The purpose of this thesis was to determine whether a right to privacy exists within the body of the Constitution. Knowing that such a right is not textually explicit, I chose to examine arguments concerning both the intent of the founding fathers and the idea that a right to privacy exists as a human right. I also examined an extensive body of case law to determine how the Supreme Court has defended such a right as implicit in the Constitution. Based upon my findings in the literature and constitutional law, I determined that a right to privacy is protected by constitutional text.

Implicitly Explicit:
A Case for a Constitutional Right to Privacy

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INTRODUCTION

"Civilization is the progress toward a society of privacy. The savage's whole existence is public, ruled by the laws of his tribe. Civilization is the process of setting man free from men."
— Ayn Rand

The codification of law is and always has been the most difficult task in forming a new government. Laying down a series of laws that are designed to govern the people while simultaneously allowing them independence through rights and liberties, is a challenge that cannot go without its struggles and its controversies. The formation of the United States Constitution was no different.

The document has met with serious debate over its meaning since its ratification in 1789. Ambiguities in the text have led to fierce courtroom battles over what exactly our rights and liberties inherent in the Bill of Rights and the seventeen subsequent amendments entail. One of the most recent, notwithstanding most popular, constitutional quarrels, has been over the right to privacy.

There is no line of text in the Constitution that guarantees the people a right to privacy, but there a number of vague — yet striking — allusions to a right to privacy within the body of the document. As arbiter of the law, the Supreme Court has had to mediate these battles and determine what, if anything, in the Constitution points to a potential right to privacy. Arguments on either side have rested on the intent of the Framers, the lack of explicit text, the appropriate level of interpretation necessary for interpreting the Constitution, and the various references to something hidden in the language of the law.

Without solid textual grounding, it is difficult to imagine articulating any solid evidence that such a constitutional right exists. Through an examination of the Court, the history of privacy as

a concept, and the history of privacy as law, however, I will provide evidence to show that there is such a right to privacy implicitly explicit within the body of the Constitution.

BACKGROUND

"It is emphatically the province and duty of the judicial department to say what the law is."
– Chief Justice John Marshall

It is essential that one have a basic understanding of the history and function of the Supreme Court before delving further into the issue of privacy as a constitutionally protected right. I will later return to these issues and terms without pausing for detailed explanation, so it is pertinent that one become acquainted – if only briefly – with the complex inner and outer workings of the Court before attempting to process the more complicated information that I will present in coming sections.

THE HISTORY OF THE SUPREME COURT

The inception. The Supreme Court became a staple of the American legal system with the ratification of the United States Constitution and the passage of the Federal Judiciary Act of 1789.[2] Article III of the United States Constitution made the provision for a federal judiciary with a single superior court. It was this act of Congress, however, that gave the United States Supreme Court its prominence in the judicial system.[3] Article III also laid out the initial powers of the Court, which, in truth, were extremely limited. The powers of the Supreme Court, under the Constitution, were limited to hearing cases upon original, mandatory, and appellate jurisdiction as defined and recommended by the United States Congress.[4] Congress was given the power to define which types of cases, and even how many cases, the Court would hear.[5] The Court's original jurisdiction involves "all cases, in law and equity, arising under this [sic]

[2] Federal Judiciary Act of 1789.
[3] Ibid and United States Constitution, Article III.
[4] United States Constitution, Article III.
[5] Ibid, Article II.

Constitution, the laws of the United States, and treaties."[6] More generally, the original jurisdiction involves all federal cases, including those affecting ambassadors, other public ministers, and consuls involved in disputes to which the United States is a party; suits between two different states; suits between a state and a citizen of another state; and suits between a state and/or its citizens and foreign countries.[7] The Court's mandatory jurisdiction includes cases which it is required to hear because of the structure of the United States court system. Certain cases, depending upon which path they take through the system, must be appealed directly to the Supreme Court, and the Court may not refuse to hear these cases.[8] As far as appellate jurisdiction goes, Congress has Article III powers to decide which types of cases the Court may hear on appeal, but the primary power of selection lies with the justices of the Court.[9] They receive, on average, seven thousand petitions per annum.[10] Ninety-five percent of the cases that come before the Court as petition come on appeal from lower courts.[11] Almost all petitions come as requests for certiorari, whether they are formal legal requests on appeal from lower courts or hand-written pleas from individuals. When the Supreme Court grants "cert," as the justices call it, they simply agree to hear a case; conversely, when the Court does not grant cert, it does not qualify as a ruling or an affirmation of the lower court's decision – only a declaration that the Supreme Court does not agree to hear the case.[12] On average, of the nearly seven thousand cases petitioned, the Court only agrees to hear oral arguments in about one hundred per year.[13]

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[6] David M. O'Brien, *Storm Center: The Supreme Court in American Politics*, 7th ed., (New York: W.W. Norton and Co., 2005), p. 164.
[7] Ibid, p. 164-165.
[8] Ibid, p. 165.
[9] Ibid, p. 165.
[10] Steve Mount, "The U.S. Constitution Online," 6 October 2005, <http://usconstitution.net> (Accessed 18 October 2005).
[11] O'Brien, p. 158.
[12] Ibid, p. 165
[13] Mount

The membership. When the Supreme Court was finally unveiled on February 2, 1790, the number of justices was set at six under the provisions of the Federal Judiciary Act of 1789.[14] Congress was given the constitutional power to change the number of justices on the Court as it saw necessary,[15] and the final number was set at nine in 1869, with one chief justice and eight associate justices.[16] Justices of the Supreme Court must be nominated by the president upon the vacancy of a seat on the bench or upon the addition of a justice to the Court by an act of Congress. After formal nomination, the candidate for the justiceship must undergo a confirmation hearing before the United States Senate, and then must be confirmed by a majority vote in the Senate.[17] Article III of the Constitution awards all federal judges life tenure under "good behavior." Typically, justices may vacate their positions by death, voluntary retirement, or impeachment.[18] It is usually understood that justices are granted life tenure to ensure that they do not have to appeal to politics to maintain their positions and status. The judicial branch is supposed to be the arbiter of law, not simply of political questions, and so it is widely held that federal judges should not be subject to election or periodic votes of confidence. In keeping them out of the immediate political eye, justices are supposed to be free from political influence and the pressure to conform to either the will of those who put them in power or public opinion. Though the design is ideal, and objectivity is a noble pursuit, the original intentions do not always hold sway. During the inception of the Constitution, the public had little say in government. The elites – in special caucuses – elected the president and senators; only the House of Representatives was freely elected by the people en masse.[19] Thus, the higher-ups in

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[14] Ibid.
[15] Ibid.
[16] Lawrence Baum, *The Supreme Court*, 7th ed., (Washington, D.C.: CQ Press, 2001), p. 14.
[17] Ibid, p. 14.
[18] Ibid, p. 14.
[19] Richard Davis, *Electing Justice: Fixing the Supreme Court Nomination Process*, (New York: Oxford University Press, 2005), p. 86.

government, including the justices, were not subject to critique by democratic process. Over the next two hundred years, however, there was a shift toward greater democratic participation. The advent of universal manhood suffrage,[20] woman suffrage,[21] the direct election of senators,[22] and the media's interest in politics put all members of the federal government in the spotlight. This is especially seen when cases of extreme controversy, such as those dealing with abortion or gay rights, are placed on the Court's docket. Cable news stations like CNN and MSNBC announce the impending cases and air the arguments on both sides before the justices have a chance to hear oral arguments in court. The major cases tried in the Supreme Court now are also first tried in the court of public opinion, and though there is no requirement that the justices conform to the will of the public, only rarely do they hand down rulings that seem to oppose the general public consensus. Their job necessarily involves paying attention to what the public wants, and in order "to persist and function effectively … [the Court] must continuously try to amass and husband the good will of the public."[23] In the event that a Supreme Court decision is not met with support by the public, the law makes provisions for override. Congress may issue remedial legislation to change the law in question or it may issue statutory override, which then becomes the law until the statutory change is challenged in case before the Supreme Court. The responsibility of enforcement lies with the executive branch, and the executives are by no means required to enforce these decisions.[24] If President Dwight D. Eisenhower had not demanded the National Guard to enforce public school integration following the 1954 decision in *Brown v. Board of*

[20] United States Constitution, Amendment XV
[21] Ibid, Amendment XIX
[22] Ibid, Amendment XVII
[23] Jeff Yates, *Popular Justice: Presidential Prestige and Executive Success in the Supreme Court*, (Albany: State University of New York, 2002), p. 16.
[24] Yates , p. 17

Education of Topeka, for example, it is possible that widespread integration would never have occurred.

The most effective – and consequently the most difficult to execute – method for overriding a Supreme Court decision is through constitutional amendment. Only six decisions have ever been overruled by constitutional amendment, the most prominent being the Civil War Amendments' override of the Dred Scott decision of 1857.[25] The Dred Scott decision declared that slaves were not citizens, and could therefore be treated simply as property. The Thirteenth, Fourteenth, and Fifteenth Amendments make up the Civil War Amendments, granting slaves freedom, citizenship, and suffrage, respectively.[26]

The revolution. Until the turn of the nineteenth century, the judicial branch was, as Founding Father Alexander Hamilton very accurately put it, "the least dangerous branch" of the federal government.[27] The Court had no real checks on the other two branches, and consequently, it had no real power to stand on when faced with pressure from the legislature or the executive. The president had the power to nominate justices and refuse to enforce their decrees. The House of Representatives had the power to draw Articles of Impeachment against justices. The Senate held the power to confirm or deny justices a seat on highest bench, and also to try them during impeachment hearings. The Court, on the other hand, could do very little to affect policy or to check the other branches. It could only hear cases brought to it, and could not overturn laws. The interpretation of the law at the turn of the century rested on the prospect that all legislation passed was perfectly conformable to the Constitution. Thus, the balance of power among the triumvirate was, in a word, unbalanced.

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[25] O'Brien, p. 350.
[26] *Scott v. Sandford*, 60 U.S. 393 (1857).
[27] O'Brien, p. 30.

