamental rights. The problem arises as a matter of constitutional interpretation, as illustrated when an individual claims a law infringes on his or her right to privacy.

The right to privacy is a broad area of Substantive Due Process. Modern litigation surrounding Substantive Due Process often centers on the right to privacy. The underlying idea is that there are certain areas of an individual’s private life that the government cannot intrude upon. Even though the right of privacy is not enumerated by the Constitution, it is nevertheless protected by the Fourteenth Amendment’s Due Process Clause. In particular, it is protected as an implied fundamental right by the liberty provision of the Due Process Clause. The right of privacy is an umbrella that encompasses the fundamental rights of: 1) parental control over the upbringing of their children; 2) procreation; 3) family, and 4) private sexual activity.

38. See e.g., infra n. 44-47.
39. Constitutional interpretation is the Court’s basic function. However, there are many schools of thought regarding exactly how the Court should interpret the Constitution. Of course, every different Justice has his or her own philosophy on this matter. See, e.g., ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW (1997) (detailing current Supreme Court Justice Scalia’s personal philosophy on constitutional interpretation). An entire treatise could be written on the varying views of constitutional interpretation, therefore this note will not begin to even touch the surface of the matter. For the purpose of Substantive Due Process and the right of privacy, the debate is whether there are certain “fundamental rights,” including the right of privacy, not enumerated within the Constitution that are nevertheless protected by the Constitution.
40. There is no explicit mention of a “right to privacy” anywhere in the Constitution. However, the Court has recognized the existence of this implied fundamental right and has also recognized its protection by the Fourteenth Amendment’s Due Process clause under the theory of Substantive Due Process. See infra p. 17.
41. See, e.g., Lawrence, 539 U.S. 558.
45. See Lawrence, 539 U.S. 558. It should be noted that the Court has recognized the right of privacy to include the right to make medical care decisions. This is the right of an individual to refuse medical treatment, even lifesaving treatment. See Cruzan v. Dir. Mo. Dept. of Health, 497 U.S. 261 (1990). However, the Court has refused to recognize that the right of privacy guarantees the right to physician-assisted suicide. See Washington v. Glucksberg, 521 U.S. 702 (1997). For more, see David A. Pratt, Too Many Physicians: Physician-Assisted Suicide After Glucksberg/Quill, 9 ALB. L.J. SCI. & TECH. 161 (1999).
1. The Right of Parents to Control the Upbringing of their Children

The notion of fundamental rights in relation to privacy began in the 1923 case of Meyer v. Nebraska. In Meyer, the Court struck down a Nebraska law prohibiting the teaching of any modern language other than English in any public or private grammar school. The plaintiff was a school teacher at a private parochial school in Nebraska that taught German to the children of German immigrants. The law at issue banned the teaching of German, French, Spanish, Italian, and "every other alien speech." In striking down the law on Substantive Due Process grounds, the Court held this law violated the liberty guaranteed by the Due Process Clause of the Fourteenth Amendment. The court then explained the meaning of the word "liberty" in the Fourteenth Amendment:

The "liberty" guaranteed by the Due Process Clause of the Fourteenth Amendment denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.

It is important to note that the Court held that liberty was a common law privilege. This means that liberty does not have to be defined by the Constitution; it can be defined by the courts. In essence, a court can find an implied privilege or right that is essential or fundamental and protect it through the liberty clause of the Fourteenth Amendment.

