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INTRODUCTION

The Due Process Clause of the Fourteenth Amendment provides in part that no State shall "deprive any person of life, liberty, or property, without due process of law . . . ."[1] This Clause "guarantees more than fair process"—it imposes substantive restraints on government power.[2] Although the Court's substantive due process doctrine often has been criticized,[3] it is now well established[4] and provides protection for so-called fundamental rights.[5]

According to traditional doctrine, if government action substantially interferes with a fundamental right, the state must demonstrate that the

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1. U.S. CONST. amend. XIV, § 1. The counterpart Due Process Clause of the Fifth Amendment imposes an identical restraint on the federal government. U.S. CONST. amend. V.

2. Troxel v. Granville, 530 U.S. 57, 65 (2000) (quoting Washington v. Glucksberg, 521 U.S. 702, 719 (1997)).

3. *See, e.g.*, CHARLES L. BLACK, JR., A NEW BIRTH OF FREEDOM: HUMAN RIGHTS, NAMED & UNNAMED 3 (1997) ("This paradoxical, even oxymoronic phrase—'*substantive* due *process*'—has been inflated into a patched and leaky tire on which precariously rides the load of some substantive human rights not named in the Constitution."); ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 31 (1990) (explaining substantive due process is a "momentous sham"); JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 18 (1980) ("'[S]ubstantive due process' is a contradiction in terms—sort of like 'green pastel redness.'").

4. *See Glucksberg*, 521 U.S. at 719-20; Zablocki v. Redhail, 434 U.S. 374, 384 (1978); *see also* David Crump, *How Do Courts Really Discover Unenumerated Fundamental Rights? Cataloguing the Methods of Judicial Alchemy*, 19 HARV. J. L. & PUB. POL'Y 795, 838 (1996) ("The Supreme Court consistently has . . . recognize[d] unenumerated fundamental rights . . . ."); James E. Fleming, *Securing Deliberate Autonomy*, 48 STAN. L. REV. 1, 13 (1995) ("Griswold today is a case that any nominee, to stand a chance of being confirmed, has to say is rightly decided.").

5. Although substantive due process and fundamental rights doctrine sometimes are used interchangeably, they are not equivalents. Substantive due process, in addition to securing certain fundamental rights, *see infra* note 13, protects against arbitrary government action, *see Glucksberg*, 521 U.S. at 766 (Souter, J., concurring); Daniels v. Williams, 474 U.S. 327, 331 (1986); Poe v. Ullman, 367 U.S. 497, 543-44 (Harlan, J., dissenting), safeguards individuals from conduct by government officers that "shocks the conscience," County of Sacramento v. Lewis, 523 U.S. 833, 846 (1998); United States v. Salerno, 481 U.S. 739, 746 (1987) (quoting Rochin v. California, 342 U.S. 165, 172 (1952)), and limits the size of civil punitive damages, State Farm Auto Ins. Co. v. Campbell, 538 U.S. 408, 416 (2003). Nevertheless, this article focuses on the fundamental rights branch of substantive due process generally, and the right to privacy, specifically.

action is narrowly tailored to further a compelling government interest.[6] If no fundamental right is involved, the government need only establish a rational basis for the challenged action.[7] Thus, determining whether there is a fundamental right involved becomes critical. Unfortunately, given the political differences of the Justices and the lack of any clear conceptualization in this area, determining whether a fundamental right exists has proven to be a Herculean task.

The Supreme Court Justices have adopted two, often conflicting, approaches to determine whether a case involves a fundamental right. The more liberal Justices, seeking to protect minority interests, ask whether a right is central to personal dignity and autonomy or is at the heart of liberty.[8] The more conservative Justices, fearing judicial activism at the expense of democratic preferences, insist that a right is not fundamental unless it is "deeply rooted in this Nation's history and tradition" and "implicit in the concept of ordered liberty."[9] The former test is easily criticized as too indeterminate,[10] the latter as protecting only those rights that don't need protection.[11] The difficulty in determining whether a fundamental right exists is compounded by disingenuous application of the Court's compelling government interest and rational basis review.[12] It is not surprising then that there is little clarity on questions ranging from the constitutionality of bans on same-sex marriages or the sale of sex toys to criminalization of adultery, incest, or the use of marijuana for medical purposes.