In 1803, however, the "least dangerous branch" let its ultimate power be known. In *Marbury v. Madison*, the Court decided that Congress had overstepped its Article III powers to determine the original jurisdiction of the Supreme Court,[28] and declared the act of Congress invalid on its face, and thus – using the term for the first time – unconstitutional.[29] In his opinion for the Court, Chief Justice John Marshall declared that "it is emphatically the province and duty of the judicial department to say what the law is," and that the Court was vested with the power of judicial review – the ability to interpret the law with respect to the Constitution, and overturn any law, statute, policy, or act of Congress that it felt was not in accordance with the laws of the document.[30] In what is called the judiciary's first activist decision, the Court handed itself its greatest power – a power that has not met with legitimate challenge since its inception. Few can dissent in allowing the arbiter of the law the ability to ensure that the laws passed by Congress adhere to the "supreme law of the land."[31] Not allowing the judiciary this power could, in effect, have allowed legislative institutions to pass and maintain unjust laws and policies – such as the segregation laws in existence until the landmark ruling in *Brown v. Board.*[32]

Though the Supreme Court gave itself this incredible power, it was at first lax in using it. It was used for the first time in *Marbury*, but it was not to strike down an act of Congress again until the Dred Scott case of 1857 – fifty-four years later.[33] Since that implementation of judicial review, however, the Court's willingness to overturn laws has increased substantially. As shown in Table 1, the Court has overturned one hundred forty-eight laws in whole or in part since 1790:

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[28] Ibid, p. 30.
[29] *Marbury v. Madison*, 5 U.S. 137 (1803).
[30] Ibid, at 177.
[31] Charles Fried, *Saying What the Law Is: The Constitution in the Supreme Court*, (Cambridge: Harvard University Press), p. 40.
[32] *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954).
[33] O'Brien, p. 30.

Table 1: Number of Federal Statutes Held Unconstitutional by the Supreme Court, 1790-1999			
Period	Number	Period	Number
1790-1799	0	1900-1909	9
1800-1809	1	1910-1919	6
1810-1819	0	1920-1929	15
1820-1829	0	1930-1939	13
1830-1839	0	1940-1949	2
1840-1849	0	1950-1959	5
1850-1859	1	1960-1969	16
1860-1869	4	1970-1979	20
1870-1879	7	1980-1989	16
1880-1889	4	1990-1999	24
1890-1899	5	Total	148
Source: Lawrence Baum, The Supreme Court, 7th ed., (Washington, D.C.: CQ Press, 2001).			

Though we can see that the Court has been active in using judicial review in federal cases, it has been more likely to do so in cases of state laws and local ordinances. Table 2 shows us that the Court has overturned more than twelve hundred of these lower laws since 1790:

Table 2: Number of State Laws and Local Ordinances Held Unconstitutional by the Supreme Court, 1790-1999			
Period	Number	Period	Number
1790-1799	0	1900-1909	40
1800-1809	1	1910-1919	118
1810-1819	7	1920-1929	139
1820-1829	8	1930-1939	93
1830-1839	3	1940-1949	57
1840-1849	9	1950-1959	61
1850-1859	7	1960-1969	149
1860-1869	23	1970-1979	193
1870-1879	36	1980-1989	162
1880-1889	46	1990-1999	61
1890-1899	36	Total	1,249
Source: Lawrence Baum, The Supreme Court, 7th ed., (Washington, D.C.: CQ Press, 2001).			

Though the Supreme Court has overturned nearly one hundred fifty federal statutes in whole or in part, it does not necessarily imply that Congress has been entirely upset about each. Congress is more likely to severely oppose the Court's decisions when it invalidates a statute close to the time of its inaction or when it is done at a consistent rate. The striking down of older statutes or sporadic invalidation is much less likely to stir up conflict between the legislative and judicial branches.[34] The Court is much more likely to overturn state laws and city ordinances than it is federal statutes for one primary reason: When the Court overturns a lower law, it does not place the Court at odds with the other two branches of the federal government.[35]

A cult of personality. Ideology has become an important criterion in the selection of Supreme Court nominees, and this fact will play an important role in later discussion of political beliefs intervening in the successful arbitration and interpretation of the law. The Court's primary purpose is and always has been the truthful, honest, and objective interpretation of the Constitution and the statutory laws of the United States. But personal preference has a way of sneaking into this supposedly objective analysis. The ultimate aim – and difficulty – for members of the Court is to strike a balance between these personal preferences and the accurate interpretation of the law as faithful to the Constitution.[36]

A MATTER OF INTERPRETATION

[34] Baum, p. 196
[35] Ibid, p. 198.
[36] Ibid, p. 157.

The constitutional revolution of 1803 lays the foundation for the remainder of this analysis in its formation of an activist logic in interpreting the Constitution. The power of judicial review and the subsequent policy of judicial activism form the basis for a discussion of privacy as a constitutionally protected right. We must look, herein, at how judicial review plays a role in a loose interpretation of the Constitution, how a strict interpretation imposes judicial restraint, and how these theories differ from one another.

The non-interpretivist approach. The non-interpretivist approach is often referred to as a loose construction of the Constitution. Patrons of this interpretation insist that the Framers wrote the Constitution so as to be a living document, applicable to any issues which might arise over time. They believe that the Constitution is flexible and ambiguous, and that liberties must be taken in interpreting what the Framers' actually intended. In short, the non-interpretivist approach "frequently requires going beyond text and historical context to structural arguments grounded in the Constitution and to broader principles of constitutional politics."[37]

Judicial review plays a key role in the non-interpretivist approach. Because of the ambiguities in the Constitution, interpreters are allowed to decide which laws conform to their interpretation of constitutional law, and strike down the ones that do not meet their requirements.

The interpretivist approach. The interpretivist approach emphasizes a strict construction of the Constitution. Supporters of this theory hold that the Constitution should be taken literally, without room for interpretation. They believe that the Framers' intentions were explicit and unwavering, and that the document should not actually be interpreted per se, but taken directly – word for word – as it was adopted in 1789. In a nutshell, the interpretivist approach holds that

[37] O'Brien, p. 302

"constitutional interpretation should be confined to the text and historical provisions of the Constitution."[38]

Judicial review is not as much a key component in an interpretivist approach as in the non-interpretivist approach. The distinction between judicial review as implemented in loose and strict constructions is that in a loose approach, there is much more room for judicial review. When interpreting the Constitution broadly, it is easier to strike down legislation as unconstitutional because there is more space with which to take liberties. With a strict construction, the only room there is for judicial review is by striking down legislation that directly conflicts with the explicit text of the Constitution.

Activism and restraint. It is from these two camps that the notions of judicial activism and judicial restraint arise. Judicial activism itself has been interpreted many ways to include many different components, but for the purposes of this argument, we must adopt a general, yet sufficient definition. Activism is a judicial policy that "makes significant changes in public policy, particularly in policies established by other institutions."[39] This can mean interpreting the Constitution very broadly, overturning a long-standing precedent, writing legislation in an opinion, or striking down laws, statutes, ordinances, or policies. The core of judicial activism is the idea that judges should not avoid cases, and they should exercise their powers to their fullest extent.[40]

Judicial restraint is simply the tendency to avoid activist policies. This is typically shown by an adherence to narrow groundings in the Constitution, a refusal to hear certain issues in

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[38] Ibid, p. 302
[39] Baum, p. 5.
[40] Marvin Schick, "Judicial Activism on the Supreme Court," *Supreme Court Activism and Restraint*, Stephen C. Halpern and Charles M. Lamb, eds., (Lexington: D.C. Heath and Co., 1982), p. 45.

court, a refusal to exercise judicial review, or a refusal to overturn precedent.[41] Judicial review is generally thought to follow a few certain assumptions about both the operations and purpose of the judicial branch. First, the justices are appointed not to mix in their personal views with the law, or to add their own brand of ethics to the nature of the Constitution, but to faithfully interpret the law according to the intent of the Framers. Secondly, the justices are to defer "political question" to the legislative and executive branches. They are not to rule on issues over which one of the other branches may exercise control and oversight. Third, the justices are intended to rely also on statutory construction and not simply on constitutional construction. In this way, they adhere to the intentions of the Framers, the amendments of the people, and the laws of the modern land. Fourth, the Supreme Court is only supposed to accept cases where the parties bringing suit have standing to sue. Cases may not be brought arbitrarily, and the party in question must have a legitimate case in controversy to present its case to the Court. Fifth, the justices are not to issue advisory opinions to lower courts. They are to refrain from extending their opinions to the interpretation of the law in all ways, including disclosing how they feel about certain issues before they hear them in oral arguments. Finally, the Court should seldom overrule the policies of the other branches. This should only be done in cases that involve severe and blatant violations of constitutional provisions.[42]

The exercise of judicial activism, to the restraintists, is both anti-democratic and a blatant usurpation of constitutional power.[43] It allows the Court – as a group of only nine – to govern the state through the power of policymaking. Regardless of laws drafted, debated, and passed by the elected members of Congress and signed by the president, the Supreme Court may assume

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[41] Ibid, p. 6.
[42] Charles M. Lamb, "Judicial Restraint on the Supreme Court," *Supreme Court Activism and Restraint*, Stephen C. Halpern and Charles M. Lamb, eds., (Lexington: D.C. Heath and Co., 1982), p. 8.
[43] Ibid, p. 9-12.

ultimate legislative power by taking an activist stance. It veritably removes the point of freely electing leaders when their decisions and their labor may be stricken from the record based upon the ideologies of a few "old" judges. "Americans wind up, on various topics, ruled by nine persons appointed for life who are more or less immune to the influence of majority sentiment."[44]

One of the major misconceptions about the activist-restraint issue is that it follows along a liberal-conservative divide. Most people associate judicial activism with liberal politics, claiming that liberals have the desire to give the government more power; similarly, people associate judicial restraint with conservative politics because conservatives like to minimize the size and function of the federal government. This traditional division, however, does not hold true – there can be both liberal and conservative activists. Put simply, a judicial activist can be a person of any ideology who wishes not to see a certain type of precedent overturned, or a certain type of right not read into the Constitution. A conservative activist, for example, would seek to overturn a Supreme Court precedent with a long standing of upholding a right to gay marriage. Likewise, a liberal activist would seek to overturn long-standing laws prohibiting abortion.[45] The problem is not in the fact that judicial activism exists, but in where to draw the line in its use. We can easily see that activists are more inclined to follow a non-interpretivist approach, and restraintists adopt the interpretivist doctrine, but we also have to realize that given modern circumstances and the nature of modern problems, we cannot adhere to both. We cannot interpret solely the text in some cases, and allow ourselves to be more lenient with other passages. To be consistent – to be legitimate – we must adopt one, and only one, cohesive approach to constitutional interpretation. Once we have concluded that one is decisively better – or at least

[44] Leslie Friedman Goldstein, *In Defense of the Text*, (Savage, Maryland: Roman and Littlefield Publishers Inc., 1991), p. 99.
[45] Ibid, p. 158.

more appropriate than one or any other, then we can look more accurately at the passages of the Constitution, and in turn, develop a better understanding of how to apply these principles to our laws.