The Court further held that "the individual has certain fundamental rights which must be respected." The Court then held that parents have a fundamental right to control the upbringing of their children, which includes the right of a parent to determine how his or her child should be educated. The Court held that a state could not interfere with this right simply by asserting its "police power." This is significant as it pertains to

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46. This could likely be included under the "right to family." Because it provides the basis for the right to privacy, it will be discussed separately. See infra, p. 12-13.
47. 262 U.S. 390. One could argue, however, that this notion has existed almost since the beginning of the Court. In 1798, Justice Iredell and Justice Chase debated in Calder v. Bull, 3 U.S. 386 (1798), as to whether there were certain inherent rights, or "natural laws," protected by the Constitution.
48. Id. at 403.
49. Id. at 401. However, the law did not ban the teaching of Greek, Latin, or Hebrew.
50. Id. at 399.
51. Id. It should be noted that Meyer was decided within the Lochner era. Therefore, the right of liberty of contract still existed.
52. Admittedly, this sounds very much like the Lochner court's reasoning with regard to liberty of contract, or economic rights. However, an argument could be made that the inherent difference between the right to privacy and the right of liberty of contract is that with the exception of the Takings Clause, the Constitution does not provide any explicit protection for economic rights, whereas it does provide many specific protections for individual rights.
53. Id. at 401.
54. Id.
the right of privacy because, although the right of privacy was not explicitly recognized in this decision, it is implicit that there are certain areas of an individual’s private life, such as a parent’s decision on how to control the upbringing of their child, which a state does not have the authority to intrude upon.

2. The Right to Procreate

In 1942, in *Skinner v. Oklahoma*, the Court struck down an Oklahoma statute that required a “habitual criminal,” defined as an individual convicted of three or more felonies of “moral turpitude,” to be sterilized.\(^{55}\) This statute, however, only applied to “blue collar criminals,” and not to “white collar criminals.”\(^{56}\) The effect of the statute’s application was that an individual would be sterilized for three or more convictions of armed robbery, but not for embezzlement, even though the underlying offense of both crimes was theft and the prison sentence for both crimes was the same.

In striking down the statute, the *Skinner* Majority decided the case on Equal Protection grounds, not Substantive Due Process grounds.\(^{57}\) It recognized, however, that the sterilization statute “deprives certain individuals of a right which is basic to the perpetuation of a race—the right to have offspring.”\(^{58}\) The Court further stated, “[w]e are dealing here with legislation which involves one of the basic civil rights of man. Marriage and procreation are fundamental to the very existence and survival of the race.”\(^{59}\) In essence, the Court recognized a fundamental right to marriage and procreation, even though neither is enumerated in the Constitution.

The Court reasoned that the statute violated the Equal Protection Clause because it protected a fundamental right of one group of individuals, but did not extend the same protection to another group. The Court asserted: “[s]terilization of those who have thrice committed grand larceny with immunity for those who are embezzlers is clear, pointed, unmistakable discrimination. . . . [and therefore violates the Equal Protection clause].”\(^{60}\) Although the Court declined to decide this case on Substantive Due Process grounds, Chief Justice Stone held in his concurring opinion that the Oklahoma statute was a violation of Due Process because it violated an individual’s “personal liberty.”\(^{61}\)

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\(^{55}\) 316 U.S. at 543.

\(^{56}\) The statute provided: “offenses arising out of the violation of the prohibitory laws, revenue acts, embezzlement, or political offenses, shall not come or be considered with the terms of this act.” *Id.* at 537.

\(^{57}\) Commentators believe this case was decided on the basis of Equal Protection instead of Substantive Due Process because the Court was trying to move away from any semblance of the *Lochner’s* reasoning. See William Cohen, *Is Equal Protection Like Oakland? Equality As A Surrogate For Other Rights*, 59 Tul. L. Rev. 884, 891-92 (1985).

\(^{58}\) *Skinner*, 316 U.S. at 536.

\(^{59}\) *Id.* at 541.

\(^{60}\) *Id.* at 541-42.

\(^{61}\) *Id.* at 544.
As Chief Justice Stone stated, "[t]here are limits to the extent to which the presumption of constitutionality can be pressed, especially where the liberty of the person is concerned . . ." Therefore, even though Skinner was technically decided on Equal Protection grounds, it is nevertheless a key decision in the history of the right to privacy because it not only recognized that the right to procreate and the right to marry were fundamental, but also recognized that the Fourteenth Amendment's Due Process Clause could be violated when a state intruded on an individual's personal liberty.