This article proposes a conceptualization of a central branch of the fundamental rights doctrine—the constitutional right to privacy,[13] which

6. *See* Lawrence v. Texas, 539 U.S. 558, 593 (2003) (Scalia, J., dissenting); *Glucksberg*, 521 U.S. at 721; Reno v. Flores, 507 U.S. 292, 302 (1993); Carey v. Population Serv. Int'l, 431 U.S. 678, 686 (1977) (citing Roe v. Wade, 410 U.S. 113, 155-56 (1973)). Despite what traditional doctrine provides, this article argues that a sliding scale approach to fundamental rights issues best balances competing government and individual interests and is consistent with actual Supreme Court practice. *See infra* notes 177-234 and accompanying text.

7. *See Glucksberg*, 521 U.S. at 766-67 & n.9 (Souter, J., concurring); Lyng v. Castillo, 477 U.S. 635, 638-39 (1986).

8. *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 851 (1992) (plurality opinion); *see also Lawrence*, 539 U.S. at 562 ("Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct.").

9. *Lawrence*, 539 U.S. at 593 (Scalia, J., dissenting) (quoting *Glucksberg*, 521 U.S. at 721).

10. *See, e.g.*, Crump, *supra* note 4, at 854-56.

11. *See* Michael H. v. Gerald D., 491 U.S. 110, 140-41 (1989) (Brennan, J., dissenting); *see also infra* notes 96-97 and accompanying text; Adam B. Wolf, *Fundamentally Flawed: Tradition and Fundamental Rights*, 57 U. MIAMI L. REV. 101, 115 (2002).

12. *See infra* notes 106-26 and accompanying text.

13. In addition to providing protection for privacy interests, the fundamental rights branch of substantive due process, *see supra* note 5, incorporates key provisions of the Bill of Rights against the states, *see* Duncan v. Louisiana, 391 U.S. 145, 150 n.14 (1968); Peter J. Rubin, *Square Pegs and Round Holes: Substantive Due Process, Procedural Due Process, and the Bill of Rights*, 103 COLUM. L. REV. 833, 842 (2003), and includes protection for the rights to vote, *see* Harper v. Virginia State Bd. of Elections, 383 U.S. 663, 670 (1966); to travel interstate, *see* United States v. Guest, 383 U.S. 745, 757 (1966); to access the courts, M.L.B. v. S.L.J., 519 U.S. 102, 107 (1996); Griffin v. Illinois, 351 U.S. 12, 17 (1956), and to be free of totalitarian legislation, *see Poe*, 367 U.S. at 521-22 (1961) (Douglas, J., dissenting) (quoting Robert L. Calhoun, *Democracy and Natural Law*,

remedies some of the deficiencies in the Court's jurisprudence. Specifically, this article argues for a Lockean view[14] of the Constitution as a pact between individuals and the government to forego certain rights that are necessary to further society's interests, but with a reservation of rights in certain private areas where the government does not belong. When the government regulates in an area where it does not belong, presumptively it needs the regulation to be narrowly tailored to achieve a compelling government interest. If regulation is in an area where the government does belong and the regulation does not significantly affect private interests, presumptively the regulation is valid as long as there is a rational basis for the regulation. However, if a regulation in an area where the government belongs significantly affects private interests, a balancing test should be applied, giving deference to the legislature's initial determination of the appropriate balance. By specifically indicating the areas where the government does and does not belong and identifying the most important variables in the balance when balancing is appropriate, this article hopes to bring a degree of clarity, or at least honesty and consistency, to an area in which it too long has been lacking. The proposed conceptualization appears to be consistent with the views of the Framers and early political philosophers,[15] as well as most of the Court's case law.[16] By providing a conceptualization and admitting to balancing in some cases, the recommended approach provides more honest analysis, better guidance to lower courts, and desired flexibility in evaluating regulations impacting important individual interests.