A case for activism. It is no longer 1789. It is no longer 1791. Times have changed, and life has changed. It is difficult to believe that the text penned in the Constitution 229 years ago is still applicable today. We should expect, however, the interpretation of our laws to follow the exodus of social progress. Much of the defense of interpretivism centers on the argument of Framers' intent. Many claim that the Founding Fathers would not want for us to twist and mangle the text of the Constitution to suit our needs, but unfortunately, this is a line of argument that cannot stand. Our needs do not match their needs, nor will they ever again. In the two hundred twenty-nine years since the ratification of the Constitution, we have seen a second war for independence, black and woman suffrage, industrial revolution, Civil War, depression, and other radical changes. It is unfeasible to believe that our modern value system is even remotely close to that of the Founding Fathers. To adopt the belief that we are supposed to faithfully adhere to every line and every word of the Constitution as gospel is, as former Justice William J. Brennan, Jr., once said, to "turn a blind eye to social progress."[46] There is little room to believe that the Framers could have foreseen judicial battles over gay rights, abortion, or stem cells, and to interpret the laws as applied to these unique circumstances as they would or might have been in the late 1700s is to reduce the value of the human condition. In light of progress and forward-thinking, we must adopt not only a looser interpretation of the Constitution, but also a willingness to enforce these interpretations and exercise activism.

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[46] Lino A. Graglia, "How the Constitution Disappeared," *Interpreting the Constitution*, Jack N. Rackove, ed., (Boston: Northeastern University Press, 1990), p. 35.

Activism is necessary for several reasons. First, an activist approach to constitutional law allows for greater protection of important but inexplicit rights, such as a right to privacy. The Constitution, on its face, makes no explicit textual reference to a right to privacy, and even though the so-called "right" has been part of the American history and tradition since well before the Constitution was written, a strict interpretation does not make the allowance for reading a right to privacy into the Constitution.[47] Secondly, and in the same vein, activism allows us to create rights that may or may not be explicit in the Constitution. According to the provisions of the Ninth Amendment, "the enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people."[48] Advocates of judicial restraint argue that it is not our responsibility to "create" rights out of the constitutional cloth. If this were the case, they say, then there would be no point to having a Constitution at all. However, again, it is faulty to assume that the Framers were aware of every possible situation that could arise under the dictates of the Constitution. The Ninth Amendment was James Madison's way of asserting that the Framers actually acknowledged that they may not have thought of everything.[49] Third, judicial activism only helps to strengthen the Court's position as the arbiter of law. The judicial branch of the government is vested with the interpretation of the law, but if we do not allow judges and justices to interpret, then they are being denied the ability to faithfully and fully perform their duties. If we are strictly to adhere to literal text references written more than two centuries ago, then the arbitration of the law is null. Judicial restraint thus relies on good faith that there will never be exceptions to the rules, that there will never arise a case which may or

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[47] Louis D. Brandeis and Samuel D. Warren, "The Right to Privacy," *Harvard Law Review*, Vol. IV, No. 5, (15 December 1890), <http://www.lawrence.edu/fast/boardmaw/Privacy_brand_warr2.html> (Accessed 6 October 2005).
[48] United States Constitution, Amendment IX
[49] Jeffrey M. Shaman, "Interpreting the Constitution: The Supreme Court's Proper and Historic Function," *Judicial Politics: Readings from 'Judicature,'* 3rd ed., Elliot E. Slotnik, ed., (Washington, D.C.: CQ Press, 2005), p. 43.

may not make the words of the Constitution seem vague or overbroad. This, as we have seen throughout the past two centuries, however, is blatantly false, and the Constitution is rife with ambiguities in the first place. Article II declares that the president is required to maintain the "faithful execution" of the law.[50] Article III declares that federal judges will retain their positions as long as they exhibit "good behavior," but if not, may be tried for "high crimes and misdemeanors."[51] The Fourth Amendment refers to "unreasonable" searches and seizures.[52] The Eighth Amendment prohibits "cruel and unusual" punishment.[53] The Fourteenth Amendment guarantees certain "privileges and immunities."[54] Nowhere in the entire document are these terms clarified, though. We are left with a vague body of laws meant to serve as the "supreme law of the land," and this gives the judicial department no choice but to interpret. In fact, textualism at its finest points us in the direction of extratextualism.[55] Even if we take every word at its face value, these ambiguities force the courts to resort to interpretation. What are literally "unreasonable" searches and seizures? What qualifies as "cruel and unusual"? Were we able to ask James Madison to answer these questions, perhaps we would have a resolved debate. For now, however, we must trust to ourselves, and to our current values, to determine to what these ambiguities refer.

More than an appeal to ambiguities, however, gives us reason to adopt this approach to extratextualism and activism. We must recognize that the federal government is already a limited one, and that there are checks and balances to ensure that judges do not – as textualists fear – run rampant with the fundamental values of the Constitution.[56] In truth, and to take a radical

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[50] United States Constitution, Article II.
[51] Ibid, Article III.
[52] Ibid, Amendment IV.
[53] Ibid, Amendment VIII.
[54] Ibid, Amendment XIV.
[55] Goldstein, p. 103.
[56] Philip Bobbitt, *Constitutional Fate: Theory of the Constitution*, (New York: Oxford University Press, 1982), p. 7-12.

standpoint, these bedrock principles of the Constitution would exist in our culture with or without the text to give them meaning. Liberty, equality, community, and solidarity – all principles upon which America was founded – do not rely on a 229-year-old document for their survival, meaning, or importance to our culture. We could veritably do away with the Constitution, and our intuitions about rights and justice and basic values would continue to thrive.[57] James Madison and Thomas Jefferson even asserted that it was not the Constitution that should be the torch for America, but the Declaration of Independence, wherein our forefathers laid out the values for which the country stood.[58] Do away with the Constitution, they said, and the people may revolt, but the people will not dissolve.

Judges should be the ones to elucidate these bedrock principles where Congress fails to do so, as well. When the executive and the legislative branches fall short of upholding the rights and liberties of the people, then it becomes the responsibility of the judiciary – as arbiters of the law – to ensure that these bedrock values are not compromised.[59] Even if this means taking a step outside of basic Article III powers, the justices are endowed with the obligation to uphold the basic principles of the Constitution – this is what we mean when we say that they are supposed to interpret the document. They are not vested with the power to make it say whatever they would have it say, but rather, they are entrusted with interpreting the contract so as to maximally promote these founding principles, and restrict the rights and liberties of the people only when absolutely necessary.

A final defense, and the one that is most advantageous to the argument at hand, is that some parts of the human personality are simply not suited for the governmental sphere.[60] First

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[57] Graglia, p. 47.
[58] Harry V. Jaffa, "What Were the Original Intentions of the Framers of the Constitution of the United States?" *Original Intent and the Framers of the Constitution*, Harry V. Jaffa, ed., (Washington, D.C.: Regnery Publishers, 1994), p. 43.
[59] Bobbitt, p. 7-12.
[60] Ibid, p. 7-12.

and foremost among these characteristics is privacy, the area where the crux of the activist/restraintist debate derives. Under this defense, it is recognized that there are just some things that the government – state, federal, or municipal – has no business interfering with. What is done in the privacy of one's home, for example, should be none of the government's concern, with the exception of illegal activity. Some argue that homosexual conduct and illicit drugs are illegal, regardless of where the acts are performed. We, like the justices, have to recognize the difference between illegal acts that are justifiably prohibited and those acts that are made illicit simply out of legislative taste. Those that are not justifiably prohibited should not be regulated by the government within the private sphere. This is an argument of much controversy, and one we will return to more fully in the next section when we discuss personal privacy.

The vox populaire. It goes without saying that interpretations will run parallel to the social doctrines of the period in which they are interpreted. It is fairly certain that the ruling in *Roe v. Wade* would not have stood in the middle of the nineteenth century, but the 1970s was a period more amenable to women's rights and issues of personal privacy.[61] Though the justices may have had qualms with interpreting an implicit right to privacy as inclusive of a right to an abortion, and though the outcry has not died down in the more than thirty years since the decision, its acceptability is based on the acceptability of prevailing social doctrine. What we should not do, once we have accepted that the Constitution should be interpreted with respect to nuance, is ignore the voice of the people. Mob democracy is a dangerous thing, without doubt, but we cannot pretend to be a democratic republic if we do not at least pay attention to the whim of the public. Not all public preferences will be reconcilable with the principles of the Constitution – slavery and the oppression of women certainly were not – but this is the reason that we have the judicial branch in the first place. The people call for action, the legislators form

[61] *Roe v. Wade*, 410 U.S. 113 (1973).

their desires into law, the executive chooses to endorse the public's will, and the judiciary then tells us whether what we want is what we may justly have. We cannot ignore social progress and we cannot stifle the vox populaire. This is not to say we must try to please all of the people all of the time, but we must aim toward the just end – to ensure liberty, equality, community, and solidarity – regardless of a line of text to back us up.

THE DOCTRINE OF PRIVACY

"It could not but happen, and was foreseen at the birth of the Constitution, that difficulties and differences of opinion might occasionally arise in expounding terms and phrases necessarily used in such a charter."
– James Madison

What James Madison could not have foreseen with the utterance of these words, however, was how appropriate they would become some two hundred years later. The text of the Constitution, though vague and ambiguous, is definite, and it points to a host of specific rights and liberties granted to the people. With any list, however, there will always be a case that does not agree entirely with its terms. The First Amendment ensures that we have a right to free speech, but it does not address that there may be conditions concerning where, when, or how we may speak. It does not address the possibility of symbolic speech or of speech as conduct. Issues arise that transcend the text – that occur solely from the change of the times and the corresponding changes in national values and cultural mores. Others, still, existed from the beginning, but perhaps were taken as given, and those in whom are vested the responsibilities of codification simply feel it unnecessary to make them textually explicit. This oversight, or possible lack of foresight, depending upon your perception of the situation, causes problems for those whose job it is to interpret what they have penned. We have seen this problem arise in the last century alone in the issues of desegregation, free speech, elections, private property, and most notably for this dialogue, the right to privacy.