The right to procreate and the right to privacy were expanded in 1965 in Griswold v. Connecticut. The Griswold Court struck down a Connecticut statute which banned the sale of "any drug, medicinal article or instrument for the purpose of preventing contraception." The Court once again declined to decide the case on Substantive Due Process grounds, instead relying upon a theory known as the 'zone of privacy.' The idea is that "guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees . . . [which] create zones of privacy." The Court then held that the statute intruded on the marital relationship, thereby violating the fundamental rights of privacy—specifically the rights of marriage and procreation.

Griswold also produced several concurring and dissenting opinions. Concurring Justice Goldberg argued that the basis for finding a right of privacy lies not within the penumbra and zone of privacy advocated by the Majority of the Court, but within the Ninth Amendment. In his

62. Id.
63. 381 U.S. 479 (1965).
64. Id. at 480.
65. The Court acknowledged that it was not using the Lochner case or Substantive Due Process as grounds for striking down the statute. The Court stated that "[o]vertones of some arguments suggest that [Lochner] should be our guide. But we decline that invitation . . ." Id. at 481. Once again, this was likely an attempt by the Court to distinguish its reasoning from the failing Lochner rationale.
66. Id. at 484.
67. Id. at 486. It is interesting to note how the Majority opinion dances around the issue of contraception and procreation. It never comes out and explicitly says that a married couple has the right to use contraception. The court frames the issue as violating rights of privacy created from the zone of privacy. It should also be noted that the "penumbra" and "zone of privacy" were completely invented. The Court also never comes out and fully reemphasizes the right to procreate. It merely says Skinner recognized a privacy right protected by the "zone of privacy." See Id. at 485. The inference drawn is that Skinner stood for the recognition of a fundamental right to procreate. As is often the case in Constitutional Law, one must look to later decisions to derive a case's full meaning. As the Court explained in Carey v. Population Services, Intern., "[i]n light of its progeny, the teaching of Griswold is that the Constitution protects individual decisions in matters of childbearing from unjustified intrusion by the State." 431 U.S. 678, 687 (1977).
68. Griswold, 381 U.S. at 486-99. However, this approach has not been subsequently addressed by the Court. Consequently, many commentators argue that the basis for protection of implied fundamental rights lies not within Substantive Due Process, but within the Ninth Amendment. For more on the interpretation of the Ninth Amendment, see Sol Wachtler, Judging the Ninth Amendment, 59 FORDHAM L. REV. 597 (1991); Andrzej Rapaczynski, The Ninth Amendment and the Unwritten Constitution: The Problems of Constitutional Interpretation, 64:1
concurrence, Justice Harlan argued that the statute violated Due Process by impinging on “important fundamental liberties” which were “implicit in the concept of ordered liberty.” Justice White concurred and argued that the statute violated Substantive Due Process because it impinged on liberty.

Justices White and Black both dissented in separate opinions and argued they could not find the right of privacy anywhere within the Constitution. Therefore, the Majority was doing nothing more than making up rights and engaging in the same repudiated philosophy as the *Lochner* Court. As in *Griswold*, the Court was moving towards finding a right of privacy. Yet, they were still afraid of being accused of engaging in Lochnerism. Therefore, the Majority was hesitant to use the term “Substantive Due Process” when finding the Constitution protected a right that was not enumerated.

No venture into the realm of the right of privacy would be complete without a discussion of *Roe v. Wade.* As commonly understood, *Roe* stands for the notion that it is a woman’s right to have an abortion. However, a nuanced understanding of *Roe* reveals that the right to have an abortion is derived from the right to procreate. In order for the Court to reach this conclusion, it had to engage in a theoretical discussion of the right to privacy, what it encompasses, and where it is derived from.

