Right of Privacy: Origin and Evolution of a Constitutional Right

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RIGHT OF PRIVACY: ORIGIN AND EVOLUTION
OF A CONSTITUTIONAL RIGHT

by

Eugene W. Smith

A Thesis
Submitted to the
Faculty of The Graduate College
in partial fulfillment of the
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WE HEREBY APPROVE THE THESIS SUBMITTED BY

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ENTITLED Right of Privacy: Origin and Evolution of a Constitutional Right

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This paper investigates the historical and legal question of how the Supreme Court developed the constitutional right of privacy from the Civil War Amendments to the Constitution. The emphasis is on tracing the Court's interpretation of the Fourteenth Amendment since the Civil War.

Primary sources consulted included the Constitution, statutes, government publications, court opinions, briefs and other parts of case records. Newspapers, periodicals and books were used to trace more recent developments.

The paper traces the Court's use of the legal doctrines of substantive due process, selective incorporation and the new equal protection to first create a right of family privacy, then a right of sexual privacy. It concludes that the Court used the Fourteenth Amendment to "amend" the Constitution by judicial interpretation rather than trying to find the original intent of the drafters of the Constitution or of the Civil War Amendments.
TABLE OF CONTENTS

CHAPTER

I. BACKGROUND ................................................. 1
   Introduction............................................. 1
   Civil War Era Constitutional Amendments......... 9
   Privileges and Immunities............................. 11
   Economic Substantive Due Process .................. 18
   Chapter I Endnotes................................. 22

II. SOCIAL SUBSTANTIVE DUE PROCESS ....................... 26
   Chapter II Endnotes................................. 35

III. SELECTIVE INCORPORATION AND THE RIGHT OF PRIVACY 36
   Beginnings of Selective Incorporation........... 36
   Incorporation of the First Amendment............ 40
   Strict Scrutiny of a Fundamental Right .......... 44
   Incorporation of First and Fourth Amendments 46
   Chapter III Endnotes.................................. 53

IV. THE RIGHT OF FAMILY PRIVACY ............................ 56
   Contraception.......................................... 58
   Right to Marry....................................... 63
   Chapter IV Endnotes................................ 67

V. ROE V. WADE ................................................. 69
   Legislative Abortion Reform....................... 69
Table of Contents--Continued

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Judicial Coup</td>
<td>73</td>
</tr>
<tr>
<td>Chapter V Endnotes</td>
<td>88</td>
</tr>
<tr>
<td>VI. REACTION TO ROE V. WADE</td>
<td>91</td>
</tr>
<tr>
<td>Religious Reaction</td>
<td>91</td>
</tr>
<tr>
<td>Political Reaction</td>
<td>94</td>
</tr>
<tr>
<td>Academic Legal Reaction</td>
<td>97</td>
</tr>
<tr>
<td>Judicial Developments</td>
<td>99</td>
</tr>
<tr>
<td>Chapter VI Endnotes</td>
<td>108</td>
</tr>
<tr>
<td>VII. CONSTITUTIONAL INVERSION</td>
<td>112</td>
</tr>
<tr>
<td>Chapter VII Endnotes</td>
<td>118</td>
</tr>
<tr>
<td>BIBLIOGRAPHY</td>
<td>119</td>
</tr>
</tbody>
</table>
CHAPTER I

BACKGROUND

Introduction

This paper will trace the origin and development of the legal doctrine that has come to be known as the right of privacy. The phrase, the right of privacy, aside from its use in constitutional law, is also a common term in the modern technological era. The tabloids, in both electronic and supermarket versions, make an industry of invading the privacy of celebrities to feed the maw of the public’s appetite for titillation. The government has everyone numbered and catalogued in Internal Revenue and Social Security computer databases, beginning at the cradle and continuing to the grave. Users of the new computer highways find they must exercise care to protect both their machines and their privacy.

One might be justified in concluding that the Supreme Court developed the constitutional right of privacy to protect the American public, including celebrities, from unlawful invasions of privacy by the government and other organizations. Interestingly, the right
of privacy, as interpreted by the Supreme Court, has little to do with freedom from snooping activities by the government or private individuals.

There are federal and state statutes which set limits on the government's use of data and provide the means for people to find out what government files about them contain. There is also a body of case law, called tort law, recognizing the right of an individual to privacy and allowing one person to sue another for an invasion of privacy. But the main body of constitutional law about the right of privacy is not about governmental use of data or intrusions on the privacy of persons.¹

The right of privacy is probably best known from the controversy over Roe v. Wade, a case decided in 1973.² In that case the United States Supreme Court ruled that a woman's right of privacy was protected by the Constitution from the power of the states to forbid abortions. Whether the Constitution gives the Supreme Court power to make such a ruling has remained a cause of political debate in every national election and in the selection of every Supreme Court justice since that time.

The concept of a right of privacy has also created recent controversy over whether there is a right to die. Proponents of such a constitutional right base their le-
The article apparently had a limited impact on the subsequent development of the law of the right of privacy. If it was the authors' intent to restrain press coverage of public figures, their hope has not been realized. The type of right Brandeis advocated has been swallowed up by the Supreme Court's expansive reading of First Amendment freedom of the press in libel and privacy suits by public figures.

While the Brandeis article was influential in stimulating the development of a right to privacy which allowed one person to sue another, it did not directly create a right of privacy vis a vis the government. Brandeis himself, during his long tenure as a Supreme Court Justice, did contribute to development of the concept of a right of privacy as a limit on the power of government.

In his article of 1890, Brandeis referred to the work of an eminent constitutional scholar, Thomas MacIntyre Cooley, Justice of the Michigan Supreme Court and University of Michigan law professor. He quoted the phrase "the right to be let alone" from Cooley's treatise on the law of torts and later used similar phrasing in a dissent in the case of Olmstead v. United States. That phrase gradually came to be synonymous with the
right of privacy. Olmstead was a member of a bootlegging ring and federal agents used the new technique of wiretapping to build a case against the bootleggers. Olmstead and his cohorts naturally thought that was cheating and challenged his conviction, with the help of the telephone company, on the grounds his telephone conversations were private and the government had no right to listen in surreptitiously.

In that era the focus of judicial review of the legality of a search was on whether government agents trespassed on a citizen's property to seize incriminating evidence or to eavesdrop. The trespass itself, if not properly authorized by a search warrant, was a violation of the Constitution and evidence obtained that way could not be used by the government. The use of new technology allowed government agents in the Olmstead case to intercept the most private telephone conversations without physically entering the defendant's property. Under the prevailing legal view, where there was no trespass by government agents, there was no violation of Olmstead's rights and his conviction was proper.

Brandeis broke free of the trespass concept the courts had developed to enforce the Fourth Amendment ban on warrantless searches in an era when a forcible or
surreptitious physical trespass by government agents was necessary to evade the warrant requirement. Instead, he focused on the invasion of Olmstead's privacy without a physical trespass the new technology made possible. While he was in the minority in the Olmstead case, and the Court did not then adopt his right of privacy concept, his insight foreshadowed later analysis. It was taken up by a majority of the Supreme Court in later cases.

The modern Court currently uses privacy analysis for search and seizure cases under a formula balancing the reasonable expectation of privacy of the accused against the extent of the government's intrusion. Although Brandeis first suggested the idea in 1927, a majority of the Court did not adopt that balancing test until Justice John Marshall Harlan convinced a majority to do so in the 1967 case of Katz v. United States. While such recent cases which follow Brandeis' focus on privacy for analyzing search and seizure issues under the Fourth Amendment arguably constitute a branch of the constitutional right of privacy, we actually jump ahead of the story with the Katz case.9

It is an interesting fact that the most controversial of modern cases about a right of privacy are directly linked to sexuality. The 1973 case of Roe v.

Even the most naive student of history knows that the Constitutional Convention of 1787 did not debate questions of sexuality. Neither did Congress or the state legislatures in ratifying the Fourteenth Amendment. The text of the Constitution, including the Fourteenth Amendment, does not explicitly mention any such right and, of course, proponents make no claim that it does. But, as Alexis de Tocqueville said: "There is hardly a political question in the United States which does not sooner or later turn into a judicial one."

The post Civil War Supreme Court has undertaken the task of reviewing state laws affecting individual's rights and the concomitant duty to strike laws in conflict with the Constitution. That perspective is, however, a modern view of the Supreme Court's power. Before the Civil War such was not the practice. To understand the basis of modern rulings on the right of privacy, it is necessary to consider the revolution in constitutional jurisprudence which made questions of personal rights, and state laws affecting those rights,
subjects upon which the Supreme Court was expected to rule.

The answer to how a right of privacy, linked to human sexuality, came to be a constitutional right is to be found in the story of the Fourteenth Amendment which produced a revolution in constitutional law after the Civil War. That revolution occurred over such a long period of time that the word evolution may be more appropriate to describe the on-going process of change. The results of the process truly were revolutionary in the substance of the law, however.

That process took three distinct doctrinal paths. The first to develop was the doctrine of substantive due process, of which most of the modern constitutional right of privacy is a subcategory. The second was the doctrine of selective incorporation. A lesser part of the constitutional right of privacy fits under that doctrinal heading. The third legal doctrine is sometimes called the new equal protection, and it is less clearly defined in the law. It is conceptually related to substantive due process and, to a lesser extent, selective incorporation. Because the concept of substantive due process was the first to develop, it is the place to start.
Civil War Era Constitutional Amendments

To trace the origin of the modern constitutional doctrine of the right of privacy it is necessary to go back to the so-called Civil War series of Constitutional Amendments.

Chief Justice John Marshall ruled in 1833 in the case of *Barron v. Baltimore* what everyone at that time assumed, that because the Bill of Rights, the first ten amendments to the Constitution, applied only to the federal government, the states were not bound by its prohibitions. That position became the central constitutional problem in the aftermath of the Civil War. How were the former slaves to be raised from servitude if the states they lived in wanted to keep them down?

The first Congressional move was adoption of the Thirteenth Amendment outlawing slavery, proposed to the states by Congress in February, 1865 and ratified by the required twenty-seven states after Lincoln’s assassination in April, 1865. Lincoln’s death joined the issue between the Radical Republicans in Congress and President Andrew Johnson. Because the Thirteenth Amendment was seen as inadequate, Congress passed the Civil Rights Act of 1866 and the Freedman’s Bureau Bill over President Johnson’s veto. Questions were raised as to the constitutional power of Congress to pass the Civil
Rights Act and Congress passed another proposed constitutional amendment and sent it to the states in 1866.¹³

The debate over the Fourteenth Amendment in Congress, and in the states during the ratification process, is one of the most important and hotly debated chapters in American legal history. The controversy over original intent and proper use of the Amendment has been central to the question of whether a right of privacy is even to be found in the Constitution.¹⁴

The parts of the Fourteenth Amendment relevant to modern Constitutional jurisprudence are three short and vague clauses in section one. The "due process" clause simply says that no state shall "deprive any person of life, liberty, or property, without due process of law." The "equal protection" and the "privileges and immunities" clauses are equally terse; stating, respectively, that no state shall "deny to any person the equal protection of the laws," and that no state shall "make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." Unlike the Thirteenth Amendment, the Civil Rights Act of 1866 and the Fifteenth Amendment, the Fourteenth Amendment does not use words limiting it to discrimination based on race, color or previous servitude.¹⁵

The equal protection phrasing is not found else-
where in the original Constitution. The words dealing with due process are nearly identical to those in the Fifth Amendment, which was understood to apply only to the federal government when the Fourteenth Amendment was ratified. Similar privileges and immunities language is found in both the original Constitution in Article IV, Section 2, and in the Articles of Confederation in Article IV, and, unlike the Bill of Rights, was applicable to state governments from the beginning.

Privileges and Immunities

The Fourteenth Amendment had not been on the books long before the Supreme Court was pressed to decide what it meant. In 1873 the Court handed down an historically based and restrictive ruling in the *Slaughter House Cases*, only seven years after ratification of the Amendment. The facts of that case involved a Louisiana Reconstruction state legislature that had been bribed to grant a monopoly in the butchering business. John Archibald Campbell, a former Supreme Court Justice who resigned when the Confederate States seceded, in a startling turnabout for a Confederate, urged the Court to read the Amendment broadly and to use federal power to strike the state sanctioned monopoly.¹⁶

Campbell focused his brief and his oral argument
mostly on his theory that the privileges and immunities language of the Fourteenth Amendment protected the civil rights, including economic rights, of all citizens of the United States. He did not stress the due process clause. Justice Samuel Miller, a Lincoln appointee, followed the same approach in his opinion.\(^{17}\)

Writing for the majority, Miller said that the purpose of the Fourteenth Amendment was to provide for the "protection of the newly-made freeman and citizen from the oppression of those who had formerly exercised unlimited dominion over him."\(^{18}\) It was not to give the Supreme Court general power to pass on the wisdom of state legislation. The crux of his ruling was that the privileges and immunities clause of the Amendment did not create a new and separate bundle of civil rights for citizens of the United States. It did make "all persons born or naturalized in the United States" citizens of both the United States and of their state.\(^{19}\) In short, the states no longer determined which of their residents were citizens and so they could not exclude the former slaves from citizenship. But the civil rights of those citizens were still to be determined, with the exception of a short list of privileges and immunities protected by the Federal Constitution, by their state of residence.\(^{20}\)
Viewed in the context of the law at that time, Miller's decision was a common sense response to Campbell's novel theory of the reach of the Fourteenth Amendment. The states exercised considerable discretion in deciding the legal rights of their residents, notably in setting age limits, typically twenty-one, for the right to make binding contracts and for the right to vote. They also treated women, including former slaves, different than men. Women were excluded entirely from the right to vote, which in that era was usually classified as a political right, not a civil right. A married woman was also generally considered legally incompetent to make contracts without the consent of her husband.21

Miller did comment in passing that under existing precedents Louisiana's placing a restraint on the butcher's trade was not a deprivation of property under the due process of law clause. In short, the grant of a monopoly by the state legislature in an industry affecting public health was not a violation of the Constitution because it was a monopoly.22

Justice Stephen Field disagreed. Like Miller, he too focused on the privileges and immunities clause of the Fourteenth Amendment. But he disagreed with Miller that a legislative monopoly was constitutional. He focused instead on the effect it had on the right of the
butchers to carry on their trade. Field found support for his view in the 1866 Civil Rights Act which defined the "civil rights" it sought to protect as the right to:

- make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property as enjoyed by white citizens.²³

Unlike Justice Miller, he focused on the emphasis in the Act on property rights and not on its closing reference to race.