DEFERENCE TO A HIGHER AUTHORITY

Given the discussion in the previous section, we have little or no reason not to believe that the Constitution, though devoid of any explicit textual reference to a right to privacy, is not inclusive of such a right. If we concede that the Supreme Court is vested with the power to fully

and actively interpret the law – and in many cases this means invoking the power of judicial review – and if we recognize that judicial activism is an acceptable route for the Supreme Court to take, then we are left without good reason to deny that the Court may, with reason and apprehension, read into the Constitution those rights that are not explicit, but necessary for the faithful order and execution of liberty. The Court may, from time to time, use the text of the Constitution to confer rights to the people that are not actually there. This sounds a bit improvisational for a government that purports to be democratic and liberal – a sort of fly-by-the-seat-of-our-pants rule of law – but it is not as though the Court is simply making up the rules as it goes. In every instance where they have relied on a right to privacy as a defense for their decision, they have cited both constitutional provisions and/or common law precedent to justify their reliance on this constitutional right.

Given the venerable history and tradition of the highest bench, we may justly view them as legitimate and trustworthy guardians of the law. Though we may defer to their authority in deciding what is there and what is not, it is worth examining their methods and justifications to determine which cultural values and which lines of the Constitution point to a right to privacy.

THE RIGHT TO BE LET ALONE

What is so special about privacy? Privacy, it has been said, is a notion at least as old as common law itself.[62] It precedes the drafting of our Constitution, the formation of the United States, and even the dawn of Western civilization as a whole. The concept itself, beyond the bounds of the law, has important historical, philosophical, anthropological, and sociological

[62] Brandeis and Warren.

significance.[63] Aristotle made the distinction between public and private spheres of life, the latter being the realm of the home and the family and separate from that of the government. Nineteenth century utilitarian philosopher John Stuart Mill, in his essay *On Liberty*, noted that the public sphere is that which refers to the appropriate realm of government action, and that there existed a private world in which the government had no place. Likewise, eighteenth century political philosopher John Locke, in his *Second Treatise on Government*, argued that there existed a state of nature wherein every person had an equal claim to all property – which was all public in its essence. Locke noted, however, that we own ourselves and our bodies, which are therefore private. He also declared that a person may come to own private property by "mixing one's labor with it."[64] If a person were to till a piece of land, for example, he or she could come to own it privately. Sociological anthropologist Margaret Mead said that various cultures – other than modern Westerners – seek privacy by having certain rituals and ceremonies away from the group in secret locations. They also seek to keep certain members of the group away from these practices, so as to have them in private. Also, zoological anthropologist Alan Westin asserted that animals also look for privacy away from their larger family groups. They go to private locations to bear their children, to mate, and to die.[65] We can see, then, that privacy is not a modern innovation, but is perhaps something that is intrinsically valuable and natural, not only because we are human, but simply by virtue of being alive.

The concept of privacy is not without its criticisms, however. The first and foremost of these is the basic question of whether there is actually anything special about privacy, in and of itself. Many contemporary critics argue that every action said to be protected by a fundamental

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[63] Judith DeCew, "Privacy," *The Stanford Encyclopedia of Philosophy*, (14 May 2002), <http://plato.stanford.edu/archives/sum2002/entries/privacy> (Accessed 11 January 2006).
[64] Ibid.
[65] Ibid.

right to privacy is likewise protected by other rights and liberties, most notably by the rights of private property explicit in the Fifth Amendment and by basic bodily security. This reductionist criticism of privacy, however, cannot be misconstrued in its rhetoric and apparent truth to encompass all rights under the umbrella of privacy. In *Lawrence v. Texas* (2003), the Supreme Court ruled that persons have a right, under privacy, to engage in homosexual relations.[66] I fail to see how this right falls under either the rights of private property or bodily security. A right to homosexual relations is a right to choose one's lifestyle, and it falls under neither camp, no matter how broadly we stretch them. We can therefore reject reductionist criticisms of privacy, and move on to others with more substantial merit.

The second most powerful criticism is the one put forth by feminists. They claim that if the "private domain [is] free from any scrutiny" then it becomes dangerous to women and minorities because it allows the perpetuation of discrimination behind closed doors. If the government is prohibited from entering the sacred walls of the home, it must turn a blind eye to the crimes – both of physical abuse and repression – committed within them.[67] Though feminists like Catharine MacKinnon make valid points about crimes committed behind closed doors, their belief that privacy itself would be the cause for perpetuation is ludicrous. A right to privacy does not preclude prosecution. The institution of marriage is sacrosanct and protected by the right to privacy, but it is not immune from the greater state interest of prosecuting domestic violence. Criminal behavior dissolves the sacredness of the boundaries of privacy, unless the behavior in question, such as that in *Lawrence*, can be shown to have its own substantial worth.

Less pertinent to our argument, but still mildly substantial is Richard Posner's economic criticism of privacy. His claims are less applicable here simply because his arguments concern

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[66] *Lawrence v. Texas*, 539 U.S. 558 (2003), at 558.
[67] DeCew

informational privacy – the differences between this and the matters actually at hand will be explained later. Regardless, we may still utilize his thesis in the respect of keeping our private actions private from active communication in the public sphere. Posner claims that privacy is only valuable insofar as the information we want to protect is valuable. The less valuable the information, the less we rely on a right to privacy. This is the reason, he argues, that professors do not let their students read their letters of recommendation; it undermines the value of the statement if the author is afraid of offending the student being recommended.[68] I find this thesis accurate in its observation, but lacking in its authority as a successful criticism of the value of privacy. Privacy assures us that information disclosed is protected. It allows us to be more forthcoming to medical professionals, to our attorneys, to our religious leaders, and our spouses. Truth is protected and secured when privacy is guaranteed. If we were to remove the protection of informational privacy from the doctor-patient relationship, then we might feel less confident about releasing embarrassing information about ourselves to a professional who might better help us were he or she privy to this knowledge. Even worse, removing this confidence could allow those with alternative or unpopular lifestyles to become targets of crime or discrimination. Privacy itself makes these relationships fruitful, and so Posner's claim that there is nothing special about it falls far short of accuracy.

Other criticisms of privacy rights include the non-constitutionality of the phrase and the fact that reading it into the law, as the Supreme Court appears to have done, amounts to judicial activism. I believe that previous statements are enough to rule out these final critiques, considering that we have already accepted that judicial activism is not a detriment to the power and validity of the Constitution, and also that extratextualism may be appropriate in some regards.

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[68] Ibid

Though the major criticisms have been overcome, we still have the lingering question: What is so special about privacy? Privacy is special for no other reason than that it is part of our "inviolate personality" as human beings.[69] Though Westin concluded that animals also have an innate notion of privacy, this only shows that privacy transcends the manmade world, and is something of which we have a natural concept. We speak of privacy hereafter, however, as a feature of humanity and basic human dignity.[70] It is a necessary condition for the human race to lead valuable lives, to have intimate relationships, and to feel that we possess something special which no one and no government can take from us. What is special about privacy is its moral significance. Privacy ensures autonomy and dignity, and "has moral value because it shields us in all … contexts by providing certain freedom and independence – freedom from scrutiny, prejudice, pressure to conform, exploitation, and the judgment of others."[71] Privacy gives us status as moral actors and "protects us from unwanted access by others."[72]

Moreover, some degree of privacy is necessary for the people to trust their government. How free would any of us feel if our homes, our bodies, or our lives were subject to random government inspection or control?[73] The very concept is overtly Orwellian, but simply imagine what our natural reaction would be if our government suddenly adopted such a position on privacy. We would lose all faith in the stewardship of our leaders, and we would make a conscious effort to hide the pieces of our lives to which we did not want others to have access. If nothing else, this example illustrates that we value our privacy as having some intrinsic worth,

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[69] Brandeis and Warren.
[70] DeCew
[71] Ibid.
[72] Ibid.
[73] "The Fundamentals of Our Fundamental Freedoms," CCLA, <http://www.ccla.org/schools/personal.shtml> (Accessed 11 January 2006).

namely, that it allows us to live freely without fear of intrusion – to own all the dignity afforded us as human beings.

Two interpretations. It is generally accepted that Louis D. Brandeis and Samuel D. Warren made the first mention of any "right to be let alone" in American legalese. Their publication in the Harvard Law Review, aptly titled *The Right to Privacy*, identified that not only was privacy instrumental in the function of government and daily life, but that it was also the responsibility of the law to adapt itself to make room for it. Arguably the first patrons of serious judicial activism, Brandeis and Warren asserted that "political, social, and economic changes entail the recognition of new rights, and the common law, in its eternal youth, grows to meet the new demands of society."[74] Reliant on history, custom, and their beliefs about what the Founding Fathers intended in the ratification of the Bill of Rights, *The Right to Privacy* points to a fundamental right to be let alone, textually explicit or not.

It is worth noting, however – not to contradict my argument, but in the end to strengthen it – that the type of privacy Brandeis and Warren were so adamant about protecting is not the type of privacy on which the remainder of this thesis will focus. Brandeis and Warren's concept of privacy is the traditional notion – what I will call hereafter the "Fourth Amendment interpretation of privacy." The type of privacy with which my argument is concerned is the less tangible version – the privacy of person. I will explain each in turn.

The Fourth Amendment states that "the right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated …"[75] This may be slightly confusing, since I have identified the second type of privacy as privacy of person and yet the word "person" is mentioned in the Fourth Amendment. To clarify,

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[74] Brandeis and Warren
[75] United States Constitution, Amendment IV

"person" in the Fourth Amendment sense refers to the physical person. In other words, our physical bodies are free from unwarranted search and seizure, whereas the second type of privacy will focus more on the intangible aspects of personhood.

In the physical sense, the right of privacy is limited to those who are in a place that a person would reasonably expect to be private, such as a home, a phone booth, a hotel room, a car, etc.[76] There is a general acceptance that we have a right to privacy vis-à-vis home invasion, security of documents, and intrusion on the physical body, but there is debate concerning the breadth of the Fourth Amendment's protection. Over time, the amendment has grown to include the privacy of personal information, and this intensifies the competition between the individual and the government's "need to know."[77]

Technology was technically the first real threat to any right to privacy. Until telephones, wiretaps, computers, surveillance cameras, cell phones, PDAs, and global satellite positioning, just to name a few, became the norm, there was little fear that a person's privacy could be invaded. People were secure in their homes, save only from the occasional peeping tom.[78] Nevertheless, the individual and the state have been able to strike a compromise when it comes to a right to privacy concerning both information and physical boundaries. The use of search warrants allows persons a reasonable degree of privacy while allowing the government access to information it finds pertinent, so long as the state (as officers of the law or government officials) can convey to a judge a relevant and convincing belief – called "probable cause" or "reasonable grounds" – that the information it seeks is in a particular private location. Warrants must also be

[76] *Katz v. U.S.*, 389 U.S. 347 (1967), at 350.
[77] "The Fundamentals of Our Fundamental Freedoms."
[78] Ronald B. Standler, "Privacy Law in the USA," (24 May 1998), <http://www.rbs2.com/privacy.htm>, (Accessed 24 October 2005).

tailored so that they narrowly define the items, evidence, or information sought; they may not be used as licenses to "go fishing," so to speak.[79]

Controversial though it may remain, it appears as though the Fourth Amendment right to privacy has all but been declared universally accepted. It is also often taken for granted that "the Supreme Court has been explicit in ruling that privacy is a central reason for Fourth Amendment protection ...", even though the word is not so much as mentioned in the text of the amendment. The problem and the crux of the controversy over a right to privacy, we see, occurs when, as Brandeis and Warren said, the necessity arises "to define anew the exact nature and extent of such protection."[80] Their words laid the ground for a more contemporary version of a right to privacy, and the one on which the remainder of this argument will address.