The Court determined that the Constitution never explicitly mentions any right of privacy. Nonetheless, the Court argued that in the past, it had recognized that a right of personal privacy exists. The Court expanded upon this by asserting that only personal rights which are fundamental or “implicit in the concept of ordered liberty” are guaranteed the protection of the right of privacy. The Court then concluded that “the right of privacy

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69. Id. at 500.
70. Id. at 502-07.
71. Id. at 507-31. As was noted in supra note 41, invoking the *Lochner* Court is often used as a way to disparage the reasoning of the Majority.
73. This is not quite accurate. In fact, this is a common misconception about *Roe*. While the *Roe* Court recognized a woman’s right to have an abortion, this recognition was not the actual holding. *Roe* held that a state may not ban abortion without a compelling interest. The Court then set up a trimester system to determine when a state has a compelling interest to ban abortion. For the first trimester, the decision to conduct an abortion was up to the medical judgment of the pregnant woman’s physician. The practical effect of this was that if a physician agreed to conduct an abortion during the woman’s first trimester, the State could not prevent a woman from having an abortion. Between the second and third trimester, the State could regulate abortion based on the State’s compelling interest in the health of the mother. This meant the State could only ban a woman from having an abortion if a physician determined the mother’s life would be at risk if she had an abortion. Finally, after the third trimester, the State could ban abortions. The reasoning behind this was that, because the fetus would have reached the point of viability, the State had a compelling interest in protecting the life of the fetus. This restriction was subject to a health exception for the mother, which meant a woman could still have an abortion after the third trimester if a physician deemed her life would be at risk if she carried the fetus to term. Id. at 165-67.
74. Id. at 152.
75. Id.
76. Id. The Court says the right of privacy extends to “activities relating to marriage, . . .
[is founded] in the Fourteenth Amendment’s concept of personal liberty,” and it includes a woman’s right to an abortion. This was a giant leap forward in the Court’s thinking because it was explicitly recognizing the right of privacy as an implied fundamental right, which is protected by the liberty provision of the Fourteenth Amendment’s Due Process Clause. Thus, even though Roe is most often cited as a victory for women’s rights and pro-choice advocates, it was an even larger victory for Substantive Due Process and implied fundamental rights.

3. The Right to Family

The right to family is not one right, but many rights. It includes the right to marry, as recognized in Skinner, despite being decided on Equal Protection grounds. The Court again recognized the right to marry in Loving v. Virginia. In striking down a Virginia statute banning interracial marriages, the Court declared: “[m]arriage is one of the ‘basic civil rights of man,’ fundamental to our very existence and survival.” The Court held the interracial ban violated not only the Equal Protection Clause, but also the liberty provision of the Due Process Clause. Also included in the right of family is the right to custody of one’s children, as recognized in Stanley v. Illinois, and in Michael H. v. Gerald D.

Finally, included within the right of family is the right to keep one’s family together. This right was recognized in Moore v. City of East Cleveland. In Moore, the Court struck down a city ordinance restricting the types of family members that could live together. The Court held the statute violated Substantive Due Process because “the choice of the ‘extended family’ pattern is within the ‘freedom of personal choice in matters of . . . [private] family life [that] is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment.” As these cases demonstrate, the right to family is broad, and any government attempt to procreation, . . . contraception, . . . family relationships, . . . and child rearing and education.”

77. Id.
78. The Court in Planned Parenthood v. Casey, 505 U.S. 833, 834, 879 (1992), reaffirmed Roe and also provided the explanation that the right to abortion was based on the right of privacy, which is protected by Substantive Due Process. The Court stated Roe “determined that a woman’s decision to terminate her pregnancy is a ‘liberty’ protected against state interference by the substantive component of the Due Process Clause of the Fourteenth Amendment.” Id. at 834.
79. 316 U.S. at 541. Once again, the right to family could almost certainly be traced back to Meyer, just as the right to control the upbringing of one’s children could be included within the right to family. See supra note 47.
80. 388 U.S. at 12.
81. Id. (internal citations omitted). See also Zablocki, 434 U.S. at 385-86 (1978) (holding the right to marry is a fundamental right of privacy implicit in the Due Process Clause).
82. Id. Once again, the Court does not explicitly say “Substantive Due Process,” or “right of privacy,” but a violation of the liberty provision of the Due Process Clause is nevertheless a Substantive Due Process violation.
83. 405 U.S. 645 (1972).
86. Id. at 511 (quoting Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632, 639-640 (1974)).
regulate the traditional family arrangement will likely be a violation of Substantive Due Process.\textsuperscript{87}