Part I of this article provides a brief review of existing fundamental rights law and the problems associated with both defining fundamental rights and applying the Court's standard of review. Part II defines the proposed right of privacy, specifying and justifying the areas where the government does and does not belong. It explains the factors to be considered in the proposed balancing or sliding scale test and responds to anticipated criticisms of the balancing approach. Finally, Part III ad-

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5 NAT. L. F. 31, 36 (1960)); Pierce v. Soc'y of the Sisters of the Holy Names of Jesus and Mary, 268 U.S. 510, 535 (1925); Jeb Rubenfeld, *The Right of Privacy*, 102 HARV. L. REV. 737, 806 (1989), rights that are deemed fundamental to the structure of our governmental system. The constitutional right to privacy, as used in this article, refers to the unenumerated right to privacy protected by substantive due process. The article does not address privacy interests protected by specific provisions of the Constitution, for example, the Fourth Amendment's right to be free of unreasonable search and seizures, *see* U.S. CONST. amend. IV; Katz v. United States, 389 U.S. 347, 361-62 (1967) (Harlan, J., concurring), or tort concepts of privacy. *See generally* Daniel J. Solove, *Conceptualizing Privacy*, 90 CAL. L. REV. 1087, 1100 (2002); Samuel D. Warren, & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 195 (1890).

14. *See* JOHN LOCKE, TWO TREATISES OF GOVERNMENT 353 (Peter Laslett ed., Cambridge Univ. Press 1988) (1690); *see also* RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY 323-29 (2004); A. JOHN SIMMONS, THE LOCKEAN THEORY OF RIGHTS 218-20 (1992); Mark C. Niles, *Ninth Amendment Adjudication: An Alternative to Substantive Due Process Analysis of Personal Autonomy Rights*, 48 U.C.L.A. L. REV. 85, 110-12 (2000).

15. *See* BARNETT, *supra* note 14, at 68-76; Niles, *supra* note 14, at 108.

16. *See infra* Part I.

dresses many of the "hot" substantive due process questions, such as the validity of bans on gay marriage and the use of medical marijuana, to illustrate application of the recommended approach.

I. EXISTING FUNDAMENTAL RIGHTS/PRIVACY LAW

A. Determining Whether a Fundamental Right Exists

Ironically, much of the modern fundamental rights/privacy doctrine derives from dissents in a case dismissed for lack of justiciability. In *Poe v. Ullman*,[17] plaintiffs challenged a Connecticut statute forbidding the giving of contraceptive advice and the use of contraceptives.[18] The Court held that there was no justiciable controversy based on its finding that Connecticut had chosen not to enforce the statute.[19] Both Justice Douglas and Justice Harlan dissented.[20] Foreshadowing the Court's decision in *Griswold v. Connecticut*,[21] the Justices found the statute unconstitutional as an invasion of privacy, a liberty interest protected by the Fourteenth Amendment.[22] Their approaches, however, presaged what would become a continuing controversy for the Court. Justice Douglas found that privacy is a right "implicit in a free society,"[23] finding support for the right in both the "totality of the Constitutional scheme" and the common law right "to be let alone."[24] He specifically rejected the notion that tradition was a suitable basis for defining protection under the Fourteenth Amendment, stating

> The due process clause . . . guarantees basic rights, not because they have become petrified as of any one time, but because due process follows the advancing standards of a free society as to what is deemed reasonable and right. It is to be applied, according to this view, to facts and circumstances as they arise, the cases falling on one side of the line or the other as a majority of the nine justices appraise conduct as either implicit in the concept of ordered liberty or as lying without the confines of that vague concept.[25]

Justice Harlan, finding the contraceptives ban an "invasion of privacy in the conduct of the most intimate concerns of an individual's personal life,"[26] agreed that the Connecticut statute violated the fundamental rights belonging "to the citizens of all free governments."[27] Justice