Justice Joseph Bradley, who agreed with Justice Field's conclusion, dissented on the additional grounds that the Fourteenth Amendment was intended to codify in the Constitution the fundamental rights of Englishmen as set out in Magna Charta. As he expressed it, those rights of "life, liberty, and property [were] inviolable, except by due process of law." He also said the "rights to life, liberty, and the pursuit of happiness" were the same as the "rights of life, liberty and property," and that the Fourteenth Amendment gave the Supreme Court authority to enforce them even against a state legislature.²⁴

That declaration of rights seemed to equate the Fourteenth Amendment with the Declaration of Independence and the Bill of Rights, a dubious proposition the Supreme Court has never been willing to follow. In
addition to staking out what is probably the most extreme reading of the scope of the Fourteenth Amendment by a Justice, Bradley also referred to Adam Smith’s *Wealth of Nations* and Blackstone’s *Commentaries.*

Bradley apparently was willing to wed laissez faire economic theory to the common law and apply the progeny to the states, foreshadowing later use of the Fourteenth Amendment for that purpose.

Campbell’s argument that the Fourteenth Amendment protected a wide variety of privileges and immunities, that is, fundamental rights, and that those privileges and immunities were the same for all citizens of the United States, found limited support in the obiter dictum of Justice Bushrod Washington’s 1823 opinion in the case of *Corfield v. Coryell.* However, Justice Washington, in interpreting the privileges and immunities clause of Article IV of the Constitution, had actually decided that the privilege at issue, harvesting oysters in New Jersey waters, was one over which the state of New Jersey had exclusive control.

Washington’s ruling was consistent with the application of similar language in the Articles of Confederation, which had been the source of the privileges and immunities clause in the Constitution. Stripped of the ringing declarations of Washington and Bradley, the
privileges and immunities concept was simply a declaration that the individual states could not discriminate against citizens of another state when they were temporarily present in a host state. The clause did not vest nonresident citizens with political rights or privileges such as the right to vote or hold office. It simply allowed them the protection of the laws of the host state in such matters as buying and selling property and making and enforcing contracts. That is the same principle familiar today in state legal rules which require nonresident students at state colleges and universities to pay a higher rate of tuition.

The limited reading Justice Miller gave to the privileges and immunities clause of the Fourteenth Amendment has been severely criticized by some modern historians. They apparently believe it was part of a pattern of callous decisions by the Supreme Court which ignored the intent of the framers of the Fourteenth Amendment and left the former slaves to the mercy of the black codes and segregation. They do not focus on the fact that Miller did say the Fourteenth Amendment was designed to protect the former slaves, but not to change the structure of federalism. He simply rejected the idea that the Amendment was designed as a tool to allow federal courts to decide what the economic rights of
citizens were within their state of residence. In short, he rejected the role of subjecting state common law and statutory rules to judicial review on the basis of an evaluation of their merits, or to phrase it in a way which became very familiar in later Supreme Court jurisprudence, their substance.

It is true that the case was decided at the beginning of a period when the Supreme Court read the scope of the Fourteenth Amendment very narrowly in matters dealing with race. But it should be noted that the Slaughter House Cases decision was not about the rights of the freedmen. Unlike other cases decided in the following twenty-five years, such as Plessy v. Ferguson, the Civil Rights Cases, and United States v. Harris; the Slaughter House Cases definition of the privileges and immunities clause of the Fourteenth Amendment has never been repudiated by the Supreme Court. It remains the law of the land for that part of the Fourteenth Amendment.²⁹

However, Miller's limitation of the Fourteenth Amendment to the context of race, as the language of the Civil Rights Act of 1866 also did for its enumerated rights, rejecting the idea that it could be expanded to other areas such as economic regulation, was followed by the Supreme Court only until the 1897 decision in All-
That case marked the beginning of the assumption of power by the Supreme Court to decide if state economic legislation violated the Court’s reading of the due process clause.

Economic Substantive Due Process

The privileges and immunities clause having been rejected as a tool to nationalize judicial review of economic legislation, advocates of a broad reading of the Fourteenth Amendment turned to the due process clause. The language of that clause was wonderfully vague, rather like the language of the Declaration of Independence and the Preamble to the Constitution. Following the path suggested by Justice Bradley in his Slaughter House Cases dissent, advocates argued that due process meant that a person had liberty to pursue economic pursuits free from state regulation. The Supreme Court began to acknowledge such a right in Allgeyer v. Louisiana.

In the Allgeyer case, Justice Rufus Peckham held that a Louisiana statute requiring insurance companies doing business in the state to have a license there violated the due process clause of the Fourteenth Amendment. Peckham said the liberty the due process clause protected included the right to pursue any occupation
and to make any contract necessary to carry on a trade or to manage property, free from state interference. That reading of the due process clause was obviously similar to the rights listed in the Civil Rights Act of 1866. It was also similar to what Campbell had argued for in the *Slaughter House Cases*, even if Justice Peckham did not explicitly say he intended the similarity.  

Although there had been precursors to economic substantive due process in state cases, and in litigation by railroads against state rate regulation, the *Allgeyer* case marked the first full incorporation of the doctrine into Fourteenth Amendment analysis by the Supreme Court.  

In one of those cases, *Lochner v. New York*, Justice Peckham's 1905 opinion struck down a state law prohibiting bakery workers from working over 10 hours per day or 60 hours per week. He said that law was not a proper exercise of the state's police power because it interfered with the right of contract between employer and employee, and that right of contract was a liberty protected by the Fourteenth Amendment. 

Justice Oliver Wendall Holmes dissented with his famous dictum that: "The Fourteenth Amendment does not
enact Mr. Herbert Spencer’s *Social Statics*."³⁴

There was disagreement with the Court’s use of economic substantive due process under the Fourteenth Amendment to strike progressive social legislation throughout the Progressive era. Yet, while substantive due process was the vehicle for striking many new state labor laws, the Court did not strike all labor laws in that era. Estimates vary, but it appears that more state laws were sustained than were struck. The Court apparently had a paternalistic soft spot for women and children and upheld regulation of hours for them.³⁵

Justice Peckham’s views as set out in the *Lochner* case did prevail until the New Deal, when new appointees to the Court after 1937 caused the Court to retreat from its liberty of contract formula of the rights protected by the Fourteenth Amendment. By the time of the New Deal, Chief Justice Charles Evans Hughes was willing to specifically disavow the practice of equating liberty of contract with the due process clause of the Fourteenth Amendment. In 1937, in the case of *West Coast Hotel v. Parrish*, the Court upheld a Washington State minimum wage law for women.³⁶

The Supreme Court continued a quiet retreat from the use of economic substantive due process throughout the New Deal era. By the time of *Ferguson v. Skrupa* in
1963, the Supreme Court had completely abandoned, Justice Black said, the very concept of substantive due process as a means to exercise a judicial veto of laws with which it did not agree.\textsuperscript{37}

That strong dismissive language seemed to herald the end of substantive due process as a tool for judicial review of state laws. However, that was not the full story. The Court had also developed a parallel line of substantive due process cases which were not related to economic issues. It was from that less well known line of cases which had not been at the center of national politics, and the New Deal struggle for control of the Court, that the modern right of privacy developed.
Chapter I Endnotes


Michigan also has a similar statute at Michigan Compiled Laws, sec. 15.243 and a criminal code prohibition of electronic evesdropping at Michigan Compiled Laws, sec. 750.539.

Tort law is basically state law and is set out in case law dating back hundreds of years and it is often codified in standard jury instructions for convenience.


10 Roe v Wade, 410 U.S. 113 (1973); Griswold v Connecticut, 381 U.S. 479 (1965); Eisenstadt v Baird, 405 U.S. 438 (1972); Doe v Commonwealth’s Attorney, 425 U.S.
901 (1976); Bowers v Hardwick, 478 U.S. 186 (1986).


12Baron v Baltimore, 7 Pet. 243, 8 L. Ed. 672 (1833).


15Quint, 471-475.


18Slaughter House Cases, 83 U.S. 36, 71 (1873).
21Ironically, in the case immediately following the Slaughter House Cases in the case reports, the Supreme Court rejected the arguments of Matthew Hale Carpenter (winning counsel in the Slaughter House Cases) and upheld the refusal of the Illinois Supreme Court to admit Myra Bradwell to the bar because she did not have the legal capacity to make contracts without her husband's consent. That appears odd to the modern mind, but it sheds some light on the potentially vast scope of judicial review Justice Miller wished to avoid.

22Slaughter House Cases, 83 U.S. 36 (1873), 80-81; Justice Miller was willing to have Congress enforce the equal protection clause via legislation to protect the newly freed slaves.

23Quint, 472-474.


25Ibid., 110.

26Corfield v Coryell, 6 Fed. Cas. 546 (C.C.E.D. PA, 1823).

27Meyer, 20-23, 26, that is also essentially the same meaning given to the privileges and immunities clause of Article IV, Section 2, and that does raise the question of why the drafters of the Fourteenth Amendment bothered to include it.


29Slaughter House Cases, 83 U.S. 36 (1873); Plessy v Ferguson, 163 U.S. 537 (1896); Civil Rights Cases, 109 U.S. 3 1883; United States v Harris, 106 U.S. 629 (1882).

30Allgeyer v Louisiana, 165 U.S. 578, 583-592 (1897).

31Ibid.

32Richard C. Cortner, The Iron Horse and the


34Ibid., 53, 75.


36West Coast Hotel v Parrish, 300 U.S. 379 (1937).

CHAPTER II

SOCIAL SUBSTANTIVE DUE PROCESS

Although a majority of the Supreme Court was willing to announce in 1963 that it had rejected the doctrine of substantive due process, whether that was true in fact was open to doubt. The Court had made a series of decisions shortly after World War I which were not tagged with the substantive due process label by critics because they were not directed against economic legislation. But the Court, in fact, did decide in those cases what the substance of due process was.

Part of the progressives' critique of the Court during the first one-half of the twentieth century was that the state legislatures and Congress should determine what the substance of the law should be. The Court should confine itself to enforcement of procedures necessary to guarantee due process. Unfortunately for that theory, the sometimes ugly passions World War I generated resulted in some state laws which seemed motivated by hatred for all things German.

Several states, including Nebraska, passed laws requiring all schools to teach in the English language,
banning the teaching of any foreign language in any public or private school below the ninth grade. The Nebraska law was challenged by a teacher who was convicted of teaching German at a Lutheran school.

Relying on a state court ruling that the law allowed teaching German outside school hours, the Zion Lutheran school decided to add one-half an hour to its noon recess, without a corresponding increase in the length of the school day. The local authorities felt that Zion was pressing the issue too far and the County Attorney went to the school and observed ten year old Raymond Parpart reciting Bible lessons in German to his teacher, Robert Meyers.¹

The teacher was convicted by a jury and fined. After raising the issues of a denial of his Fourteenth Amendment privileges and immunities, as well as due process and equal protection rights, in the state courts, and losing, Meyer appealed to the Supreme Court. In keeping with legal theory of the day, his brief was couched in terms of violations of his right to pursue his vocation as a teacher of German and his right to freely enter into a contract to teach German.²

The Supreme Court in Meyer v. Nebraska, decided in 1922, lost little time in finding a violation of Meyer's right to engage in his occupation and struck the Nebras-
ka law as a violation of his liberty rights under the due process clause. Justice James McReynolds, a reactionary in economic matters, listed the liberties he believed that clause included as:

the right to contract, to engage in the common occupations, acquire useful knowledge, marry, establish a home and bring up children, worship God and enjoy common law privileges essential to the orderly pursuit of happiness by free men.³

Obviously, McReynold's list was not taken verbatim from the Fourteenth Amendment, although some of the items were enumerated in the 1866 Civil Rights Act. The Justice seems to have taken the categories from the "liberty lists" in the Allgeyer and Lochner cases, adding the right to marry and worship God. His opinion was written broadly enough to cover the rights of parents, although they were not parties to the appeal in the case. It was also something new in constitutional jurisprudence, moving away from the focus on Fourteenth Amendment substantive due process "liberties" as property rights.