The notion of a broader interpretation of privacy – the privacy of person – puts the entire issue of privacy in a very different context, one in which "the government attempts to limit the choices of individuals in various personal areas, such as use of contraception or abortion, whom to marry, and the right to choose how to rear and educate one's children."[81] What we mean here is something decidedly more intimate than any conception of physical security as privacy. This is a *personal* privacy which comprises the privacy of decision, choice, preference, lifestyle, and self. Personal privacy seeks to protect both the tangible body and the less solid idea of the choices that affect it. "It has generally been viewed as a right protecting one's individual interest in independence in making certain important and personal decisions about one's family, life, and lifestyle.[82] When we broaden the concept of privacy to include more than the physical self or surrounding, then we allow such issues as abortion, contraception, sodomy, death, education,

[79] "The Fundamentals of Our Fundamental Freedoms."
[80] Brandeis and Warren
[81] Standler
[82] DeCew

religion, marriage, medical treatment, and physician-assisted suicide to fall under the umbrella of a right to privacy.

This is the controversy with privacy. No one argues that we have a right to feel secure in our homes, or that our conversations are private unless they become the subject of some compelling government interest such as national security or criminal prosecution, but if we affirm a fundamental right to privacy, we let in all of the above controversial topics, guaranteeing ourselves fundamental rights to abortion, procreation, prevention of procreation, marriage, homosexuality, death, and so on. We tiptoe on dangerous ground in declaring that a fundamental right to privacy exists, as many a conservative dissent will show in the discussion of case law, but can we use a slippery slope argument to deny the people what Brandeis and Warren called one of the rights "most valued among civilized men"?[83] I, like the Supreme Court, have reservations with doing this. The right to privacy has been declared a fundamental right over and over again in the text of common law, thus elevating it to the level of free speech and freedom of the press. The great risk posed in doing this was, is, and will remain the same: There is no right to privacy in the Constitution. Unfortunately, no amount of rhetoric can change that – only a constitutional amendment can make it textually explicit, and given the bevy of controversial topics which would become irrefutable if such an amendment were added, we can say with certainty that we will not have to worry about it at any time in the near future.

The task before me, however, is to show that a right to privacy actually exists, and to do that, I will have to show that even though the right to privacy is not textually explicit in the Constitution, the language of the document, coupled with history, custom, tradition, and original intent, is sufficient to make the right implicit enough to call it explicit. We have already established that a loose interpretation of the Constitution is not only acceptable, but required to

[83] Brandeis and Warren

keep the Constitution in tune with the times, so there is no harm in looking into the text to see if it permits a right to privacy. To do this, I turn to common law and the opinions of the venerable justices appointed to Supreme Court. Based on their opinions and judgments of the law, we will see that there is enough evidence in the document that a right to privacy ought to be considered one of our fundamental freedoms.

PERCEIVING PRIVACY

"Had those who drew and ratified the Due Process Clause of the Fifth Amendment or the Fourteenth Amendment known the components of liberty in its manifold possibilities, they might have been more specific." – Supreme Court Justice Anthony Kennedy

Though we well established in the last section that there is no explicit right to privacy within the body of the Constitution, we may interpret the document broadly enough so as to encompass such a right. In no way will we be simply creating this right from the mere desire for it, as many interpretivist critics would argue, but rather, we look to the insinuations of other rights and the suggestions of several amendments for our foundation. The Supreme Court has relied on such nuances for more than forty years to ground and verify the right to privacy. We look now to their decisions in several major privacy cases and the grounds they rely on to justify their "creation" of a right to privacy.

THE CONSTITUTIONAL RIGHT TO PRIVACY

As early as 1923, the Supreme Court began using a privacy-type defense in its decisions. Though a right to privacy was never specifically invoked, cases like *Meyer v. Nebraska* (1923) and *Pierce v. Society of Sisters* (1925), both of which concerned parents' rights to raise and educate their children and were decided based on the notion of liberty in the Due Process Clause of the Fourteenth Amendment, laid the foundation for a right to privacy inherent in the same clause.[84] In his dissent in the 1928 case of *Olmstead v. U.S.*, Justice Louis D. Brandeis first articulated the now famous phrase "the right to be let alone," derived from his joint publication with Samuel D. Warren.[85] In 1944, the Supreme Court used the Fourteenth Amendment to issue

[84] "Exploring Constitutional Conflicts: The Right of Privacy," <http://www.law.umkc.edu/faculty/projects/ftrials/conlaw/rightofprivacy.html> (Accessed 4 January 2006).
[85] *Olmstead v. U.S.*, 277 U.S. 438 (1928), at 478.

fundamental status to the right to procreate in *Skinner v. Oklahoma.*[86] These cases all referred to topics later deemed and understood as private, though they were cited so at the time. The major advancement, however, was still several decades in the making.

In 1965, everything known about privacy law in the United States changed. The Supreme Court handed down its decision in the landmark case of *Griswold v. Connecticut.* Estelle Griswold, executive director of the Planned Parenthood League of Connecticut, and the league's medical director, a Yale-educated, licensed physician, were both convicted under a Connecticut statute criminalizing the dissemination of both information regarding contraception and contraceptive devices themselves. The Connecticut statute made it a crime for any person to use a "drug or article" to prevent conception, and the doctors had given information to a married woman and prescribed her a contraceptive device for personal use.[87] The particular section of the law in question also declared that "any person who assists, abets, counsels, causes, hires, or commands another to commit any offense may be prosecuted and punished as if he were the principal offender."[88] Justice William O. Douglas delivered the opinion of the Court in the [vote] decision which affirmed the right to privacy for the first time. In asserting that access to and distribution of contraception to married persons was a matter of privacy, Douglas declared that though there was no right to privacy explicit in the text of the Constitution, there was evidence of such a right in the "penumbras" and "emanations" of several constitutional amendments.[89] The Court has recognized, Douglas said, that the First Amendment includes at least one peripheral right, and also several insinuations within it that allude to a right to privacy.[90] There is no right of association mentioned in the First Amendment, Douglas correctly declared, but he points out that

[86] *Skinner v. State of Oklahoma. Ex. Rel. Williamson,* 316 U.S. 535 (1942), at 541.
[87] *Griswold v. Connecticut*, 381 U.S. 479 (1965), at 479.
[88] Ibid, at 480.
[89] Ibid, 482-484.
[90] Ibid, at 482

the Supreme Court recognized a fundamental right to privacy in one's associations based on the First Amendment in the case of *NAACP v. Alabama.*[91] The First Amendment reads: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."[92] Though it makes no textual reference to a right to associate as one chooses, it is interpreted, through the religion clauses and the right to assemble, that the First Amendment contains a penumbral right of privacy in the right of association.[93] Douglas goes on to articulate the "various guarantees [within the Constitution that] create zones of privacy."[94] In addition to the First Amendment, there is also the Third Amendment's proscription that "no soldier shall ... be quartered in any house, without the consent of the owner ..."[95] The Fourth Amendment guarantees the "right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures."[96] The Fifth Amendment's self-incrimination clause protects the privacy of the self.[97] Finally, Douglas declares that the Ninth Amendment's allowance for the retention of unenumerated rights likewise alludes to a right to privacy.[98] Based on so many textual references, or insinuations, of a right to privacy, the Court held that such a right to privacy must be broad enough to encompass the "sacred precincts of marital bedrooms" and the right of married persons to prevent conception.[99]

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[91] *NAACP v. Alabama*, 357 U.S. 449 (1958), at 462.
[92] United States Constitution, Amendment I
[93] *Griswold v. Connecticut*, at 482-483
[94] Ibid, at 484
[95] Ibid, at 484, and United States Constitution, Amendment III
[96] Ibid, at 484, and United States Constitution, Amendment IV
[97] Ibid, at 484, and United States Constitution, Amendment V
[98] Ibid, at 484, and United States Constitution, Amendment IX
[99] Ibid, at 485

Justice Arthur Goldberg's concurring opinion relies primarily on the unenumerated rights clause in the Ninth Amendment, which reads: "The enumeration in the Constitution of certain rights, shall not be construed to deny or disparage others retained by the people."[100] The very language of the Ninth Amendment points to the idea that a right to privacy may be interpreted as part of the document, if societal evidence exists to show the people believe they should have such a right. "The language and history of the Ninth Amendment reveal that the Framers of the Constitution believed that there are additional fundamental rights ... which exist alongside those fundamental rights specifically mentioned in the first eight constitutional amendments."[101] The entire purpose of including such an amendment, Goldberg declares, was to quiet fears about adopting a document that contained an explicit list of the people's rights. Including the Ninth Amendment gave the government a way to proverbially cover all of its bases in case they forgot something.[102] Goldberg goes on to point out that in the I Annals of Congress 439, James Madison specifically stated this purpose to Congress amid arguments that granting certain rights to the people would disparage others not mentioned. Madison conceded that this was the best argument against the ratification of the Bill of Rights, but that the Ninth Amendment would serve as an adequate safeguard because it would allow for the later inclusion of rights not specifically guaranteed at that particular time.[103] In no way could the Framers have intended the first eight amendments to the Constitution to be an exhaustive list of all of the rights retained by the people. To do so would have been not only to commit an injustice against the people they were claiming to serve, but also to err in their judgment of the people's values. The Ninth Amendment does nothing to "broaden the powers of the Court," but it lends support to the Due

[100] United States Constitution, Amendment IX
[101] *Griswold v. Connecticut*, at 488
[102] Ibid, at 489
[103] Ibid, at 489-490