17. 367 U.S. 497 (1961).
18. *Poe*, 367 U.S. at 498.
19. *Id.* at 508.
20. *Id.* at 509, 522.
21. 381 U.S. 479 (1965).
22. *Poe*, 367 U.S. at 517 (Douglas, J., dissenting); *id.* at 539 (Harlan, J., dissenting).
23. *Id.* at 521 (Douglas, J., dissenting).
24. *Id.* & n.12.
25. *Id.* at 518 n.9 (quoting OWEN J. ROBERTS, THE COURT AND THE CONSTITUTION 80 (1951)).
26. *Id.* at 539 (Harlan, J., dissenting).
27. *Id.* at 541 (Harlan, J., dissenting).

Harlan, citing Justice Brandeis' dissent in *Olmstead v. United States*,[28] also found that the liberty interest of the Fourteenth Amendment "conferred, as against the government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men."[29] However, Justice Harlan, unlike Justice Douglas, did not feel comfortable allowing judges to roam at large.[30] Rather, he thought the balance between the liberty of the individual and the demands of an organized society should have "regard to what history teaches are the traditions from which it developed as well as the traditions from which it broke."[31] This disagreement concerning the proper role of tradition and the perspective from which it should be defined has been a continuing controversy for the Court.[32]

The Court as a whole explicitly recognized a right to privacy and invalidated Connecticut's contraceptives ban in *Griswold*.[33] Two years later in *Loving v. Virginia*,[34] the Court held that a ban on interracial marriages violated the Due Process Clause of the Fourteenth Amendment, finding the freedom to marry a "vital personal right[] essential to the orderly pursuit of happiness by free men."[35] In *Eisenstadt v. Baird*,[36] the right to use contraceptives recognized in *Griswold* was extended to unmarried couples.[37] The Court stated: "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."[38] The Court next held a ban on abortions unconstitutional in *Roe v. Wade*,[39] stating that the "right of privacy . . . founded in the Fourteenth Amendment's concept of personal liberty . . . is broad enough to encompass a woman's decision whether or not to terminate her pregnancy."[40] The right of privacy was further expanded in *Moore v. City of East Cleveland*.[41] In that case, the Court ruled unconstitutional a zoning ordinance that limited occupancy in dwelling units to families narrowly defined to

28. 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

29. *Poe*, 367 U.S. at 550 (Harlan, J., dissenting) (quoting *Olmstead*, 277 U.S. at 478 (Brandeis, J., dissenting)).

30. *Id.* at 544 (quoting Rochin v. California, 342 U.S. 165, 170 (1952).

31. *Id.* at 542. Justice Harlan went on to recognize that tradition "is a living thing," and defined the relevant tradition broadly as privacy in the individual's marital relations. *Id.* at 539, 542, 552.

32. *See infra* notes 62-84 and accompanying text; *see also* Michael H. v. Gerald D. 491 U.S. 110, 123 (1989).

33. 381 U.S. 479, 485-86 (1965).

34. 388 U.S. 1 (1967).

35. *Id.* at 12. The Court first held that the Virginia statute violated the Equal Protection Clause of the Fourteenth Amendment. *Id.* at 11-12.

36. 405 U.S. 438 (1972).

37. *Id.* at 454-55.

38. *Id.* at 453 (emphasis added).

39. 410 U.S. 113 (1973).

40. *Id.* at 153.

41. 431 U.S. 494 (1977) (plurality opinion).

exclude the plaintiff and her two grandsons.[42] The plurality opinion affirmed that the Court had "long recognized that freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment."[43] In *Cruzan v. Director, Missouri Department of Health*,[44] the Court, although affirming Missouri's right to require clear and convincing evidence of an incompetent's wishes to withdraw life-sustaining medical treatment, assumed and strongly suggested that the Due Process Clause protected the right to refuse unwanted lifesaving medical treatment.[45] Most recently, in *Lawrence v. Texas*,[46] the Court, overruling *Bowers v. Hardwick*,[47] held unconstitutional Texas' statute making homosexual sodomy illegal.[48] The Court indicated that "Liberty protects the person from unwarranted government intrusions into a dwelling or other private places . . . . [It] presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct."[49]