4. Right to Private Sexual Activity

The right to private sexual activity is perhaps one of the most basic forms of the right of privacy. It could be argued this right has been implicitly protected since the right to procreate was first recognized as an implied fundamental right. In any event, this right still requires its own distinct category within the right to privacy.

The right to engage in private sexual activity is explicitly conferred in Lawrence.\textsuperscript{88} However, in order to fully understand Lawrence, a discussion of Bowers v. Hardwick is necessary.\textsuperscript{89} Bowers involved a Georgia statute making it illegal for adults to engage in sodomy.\textsuperscript{90} Hardwick was arrested pursuant to this statute for engaging in consensual sodomy with another male in his own home.\textsuperscript{91} The Bowers Court framed the issue as whether the Constitution protected a fundamental right of homosexuals to engage in sodomy.\textsuperscript{92} The Court answered with a resounding "no."

The Majority opinion explained that in order for a fundamental right or liberty to be granted the protection of the Due Process Clause, the right must be one that was "implicit in the concept of ordered liberty," or a liberty which was "deeply rooted in this Nation’s history and tradition."\textsuperscript{93} The Majority then stated: "[i]t is obvious to us that neither of these formulations would extend a fundamental right to homosexuals to engage in acts of consensual sodomy."\textsuperscript{94} Under this reasoning, the Majority held the statute to be constitutional.\textsuperscript{95}

\textsuperscript{87} It is important to note the "traditional" aspect of the family. If the family is not a traditional family (i.e., it involves same-sex marriage, polygamy, etc.), it is unlikely that the Court would provide it any substantive protection under the Due Process Clause. See infra note 108. For arguments that same sex-marriages should gain the protection of the right of privacy and Substantive Due Process, see Pamela S. Katz, \textit{The Case For Legal Recognition of Same-Sex Marriages}, 8 J.L. & POL’Y 61, 73-84 (1999).

\textsuperscript{88} 539 U.S. at 578.

\textsuperscript{89} \textit{Bowers v. Hardwick}, 478 U.S. 186 (1986).

\textsuperscript{90} \textit{Id.} at 188.

\textsuperscript{91} \textit{Id.}

\textsuperscript{92} \textit{Id.} at 190. Compare the way this issue is framed with how the Court frames the issue in Lawrence, infra p. 18-20, note 101.

\textsuperscript{93} \textit{Id.} at 191, 192 (quoting \textit{Palko v. Conn.}, 302 U.S. 319, 325, 326 (1937)).

\textsuperscript{94} \textit{Id.} at 192. The Majority said that, quite to the contrary, laws which prohibit sodomy have a firmly rooted tradition in the Nation. The Majority stated: “[s]odomy was a criminal offense at common law and was forbidden by the laws of the original thirteen States when they ratified the Bill of Rights. In 1868, when the Fourteenth Amendment was ratified, all but 5 of the 37 States in the Union had criminal sodomy laws. In fact, until 1961, 50 States outlawed sodomy, and today, 24 States and the District of Columbia continue to provide criminal penalties for sodomy performed in private and between consenting adults. . . . Against this background, to claim that a right to engage in such conduct is ‘deeply rooted in this Nation’s history and tradition’ or ‘implicit in the concept of ordered liberty’ is, at best, facetious.” \textit{Id.} at 192-194 (internal citations omitted).