Process Clauses' conceptions of liberty inherent in the Fifth and Fourteenth Amendments by not limiting their incorporation to the literal text of the first eight amendments.[104] "To hold that a right so basic and fundamental and so deep-rooted in our society as the right of privacy ... may be infringed because that right is not guaranteed in so many words by the first eight amendments to the Constitution is to ignore the Ninth Amendment and to give it no effect whatsoever."[105]

Justice John Marshall Harlan II's concurring opinion relied on the concept of substantive due process for its justification of contraception as an aspect of privacy. Such aspects, he argued, are "implicit in the concept of ordered liberty," a phrase first uttered in the case of *Palko v. Connecticut.*[106] Rights deemed fundamental must meet with the standards and norms of society and the deep traditions of history in the United States, and these rights must be dictated by the bounds of the Due Process Clause of the Fourteenth Amendment. Justice Byron White also concurred on the grounds of liberty under the Fourteenth Amendment, which states that "no state shall ... deprive any person of life, liberty, or property without due process of law.[107] Substantive due process involves claims which arise under the liberty aspect of the Due Process Clause, and in this case, Justices Harlan and White claim that privacy is in accordance with concept of liberty as it arises here.[108]

In conclusion from *Griswold*, we see that "taken together, those amendments indicate a fundamental concern with the sanctity of the home and the right of the individual to be [let] alone."[109] Moreover, it is clear that "the Bill of Rights ... reflects the concern of James Madison and other Framers for protecting specific aspects of privacy ..."[110]

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[104] Ibid, at 493.
[105] Ibid, at 491
[106] Ibid, at 499, and *Palko v. Connecticut*, 302 U.S. 319 (1937), at 325.
[107] Ibid, at 502, and United States Constitution, Amendment XIV
[108] O'Brien, 15-16
[109] Ibid, 350
[110] "Exploring Constitutional Conflicts: The Right of Privacy"

Griswold's companion case, *Eisenstadt v. Baird*, addressed the same right to contraception as it applies to single persons. In *Eisenstadt*, the conviction involved the dissemination of contraceptives to an unwed woman after a lecture describing their use. The Massachusetts Supreme Judicial Court set aside the conviction for exhibiting the contraceptives, but upheld the conviction for distribution.[111] As written, the law in question in this case allowed for the distribution of contraception to married persons, however, only for the prevention of disease, not the prevention of conception. Singles were not allowed to obtain contraceptive devices and only doctors or pharmacists were allowed to prescribe such devices.[112] *Eisenstadt* was decided on the Fourteenth Amendment's Equal Protection Clause, as well as on the tenets of *Griswold*. The idea is that the need for contraception is equal between married and single persons, and once you allow it for one, as in *Griswold*, you must allow it for both.[113] In citing *Griswold*, the case also affirms the principles of the penumbras and emanations apparent in the first eight amendments, the enumeration clause of the Ninth Amendment, and the Due Process Clause of the Fourteenth Amendment. The major significance of *Eisenstadt*, however, is that it affirms that privacy is not simply an aspect of the sanctified union of marriage, but an aspect of citizenship. Justice William Brennan asserts in his majority 6-3 opinion:

> It is true that in *Griswold* the right of privacy in question inhered in the marital relationship. Yet the marital couple is not an individual entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup. If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.[114]

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[111] *Eisenstadt v. Baird*, 405 U.S. 438 (1972), at 440
[112] Ibid, at 442
[113] Ibid, at 443, 450.
[114] Ibid, at 453

The 1967 case of *Loving v. Virginia*, the Supreme Court addressed the issue of marriage as it relates to privacy. Having previously decided that there is something sacrosanct about the marital bedroom in *Griswold*, the Court was now faced with deciding that marriage itself, and not just its bedroom activities, was fundamental to the notion of privacy.

Mildred Jeter, a black woman, and Richard Loving, a white man, married in Washington, D.C., and returned to Virginia in June of 1958. In October of 1958, the couple was indicted under a Virginia antimiscegenation law. The Lovings pleaded guilty in January of 1959, and they were sentenced to one year in jail for their crime. The trial judge agreed to suspend their sentence for twenty-five years pursuant on the condition that the couple leave the state and not return for those twenty-five years. The Lovings agreed and moved to the District of Columbia. In 1963, they filed a motion to have the judgment vacated on the grounds that it violated both the Equal Protection and Due Process Clauses of the Fourteenth Amendment. The Supreme Court of Appeals of Virginia upheld the constitutionality of Virginia's antimiscegenation law, arguing that the state's legitimate purpose in restricting who could marry whom was to preserve racial integrity and that there was no violation of the Equal Protection Clause insofar as the Fourteenth Amendment is construed to mean that equality can be applied separately to the races, so long as it is applied equally.[115]

The Supreme Court, however, disagreed, arguing that the only justification for the law was purely based on race, and was therefore a violation of the Fourteenth Amendment's Equal Protection Clause.[116] The Court also said that such a law also deprives the Lovings of their liberty under the Due Process Clause of the Fourteenth Amendment. "The Fourteenth Amendment requires that the freedom of choice to marry not be restricted. ... The freedom to

[115] *Loving v. Virginia*, 388 U.S. 1 (1967), at 2-3, 7-8
[116] Ibid, at 11

marry, or not marry ... cannot be infringed by the state."[117] Though the reference to the Due Process Clause and Chief Justice Earl Warren's insistence that the state may not intervene in a couple's decision to marry — or a single person's decision not to — do not specifically mention a right to privacy, *Loving* has been cited multiple times as the case that affirms marriage is included in those actions under privacy's umbrella.

In the 1969 case of *Stanley v. Georgia*, a unanimous Court also extended the right to privacy to cover the possession and viewing of obscene materials in the home. Under the guidance of the First and Fourth Amendments, Justice Thurgood Marshall wrote in his majority opinion that "whatever may be the justifications for other statutes regulating obscenity, we do not think they reach into the privacy of one's own home."[118] This portion of the defense rested obviously on the Fourth Amendment protection of houses and effects against unreasonable searches and seizures, but the real crux of the defense in *Stanley* came from Marshall's next few lines, dictating that a more personal form of privacy was at issue in this case. Marshall declared that "if the First Amendment means anything, it means that a State has no business telling a man, sitting alone in his own house, what books he may read, or what films he may watch. Our whole constitutional heritage rebels at the thought of the giving government the power to control men's minds."[119] The Court, more adamantly than in *Griswold*, thus affirmed that the First Amendment contains an implicit right to privacy in its periphery. Not only, they insisted, does the home constitute a "zone of privacy," but so, too, do the minds of men.

The Court further expanded the notion of a First Amendment right to privacy when it once again tackled the right of parents to rear their children according to their own choice. The

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[117] Ibid, at 12
[118] *Stanley v. Georgia*, 394 U.S. 557 (1969), at 565.
[119] Ibid, at 565

Court had already decided in *Meyer* that parents have a right to teach their children a foreign language under the liberty principle in the Fourteenth Amendment's Due Process Clause:

> Without doubt, [the Due Process Clause] denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.[120]

In like fashion, the Court agreed in *Pierce* that parents have a right to send their children to private schools if they choose to do so. The state of Oregon had passed a Compulsory Education Act in 1922 requiring that all students attend public school. [121] Relying heavily on its two-year-prior opinion in *Meyer*, the Court declared that the Due Process Clause also covers the right of parents to choose the path of the children's education. "The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the state to standardize its children by forcing them to accept instruction from public teachers only."[122] As the law stood, it unreasonably interfered "with the liberty of parents and guardians to direct the upbringing and education of children under their control."[123] These two cases, though making no mention of privacy as the foundation for their justification, laid the groundwork for the 1972 case of *Wisconsin v. Yoder*, which translated the liberty principle of the Due Process Clause as inclusive of a private right to choose one's religion and education according to religion under the conditions of the First Amendment.

In 1972, several members of the Amish population of Green County, Wisconsin, were convicted for violating the state's compulsory education policies by pulling their children out of

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[120] *Meyer v. State of Nebraska*, 262 U.S. 390 (1923), at 399.
[121] *Pierce v. Society of the Sisters of the Holy Names of Jesus and Mary*, 268 U.S. 510, (1925), at 530.
[122] Ibid, at 535
[123] Ibid, at 534-535

public schooling after the eighth grade. The law required that all children remain in the school system — public or private — until age 16. The Wisconsin Supreme Court upheld the conviction on appeal, but in a 6-3 decision, the Supreme Court reversed, declaring that it is within the First and Fourth Amendments' tenets for parents to decide how far their children can be educated according to their religious beliefs.[124] The Amish did not object to early elementary education because children needed to learn the basics of reading, writing, and arithmetic to read the Bible and participate actively in a normal Amish life.[125] They objected, however, on the grounds that:

> Formal high school education beyond the eighth grade is contrary to Amish beliefs, not only because it places Amish children in an environment hostile to Amish beliefs with increasing emphasis on competition in class work and sports and with pressure to conform to the styles, manners, and ways of the peer group, but also because it takes them away from their community, physically and emotionally, during the crucial and formative adolescent period of life.[126]

The Amish argued that requiring their children to attend school when it was detrimental to the very way of life they held dear was both a violation of the First Amendment right to the free exercise of their religion and their Fourteenth Amendment right to raise their children according to their own values.[127] The Court agreed with their sentiments, and Chief Justice Warren Burger attempted to quiet fears that allowing Amish families to dictate the terms of their children's education would lead to a slippery slope allowing all sorts of fanatical or fundamentalist groups to propagate dangerous views to their children. "A way of life that is odd or even erratic," he wrote, "but interferes with no rights or interests of others is not to be condemned because it is different."[128]

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[124] *Wisconsin v. Yoder*, 406 U.S. 205 (1972), at 234.
[125] Ibid, at 212
[126] Ibid, at 211
[127] Ibid, at 209
[128] Ibid, at 223-224

The state still has an interest in the education of its children as far as interference with the rights of or harm to others is concerned, but it cannot act in an all-encompassing *parens patriae* role. To allow this would be to allow the government to have control over our most intimate choices.[129] Like *Meyer* and *Pierce* before it, *Wisconsin v. Yoder*, makes no explicit mention of the word privacy, but it does emphasize a reliance on religion and the level of intimacy involved in such a choice or association. The Court already declared in *NAACP v. Alabama* that a person has a right to associational privacy, but *Yoder* goes much deeper than that. Choosing one's religion and choosing to live according to its precepts is one of the most intimate decisions a person can make in his or her lifetime. The fact that it is not mentioned explicitly as private does not make it any less so. By declaring that the state may not interfere in one's choice of religion or — with reasonable expectation — one's free exercise thereof, the Court has, in essence, declared that choice itself is a zone of privacy. Some decisions are so intimate, so entangled with the very nature of what it means to be a person, that they are free from all government intrusion. The state may not — I dare say, cannot — enter my mind and tell me how to think. The conduct by which we act may be regulated, but my decisions, my choices, and my thoughts are my own, and therefore private. They fall under the realm of privacy precisely because they are outside the realm of government interference.