Even as the right of privacy was expanding, several Justices, fearing a return to the *Lochner* era, expressed concern about the potentially unlimited reach of the Court's expansive language and ad hoc identification of fundamental rights.[50] The Court's retrenchment began with *Bow-*

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42. *Id.* at 506.
43. *Id.* at 499 (quoting Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632, 639-40 (1974)).
44. 497 U.S. 261 (1990).
45. *Id.* at 281.
46. 539 U.S. 558 (2003).
47. 478 U.S. 186 (1986).
48. *Lawrence*, 539 U.S. at 578.
49. *Id.* at 562.
50. *See, e.g.*, Moore v. City of Cleveland, 431 U.S. 494, 502 (1977) (plurality opinion). In *Moore*, the plurality stated:

> Substantive due process has at times been a treacherous field for this Court. There are risks when the judicial branch gives enhanced protection to certain substantive liberties without the guidance of the more specific provisions of the Bill of Rights. As the history of the *Lochner* era demonstrates, there is reason for concern lest the only limits to such judicial intervention become the predilections of those who happen at the time to be Members of this Court. That history counsels caution and restraint.

Moore, 431 U.S. at 502 (footnote omitted). In addition, Justice White in his dissent stated:

> That the Court has ample precedent for the creation of new constitutional rights should not lead it to repeat the process at will. The Judiciary, including this Court, is the 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 even the design of the Constitution . . . . [Given] that much of the underpinning for the broad, substantive application of the Clause disappeared in the conflict between the Executive and the Judiciary in the 1930's and 1940's, the Court should be extremely reluctant to breathe still further substantive content into the Due Process Clause . . . .

Id. at 544 (White, J. dissenting). In *Griswold*, Justice Goldberg explained:

> In determining which rights are fundamental, judges are not left at large to decide cases in light of their personal and private notions. Rather, they must look to the 'traditions and [collective] conscience of our people' to determine whether a principle is 'so rooted [there] . . . as to be ranked as fundamental.

Griswold v. Connecticut, 381 U.S. 479, 493 (1965) (Goldberg, J., concurring) (quoting Snyder v. Massachusetts, 291 U.S. 97, 105 (1934)). Similarly, Justice Black, dissenting in *Griswold*, noted:

> The Due Process Clause . . . was liberally used by this Court to strike down economic legislation in the early decades of this century, threatening, many people thought, the

ers v. Hardwick,[51] a challenge to Georgia's sodomy statute. Justice White, writing for the Court, warned:

> 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. That this is so was painfully demonstrated by the face-off between the Executive and the Court in the 1930's, which resulted in the repudiation of much of the substantive gloss that the Court had placed on the Due Process Clauses of the Fifth and Fourteenth Amendments. There should be, therefore, great resistance to expand the substantive reach of those Clauses, particularly if it requires redefining the category of rights deemed to be fundamental.[52]

The Court, reversing the Court of Appeals, found the sodomy statute constitutional and rejected the claim that the Fourteenth Amendment provided protection of private sexual conduct between consenting adults.[53] Justice White limited the reach of the Due Process Clause by defining the right to be protected narrowly, asking whether there is a fundamental right for homosexuals to engage in acts of consensual sodomy.[54] By focusing on the specific conduct, rather than aspirational goals,[55] Justice White was easily able to conclude that such a right was not "'implicit in the concept of ordered liberty' such that 'neither liberty nor justice would exist if [they] were sacrificed'" [56] or "deeply rooted in this Nation's history and tradition,"[57] the two alternative tests he identified for determining fundamental rights.[58]

Justice Scalia, in *Michael H. v. Gerald D.*,[59] sought to further restrict the Court's fundamental rights jurisprudence. In *Michael H.*, a putative natural father whose blood tests indicated a 98.07% probability of paternity challenged a California statute creating a presumption that

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> tranquility and stability of the Nation. That formula, based on subjective considerations of 'natural justice,' is no less dangerous when used to enforce this Court's views about personal rights than those about economic rights.