\textsuperscript{95} \textit{Id.} at 196. Hardwick also claimed that even if the right to engage in sodomy was not a fundamental right, the Georgia statute still violated Due Process because it purported to regulate nothing more than morality. The Court responded by stating: “[t]he law, however, is constantly
The Majority’s opinion was met with a scathing dissent by Justice Stevens.\textsuperscript{96} He argued that sodomy was protected by the Due Process Clause of the Fourteenth Amendment, stating: “[t]he essential ‘liberty’ that animated the development of the [right of privacy] surely embraces the right to engage in non-reproductive, sexual conduct that others may consider offensive or immoral.”\textsuperscript{97} Justice Blackmun also dissented, claiming the Majority betrayed the Nation’s tolerance for non-conformity.\textsuperscript{98} Seventeen years would pass before another case concerning the right to private sexual activity would come before the Court.

In 2003, the Court decided \textit{Lawrence}, which once again involved a state statute prohibiting sodomy. This time, however, the issue before the Court was framed differently. The issue was “[w]hether petitioners’ criminal convictions for adult consensual sexual intimacy in the home violate their vital interest in liberty and privacy protected by the Due Process Clause of the Fourteenth Amendment.”\textsuperscript{99} With the issue framed in this manner, Justice Kennedy, writing for the Majority of the Court, answered with a resounding “yes.”\textsuperscript{100}

The Majority held the Texas statute unconstitutional, based on the evolution of the right of privacy and Substantive Due Process.\textsuperscript{101} The Majority confirmed that “the protection of liberty under the Due Process Clause has a substantive dimension of fundamental significance in defining the rights of the person.”\textsuperscript{102} The Majority then held that a State or court cannot “define the meaning of the [sexual] relationship [between adults] absent injury to a person or abuse of an institution the law protects.”\textsuperscript{103}

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\item Based on notions of morality, and if all laws representing essentially moral choices are to be invalidated under the Due Process Clause, the courts will be very busy indeed.” \textit{Id.\textsuperscript{96}} at 214-220. Chief Justice Burger concurred in the judgment and argued that because sodomy was immoral (referring to Sir William Blackstone’s quote calling sodomy “the infamous crime against nature”), it was subject to State intervention. \textit{Id.\textsuperscript{96}} at 196-97. Justice White also concurred, expressing his reservations that the punishment for the crime of sodomy (up to 20 years in prison), if it were to be imposed, would create a “serious Eighth Amendment [prohibition against cruel and unusual punishment] issue.” \textit{Id.\textsuperscript{96}} at 197-98.
\item \textit{Id.\textsuperscript{97}} at 218.
\item \textit{Id.\textsuperscript{98}} at 214.
\item \textit{Lawrence}, 539 U.S. at 564. There were two other issues as well. One asked whether the Texas statute violated Equal Protection, and the other asked whether \textit{Bowers} should be overturned. \textit{Id.\textsuperscript{99}} However, the Majority declined to decide the case based on Equal Protection.
\item This is a prime example of how the Court can frame an issue to get the results it wants. The \textit{Bowers} Court framed the issue in a way that no Justice could say “yes.” However, with the way the issue in \textit{Lawrence} was framed, a rational Justice would have a hard time saying “no.”
\item The Majority looked at the “substantive reach of liberty under the Due Process Clause” as it evolved from \textit{Meyer} through \textit{Griswold}, \textit{Roe} and \textit{Carey}. \textit{Id.\textsuperscript{100}} 564-68.
\item \textit{Id.\textsuperscript{101}} at 565.
\item \textit{Id.\textsuperscript{102}} at 567. This is the “Harm Principle” made famous by John Stuart Mill. The “institution the law protects” is referring to the traditional institution of marriage (heterosexual marriage). The Majority later says that \textit{Lawrence} “does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter.” \textit{Id.\textsuperscript{103}} at 578. This is how the Majority attempts to “keep the lid on” Substantive Due Process as applied to “same-sex marriage.” For an analysis on whether this has been successful, see Lisa K. Parshall, \textit{Redefining Due Process Analysis: Justice Anthony M. Kennedy and the Concept of Emergent Rights}, 69 ALB. L. REV. 237, 249-281 (2005-2006). Justice Scalia, in his dissent, thinks the
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court then stated: “adults may choose to enter upon this relationship in the confines of their homes and their own private lives and still retain their dignity as free persons.”