At the beginning of the 1970s, however, the face of privacy rights in the United States underwent their most dramatic and controversial change to date. "No longer was the Court legislating at the margins against curious, outdated, and nationally unpopular state laws" like those in *Griswold* and in *Loving*, but now was tackling greater and highly divisive "in bold and broad strokes."[130] The case was, of course, the landmark 1973 case of *Roe v. Wade*, and the

[129] Ibid, at 234
[130] Goldstein, p.100

aftershock of the decision still tears through political debate thirty-three years later. Arguably, *Roe* is one of the most controversial cases the Court has ever decided, and more readily defensible, it is the most contentious privacy case to which the Court has ever granted cert. In 1972, a pregnant single woman, known in the case under the pseudonym Jane Roe — ironically, to protect her privacy — brought suit against the state of Texas, challenging the constitutionality of Texas' criminal abortion laws. The laws in question, Texas Penal Code articles 1191-1194 and 1196, outlawed abortion in all situations except one exceptional circumstance.[131] These statutes "make it a crime to 'procure an abortion,' as therein defined, or to attempt one, except with respect to 'an abortion procured or attempted by medical advice for the purpose of saving the life of the mother.'"[132] Roe claimed that the Texas statutes were unconstitutionally vague and that they abridged her "right of personal privacy" apparent and protected by at least the "First, Fourth, Fifth, Ninth, and Fourteenth Amendments."[133] The District Court sided with Roe, declaring that it is a fundamental right for all women — both married and single — to choose whether to bear children under the Ninth Amendment and the Fourteenth Amendment's liberty principle in the Due Process Clause. The statutes in question were unconstitutionally vague concerning what would or would not constitute a jeopardy to the mother's life, and were overbroad in their infringement upon Roe's right to liberty.[134]

Justice Harry Blackmun wrote the majority opinion in the 7-2 case, but before going into the defense for the Court's decision, he elected to filter through the common moral objections to abortion — the personhood debate, maintaining the dignity of the physician, the state's interest

[131] *Roe v. Wade*, 410 U.S. 113 (1973), at 113, 118.
[132] Ibid, at 118-119
[133] Ibid, at 120
[134] Ibid, at 122

in protecting life, and the idea of life beginning with conception.[135] Discounting the moral objections would allow the legal reasoning to shine through and be, ideally, free of personal opinion on the ethical permissibility of the practice. The Court is not in place to legislate taste, nor to shed light on ethical dilemmas that have endured since the dawn of man; the justices are arbiters of law, and their only objective is to consider the constitutionality of the practice, not its moral popularity. Typical conservative appeals to history and the Hippocratic Oath are null, Blackmun declares, simply there is no compelling evidence of an historical condemnation of abortion. Criminal abortion laws, he points out, are of relatively recent vintage, most only being established during the latter half of the nineteenth century, so any claim that abortion has been proscribed by our norms and values for centuries is merely arguing for effect and not from fact.[136] The truth is actually quite to the contrary. Ancient views on abortion were much more lenient. The Greeks and Romans, in fact, practiced abortion regularly, and "it was resorted to without scruple."[137] In *The Republic*, Plato describes that children born deformed or from unapproved childbirth shall be either aborted or vacated from the ideal city. Indeed, there was little protection shown to the unborn in ancient times.[138] Granted, it is difficult to argue the ancient perspective in modern times, but it is worth noting that abortion has not always been a condemned practice. Also, the Hippocratic Oath is an oddity, Blackmun argues, because ancient beliefs on abortion do not mesh with the text of the Oath. While translation from dead languages is never completely accurate, the Oath is generally thought to read: "I will neither give a deadly drug to anybody if asked for it, nor will I make a suggestion to this effect. Similarly, I will not

[135] Ibid, at 129-151
[136] Ibid, at 129
[137] Ibid, at 130
[138] Ibid, at 130-131

give to a woman an abortive remedy."[139] Though Hippocrates' words appear rather clear, it is difficult to reconcile his statements with the thoughts of his contemporaries. Language is suspect, and debate still rages over whether Hippocrates' words actually insinuated suicide and abortion, since the Greeks and Romans both were advocates of — or at least, tolerant of — abortion, infanticide, and suicide.[140]

Blackmun also addresses the arguments concerning fetal viability and personhood, arguing that medically speaking, the fetus is not "quickened" — the first recognizable movements of the fetus in utero — until around the sixteenth week of pregnancy. Common law, he notes, has not traditionally indicted women or physicians for performing abortions before the quickening of the fetus.[141] Though the fetus is biologically alive at this stage of development, it is not capable of surviving without attachment to the mother's body, and until it has developed such capacity, many, including Blackmun, argue that we cannot view the fetus as a person.[142] Perceptions vary as to when "personhood" begins. Some in the fundamentalist theological sect argue that life begins at conception and abortion is therefore murder. One popular view that persisted until the nineteenth century was that sustaining "animation" — infusion with a soul — took forty days for a male and eighty days for a female.[143] Despite all popular view, however, the Court has declared that there is no qualification in the Constitution for what the term "person" — primarily used in the Fourteenth Amendment— actually means. "No case could be cited that holds that a fetus is a person within the meaning of the Fourteenth Amendment."[144] Moreover,

[139] Ibid, at 131
[140] Ibid, at 131
[141] Ibid, at132
[142] Ibid, at 133-134
[143] Ibid, at 135-136
[144] Ibid, at 157

Blackmun said, the Court will not construe the term to include the unborn, so personhood arguments as an attack on abortion are roads to nowhere.[145]

After appropriating the focus to the legal arena by showing that moral claims do not hold weight in the justiciability of the case, Blackmun turns to the defense of the decision. The Court recognizes openly in *Roe* that "the Constitution does not explicitly mention any right to privacy," but holds that it "has recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution."[146] The opinion relies heavily on precedent from *Stanley*, *Katz*, Brandeis' dissent in *Olmstead*, *Griswold*, *Meyer*, and *Pierce* to illustrate the multiple times a privacy defense has been called upon by the Court. Blackmun affirms that the "only personal rights that can be deemed 'fundamental' or 'implicit in the concept of ordered liberty' are included in this guarantee of personal privacy," and he delivers no short list of the various aspects that the Court has designated as fundamental.[147] A brief sample includes rights relating to marriage, procreation, contraception, family relationships, and child-rearing and education.[148] It is not random chance that these topics all concern personal choices, and it is no mere coincidence that they have all relied on substantive due process to support themselves as being included in a fundamental right to privacy.

Relying on this very concept of liberty inherent in the Due Process Clause of the Fourteenth Amendment, the majority of seven declared that "this right of privacy ... is broad enough to encompass a woman's decision whether or not to terminate her pregnancy."[149] Nevertheless, the Court does not issue a free-for-all with respect to our bodies, but recognizes that the state does have a compelling interest in protecting life, and the right to an abortion must

[145] Ibid, at 157-158
[146] Ibid, at 152
[147] Ibid, at 152, quoting *Palko v. Connecticut*, at 325
[148] Ibid, at 152-153
[149] Ibid, at 152

balance against this state interest. The state may impose narrowly drawn and specific limitations on abortion, but may not draw such regulations so as to burden the mother or abridge her right to choose. They may, for example, designate that abortions performed in the third trimester may be done so only to save the life of the mother, but they may not proscribe the practice.[150]

William Rehnquist's powerful dissent relies heavily on the arguments countered by Blackmun in the majority opinion. The conservative appeal to history, morality, and prevalence of law, however, do not stand against the overwhelming authority of constitutional claim. Rehnquist declares that thirty-six states — at the time of Fourteenth Amendment's adoption in 1868 — had criminal abortion laws on their books.[151] The question is, however, since when is popularity tantamount to constitutionality? The prevalence of a law makes it no more constitutional than the degree of faith in an opinion makes it indisputably true. The one does not imply the other, and some better defense for the proscription of abortion is necessary.

Rehnquist attempts such a constitutional proscription with the typical conservative defense that a right to privacy is not explicit in the text of the Constitution. "To reach its result," he claims, "the Court has had to find within the scope of the Fourteenth Amendment a right that was apparently completely unknown to the drafters of the amendment."[152] But regardless of its non-appearance in the body of the Constitution, the Court has on numerous occasions confirmed its existence, and what is more, Rehnquist himself qualifies what a right to privacy under the Fourteenth Amendment truly entails in his majority opinion in *Washington v. Glucksberg* in 1997. Though his opinion and defense may have held some weight in 1973, the curiosities in the evolution of the right to privacy and the ideology of the Court point to an ever-increasing acceptance — even among conservatives — that the right is there somehow.

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[150] Ibid, at 154-155
[151] Ibid, at 174-175
[152] Ibid, at 174

Though *Roe* is likely as controversial as the right to privacy gets, the next two decades saw debacles of their own. In 1986, the Court heard arguments in the case of *Bowers v. Hardwick*, which attempted to put sodomy on the list of activities protected by a right to privacy. The Court, however, was unwilling to do so because, as they noted, the activities under a right to privacy have been registered as "implicit in the concept of ordered liberty" or "deeply rooted in this nation's history and tradition."[153] The Court decided that homosexual activity is neither of these. The Court, we see, is fickle in its application of the principles and dogma of history in deciding its cases, but this is largely attributable to those cases penned by conservative majorities since the creation of a privacy right out of the constitutional cloth was primarily a liberal endeavor. Nevertheless, inconsistency undermines legitimacy, and the Court looks foolish in its opinion in this case. Byron White, in writing for the bare 5-4 majority, uses the spotlight to chastise the Court itself for its precarious insistence on privacy rights. "The Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution."[154] He cites that twenty-five states have anti-sodomy laws on their books — a statement which makes the opinion look all the more untrustworthy, considering that Footnote six in the opinion lists thirty-eight, the most recent of which passed in 1868.[155] Once again, we must question why popularity is believed to amount to constitutionality, and we are left to believe that the non-explicit defense is simply the conservatives' way of judging taste and personal morality. It is difficult to believe that abortion is morally permissible under the tenets of substantive due process, but sodomy is not. As Justice John Paul Stevens says in his dissent, "the fact that the governing majority in a state has traditionally viewed a practice as immoral is not a sufficient reason for upholding a law

[153] *Bowers v. Hardwick*, 478 U.S. 186 (1986), at 191-192
[154] Ibid, at 194-195
[155] Ibid, at 196, and Footnote 6, at 193-194

prohibiting the practice."[156] There is no compelling interest, he argues, for denying fundamental status to such an intimate choice as to engage in the sexual activity of one's choosing.