Griswold, 381 U.S. at 522 (Black, J., dissenting) (citing Lochner v. New York, 198 U.S. 45, 64 (1905)).

51. 478 U.S. 186, *overruled by Lawrence*, 539 U.S. at 558.

52. *Bowers*, 478 U.S. at 194-95.

53. *Id.* at 196.

54. *Id.*

55. The four dissenting justices challenged the majority's definition of the right involved stating, "This case is no more about 'a fundamental right to engage in sodomy' . . . than *Stanley v. Georgia* . . . was about a fundamental right to watch obscene movies . . . ." *Bowers*, 478 U.S. at 199 (Blackmun, J., dissenting) (quoting *id.* at 191 (majority opinion)). "Rather, this case is about 'the most comprehensive of rights and the right most valued by civilized men,' namely, 'the right to be let alone.'" *Id.* (Blackmun, J., dissenting) (quoting Olmstead v. United States, 277 U.S. 438, 478 (1928)).

56. *Id.* at 191-92 (majority opinion) (quoting Palko v. Connecticut, 302 U.S. 319, 325-26 (1937)).

57. *Id.* at 192 (quoting Moore v. City of E. Cleveland, 431 U.S. 494, 503 (1977)).

58. *Id.* at 191-92.

59. 491 U.S. 110 (1989) (plurality opinion).

the father of a child born to a married woman was the woman's husband.[60] Justice Scalia's plurality opinion began by quoting Justice White's reasons for being "extremely reluctant to breathe . . . further substantive content into the Due Process Clause."[61] To "limit and guide interpretation of the Clause," Justice Scalia insisted that a liberty interest be "rooted in history and tradition."[62] No alternative test was offered, and unlike in *Poe*, the focus of the Court's review of tradition was historical.[63] Moreover, writing for himself and the Chief Justice, Justice Scalia explicitly adopted Justice White's strategy of defining the relevant tradition narrowly.[64] Justice Scalia opined that the appropriate inquiry is

> [T]o the most specific level at which a relevant tradition protecting, or denying protection to, the asserted right can be identified. If, for example, there were no societal tradition, either way, regarding the rights of the natural father of a child adulterously conceived, we would have to consult and (if possible) reason from, the traditions regarding natural fathers in general.[65]

In *Washington v. Glucksberg*,[66] Chief Justice Rehnquist, writing for a majority, upheld the state of Washington's ban on assisted suicide and placed his own limiting gloss on the test for fundamental rights.[67] He first reiterated the Court's reluctance to "expand the concept of substantive due process . . . ."[68] Although acknowledging that many of the rights and liberties previously recognized by the Court sounded in personal autonomy, [69] the Chief Justice refused to recognize any right to make all important, intimate, and personal decisions.[70] To determine if a fundamental right existed, the Chief Justice first required a "'careful description' of the asserted fundamental liberty interest."[71] By finding the "careful description" of the fundamental right asserted by reference to

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60. *Id.* at 114-15.

61. *Id.* at 122 (quoting *Moore*, 431 U.S. at 544 (White, J., dissenting)).

62. *Id.* at 122-23.

63. *Id.* at 124-25.

64. *Id.* at 127 n.6.

65. *Id.* Justice Brennan, joined by Justices Marshall and Blackmun, vigorously dissented. He challenged Justice Scalia's reliance on tradition, his strictly historical perspective, and his definition of the relevant right at the most specific level of generalization. *Id.* at 136 (Brennan, J. dissenting). Justice White, joined by Justice Brennan, filed a separate dissent. *Id.* at 157 (White, J., dissenting).

66. 521 U.S. 702 (1997).

67. *Glucksberg*, 521 U.S. at 720.