The Majority then turned their attention to Bowers. They stated the Bowers Court got the “history and tradition” of sodomy wrong, claiming that even though sodomy has been banned during the history of the Nation, it has only been enforced for acts of sodomy in public and has rarely been enforced for acts of sodomy in private. Therefore, the Majority concluded, no longstanding history or tradition existed for regulating private acts of consensual sodomy. The Majority then specifically overruled Bowers. Finally, the Majority stated: “[t]he State cannot demean [homosexuals’] existence or control their destiny by making their private sexual conduct a crime. Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government.”

In dissent, Justice Scalia ridiculed the Majority for disregarding stare decisis and dismissing Bowers. He argued the law had not changed enough in seventeen years to overturn Bowers. He also argued the Majority had misinterpreted the facts regarding the “history and tradition” of sodomy: “the only relevant point is that [sodomy] was criminalized—which suffices to establish that homosexual sodomy is not a right ‘deeply rooted in our Nation’s history and tradition.’” Finally, Justice Scalia warned that Lawrence will someday lead the Court to recognize homosexual marriage. From the surface, Lawrence appears to have broadened the right of privacy and Substantive Due Process.

III. CONCLUSION: THE STATE OF SUBSTANTIVE DUE PROCESS

Lower Courts have consistently declined to extend the holding of Lawrence beyond its facts. Lawrence has not been extended to cover

Majority is fooling itself in believing Lawrence “does not involve the issue of homosexual marriage,” since one can only entertain such a belief if “principle and logic have nothing to do with the decisions of this Court.” Id. at 605 (internal quotations omitted).

104. Id. at 567.
105. Id. at 568-72.
106. Id. at 573.
107. Id. at 578.
108. Id.
109. Id. at 586-92.
110. Id. at 596.
111. Id. at 596-605. There was also a concurring opinion by Justice O’Connor in which she argued that she would have invalidated the Texas statute on Equal Protection grounds. Id. at 579-85. Justice Thomas also dissented accused the Majority of substituting their judgment for that of the Texas Legislature and engaging in “Lochnerism.” He also said that he can find no right of privacy anywhere within the Constitution. Id. at 605-06.
112. See, e.g., Lofton v. Sec’y of Dept. of Children and Family Serv., 358 F.3d 804 (11th Cir. 2004) (declining to extend Lawrence to strike down Florida Ban on gay couple adoption of
incest, gay marriage, gay couple adoption, or polygamy, despite the fact that logic dictates that if banning one type of non-traditional human relationship is unconstitutional, the government certainly cannot ban any other type of non-traditional human relationship. Therefore, Lawrence appears confined to a narrow holding that Substantive Due Process and the right of privacy bar states from criminalizing homosexual sodomy. Lawrence has not been interpreted as affording same-sex marriage the protection of Substantive Due Process.

Massachusetts allows same-sex marriage, as do Canada and several European countries. Four states recognize homosexual civil unions. This reflects a trend that society is beginning to believe that homosexuals share heterosexuals’ implied right to marriage. The history of Substantive Due Process demonstrates that the Court and the law evolve over time. It is likely that Justice Scalia’s warning will come to fruition, and the Court will determine that Lawrence indeed stands for the right to same-sex marriage.

For now, Substantive Due Process is alive and well. Whenever an individual claims a State is denying one of the rights afforded by the Bill of Rights, Substantive Due Process is invoked. Whenever an individual claims the right of privacy, Substantive Due Process applies. It is an ever-evolving mechanism that adapts to not only the law, but to society’s views on fundamental rights. Although Substantive Due Process can be fickle at times, it is still an important check on unwarranted government intrusion into our lives. We would all do well to remember that there is no liberty without Due Process under the law.


113. Ultimately, the logic of Skinner may prevail over Lawrence, and the basis for allowing same-sex marriage may be found on Equal Protection grounds, not Substantive Due Process.