Justice Blackmun's fiery dissent emphasized that "this case is about 'the most comprehensive of rights and the right most valued by civilized men,' namely, 'the right to be let alone.'"[157] Blackmun points out that the Court, in its majority, relies on the idea of homosexual sodomy, but that in fact, the actual law makes no mention of the sexes of those involved in the act, and attributes the opinion to the Court's "almost obsessive focus on homosexual activity."[158] Not only does the claim involve "an unconstitutional intrusion into [Michael Hardwick's] privacy and his right to intimate association," but the activity occurred in the home, which already has Fourth Amendment privacy significance.[159] "The right of individuals to conduct intimate relationships in the intimacy of his or her home seems ... to be at the very heart of the Constitution's protection of privacy."[160]

Blackmun's powerful dissent in *Bowers* became the foundation for the Court's 2003 opinion in *Lawrence v. Texas*, where the right to engage in homosexual sodomy was affirmed in a 6-3 vote. The Court failed in *Bowers*, wrote Justice Anthony Kennedy, to recognize the liberty at stake in the case.[161] The Court emphasized the precedent of *Griswold*'s marital bedroom and *Eisenstadt*'s privacy of the individual, and concluded, in standard fashion, that denying persons the right to choose their sexual partners and sexual activity is a violation of the liberty principle in the Due Process Clause of the Fourteenth Amendment, and runs counter to the very heart of the right to privacy therein.[162]

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[156] Ibid, at 214
[157] Ibid, at 199, quoting Brandeis' dissent in *Olmstead v. U.S.*, at 478
[158] Ibid, at 200
[159] Ibid, at 201, 206
[160] Ibid, at 208.
[161] *Lawrence v. Texas*, 539 U.S. 558 (2003), at 566-567
[162] Ibid, at 558

The most recent of the activities discussed as part of a right to privacy came under fire in 1997 in the case of *Washington v. Glucksberg*. The case considers the right to die via physician-assisted suicide, and begins with an examination of the nation's history and opinion on the matter, affirming that it is a crime to assist suicide in almost every state.[163] The unanimous Court held that the Due Process Clause does not restrict liberty by denying the right to assisted suicide simply because it guarantees fairness in allowing the refusal and/or removal of life-sustaining medical treatment.[164] The right to refuse medical treatment was affirmed as a "constitutionally protected liberty interest" in the case of *Cruzan v. Director, Missouri Department of Health* in 1990, when an invalid girl's parents requested to remove their daughter from life support after clear and convincing evidence was presented that those were her wishes.[165] In a concurring opinion in *Cruzan*, Justice Sandra Day O'Connor confirmed that privacy was an essential element in this right, declaring that "the liberty guaranteed by the Due Process Clause must protect, if it protects anything, an individual's deeply personal decision to reject medical treatment."[166]

In *Glucksberg*, however, Rehnquist, as Chief Justice, emphasized the tenets of the Hippocratic Oath and declared a veritable condemnation on suicide, which, as we saw earlier, has not always been regarded as a reprehensible practice. It is, in fact, of a somewhat recent vintage and is often regarded simply as immoral, rather than indefensible. Nevertheless, the Court refuses to grant physician-assisted suicide and the right to die as fundamental privacy rights because, as Rehnquist declares:

> [There] has always been a process whereby the outlines of the liberty specially protected by the Fourteenth Amendment — never

[163] *Washington v. Glucksberg*, 521 U.S. 702 (1997), at 710
[164] Ibid, at 719
[165] *Cruzan v. Director, Missouri Department of Health*, 497 U.S. 261 (1990), at 261, 278, 280
[166] Ibid, at 289

> fully clarified, to be sure, and perhaps not capable of being fully clarified — have at least been carefully refined by concrete examples involving fundamental rights found to be deeply rooted in our legal tradition.[167]

The state's interest, the Court said, involves protecting the vulnerable from being taken advantage of, as well as protecting the disabled and terminally ill from prejudice.[168] Justice O'Connor, in her concurring opinion, declared that we could not always secure that a decision to terminate one's own life would be voluntary. There could pressure from family members to end the economic burden of long-term care, for example, and until we can guarantee that such an intimate decision would actually be one's own, the state must be allowed to intervene.[169] Justice Stevens adds that allowing a fundamental right to die by physician-assisted suicide opens up the possibility that doctors could kill patients who had become unruly or unmanageable and simply label murder as "mercy."[170] In sum, the Court declares that the state interest is too overwhelming in this case to declare a fundamental liberty interest in physician-assisted suicide, refusing to grant it privacy status.

On January 17, 2006, however, the Court handed down its ruling in the much-anticipated case of *Gonzales v. Oregon*, which dealt with Oregon's 1994 Death with Dignity Act, allowing the terminally ill to seek physician assistance in ending their own lives. The Oregon act was the first state law in the history of the United States "authoring physicians to prescribe lethal doses of controlled substances to terminally ill patients."[171] The law requires counseling and mandatory waiting periods in order to actually receive the drugs. The 6-3 majority opinion written by Justice Kennedy never mentioned the word privacy, but rather questioned whether

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[167] *Washington v. Glucksberg*, at 722
[168] Ibid, at 732
[169] Ibid, at 738
[170] Ibid, at 751
[171] "*Gonzales v. Oregon*," OYEZ: U.S. Supreme Court Multimedia (17 January 2006), <http://www.oyez.org/oyez/resource/case/1848> (Accessed 17 January 2006).

physician-assisted suicide ran counter to the Controlled Substances Act of 1970. The act was intended to prevent physicians from dealing illicit drugs, not to define standards of general medical practice according to state law. The Court, however, danced around the issue of granting privacy status to the right to die by declaring that former Attorney General John Ashcroft — who originally brought the case to court — had acted illegally in threatening to revoke Oregon physicians' licenses for prescribing lethal drugs to terminally ill patients.[172] Privacy issues were not raised in this case, but its inclusion in this discussion is appropriate because of the nature of the activity in question. The Court may not have addressed privacy here, but there is little doubt that the right to die must be debated in this arena eventually.

[172] Ibid

CONCLUSION

"There is a constitutional right to privacy composed of at least two distinguishable parts. One is the privacy expressed most vividly in the Fourth Amendment: The government shall not break into my home or my office without a warrant, based on probable cause; the government shall leave me alone. The other is the notion of personal autonomy. The government shall not make my decisions for me. I shall make, as an individual, uncontrolled by government, basic decisions that affect my life's course."
— Supreme Court Justice Ruth Bader Ginsburg

Unfortunately, there is no such thing as an explicit constitutional right to privacy. Such a right, however, requires no line of text if we view the Constitution as a living document, open to interpretation, change, and modernization. The document, as it was ratified in 1789, does not mean the same thing now as it did then. Hosts of amendments have changed the nuance of the American legal tradition, and a long line of Supreme Court cases point us to the belief that there may be something there which is textually not.

Many of the basic rights we value are not present in explicit detail within the body of the Constitution. There is no constitutionally protected right to travel, to vote, to a jury of our peers, to marriage, to receive an education, to bear children, or to prevent conception.[173] As citizens, however, we perceive these rights to be ours, and the Court has, on more than one occasion, confirmed that convention goes a long way in determining and interpreting the rights of the people.

We have no choice but to open the Constitution to a loose interpretation and to allow judges to create rights out of the fabric that weaves our body of law. If we are to stay with the times, with changing norms, with the greater respect for both autonomy and tolerance, then we are left no other option. We cannot look to the Constitution as a document grounded in stone. If it were meant to be stolid and steadfast and inflexible, it would have been written that way. It is, however, rife with ambiguities and inconsistencies, and we leave it in the hands of those so

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highly educated in constitutional law — those arbiters of that law — to determine what it does and should mean.

We may argue intent of the Framers all we like, but at the end of it all, we will never know exactly what meaning they entrusted in the text of the Constitution. We have only our knowledge of the present and the hope for the future to guide us in our constitutional venture. It is impossible to rationally argue that the Framers preconceived every possible conflict that could arise under the document, and it is likewise impossible to believe that they could have had the foresight to enumerate every last possible right the people could or should retain. It is in our worst interest to appeal to the state of things more than two hundred years ago. Life is not the same, the world is not the same, and "we, the people" are not the same. We labor in futility by defending the position that they knew best.

In judging our own values, a right to privacy has come to the forefront of the constitutional debate only recently. The concept of privacy, however, is a notion older than the discovery of America. It is not a right that needs a line of text to support its importance, its validity, or its necessity. Privacy is a basic human right, and has even been codified into international law. The United Nations' Universal Declaration of Human Rights reads: "No one shall be subjected to arbitrary interference with his privacy, family, home, or correspondence, not to attacks upon his honor and reputation."[174] How is it that the international community can recognize so fundamental and so basic a right, but one of the United Nations' founding members — and one to sign this very charter — cannot perceive of it in its own body of law?

The paradox is absurd, but the fact remains that the Supreme Court has taken it upon itself to advocate this right, explicit or not. We can point to six amendments that allude to a right

[174] United Nations' Universal Declaration of Human Rights, Article 12.

to privacy, and we can read countless opinions in which the Court has defended this right over and over again based on these penumbras and peripheries alone.

Those in denial of such a right's constitutional existence would do well to consider one thing: What would you appeal to if the government suddenly took any form of the right to privacy away? There is no legal doctrine, no document, nothing to use to defend the right, save the long line of common law entirely reliant on the insinuations of six amendments. I guarantee that the threat of removal would be sufficient to convince the most rigid of interpretivists that something in the Constitution points to a fundamental right to privacy, whether it be the emanations from the Bill of Rights, the unenumerated rights clause in the Ninth Amendment, or the liberty principle in the Due Process Clause of the Fourteenth Amendment.

The basic idea is that some decisions are so intimate and so personal that the government has no business interfering with them. Life is the most precious of all of our assets, and we retain the right to choose for ourselves what we will make of it and what it will mean to us. The denial of privacy rights at best stands against, and at worst ignores, all of American history, world history, and basic human dignity.

The insinuation of support for these claims in the law is undeniable: Whether we like it or not, there is enough evidence to assure us that a right to privacy is implicitly explicit in the Constitution.

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