McReynolds followed his Meyer opinion the same year in the consolidated case titled Bartels v. Iowa, by striking several other state laws that banned teaching German or other foreign languages. The American Legion, an organization dedicated to "Americanism" and full assimilation, submitted a friend of the court (amicus)
brief in support of the statutes and in opposition to briefs of the Evangelical Lutheran Synod and the Roman Catholic Church, two churches with many non-English speaking members. Interestingly, Justice Holmes, a "legal realist" who often voted with progressive justices in opposition to the economic substantive due process concept expressed in the *Lochner* case, also refused to recognize the non-economic substantive due process claimed here. He said Iowa's law was a proper exercise of the state's police power.⁴

Those two cases were followed in 1927 by *Pierce v. Society of Sisters*. That case resulted from a challenge to Oregon's Compulsory Education Act of 1922 that required all children between the ages of eight and sixteen to attend public schools, unless they obtained permission of the public school authorities for home schooling. The Oregon law was passed as an initiative bill by the voters after a collection of fraternal lodges placed it on the ballot. That statute was not as directly tied to the passions of World War I, but it came from a related movement to enforce assimilation into the mainstream by recent immigrants, particularly Catholics. The avowed purpose of supporters of the law was to mix everyone, rich and poor, in the melting pot to produce the "True American."⁵
The Oregon law affected all private schools, sectarian or not, and while the case is commonly cited only by the name of the first appealing party, the appellants also included a private military school called Hill Military Academy that had originally been affiliated with the Protestant Episcopal Church. The lawyers for the Society of Sisters argued that the ban on children attending private schools was a violation of the property rights of the school run by the sisters. The military school joined in that argument.

The Society's lawyers also argued that the statute unlawfully interfered with the liberties of teachers at private schools to practice their vocation and to contract with the parents. They were joined in those arguments in briefs filed for the American Jewish Committee, the North Pacific Conference of the Seventh Day Adventists and the Foreign Mission Society of the Protestant Episcopal Church.

The state of Oregon argued that the state's "police power" was sufficient to require attendance at public schools. In an argument foreshadowing later First Amendment case law, the State Attorney General also argued that "absolute" separation of church and state under the First Amendment required public schools to be free from the influence of a religious organization or
belief. Apparently he was either trying to explain that the public schools would not impose Protestant beliefs on Catholic pupils, or to imply that it was not appropriate to teach religion in schools at all. He also made the mistake of arguing that the availability of public schools ended the need for any other type of school.6

McReynolds was not impressed with the argument and held that parents could decide to give their children a sectarian education whether the state approved or not.

In that era the usual Fourteenth Amendment analysis focused on whether the liberty to contract was infringed upon. McReynolds did so in this case also, as a type of afterthought. Speaking for a unanimous Court, he followed the rationale of his opinion in the Meyer case that the liberty of parents to "direct [the] upbringing and education of children under their control" as they saw fit was such a fundamental right that the state could not "force instruction from public teachers."7

McReynolds' reference to the rights of parents was not necessary to the decision, given that no parents were parties in the lawsuit, and it was probably obiter dictum in this case. But it did strongly influence the development of later Fourteenth Amendment analysis in the area of privacy rights when language from his opin-
ion was used to argue for a family right to sexual privacy in the 1960s.

That the line of economic substantive due process based on *Lochner* came to an end with the arrival of the New Deal was no surprise given the hostility of New Dealers and progressives to the Court's use of that doctrine to invalidate economic labor legislation it disagreed with. There were only a small number of schooling cases following the *Meyer* case, compared to the large number of times the Supreme Court struck state economic regulatory statutes. Given that numerical disparity, it would be fair to characterize the schooling cases as aberrations from the usual limitation of substantive due process to liberty of contract analysis. However, that distinction was not made explicit by the new Court majority which said, beginning with the case of *Nebia v. New York* in 1934, and continuing with *West Coast Hotel v. Parrish* in 1937, that it eschewed the use of substantive due process in general.  

There was doubt as to whether it was wise to so restrict the meaning of the due process and equal protection clauses in the area outside "commercial transactions." Chief Justice Harlan Fiske Stone voiced that concern in his famous footnote four in *United States v. Carolene Products Co.* in 1938. Stone mentioned
religion, the political process, racial and other minori­ties, voting and other rights from the Bill of Rights as deserving a more strict standard of scrutiny when state laws were reviewed under the due process clause.

In fact, the Court never did repudiate the *Meyer*, *Bartel*, *Pierce* line of social substantive due process cases. They remained on the books as good law, albeit seldom used because the states had complied with the spirit of the decisions. That line of cases would be revived by the Court in the 1960s when a constitutional right to contraceptives and abortion was claimed.

There was not much interest by the Vinson Court at the height of the Cold War in the late 1940s and early 1950s in free lance expansion of liberty rights.10 Also, by that time the Court’s emphasis had shifted from ad hoc determination of what substantive liberties were protected by the Fourteenth Amendment, to "incorporating" specific parts of the Bill of Rights into the due process clause.

The next steps in the development of a constitutional right of privacy were taken under the selective incorporation label. Most of the Court’s selective incorporation of specific parts of the Bill of Rights was for procedural rights such as the right to counsel and to remain silent when accused. However, enough of the
process dealt with substantive issues, especially those dealing with the First Amendment, to keep the Court doctrinally engaged in substantive due process analysis. That process eventually produced a substantive right of privacy under the First and Fourth Amendments.
Chapter II Endnotes


2Meyer, Plaintiff's Brief 7-9; Kurland, Plaintiff's Brief.


6Ibid., State's Brief, 70, 268 U.S. 510, 513.


8Nebbia v. New York, 291 U.S. 502 (1934); West Coast Hotel v. Parrish, 300 U.S. 379 (1937) was the occasion of the famous switch in time by Justice Owen Roberts.


CHAPTER III

SELECTIVE INCORPORATION AND THE RIGHT OF PRIVACY

Beginnings of Selective Incorporation

Aware of the controversy over the Supreme Court's use of the due process clause to strike down labor laws as violations of liberty of contract, the New Deal Court was sensitive to criticism that it was merely writing predilections of its members into the vague language of the Fourteenth Amendment. After Justice Owen Roberts switched his voting pattern to uphold New Deal legislation with his "switch in time" in *West Coast Hotel v. Parrish*, the Court scrupulously eschewed using the due process clause to strike down economic legislation. It was less concerned with using the due process clause to review legislation in noneconomic matters, however.

In the period before the New Deal, the Court had used the due process clause to destroy the ban on teaching German, and the attempt by Oregon to force all elementary students to attend public schools. Those cases, however, were exceptions to the rule in that era that substantive due process was an economic doctrine.

During the era of economic substantive due process,
between 1896 and 1937, the Court in each case listed the rights believed to be protected from interference by state laws. The exact source of those rights was never made clear by the Court. They probably were based on a reading of America's common law tradition by a majority of justices in a given case. But the Court never made a point of following common law precedents as such. What was clear was the preferential position in which the Court placed property rights. A new basis for determining federal Constitutional rights enforceable against the states began to emerge during the same decade, the 1920s, in which the *Meyer* and *Pierce* cases were decided.

Justice Brandeis, dissenting in the case of *Gilbert v. Minnesota* in 1920, remarked that, "I cannot believe that the liberty guaranteed by the Fourteenth Amendment includes only the liberty to acquire and to enjoy property." However, Justice McKenna, with Justice Holmes concurring, upheld the conviction of the defendant, Joseph Gilbert, for saying at a public meeting that conscription in World War I was unjust when the people did not have the opportunity to vote directly on the decision to go to war.¹

In what appears to have been his earliest expression on the Court of a right of privacy, Brandeis said that the state's absolute prohibition on advocating pac-
ifism, even in a home, was an invasion of the privacy of the home. Perhaps because the conviction was not for something said in a home, Brandeis could not win over a majority.²

In 1925 it was suggested in obiter dictum in the case of *Gitlow v. New York* that the Court was prepared to take another giant step in expanding the meaning of the due process clause.³ It had been assumed since ratification that the Bill of Rights applied only to the Federal government. The Supreme Court had so held in *Barron v. Baltimore* in 1833 when it refused to apply the Fifth Amendment to state or local government action. The Court made a similar ruling in 1845 in *Permoli v. New Orleans* with respect to the First Amendment’s free exercise of religion clause.⁴

However, while the Court in *Gitlow* upheld the conviction of Gitlow for criminal anarchy, Justice Edward Sanford also said that the First Amendment freedoms of speech and of the press were fundamental "liberties", protected from state infringement by the due process clause of the Fourteenth Amendment.⁵

In 1927 Justice Brandeis, dissenting in *Olmstead v. United States*, reiterated that the right of privacy was protected by the Fourth Amendment. He said the Bill of Rights gave Americans "the right to be let alone" free
from "every unjustifiable intrusion by the Government upon the privacy of the individual." 6

That was a considerable stretch from the meaning Thomas Cooley attached to his "right to be let alone" phrase. In Cooley's treatise on torts, he used the phrase in the conventional common law sense of a right to be let alone by other private persons. In short, it was a right to be free from assaults and other affronts to human dignity. It had nothing to do with a restraint on the power of the government.

Some of the advocates of the laissez faire liberty of contract version of substantive due process also relied on Cooley as an authority for their theory. However, that was based on Cooley's other great work, his Constitutional Limitations, first published in 1868, the year the Fourteenth Amendment was ratified. That reliance was also based on a misreading of Cooley's ideas about the power of the government. In essence, the advocates for economic substantive due process read more into Cooley, and the Constitution, than either could support. 7

Cooley had quite conventional views of the power of the government. He also had a great deal of respect for the common law tradition as a check on the government as its basic principles were codified in state and federal
constitutions. But there was little in the common law tradition to support either the economic due process theory or the Brandeisian concept of a right of privacy. That did not deter Brandeis from mining Cooley for felicitous phrases any more than it had detered the economic theorists earlier.

In an ironic twist for that era, the majority in *Olmstead* rejected the claim of a big business, American Telephone and Telegraph and other telephone companies, participating on behalf of Olmstead as amici curiae, that use of the telephone was a property right that should not be trespassed upon.

**Incorporation of the First Amendment**

By 1931, in *Near v. Minnesota*, the Court was ready to actually apply the free press clause of the First Amendment via the Fourteenth Amendment to invalidate a Minnesota law making it a crime to publish a "malicious, scandalous and defamatory newspaper, magazine or other periodical." The defendant's case was first taken by the American Civil Liberties Union (ACLU), originally a pacifist organization founded in 1917 in reaction to the militarism of World War I. When Near ran short of funds, his defense was taken over by the American Newspaper Association, which included the *Chicago Tribune*, a
conservative paper run by Colonel Robert McCormick, an ardent opponent of corrupt boss rule in Chicago.  

The Near case marked the beginning of what has been called absorption, or selective incorporation, of the Bill of Rights into the due process clause of the Fourteenth Amendment for application to state and local government. That process began even before the Court renounced the doctrine of substantive due process. The Court did not make a distinction between rights in the Bill of Rights said to be substantive as compared to those better classified as procedural. Instead, the focus of the Court was on whether the right being claimed, to use the formula preferred by Justice Felix Frankfurter, was "fundamental to the concept of ordered liberty."

The resemblance of that formula to what the Court had used to determine what economic "liberties" the due process clause included is obvious. Justices Frankfurter and Brandeis, and other Justices who shared the progressives' aversion to use of economic substantive due process by the Court, expressed concern that they were again importing substance into the Fourteenth Amendment, by a slightly different method. They persevered in the face of their doubts, however.

Justice Hugo Black offered the Court a way around the conceptual difficulty in 1947 with his theory of
complete incorporation of the Bill of Rights into the Fourteenth Amendment as set out in his dissent, with a long historical appendix, in *Adamson v. California*.\(^{11}\) Black's straight-forward theory, based on his reading of the history of the Fourteenth Amendment, was that the drafters' intent was to apply the federal Bill of Rights in full to the states. If the right was set out in the Bill of Rights, it should be applied to the states, and if it was not set out in the Bill of Rights, it should not be applied to the states. That would avoid, he believed, the constant need to sift out those rights that federal courts should force state governments to apply.

Justice Frankfurter and a majority of the rest of the Court were never convinced that Black's idea was correct. Professor Charles Fairman researched the debates on the Civil Rights Bill and the Fourteenth Amendment and declared Black's conclusions to be based on faulty history. He argued that incorporation of the Bill of Rights had not been intended.\(^{12}\)

Being unwilling to accept Justice Black's concept, the Court continued its practice of rummaging in the dustbin of history and in the members' own political and ideological proclivities for the meaning of the Fourteenth Amendment's due process clause. The result was expansion of due process in three areas: First Amendment
rights, criminal procedural rights, and social substantive rights; and the extinction in practice of the doctrine of liberty of contract associated with Allgeyer v. Louisiana and Lochner v. New York.

As Chief Justice Harlan F. Stone had suggested in 1938, although economic substantive due process was out of favor, the Court was willing to use the Fourteenth Amendment to protect First Amendment rights from state infringement. In 1937 the Court struck down a statute in DeJonge v. Oregon that forbade membership in the Communist Party on the grounds that it violated the First Amendment right to assemble and to petition the government. In 1943, in Prince v. Massachusetts, the Court overturned the conviction of a Jehovah's Witness for violating a child labor statute by allowing a child under her care to sell religious tracts. Although such a statute would have been upheld if challenged on economic grounds, the late New Deal Court struck the statute on a First Amendment challenge. It is interesting that the Court made no comment on the theoretical similarity of this decision, based on substantive rather than procedural grounds, to earlier economic substantive cases.
Strict Scrutiny of a Fundamental Right

Justice Douglas deftly avoided that issue in 1942 in *Skinner v. Oklahoma* by relying on the equal protection clause. The unfortunate Skinner was convicted of armed robbery and sentenced to the penitentiary. Because the state legislature felt prison time was insufficient punishment for repeat offenders, Skinner was slated for involuntary sterilization by forcible vasectomy. Not sharing the legislative enthusiasm for that prospect, he appealed on the grounds the Oklahoma three-strike statute violated the due process and equal protection clauses.¹⁶

Since the federal Bill of Rights is silent on the subject of involuntary sterilization, Justice Douglas was in a quandary if he wished to avoid merely echoing the substantive due process reasoning of *Meyer v. Nebraska* and *Pierce v. Society of Sisters*. Both those cases had ruled the right to raise children was protected by the due process clause, but unlike the rights the Court was selectively incorporating from the Bill of Rights, such a right was not found in the Bill of Rights. By 1941 the Supreme Court seldom looked to state common law as a source of substantive rights and the Oklahoma Supreme Court had already decided the common law in Oklahoma did not protect Skinner's future.¹⁷ Justice Douglas rose to the intellectual challenge and
opined that the equal protection clause was violated by Oklahoma's exclusion of embezzlement and political offenses from the category of crimes of moral turpitude when robbery was included.

Why should that make any difference, Oklahoma had argued. A legal classification merely needs to be a rational one, not necessarily a classification a given Court would make given the choice. Douglas responded that for such a fundamental right as the right to have children, the test of rationality is not sufficient. An infringement of a fundamental right would be strictly scrutinized by the Supreme Court.18

To say that this precursor of the strict scrutiny, compelling interest test looked remarkably like the application of substantive due process is to state the obvious. Whether it was really an equal protection case, or a substantive due process case, did not change the value of the case as a precedent for the Court. The New Deal and progressive members on the Court were more comfortable with analysis which avoided raising the specter of substantive due process which they said they had just buried.

After Skinner v. Oklahoma, the Court proceeded to extirpate economic substantive due process, culminating with Justice Black's majority opinion in Ferguson v.
Skrupa in 1963. The Supreme Court remained busy, however, after a brief period of quiescence during the Vinson years, expanding the reach of its authority over state law by selective incorporation of the criminal procedural rights in the Bill of Rights.

For years the Supreme Court reviewed state court criminal cases to see if the claimed Constitutional right was "implicit in the concept of ordered liberty." To avoid the ambiguity of that approach, Justice Black argued for incorporation of all the personal rights set out explicitly in the Bill of Rights, but that never gained the support of a majority of the Court. However, in practice the Warren Court began to base its selective incorporation decisions closely on the procedural protections found in the federal Bill of Rights.19

Incorporation of First and Fourth Amendments

Interestingly, one of the first Warren Court selective incorporation cases based on Fourth Amendment procedural issues was also the first modern selective incorporation case to revisit the question of whether the Constitution has a right of privacy. Justice Brandeis had earlier posited such a right in the search and seizure context in his Olmstead dissent. In 1961 Justice Tom Clark ruled that the protection of the Fourth Amend-
ment against unreasonable searches and seizures applied to a state court prosecution via the Fourteenth Amend-
ment. He also said that there was a right of privacy in one's home. That much would seem obvious, but the facts of the 1961 case of *Mapp v. Ohio* also raised the ques-
tion of whether private possession of obscene material was protected by the Constitution.²⁰

The police went to the house of Dollree Mapp on a tip that there was a bomb and gambling material there. After she refused them entry, the police said they ob-
tained a warrant to search the house. The ensuing search of the house yielded no bomb or gambling materi-
als, but the police did find four obscene books and sev-
eral obscene photographs and drawings. Dollree claimed that they belonged to a man who had lived in her house, although the police said they were found in her personal dresser in her bedroom.²¹

She appealed her conviction as a violation of her Fourth Amendment rights and of her right of privacy.
The ACLU filed a brief for her claiming a constitutional right of privacy based on both the Fourth and the Four-
teenth Amendments. The brief cited Brandeis' 1890 Har-
vard Law Review article, arguing that his proposed com-
mon law right of privacy should apply to the government as Brandeis had argued in his *Olmstead* dissent.²²
Because the prosecution never introduced its search warrant as evidence during the criminal trial, Justice Clark ruled that Mapp's right of privacy had been unlawfully invaded. He then invoked the selective incorporation doctrine to apply the exclusionary rule previously developed in Fourth Amendment litigation in federal courts to state courts also. 23

With the procedural due process decision in *Mapp v. Ohio*, the foundation was completed for the third branch of the modern constitutional doctrine of a right of privacy. The first branch was, of course, the social substantive due process doctrine laid down in the *Meyer, Bartels* and *Pierce* cases. The second, incipient, branch was the new equal protection theory based on fundamental rights, or suspect classes, as prefigured by Justice Douglas' *Skinner* opinion. That was related very closely conceptually to the older social substantive due process. The third branch was the selectively incorporated protections of the Fourth Amendment (like *Mapp v. Ohio*) applied to the states via the Fourteenth Amendment.

In the years following the *Mapp* decision the Supreme Court decided two other significant cases involving Fourth Amendment claims for an individual's privacy right against the government. *Stanley v. Georgia*, decided in 1969, was similar to *Mapp* in that it was a
search of a house for evidence of illegal bookmaking that instead turned up obscene material in a bedroom.\textsuperscript{24}

\textit{Mapp} had already determined that if a search was illegal, the "fruit" of the illegal search would be excluded from use as evidence in a state court prosecution. In the interval between the \textit{Mapp} decision in 1961 and argument of the \textit{Stanley} case in 1969, the Court had decided \textit{Katz v. United States} in 1967. \textit{Katz} adopted the privacy reasoning of Justice Brandeis in his \textit{Olmstead} dissent. Under Justice John Marshall Harlan's adaptation of the Brandeis concept in \textit{Katz}, the focus shifted from real estate trespass analysis to balancing the reasonableness of the expectation of privacy of the accused against the extent of the government's intrusion.

\textit{Stanley} gave the Supreme Court the opportunity to apply that expectation of privacy test to a prosecution for possession of a pornographic movie with the unappealing title of \textit{Young Blood}. The film had been found tucked away, still in the film containers, in a drawer in Stanley's bedroom.\textsuperscript{25}

The Court majority found the accused had a reasonable expectation of privacy in his house. Since the police had a valid warrant to search for evidence of gambling, there was no procedural violation to justify exclusion of the evidence under the exclusionary rule.
The police had viewed the film after it was seized, and the jury convicted him, so there was no question that it was in fact obscene under Georgia law. The remaining issue was whether Stanley could be prosecuted for mere private possession of material which was obscene and so illegal to possess under state law.26

Justice Thurgood Marshall, writing for the majority, combined the First Amendment with the Fourth Amendment, and for good measure, threw in the "right to be let alone" that Justice Brandeis had borrowed from Thomas Cooley, to create a new right of privacy based on selective incorporation of parts of the Bill of Rights. In Marshall's words, "the First Amendment means . . . a State has no business telling a man, sitting alone in his own house, what books he may read or films he may watch."27 That right was clearly substantive, although Marshall was careful not to characterize it so, in that it existed even if the search was legal in all respects. In short, the evidence was not excluded under the exclusionary rule because the search was illegal. It was excluded because the Supreme Court declared the states did not have the substantive right to make a law declaring private possession of obscene material illegal.

His brethren, Justices Potter Stewart, William Brennan and Byron White concurred only in the result,
pointing out that the search seemed to have exceeded the scope indicated in the search warrant.\textsuperscript{28}

Stanley appears to be an anomaly in the law of the constitutional right of privacy, in part because of Marshall's unorthodox mixing of First Amendment law with Fourth Amendment law. Also, state laws against pornography have concentrated on regulating its sale and distribution and there has been little attempt to enforce bans on private possession of such material. That trend began years before the Stanley decision, as the lower court decision in Mapp v. Ohio illustrated. A majority of the Ohio Supreme Court in the Mapp case reached the same result Marshall did in Stanley, but a state procedural rule required a supermajority of the court to rule a state statute unconstitutional. Because only a simple majority of the Ohio Court was willing to vote in Mapp's favor, the constitutional issue remained for federal consideration.\textsuperscript{29}

The current state of the Fourth Amendment right of privacy remains tied to traditional conceptions of a right to be free from warrantless searches and seizures by state or federal officers in the privacy of a home or its legal equivalent. The focus is on the location, not on the activity being conducted there. With the exception of the Stanley case, it has little connection to
substantive legal issues, unlike the social substantive
due process and equal protection-fundamental rights
branches of the constitutional right of privacy.
Chapter III Endnotes


2 Ibid.


5 *Gitlow*, 666.


9 Most commentators on constitutional law make a distinction between procedural due process and substantive due process in Fourteenth Amendment jurisprudence. Many of the rights set out in the federal Bill of Rights are procedural rights. For example, the right against self incrimination in the Fifth Amendment and the right to counsel in the Sixth Amendment relate to rights the accused may raise during a criminal prosecution. By contrast, the rights set out in the First Amendment are substantive in nature. A criminal prosecution may be the instance where the question of a constitutional right is raised, but the right of free speech or of freedom of the press go to the essence, or substance, of the defense to a charge itself. Either what was said or printed was legal under the Constitution, or it was not.


12 Charles Fairman, "Does the Fourteenth Amendment Incorporate the Bill of Rights: The Original Understanding," *Stanford Law Review* 2 (1949), 5-139; Black's own use in his Appendix of Bingham's speeches from the debates on the Civil Rights Act and the Fourteenth Amendment merely proves that Bingham was arguing that Congress had the power to pass affirmative statutes under authority of the Fourteenth Amendment to enforce the Bill of Rights, not that the Supreme Court could do so. That is the same point made by Professor Horace Edgar Flack in his book, *The Adoption of the Fourteenth Amendment* (Baltimore: The John Hopkins Press, 1908).


16 *Skinner v. Oklahoma*, 316 U.S. 535 (1942), microfiche ed. (Washington, D.C.: Microcard Editions, Inc.), Transcript 1, 2; his first conviction was for chicken theft, his second and third were for firearm robbery. The Oklahoma statute applied to three or more felony convictions for crimes of moral turpitude, see Petition for Certiorari.

17 Ibid., opinion of (state) Judge Higgins; State's Brief.


19 They included: the Sixth Amendment right to counsel in *Gideon v. Wainwright*, 372 U.S. 335 (1963); the right to claim the Fifth Amendment in *Escobedo v. Illinois*, 378 U.S. 478 (1964); the Sixth Amendment right to counsel in *Malloy v. Hogan*, 378 U.S. 1 (1964), and *Miranda v. Arizona*, 348 U.S. 436 (1966); the Fourth Amendment right to probable cause for a search or seizure in *Katz v. US*, 389 U.S. 347 (1967) (privacy issues too); the exceptions for a search without a search war-
rant in *Terry v. Ohio*, 392 U.S. 1 (1968); the Eighth Amendment right to be free from cruel and unusual punishment in *Furman v. Georgia*, 408 U.S. 238 (1972).


23 *Mapp*, 655, 660.


26 Ibid., 15, 20, 21, 24, 122.

27 *Stanley*, 565.

28 *Stanley*, 569-572.

29 *Stanley*, Marshall's fn. 7.
CHAPTER IV

THE RIGHT OF FAMILY PRIVACY

The liberty of contract version of economic substantive due process was urged on the Supreme Court by lawyers for large business interests. The Court adopted that legal theory to engage in hostile review of state economic legislation. The education cases, Meyer, Bar-tels and Pierce, did not result from an equivalent organized effort by an identifiable part of the Bar. Somewhat coincidentally, one of the big legal guns from the business world, William Guthrie, did eloquently argue Pierce to the Supreme Court for the Catholic hierarchy.1 But the social substantive due process cases of the 1920s were more a quick reaction by the Court to overzealous wartime and assimilation laws which stepped too sharply on religious toes, than they were planned efforts to curb state legislatures.

The Supreme Court's use of selective incorporation to apply the First Amendment to the states resulted in part from organized efforts by groups such as the ACLU and the Jehovah's Witnesses to limit state legislation in the politically sensitive areas of speech and
religion. By contrast, the selective incorporation of criminal procedural rights in the Warren Court era was driven more by the desire of that Court to change the sometimes cavalier way states treated criminal defendants.

The driving force in the development of the new equal protection theory was the civil rights movement and the groups actively working for social, political and legal change in race relations. Thurgood Marshall, before President Johnson recruited him for Solicitor General, was a virtual one man army in that long legal campaign. By the 1960s women's groups joined that effort, also.

The civil rights movement, the women's movement and the general social ferment in society in the 1960s generated a sense that the federal courts, especially the Supreme Court, were open to arguments for change. Unlike the era of laissez faire and substantive economic due process, the modern attack mounted by lawyers against state legislation was not a conservative reaction against activist state legislatures passing popular laws regulating property rights. The attack was rather against laws regulating social and sexual behavior which had been on the books for generations, but which some activists now saw as antiquated.
The selectively incorporated criminal procedural rights were already applicable to cases in federal courts, and the Supreme Court had only to look to the current federal practice for practical guidance in application of the same rights to state courts. But the cases brought by those who wanted to change social legislation for contraception and abortion did not involve questions covered explicitly by the Bill of Rights. The challenge for the reformers was to develop new legal theories of sufficient legal weight to reprise the success the business community enjoyed in the era of laissez faire, and the success the civil rights movement had with the Warren Court. The first legal success by reformers in the field of sexuality and reproduction developed from a long running campaign to make distribution and use of contraceptives legal in the state of Connecticut.

Contraception

Connecticut had a law against the sale and use of contraceptives, promoted during the late 1870s by Phineas T. Barnum, of circus fame, while he was chairman of the Connecticut Legislature's Joint Committee on Temperance. The law was passed as part of the national anti-pornography, anti-contraception and anti-abortion cru-
sade of Anthony Comstock and his Society for the Suppression of Vice. Having been enacted by a Republican Congregational Yankee establishment, it was kept on the books by the modern Democratic Catholic political structure.\(^2\)

The Planned Parenthood League of Connecticut campaigned throughout the 1940s and 1950s, without success, for legislative repeal of the state's ban on distribution and use of contraceptives. Failing to achieve that objective, they began to force a prosecution so a test case could be appealed to the Supreme Court. The local prosecutors were loath to oblige and the first effort to mount an appeal to the Supreme Court in 1943 in *Tileston v. Ullman* was dismissed for lack of justicability.\(^3\) Likewise, in 1961 *Poe v. Ullman* was dismissed after oral argument on Justice Frankfurter's finding of a lack of a real legal controversy.\(^4\) A small note of hope for the reformers was Justice Harlan's willingness in dissent to include the right of married persons to use contraceptives in the list of substantive liberties protected by the Fourteenth Amendment.\(^5\)

The Supreme Court did not hear another Connecticut test case until 1964. The Executive Director of the Planned Parenthood League of Connecticut, Estelle Griswold, widow of the former President of Yale University,
Whitney Griswold, and Dr. Lee Buxton, a Yale Medical School professor, finally succeeded in being charged with distribution of contraceptives to certain unnamed married persons. Although guilty of the offense, they pled not guilty and were willingly convicted so the law could be attacked on appeal.

Connecticut's Supreme Court of Errors duly found them guilty in 1962 and the ACLU took their federal appeal. The state attorneys for Connecticut were not strong advocates for the law since they shared the opinion of many that the law was outmoded, unenforceable and remained on the books merely because state legislators lacked the political courage to repeal it. A majority of the Supreme Court agreed and in 1965, in Griswold v. Connecticut, struck the law as a violation of the privacy of married couples under several provisions of the Bill of Rights.

Justice Douglas' majority opinion was a legal wonder, relying on "penumbras" formed from "emanations" of the personal rights found in the Bill of Rights. Douglas specifically disavowed the right of the Supreme Court to sit as a "super-legislature" for laws touching "economic problems, business affairs, or social conditions." It would do so, he implied, only for laws operating "directly on an intimate relation of husband and
wife. He cited *Meyer, Pierce* and *NAACP v. Alabama*, a 1958 First Amendment case, as indications the First Amendment has peripheral rights, or as he put it, "a penumbra", protecting marital privacy from government intrusion. Douglas also relied on the Third, Fourth, Fifth and Ninth Amendments without grounding the new right on any particular Amendment.

Chief Justice Earl Warren and Justices Arthur Goldberg and William Brennan, in a concurring opinion, agreed with Douglas. They relied on the selective incorporation of the personal rights protected by the first eight Amendments, and on the Ninth Amendment as a reservation of rights to the people in addition to those explicitly set out in the rest of the Bill of Rights. Justice Harlan also concurred, but was willing, as he had been earlier in *Poe v. Ullmann*, to rely on what he called "basic values implicit in the concept of ordered liberty," whether those rights were set out in the Bill of Rights, or not. Justice Byron White also concurred, citing *Meyer, Pierce, Skinner, and Prince v. Massachusetts*, a 1944 First Amendment case, for the proposition that the intimacies of married life should be free from such state regulation.

Justices Black and Potter Stewart dissented, saying there was no constitutional right of privacy against
state laws. Black pointed out the parallel between the
Griswold majority's reasoning and that used in the eco-
nomic substantive due process cases of Lochner, Coppage
v. Kansas and Adkins v. Children's Hospital.12 He also
noted the similarity to the social substantive due pro-
cess theory Justice McReynolds used in his Meyer and
Pierce opinions. Justice Black sardonically concluded
with the comment of Judge Learned Hand that:

For myself it would be most irksome to be
ruled by a bevy of Platonic Guardians, even
if I knew how to choose them, which I assur-
edly do not.13

The Griswold decision was initially of more
theoretical interest than an instrument of national
change since the Connecticut statute struck down was the
only one in the country forbidding use of contraceptives
by married couples.14 The badly fractured doctrinal ba-
sis of the case also raised many questions as to what
the decision meant.

In 1972 the Supreme Court moved further, striking a
Massachusetts statute that banned distribution of con-
traceptives to unmarried persons. In Eisenstadt v.
Baird, Justice Brennan avoided the doctrinal ambiguity
of Griswold by relying on Griswold's holding rather than
its theory and finding the Massachusetts statute vio-
lated the equal protection clause. In short, unmarried
people had the same constitutional right to obtain con-
traceptives as married persons and the state legislature could not say otherwise.\textsuperscript{15}

That begged the question of whether the right of unmarried persons to obtain contraceptives was a constitutional right at all, but by that time the new equal protection doctrine was a powerful and malleable tool for changing constitutional law. In 1967 that power had been demonstrated in \textit{Loving v. Virginia}.\textsuperscript{16}

\textbf{Right to Marry}

In that case Richard Loving and Mildred Jeter left their home state of Virginia to marry. They had to leave the state to do so because he was white and she was not and Virginia forbade marriage between a white person and a person of another race. On their return to Virginia in 1958 they were arrested, convicted and sentenced to a year in jail, unless they agreed to leave the county for twenty-five years. By the time their appeal reached the Supreme Court in 1966, social conditions in the United States had changed somewhat from what they had been in 1958, and a great deal from what they were in 1691 when the original anti-miscegenation law was passed in Virginia.\textsuperscript{17}

The constitutional issue was whether the Fourteenth Amendment protected a private decision to marry a person
of another race from state prohibition. The attorneys for Virginia pointed out that the Fourteenth Amendment had its origins in the Civil Rights Act of 1866 and the Freedman's Bureau Bill and argued strenuously that the Fourteenth Amendment was not intended to abolish anti-miscegenation laws. In their brief they quoted direct statements made by Senators Lyman Trumball of Illinois and C.E. Phelps of Maryland during debate on the Civil Rights Act of 1866 and the Freedman's Bureau Bill that such state laws would not be affected by the federal statutes. They also pointed out that none of the ratifying states with such laws on the books when they ratified the Fourteenth Amendment changed them after the Amendment was adopted. They capped their brief with existing state case law upholding anti-miscegenation laws.\textsuperscript{18}

Virginia's position was also opposed by the Catholic Conference, the Japanese American Citizens League and the NAACP. The technical point of law in the case was the equal punishment theory which said that if both partners in such a marriage were punished equally, there was no denial of equal protection. That legal theory, dating back to the end of Reconstruction, had been rejected by the Supreme Court shortly before in \textit{McLaughlin v. Florida}.\textsuperscript{19}
Chief Justice Warren wasted little time in striking Virginia's 1924 version of its Racial Integrity Act, a direct successor of the 1691 version, which he pointed out had been revised during a period of nativism after World War I. He relied on the equal protection clause, but, in addition, found a due process denial of a fundamental freedom, the right to marry the person of one's choice.

In addition to illustrating Warren's penchant for trying to do the right thing without much regard for technical niceties, *Loving v. Virginia* also showed how constitutional law sometimes changes with changing social conditions. By the time *Loving* was decided, a majority of the nation had reached consensus on civil rights issues in matters of race. The decision did not engender widespread popular protest and there was no movement in the Congress to repeal the decision by a Constitutional amendment, or otherwise.

The case is noteworthy for the Court's rejection of arguments for original intent based on actual undisputed statements made by prominent political participants in the Reconstruction era debates. It is also noteworthy for the Court’s rejection of original intent arguments based on the prevalent practice of the states before, during, and after the ratification of the Fourteenth.
Amendment.

The doctrinal tool used by Warren was the compelling interest test which forced Virginia to convince the court that its law advanced a state interest more compelling than the fundamental right of a person to choose a spouse. But the case was more than that. It was also an explicit rejection of the theory of white supremacy by the Court, even though the evidence that such a theory was the prevailing norm at the time the Civil War Amendments were adopted was not disputed.\textsuperscript{20}

By the early 1970s the focus had turned from the fairly narrow family right of privacy, a departure first apparent in the \textit{Eisenstadt} decision, to the twin questions of what the new right of privacy covered and who it protected from state regulation. In short, was it a family right of privacy, or was it a sexual right of privacy? The next challenge, to state laws regulating abortion, raised both those issues.
Chapter IV Endnotes


5Garrow, 193; *Griswold*, Transcript 13.

6Garrow, 268; *Griswold*, Transcript 1, 7, 13, 17-29, State's Brief 4.


9*Griswold*, 484.

10Ibid., 486-499, 500.


14Garrow, 15-16.


was outlawed between whites and other races, not all other interracial marriages were outlawed, however.

17 Ibid., Loving's Brief 17, 28.

18 Ibid., State's Motion to Affirm 7, 8, 10, 11, 12-15; Oral Argument 971, 980.

19 McLaughlin v. Florida, 379 U.S. 184 (1964); the attorneys for Virginia did not, of course, argue white supremacy to the Warren Court, nor did they try to refute the briefs of the opposing side that pointed out the prevailing race theory when the law was adopted.

CHAPTER V

ROE v. WADE

Legislative Abortion Reform

The Connecticut reformers responsible for *Griswold*, and their counterparts in other states, understood that the case had little practical impact on national policies because the Connecticut law stood alone in its ban on the use of contraceptives by mature, married adults. However, they were also aware of the theoretical possibilities raised by the Supreme Court’s analysis.

Thomas Emerson, *Griswold*’s counsel at oral argument of the *Griswold* case, said in his brief, and at oral argument under questioning by the justices, that he was not arguing for extending a right of privacy to abortion cases. Abortion was not like contraception, he said, it was not a private act in the family home, it was a public act which ended a life in being. That position was in line with Planned Parenthood’s current policy of avoiding linkage to the movement to reform abortion laws, hoping to avoid political damage to their then paramount mission of providing contraceptive information and advice.¹
Emerson had been careful in his brief and in oral argument not to get too far ahead of the Court, but the analytical basis of the *Griswold* decision opened the possibility of other changes in related areas. His argument to the Court that abortion was a different question from contraception was revealed as disingenuous when he shortly thereafter wrote an article in the Michigan Law Review suggesting application of the *Griswold* privacy rationale to abortion laws. That article was read and appreciated by a young law student, Spurgeon LeRoy Lucas, son of a Baptist deacon from Columbia, South Carolina.  

Roy Lucas, as he preferred to be called, was studying at New York University Law School in 1965 when the *Griswold* decision was announced. While he was still a law student his girl friend became pregnant and they were referred to Dr. Alan Guttmacher who recommended they go to Puerto Rico to obtain an abortion for her. Lucas felt the entire experience of traveling out of the country was unnecessarily degrading and resolved to do something to change the situation.  

He wrote a senior paper on abortion, which he later expanded to a substantial law review article, complete with statistical and sociological analysis. His then revolutionary article focused on the best way to use the
reasoning of the Supreme Court in *Griswold* to argue for a constitutional ban on state regulation of abortion.4

The emphasis of activists trying to liberalize abortion laws then was on lobbying legislatures to pass laws allowing more legal reasons for abortions. Many of the abortion laws at that time banned abortion except to save the life or health of the mother. Three states, Massachusetts, New Jersey and Pennsylvania had no statutory exceptions, but the state courts had read a life of the mother exception into the statutes. Some other states even required the mother or the doctor to prove the procedure was medically necessary.5

The difficulties with state abortion laws had not gone unnoticed by lawyers. The American Law Institute (ALI), an organization of lawyers and judges representing all states, who met regularly to develop uniform laws for the states to adopt, set about developing a model code for abortion, too. At its 1959 meeting at the Harvard Club in New York City the ALI endorsed a model penal law expanding the allowed reasons for a legal abortion to include therapeutic abortions for impairment of physical or mental health of the mother, fetal defects, or pregnancies resulting from rape or incest.

It took some time for that proposal to percolate
through the system, but by 1966 the New York Obstetricians Society was ready to endorse the concept. The following year the House of Delegates of the American Medical Association (AMA), in a major reversal of a nearly century old position, voted to endorse that standard.6

Change was also under way in the mainline Protestant churches, which had previously opposed abortion and had constituted the unofficial establishment when the laws banning abortion were passed in the 1800s. In 1962 the Presbyterians urged that state laws allow for therapeutic abortions and that state laws be made more uniform. Bishop Pike of the Episcopal Church and Cardinal McIntyre engaged in a verbal donnybrook in 1966 when the California Medical Association endorsed an ALI style law. Pike, a former Catholic, was, of course, for the change and the Cardinal was adamantly opposed.7

Early in 1967 a group of mainline Protestant and Jewish clergy in New York City went considerably further and formed a group they called the Clergymen's Consultation Service on Abortion. They began to counsel pregnant women and to refer them to abortionists in countries where the procedure was legal. The group soon ran into trouble for allegedly referring women to illegal abortionists in the state, but they emerged from that
imbroglio to become a national group. At the time the movement to liberalize state abortion laws represented a substantial change, but at its second annual convention the newly formed National Organization of Women (NOW) endorsed Betty Friedan's proposal to instead work for repeal of all abortion laws. The National Association for the Repeal of Abortion Laws (NARAL) was formed to accomplish just that goal in 1969. By 1970 the AMA, on a vote of one hundred three to seventy-three, endorsed abortions for social and economic reasons. That was essentially a repeal position, more liberal than the ALI proposed model law and of forty-seven state laws at that time. The Methodist Church also passed a resolution in support of the repeal position in April, 1970.

The lawyers lagged behind, but by 1972 the American Bar Association's House of Delegates was ready to vote two hundred seventy-seven to thirty for allowing abortions freely during the first twenty weeks of fetal life. After that, the ALI standards allowing exceptions to the ban for physical and mental health, plus rape and incest, would apply.

Judicial Coup

Lucas, who had watched the British change their na-
tional policy with one Parliamentary bill while he was visiting Britain on a post graduate fellowship, felt he had found an even faster and better way to change the law in America. He told the ACLU and the Association for the Study of Abortion (ASA) that a declaratory judgment action before a three judge panel in federal court was the best way to proceed. In short, rather than engage in a long and expensive campaign to lobby fifty state legislatures to either change or repeal their existing laws banning abortion, the Supreme Court could be petitioned to strike those laws with one decision.\(^\text{11}\)

The New York chapter of the ASA took up several appeals against the New York abortion law. Lucas participated in those cases but the subsequent legislative repeal of the entire New York statute mooted his best case, *Hall v. Lefkowitz*, because the new statute had none of the features he argued were unconstitutional.\(^\text{12}\) Meanwhile, a case was being developed in Texas by two women also just out of law school.

Sarah Weddington, daughter of a Methodist minister and a school teacher, and her friend, Linda Coffee, became active in Dallas, Texas in the effort to reform the state's 1854 abortion law which allowed abortion only to save the life of the mother. Weddington had a personal interest in that law since she had become pregnant at
age twenty-two while still an unmarried student. Ron Weddington, later her husband for six years, accompanied her across the border to Piedras Negras, Mexico, for an abortion. She found the experience humiliating and resolved that she would work to change the law.13

Because of the dismissals for lack of a legal controversy experienced by Planned Parenthood of Connecticut in its campaign to strike Connecticut’s ban on contraceptives, Weddington and Coffee were determined to avoid the same fate for their planned case. They searched for a woman who was actually pregnant to be their plaintiff, instead of filing their case with only a doctor willing to do abortions, or with an interest group as the plaintiff. They were introduced to Norma McCovy who said she was pregnant by a boyfriend but could not afford a child. After consideration, Norma McCovy agreed to become the plaintiff, together with James Hallford, a physician, and a young married couple.

The complaint asking for declaratory and injunctive relief was filed in Federal District Court for the Northern District in Dallas and was assigned to a three judge panel including District Judges Irving Goldberg and Sarah Hughes (famous for swearing Lyndon Johnson in as President) and Circuit Judge William Taylor. The panel was a good one from a plaintiff’s perspective
since Linda Coffee had recently clerked for Judge Hughes and the same panel had recently ruled the Texas sodomy statute was unconstitutionally vague in *Buchanan v. Batchelor*, a 1970 case also filed as a declaratory judgment action.\(^{14}\)

The Plaintiffs in *Roe v. Wade* claimed the Texas abortion statute was a violation of the First, Fourth, Fifth, Eighth, Ninth and the Fourteenth Amendments. The case was disposed of by the three judge panel at a combined hearing on Plaintiffs' motion for summary disposition and the State's motion to dismiss. No evidentiary hearing or trial was required by the three judge panel. The evidence in the case consisted of the affidavit of Norma McCovy filed as a Jane Roe affidavit the day before the hearing and several affidavits by medical doctors. Norma was then eight months pregnant. Coffee and Weddington, who was arguing her first contested case, argued for the Plaintiffs' and Jay Floyd, Assistant Attorney General, and John Tolle, of the District Attorney's office, argued for the State at the May 22, 1970 hearing.\(^ {15}\)

In her opinion, released less than 30 days after the motion hearing, Judge Hughes found the 1854 Texas abortion law forbidding abortions, except to save the life of the mother, void for vagueness under the Fourteenth
Amendment, and also a violation of the Ninth Amendment. However, while granting Plaintiffs' request for a declaration that the Texas abortion law was unconstitutional, the panel denied the requested injunctive relief. That, together with the District Attorney's public statement that prosecutions would continue for abortions, allowed the case to be appealed directly to the Supreme Court, bypassing a hearing by the Fifth Circuit Court of Appeals.\

Another case was being heard at the same time in Georgia where a reform statute based on the ALI Model Penal Code was challenged. That statute allowed abortions where the life or health of the mother was threatened, the fetus might be defective, or the pregnancy resulted from rape. In *Doe v. Bolton* the state also raised the question of fetal rights, particularly the issue of whether a fetus was a person under the Fourteenth Amendment and thus entitled to legal protection from the moment of conception. Under that analysis the issue became one of balancing the competing due process rights of two Fourteenth Amendment "persons", rather than an issue of the right of a pregnant mother to be let alone by the state.

In a rather unusual development, Ferdinand Buckley petitioned to be appointed guardian ad litem for Plain-
tiff Mary Doe's unborn child. The three judge panel initially granted his petition, then denied it, saying they did not consider the fetus to be a "new being with federal constitutional rights at any time during gestation." The fact that he filed a civil rights counter-complaint on behalf of the fetus alleging a conspiracy to deprive the fetus of its constitutional rights probably was a factor in the decision to limit him to amicus status. The judges did allow Buckley to participate in the case in an amicus capacity and Buckley argued the fetus was a constitutional person at the District Court level.18

Circuit Judge Lewis Morgan and District Judges Sidney Smith and Albert Henderson found Georgia's reform law unconstitutional for overbreadth for listing the allowable reasons. Like the Roe case, Doe v. Bolton was appealed directly to the Supreme Court by the Plaintiffs.

The Texas and Georgia cases were not the only pending federal court challenges to state abortion laws, nor was Doe v. Bolton the only case where the issue of a fetus as a Fourteenth Amendment person was raised. In Montana v. Rogers, a 1960 federal case, the question was asked whether a person could become a citizen because he was in utero while his mother was in the United States,
although he was born in Italy. The answer was no. Because the Supreme Court has differentiated between citizenship and personhood in Fourteenth Amendment analysis, that case left open the question of whether a fetus could be a constitutional person.\textsuperscript{19}

In 1970 a three judge panel implied that a fetus could be a constitutional person. District Judge Don Young and Circuit Judge Wieck ruled in \textit{Steinberg v. Brown} that the Ohio abortion statute was constitutional because the right of a fetus, or embryo, was superior to the right of a woman to destroy it by an abortion, except in a life threatening situation. Judge Young said that the beginning of biological life, at fertilization, was the point at which a state could begin to regulate a pregnancy.\textsuperscript{20}

In \textit{Corkey v. Edwards}, a 1971 case, another three judge panel said abortion was the destruction of a human organism and so could be regulated. The judges specifically rejected equating Cooley's "right to be let alone" formulation, as quoted by Justice Brandeis in his \textit{Olmstead} dissent, with a constitutional right of privacy. They also said ruling otherwise would be excessive judicial interference since they saw no "real distinction" between "social due process" and the discredited \textit{Lochner} economic substantive due process.\textsuperscript{21}
Not all federal judges agreed with those panels. In 1972 Judges Foreman and Barlow applied the compelling interest test of *Bates v. Little Rock* to strike New Jersey’s abortion statute in *YMCA v. Kugler*. The statute violated the right of privacy under the Ninth and Fourteenth Amendments, they said. However, Judge Garth in dissent said the state’s interest in the fetus began at conception.  

By the time the *Roe* and *Doe* cases reached the Supreme Court, the score stood at six to seven in the lower federal courts. Abortion statutes in Minnesota, Louisiana, Missouri, Ohio, North Carolina and Utah had been upheld. In Kansas, New Jersey, Georgia, Texas, Wisconsin, Illinois and Connecticut federal judges had ruled the statutes unconstitutional. In California, the state Supreme Court had ruled that state’s abortion law unconstitutional under both the California Constitution and the Fourteenth Amendment.  

The time period during which the *Roe* and *Doe* cases were working their way to the Supreme Court was a time of national political turmoil. At the end of Lyndon Johnson’s administration, it was clear the next President would not be sympathetic to liberal causes and Chief Justice Earl Warren informed President Johnson he wanted to retire from the Court. Johnson decided to
nominate his old friend Abe Fortas, already a Justice, for promotion to Chief Justice. Unfortunately for that plan, Fortas was rejected. Worse followed for him and he was soon forced to resign from the Court because of questionable dealings with financier Louis Wolfson.

The 1968 Presidential election was won by Richard Nixon and liberals saw with dismay that the new President would begin his term with an unusual opportunity to appoint both the Chief Justice and a replacement for Fortas, both liberals by any definition. Nixon nominated Warren Burger for the Chief Justice slot and he was easily confirmed. After the failure of Nixon nominees Judge Clement Haynsworth and Judge G. Harold Carswell to win Senate confirmation to replace Fortas, Burger had the opportunity to recommend the appointment of his childhood friend, Harry Blackmun, another Republican federal judge also from Minnesota.\(^{24}\)

By the time oral arguments were heard in the *Roe* and *Doe* cases, Earl Warren and Fortas had been replaced by Nixon appointees. Since President Nixon had indicated in his campaign that he favored strict construction of the Constitution, and also that he did not favor repeal or liberalization of state abortion laws, the new appointees were not considered likely to be sympathetic to extension of the *Griswold* right of privacy.\(^{25}\)
The briefing in the Roe and Doe cases was impressive. In addition to the briefs by plaintiffs' counsel, and by the state Attorneys General, sixteen friend of the court briefs were also submitted. Nine favored striking abortion laws and seven wanted them retained. One of the several financial angels for the Roe case, Jimmye Kimmey, of ASA, with funding from John D. Rockefeller, III, and Cordelia Scaife May, among others, coordinated the amicus briefs on behalf of the plaintiffs arguing for a constitutional right to an abortion.26

Meanwhile Sarah Weddington had signed on with Roy Lucas as a staff attorney at his new organization, the James Madison Institute, financed by Martin Dies, an attorney famous for his work in civil rights cases who had ready money from a recent business success. As the plaintiffs' brief in the Roe case was being drafted, tension developed between Weddington and Lucas which caused her to quit the Institute and return to Dallas with her attorney husband. It later became a point of contention between them, but the Roe brief was organized along the lines Lucas had envisaged in his law review article.27

The thrust of the argument was that there is a zone of privacy for matters closely related to the intimacies
of sex. Plaintiffs relied on the earlier social substantive due process cases of Meyer, Bartels, and Pierce, as well as the more recent privacy cases such as Skinner, Poe v. Ullman, Griswold and Loving v. Virginia. They also cited a law review article by recently retired Justice Tom Clark suggesting it was time to reform abortion laws to bring them in line with modern times.28

Some of the amicus briefs made much more esoteric arguments. The brief by the Friends Service Committee and the Methodists suggested it was improper for a state to rely on religious morality to show a compelling state interest justifying a ban on abortion. Another brief suggested it was cruel and unusual punishment under the Eighth Amendment to force a pregnancy to term. Overall they alternately cited original intent, or said it did not matter, as they felt appropriate to the particular argument at hand.29

The amicus briefs for the other side focused primarily on the question of whether an unborn child was a Fourth Amendment person (the word fetus was used very sparingly). Interestingly, none of the briefs, even those by Catholic organizations, attacked Griswold and the right of privacy that case guaranteed married couples even though it was obvious the plaintiffs' case de-
pended on the right of sexual privacy suggested by that case.\textsuperscript{30}

By the time of oral arguments, Lucas had been displaced from the case and Weddington argued on behalf of the plaintiffs. Jay Floyd argued for the state of Texas. Weddington clearly had the better of the first oral argument, in part because the justices seemed more sympathetic to her position than to that of the State. She also, neophyte that she was, simply put in a better performance.\textsuperscript{31}

The Texas statute was of 1854 vintage and allowed abortion only to save the life of the mother. The Georgia statute was a recent reform law based on the ALI model penal statute. Because of those differences, it had been thought before the cases were argued that the Georgia law was more likely to meet with the approval of the Supreme Court. But it was clear after the post argument conference that a majority of the justices favored striking both the Texas and Georgia abortion statutes.\textsuperscript{32}

That was a somewhat startling development for new Chief Justice Burger and he arranged for the case to be reargued because two new members had just been appointed to the Court to replace Justices Hugo Black and John Marshall Harlan. Apparently he hoped the two additional
Nixon appointees would be less sympathetic to an opinion striking abortion laws wholesale. Newly appointed Justice Lewis Powell had the reputation of being a mainstream conservative and Justice William Rehnquist came straight to the court from the Nixon Justice Department. The reargument turned out to be anti-climactic and ultimately made no difference in the voting since Rehnquist voted against striking the abortion statutes and Powell voted to strike the laws.

Burger apparently voted to strike the Texas law only when he saw there were sufficient votes without him so Douglas, the senior justice in the majority, would not assign the opinion, and not because he really favored striking abortion laws. Burger then assigned the case to his old friend, Justice Blackmun, an establishment Republican and Presbyterian. With encouragement from Douglas and Brennan, Blackmun labored slowly over his opinion, eventually producing the famous, or perhaps infamous, *Roe v. Wade* decision.\(^3^3\)

The *Roe* decision overturned the abortion laws of all but five states at one stroke. The laws in thirty-one states were completely invalidated and another fifteen reform style laws required extensive revision. Only Alaska, Hawaii, New York and Washington already had so-called repeal laws on the books which met the test of
Roe.\textsuperscript{34}

Blackmun's opinion specifically rejected the argument of the attorneys for Texas and Georgia, and the briefs of Americans United for Life, the Texas Diocesan Attorneys Association, and Women for the Unborn, that a fetus is a constitutional person covered by the Fourteenth Amendment prohibition on depriving any person of life, liberty or property without due process of law. Instead, said Blackmun, "the word 'person,' used in the Fourteenth Amendment, does not include the unborn."\textsuperscript{35}

Blackmun focused on the effect of state abortion laws on pregnant women, finding women to be protected by a constitutional right of privacy based on the Fourteenth Amendment. However, while that right of privacy was fundamental, it was not absolute, he said. He then divided pregnancy into three trimesters. During the first trimester the state could not prohibit a woman from getting an abortion for any reason, or no reason. In the second trimester the state could regulate abortion to protect maternal health. By the third trimester, and viability of the fetus outside the womb, the state's interest in the "potential life" was sufficiently compelling that abortions could be prohibited except to save the life or health of the mother.\textsuperscript{36}

Justice Stewart reversed his stance in Griswold and
concorded with Blackmun, saying the decision was in accord with the line of social substantive due process cases beginning with the *Meyer* and *Pierce* cases. Rehnquist dissented on the grounds that abortions were not covered by a right of privacy, nor was abortion within the tradition of liberties protected from government interference. In short, it was not a substantive due process right.
Chapter V Endnotes


3Garrow, 336; Linda J. Greenhouse, "Constitutional Question: Is There A Right to Abortion?" *New York Times*, 24 Jan 1970, 3; Dr. Alan Guttmacher was the President of Planned Parenthood Federation of America and one of the prime movers in getting that organization into the abortion field.


Garrow, 336, 342, 351, 366.


Weddington, 11, 12, 13, 14.


Ibid., 1055, footnote 3.


23 Garrow, 482.


29 Mersky, vol. 2.

30 Ibid., vol. 3.


32 Woodward, 174, 185.


36 Ibid., 164, 165.

37 Ibid., 167-171, 171-178.
CHAPTER VI

REACTION TO ROE V. WADE

Reaction to the decision in Roe v. Wade was strong, swift, and dependant on political and religious predisposition. NARAL, the ACLU, ASA and other groups that had been crusading for the change were elated. Liberal Protestant religious organizations and publications hailed the decision. Many politicians were relieved, whether they dared express that emotion or not, that the issue seemed to have been removed from the political arena where they were forced to deal with it.¹

Religious Reaction

The hierarchy of the Catholic Church, on the other hand, was shocked and said so emphatically. Conservative and traditionalist Protestants, although less prominently involved with the issue, were also strongly against the decision. The editors of Christianity Today came straight to the point and said the Court had embraced paganism, alluding to the classical pagan practice of infanticide.²

The National Association of Evangelicals (NAE),
which had not taken a strong position on abortion before the *Roe* decision, issued a statement in 1973 specifically reacting to the case. The statement said the decision was deplorable because it allowed abortion for personal convenience and was morally wrong. The NAE said it would, however, recognize the need for abortion when medically necessary and in cases of rape and incest, but only after counseling with the mother for the latter category.  

If it had been the hope of some of the justices that they had cut the Gordian Knot and that the decision would be accepted by the religious community, the reactions registered over the next ten years soon disabused them of that notion. Before *Roe*, most conservative and traditionalist Protestants had not taken an official stance on abortion. The case opened the flood gates and began the process of pulling such groups into active political participation on social issues for the first time since the abolitionist and temperance movements.

Most of the conservative Protestant churches did not react immediately as the NAE had. By the end of the 1970s only the more fundamentalist churches had issued statements condemning abortion, except for medical necessity, and for rape or incest victims. The number of denominations issuing such statements climbed rapidly
in the 1980s, a fact not lost on the Reagan Administration.

The fourteen million member Southern Baptist Convention lead the way in 1980 with a volte face from its 1967, 1971, and 1974 resolutions approving abortion to preserve the physical, emotional or mental health of the mother, and in cases of rape, incest or severe fetal defect. Its 1982 resolution went further and flatly condemned abortion and stated support for a constitutional amendment to limit abortion except to save the life of the mother. That position was nearly as strong as that taken by the Catholic hierarchy and close to what the law had been before the abortion movement was launched in the 1960s.4

Another large Protestant denomination, the Assemblies of God, issued a similar statement in 1985. The Mormons did likewise in 1986. Those statements were followed by statements by conservative branches of the Lutheran and the Methodist traditions, including the Salvation Army in 1986. Some of those churches approved abortion for medical necessity, in addition to saving the life of the mother, and for cases of rape and incest. They all shared opposition to the so-called abortion on demand rule of Roe v. Wade.5
Political Reaction

Given the authorship of the Roe opinion by Blackmun, Burger's supposed fellow strict constructionist, and Burger's own concurrence in the decision, reaction from the President and in Congress was initially muted. That soon gave way to intensive efforts to nullify the decision by constitutional amendment. The proposed amendments fell into four general categories: first, amendments declaring a fetus to be a person under the Fifth Amendment and Fourteenth Amendment due process clauses; second, amendments to restore state power to regulate abortion; third, amendments allowing Congress and the states to protect human life at all biological stages; and fourth, amendments prohibiting Congress or the states from interfering with human life at any biological stage.6

The Roe decision was issued January 23, 1973. The first Congressional reaction was registered the same day when Senator James Allen made a statement condemning the decision and placing statements by Cardinals Cooke and Krol in the Congressional Record. Representative Lawrence Hogan also denounced the decision on January 30, 1973 and introduced the first proposal for a constitutional amendment to overturn it. On May 31, 1973 Senator James Buckley introduced a proposed constitutional
amendment he called a Human Life Amendment. By 1974 hearings were held on Senate Joint Resolutions 119 and 130, also "right to life" amendments, by the Senate Judiciary Committee's Subcommittee on Constitutional Amendments. More hearings were held in 1975 on Senator William Scott's Resolution 91 to reserve power to regulate abortions to the states.

In April, 1975, during the short-lived Gerald Ford administration, the United States Civil Rights Commission chaired by Arthur Fleming weighed in with a report in favor of Roe v. Wade. The report included a summary of the history of abortion in the United States written by Jimmye Kimmey, who had marshalled the amicus briefing effort for the plaintiffs in Roe. The Commission criticized constitutional amendments under consideration in the Congress and also the several anti-abortion riders attached to appropriation bills. The report specifically criticized a number of proposed amendments introduced in both the Senate and the House between 1973 and 1975. That criticism was apparently not appreciated and the report had no effect on future efforts to introduce constitutional amendments in Congress.

Efforts similar to those in the Senate were mounted in the House also and in 1976 over twenty-five versions of constitutional amendments were introduced by repre-
sentatives from both parties. Congressman Don Edwards, Chair of the Civil and Constitutional Rights Subcommittee of the House Judiciary Committee, presided over a number of hearings in that Subcommittee. Edwards was an opponent of amending the Constitution to overturn Roe and apparently none of the House proposals ever made it to the floor for a vote by the full house.¹⁰

The first sustained attempt to reverse the decision, Senator Jesse Helms' fetal personhood amendment, was tabled by the Senate on a vote of forty-seven to forty on April 28, 1976. Congressional efforts then turned to cutting funding for Medicaid abortions. That move was more successful and the Hyde Amendment (named after Congressman Henry Hyde), barring the use of federal funds for abortion except where the life of the mother was endangered, passed in 1976.¹¹

In 1981 Senator Helms and Congressman Hyde proposed a statute defining human life. Interestingly, Judge Robert Bork, former Solicitor General in the Nixon administration who fired then Special Prosecutor Archibald Cox on President Nixon's orders, testified against it along with constitutional scholars Charles Alan Wright and Archibald Cox.¹² Meanwhile, Senator Orrin Hatch had another proposal pending, a constitutional amendment authorizing state regulation of abortion, but in the par-
liamentary maneuvering the Helms statutory proposal came to a vote first and was defeated in the Senate forty-seven to forty-six in September, 1982. Hatch made another attempt in June, 1983, but his proposed amendment was defeated fifty to forty-nine, far short of the two thirds required.\footnote{13}

Some seventy-five resolutions were offered between 1973 and 1986 to constitutionally define a fetus as a person under the Fifth and Fourteenth Amendments. Most contained the proviso that abortion would still be permitted to save the life or health of the mother and for pregnancy due to rape. Approximately eighteen versions of human life amendments were also introduced in that time period. None ever emerged from Congress.\footnote{14}

**Academic Legal Reaction**

Reaction in the academic legal community to *Roe v. Wade* and *Doe v. Bolton* was surprisingly critical. The first criticism came from an unexpected source, John Hart Ely, a former law clerk for Chief Justice Earl Warren. Ely objected not to abortion, since he thought that act was sometimes necessary, but to what he called a total lack of a sense of obligation to ground a purported constitutional right in a specific part of the Constitution. "The Constitution has little to say about
contract, less about abortion, and those who would speculate about which the framers would have been more likely to protect may not be pleased with the answer," he said. He dismissed Blackmun's opinion as an analytical twin of *Lochner* economic due process.

Even *Lochner*-style substantive due process was better than this new mutation of social due process, he sneered, because the earlier due process at least allowed a state government to save its law by making a rational defense in court. By contrast, in *Roe* the Court required a state to prove a compelling interest which was, in practice, an insurmountable hurdle.\(^{15}\)

Richard Epstein also criticized the case strongly in the *Supreme Court Review* dealing with that term of the Court. He said the new privacy cases were merely the codification in constitutional jurisprudence of the dictum of John Stewart Mill, contemporary of Herbert Spencer of *Lochner* dissent fame, from Mill's book *On Liberty*, that the state should only exercise restraining power over individuals to prevent harm to others. In the context of abortion, he added, that is not possible because of the harm to the fetus.\(^{16}\)

Professor Robert Byrn of Fordham University was even more critical, comparing the decision to *Dred Scott v. Sanford* and *Buck v. Bell*, because it did not extend
the protection of Fourteenth Amendment personhood to the unborn at any state of development. Byrn found that position an affront to the spirit of the Fourteenth Amendment and to the understanding of the Amendment held by its creators.

Judicial Developments

After the decision in Roe v Wade the Court did not revisit the issue of contraceptives for several years. In 1977 the question of whether the right to obtain contraceptives extended to unmarried minors was decided in the case of Carey v. Population Services. A New York statute prohibited the sale or distribution of contraceptives to children under the age of eighteen and the law was challenged under the rationale set out in the Griswold and Eisenstadt cases.

The facts of the case showed the confused state of public policy in the post Griswold and Roe era. James Hagan, Rector of St. Andrews Episcopal Church in Brooklyn, operated the Sunset Action Group Against VD at the church and a local store, selling and distributing male contraceptives. The program was funded by a grant from the Federal Office of Economic Opportunity, but because the age limit of the statute was not observed, it violated the state law.
Justice Brennan wrote an opinion for four justices holding that the right of privacy under the Fourteenth Amendment extended to minors, without an age limit. Powell and Stevens concurred that there should be no restriction for minors between fourteen and sixteen years of age and no ban on parents furnishing contraceptives to their children. Rehnquist wrote a scathing dissent from what he saw as interference by the Court with family business. Burger, apparently unable to deal with the legal issues, dissented without giving any reason.21

Meanwhile, the Court had decided in 1976 in Planned Parenthood of Central Missouri v. Danforth that a woman's right to get an abortion could not be limited by a requirement of consent from her husband, or from her parents if she were a minor.22 The Court waffled in another case, Bellotti v. Baird, on a parental consent requirement for minors and sent the case back to the state. When the case came back in 1979, the Court said that parental consent could not be required unless there was a procedure for the minor to obtain permission from a judge instead of from her parents. The Court revisited the issue in 1981, deciding that mere notification of a minor's parents was not the same as requiring consent.23

In 1982, during consideration of three abortion
cases, recently confirmed Justice Sandra Day O'Connor proposed a new test which would focus on the burden on the pregnant woman created by a state law regulating abortion. She proposed dropping Blackmun's trimester formula, substituting the test of an "undue burden," but was unsuccessful in those cases.\textsuperscript{24}

By 1989 political opposition to the rule of \textit{Roe v. Wade} had solidified in the Reagan and Bush administrations. During argument of \textit{Webster v. Reproductive Health Services}, Charles Fried, Solicitor General for the Bush administration, advocated abandoning the fundamental right, compelling interest test used for abortion cases since \textit{Roe}. He proposed substituting the rational relationship test the Court had been using since the New Deal to uphold economic regulation. The attorneys for Missouri joined that approach as well. Fried also drew a distinction between abortion and the \textit{Griswold} right of privacy based on the sanctity of marriage, arguing that the interests of the fetus made rigid application of that marital right of privacy inappropriate in abortion cases.\textsuperscript{25}

Chief Justice Rehnquist thought he had a majority at the conference and wrote a draft opinion, but had difficulty getting a majority to join his opinion. He eventually obtained sufficient support for an opinion
upholding the right of Oregon to say in the preamble to its abortion law that life began at conception, and upholding the ban on using public facilities for abortions and requiring testing for viability. He was not successful in jettisoning the Roe trimester formula.  

The abortion question had become such a hot political issue by the time of the Webster case that the Court was virtually swamped with amicus briefs. The case record looked more like a record of a Congressional hearing than a court record. Seventy-nine separate amicus briefs were accepted. An additional one was denied filing because it attempted to argue for unborn children.

In a development James Madison might have found startling, opposing Congressional factions filed briefs, arguing that Roe v. Wade should be upheld, and that it should be struck. The list of names of the senators and representatives signing the briefs filled four pages of the record. The division was not along party lines, although a preponderance of Democrats favored Roe and a preponderance of Republicans opposed it.

That lineup was consistent with the division on the issue begun in the 1972 election when President Nixon came out against liberalized abortion laws and Senator George McGovern, the Democratic candidate, said he was personally against abortion, but would follow the law if
it allowed abortion. That division was continued in the party platforms in 1980, 1984, 1988, and 1992. In a new twist on the emphasis Weddington, Coffee and Lucas placed on history in their Roe briefs, a group of liberal historians who called themselves "281 American Historians as Amici Curiae Supporting Appellees" submitted a brief in Webster supporting Blackmun's use of history in Roe. There was also a plethora of history scattered throughout the other briefs. At oral argument Justice Antonin Scalia questioned Frank Susman, counsel for plaintiff abortion providers, on a contradictory reading of history in the brief of the Association for Public Justice and the Value of Life Committee, Inc.

The gist of the clash of the scholarly debate was a difference of opinion as to whether there had been a tradition of legal abortions in the colonial and early national eras. The 281 historians followed the pattern set by Cyrill Means in a 1968 law review article and followed by James C. Mohr in his book, Abortion in America, of asserting that abortion in colonial America was not proscribed by statutory law, and was practiced freely. The other side said that conclusion was a gross misreading of legal and social history and that, of course, there was little statutory law on the subject, or for that matter on any subject in that era.
The latest, and apparently definitive test of Roe's validity for the 1990s, given the membership on the Court, was Planned Parenthood v. Casey. Pennsylvania's legislature passed an abortion statute in 1989 with the enthusiastic support of Democrat Governor Robert Casey. It appeared to supporters of Roe that the inclusion of abortion in the right of privacy was likely to be reversed by a Court that had five sitting justices who had voted against abortion rights, or who seemed inclined that way. Of course, if Judge Bork had been confirmed by the Senate, believing as he does that the original intent of the drafters should control, there would have been no uncertainty as to his vote, as there was for at least one of the subsequently confirmed justices.

The briefs filed in Planned Parenthood v. Casey reprises those in the Webster case. Once again the opposing congressional factions filed briefs. The liberals again implored the Court to uphold Roe. Conservatives begged the Court to do what they lacked the political power to accomplish, the repeal of Roe by constitutional amendment, and what they hoped conservative appointments had already achieved sub silentio.

Once again the 281 historians filed their brief, slightly modified to fit the facts of the case, and the American Academy of Medical Ethics filed a brief direct-
ly challenging the historians' brief. The Academy brief said the historians deliberately misrepresented the common law status of abortion and gave a politically motivated misreading of the extant common law decisions from early English and American sources. *Roe v. Wade* was in fact a sharp break with the American moral and legal tradition, and *Roe* was not within the tradition of liberty protected by the Fourteenth Amendment, the Academy argued. 33

If some enterprising legal scholar ferrets out the obscure case law from the colonial era we may know whether the historians' brief contained accurate history, or if they committed what Leonard Levy calls the felonious use of history. If they did commit such an offense, it would be in keeping with the long tradition of such use of history established by advocates before the Court and by the justices themselves. The historians' thesis certainly finds little support in traditional primary or secondary legal sources from the nineteenth century.

The Court had apparently had enough of legal history and congressional importunity by that time and there was no reference to either viewpoint during oral argument, or in the majority opinion.

To the consternation of opponents of abortion, and
the initial joy of proponents, the Court in *Casey* refused to reverse *Roe v. Wade*. Three Republicans, all appointed in the expectation that they would remove abortion from the constitutional right of privacy, issued a joint opinion, a very unusual event.

The joint opinion rejected Justice Blackmun's trimester formula, allowing more leeway to the states to decide how to regulate abortion. Justices Sandra Day O'Connor, Anthony Kennedy and David Souter upheld the constitutional right of a woman to get an abortion before the fetus could survive outside the womb. They also said that the states have an interest in the mother's health and in the life of the fetus from the time of conception. After viability, abortions could be restricted to cases where the life of the mother was at risk. The opinion left considerable room for interpretation and future litigation as states pass laws restricting abortions.34

Justice Kennedy refused to waffle about which part of the Bill of Rights produced the right to abortion, saying simply that freedom to have children, or not, was a liberty protected by the Fourteenth Amendment. In short, it was an aspect of social substantive due process established by precedent.

The decision seemed to rest mainly on the perceived
value of precedents in giving stability to the law and in avoiding the appearance the Court was amenable to raw political pressure. The four dissenting justices did not share that view and caustically stated *Roe v. Wade* should be wiped from the books.\(^3\)

It is obvious that the Court will again be confronted with the question of whether to overrule *Roe* as state legislatures continue to enact laws which contradict the spirit of *Roe v. Wade*. It is also possible that a state may pass a law encouraging, or possibly even requiring abortion. Any such law would conflict with the spirit of *Griswold v. Connecticut* and *Skinner v. Oklahoma*. It seems probable the Court, continuing body that it is, would enforce its Brandeisian version of Cooley's right to be let alone and strike any attempt to coerce a woman in what it sees as the most private of matters.
Chapter VI Endnotes


5Melton, 28-32, 33, 36, 46, 81, 152, 166, 181.


12Bork's nomination to the Supreme Court was later rejected by the Senate in part because of his outspoken disagreement with the Roe decision and because he believed the Constitution simply does not include a right of privacy, especially for abortions.
Garrow, 639, 640; Keynes, 281; Congress, Senate, Committee on the Judiciary, **Hearings Before the Subcommittee on Separation of Powers**, 97th Congress, 1st sess., 23, 24 April, 20, 21 May, 1, 10, 12, 18 June, 1981; Congress, Senate, Committee on the Judiciary, **Hearings Before the Subcommittee on the Constitution**, 97th Congress, 1st sess. 5, 14, 19 October, 4, 5, 12, 16, November, 7, 16, December, 1981.

Keynes, 283, 284.


*Dred Scott v. Sanford,* 19 How. 393 (1857); *Buck v. Bell,* 274 U.S. 200 (1927), the case where Justice Holmes approved sterilization of a mentally defective woman with the caustic comment that: "Three generations of imbecils are enough."


*City of Akron v. Akron Center for Reproductive Health,* 462 U.S. 416; *Planned Parenthood Association of


26Garrow, 676, 677.


28"President Supports Repeal of State Law on Abortion," New York Times, 7 May 1972, 1, 29 (ie., repeal of the then liberal law); New York Times 8 May 1972, 1, 42, (McGovern said he was personally opposed to abortion, but would support law if that legalized it.); Rubin, 238, 239, 242, 243.

29Kurland, Oral Argument, 943.


33Kurland, American Academy of Medical Ethics Brief, 420, 281 Historians Brief, 508, Pro-Life Congressional Brief, 818, Pro-Choice Congressional Brief, 1037.

34Ibid., Joint opinion, 1237-1243.
Ibid., Rehnquist dissent, 1339-1375; Scalia dissent, 1376-1400.
CHAPTER VII

CONSTITUTIONAL INVERSION

The question of the original intent of the framers of the Fourteenth Amendment was first raised in 1873 in the Slaughter House Cases. The Supreme Court rejected the idea that the Amendment was for general economic supervision of state laws when no question of race discrimination was raised. That view of original intent was rejected in the Allgeyer, Lochner line of cases. In the Lochner era the Court approved or disapproved state economic laws, especially those about working conditions, depending on whether it thought they interfered with what it called liberty of contract.

Neither Miller, in examining the history "fresh ...within the memory of us all," nor any of the other sitting Justices in the Slaughter House Cases, put much effort into searching out the congressional and state legislative debates on the Fourteenth Amendment. The Lochner era Court followed in their footsteps.¹

That issue was revisited when the Court began to selectively apply the Bill of Rights to protect personal rights from state laws and procedures. Professor Fair-
man was undoubtedly right that the original intent of
the framers and ratifiers of the Fourteenth Amendment
was not to incorporate the Bill of Rights into its
clauses. But, although the Court never accepted Black's
complete incorporation theory, that did not deter the
Warren Court, pushed along by the civil rights movement
and by its own agenda, from applying almost the entire
Bill of Rights as a restraint on state activity. 2

By the time contraception and abortion came to the
Court, it was ready to deal actively with those issues.
Contraception and abortion were less amenable procedur­
ally to use of the new equal protection doctrine so useful in protecting the civil rights of blacks so the
Court reached back to the doctrine of substantive due
process which had fallen into desuetude. The poor doc­
tritional fit for abortion issues was soon obvious. As in
the Lochner era, the Court found itself engaged in a
running battle with state legislatures. But, unlike the
reconstituted New Deal Court, the Reagan Court did not
simply abandon the new social substantive due process in
the face of efforts to amend the Constitution and ap­
point justices willing to strike Roe.

The nation has accepted the accretional incorpora­
tion of those rights in the Bill of Rights believed funda­
damental to the American tradition. In areas where the
issues are more substantive than procedural, there has been more resistance, as illustrated by the continued agitation over the establishment and free speech clauses of the First Amendment. There has not been a comparable effort to resist the Court's interpretation of the law for marital and family rights, probably because those rights fall well within the American tradition of personal liberty. A comparable consensus is lacking in the abortion controversy.

*Loving v. Virginia* illustrated how far the Court could move to reject history and precedent to change a tradition no longer accepted by the American people. The *Griswold* case presented a closer question, mostly because the Court was not clear in defining the source of sexual privacy. It later rejected including homosexual acts in the scope of the right of privacy and refused to overturn state sodomy laws.¹ That did not resolve the issue and legal challenges to such laws continue.

In *Roe v. Wade* the Court included a woman's unilateral decision to abort her nascent child in the right of sexual privacy. That decision did not resolve the issue and legal debate continues in that area. The problem may lie in the attempt of the Court to pour new social issues into old doctrinal wineskins, the alternative be-
ing to wait until the political process has reached a consensus before it does the pouring.

Although it is hard to envision the Constitutional Founders, or the Reconstruction Rebuilders, intending to legalize abortion, or to deal with any sexual matter at all, the question of original intent has played little part in the disposition of cases before the Court. In practice, the modern Court has effectively turned the Constitutional amending process upside down, as the Lochner Court did in the era of economic substantive due process.4

It is clear the Court has always been an active participant in the governing process. It is a part of the ruling coalition by virtue of the political process of selection and confirmation of justices by popularly elected presidents and senators. As a part of the government the Court has been acting within the boundaries of the politically possible.5 No anti-abortion constitutional amendments have been voted out of Congress because less than two-thirds of Congress has ever been in favor of striking Roe v. Wade. That it is consistent with the pattern established by congressional approval, tacit or express, of the Court's civil rights decisions before new civil rights acts were passed in the 1960s, and of its selective incorporation of the Bill of Rights
into the Fourteenth Amendment.\textsuperscript{6}

The constitutional process requires a super majority in Congress, or among the states, to have an amendment presented to the states. A super majority of the states is required to ratify an amendment. That process has only been successful in extraordinary circumstances.

The Thirteenth, Fourteenth and Fifteenth Amendments were ratified to abolish slavery, the Sixteenth to allow the government a modern tax collection method. The Eighteenth and the Twenty-First were passed to bring Prohibition in and throw it out, and the Nineteenth to give women the vote.

By contrast, the Court has selectively incorporated the Bill of Rights into the Fourteenth Amendment and exercised plenary power in enforcing substantive due process rights without formal congressional or state action. There being insufficient political objection, the changes have stuck. Whether one thinks, as Judge Robert Bork does, that such a state of affairs is a travesty of what the founders intended, or that the Constitution must be given new meaning in new circumstance, as Leonard Levy does, the fact remains that the Supreme Court practices the art of what it sees as legally and politically possible.\textsuperscript{7}

There is no tradition of changing judicial consti-
tutional interpretations by the amending process.
Therein lies the power of the Supreme Court, a fundamentally political institution, although the politics are cloaked in the arcane language of constitutional dogma. In the absence of sustained revulsion against one of its decisions, the Court exercises sufficient political power to create a constitutional right, such as the right of sexual privacy, from the barest hint of such a power in the language of the Constitution. Judge Bork is probably right in saying the founding fathers did not intend that result, but there seems no practical way to change the fact, unless the Court exercises self-imposed restraint, or a political change comparable to the New Deal changes the membership of the Court.
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