68. *Id.* (quoting Collins v. City of Harker Heights, 503 U.S. 115, 125 (1992)). To justify this reluctance, the Chief Justice observed: "'[G]uideposts for responsible decisionmaking in this uncharted area are scarce and open-ended.' By extending constitutional protection to an asserted right or liberty interest, we, to a great extent, place the matter outside the arena of public debate and legislative action." *Id.* (quoting *Collins*, 503 U.S. at 125).

69. *Id.* ("In a long line of cases, we have held that, in addition to the specific freedoms protected by the Bill of Rights, the 'liberty' specially protected by the Due Process Clause includes the rights to marry, to have children, to direct the education and upbringing of one's children, to marital privacy, to use contraception, to bodily integrity, and to abortion." (citations omitted)).

70. *Id.* at 727-28.

71. *Id.* at 721 (quoting Reno v. Flores, 507 U.S. 292, 302 (1993)).

the statute being challenged,[72] the Chief Justice effectively garnered a majority for Scalia's previously unadopted "most specific level" of generalization rule, or something very close to it.[73] The Chief Justice further limited expansion of substantive due process rights by requiring the asserted right to be both "'deeply rooted in this Nation's history and tradition' *and* 'implicit in the concept of ordered liberty' such that 'neither liberty nor justice would exist if they were sacrificed . . . .'"[74] *Glucksberg*'s conjunctive test necessarily is more restrictive than *Bowers*' disjunctive test or *Michael H.*'s focus solely on tradition. *Glucksberg*'s conjunctive test necessarily is more restrictive than *Bowers*' disjunctive test or *Michael H.*'s focus solely on tradition. As in *Michael H.*, *Glucksberg*'s inquiry into relevant traditions was historical.[75]

Although not overruling prior cases establishing fundamental rights, the conservative majority, through *Bowers*, *Michael H.*, and *Glucksberg*, appeared to completely transmogrify fundamental rights/privacy doctrine. In effect, the Court was saying, "this much but not more." It was against this background that the Court decided *Lawrence v. Texas*.[76]

Lawrence not only overruled the Court's earlier decision in *Bowers*, but contained broad open-ended language reminiscent of the Court's earlier fundamental rights/privacy case law. Justice Kennedy, writing for the majority, began his opinion by stating, "Liberty protects the person from unwarranted government intrusions into a dwelling or other private places . . . . [It] presumes an autonomy of self that includes freedom of thought, belief, expression and certain intimate conduct."[77] He then specifically rejected Justice White's narrow framing of the relevant issue in *Bowers*.[78] According to Justice Kennedy, "[t]o say that the issue in *Bowers* was simply the right to engage in certain sexual conduct demeans the claim the individual put forward, just as it would demean a married couple were it to be said marriage is simply about the right to have sexual

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72. *See id.* at 723.

73. *See supra* note 65 and accompanying text. Statutes prohibit distribution of contraceptives, abortion or interracial marriage; they do not make the decision whether to beget a child or to marry illegal or ban privacy or personal autonomy.

74. *Glucksburg*, 521 U.S. at 721 (quoting *Moore*, 431 U.S. at 503 (plurality opinion); *Palko*, 302 U.S. at 326 (emphasis added)).

75. *Id.* at 721.

76. 539 U.S. 558 (2003).

77. *Lawrence*, 539 U.S. at 562. Later in the opinion, Justice Kennedy quoted at length the broad description of liberty contained in the Court's opinion in *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 851 (1992):

> These matters [decisions relating to marriage, procreation, contraception, family relationships, child rearing and education], involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.

Lawrence, 539 U.S. at 571.

78. *Id.* at 566-67.

intercourse."[79] Justice Kennedy instead focused on whether the government could interfere with personal relationships between consenting adults.[80] In answering that question, Justice Kennedy derided the *Bowers* Court's exclusive reliance on history.[81] He opined, "[h]istory and tradition are the starting point but not in all cases the ending point of the substantive due process inquiry,"[82] and found the laws and practices of the past half-century of the most relevance.[83] Moreover, he defined recent history broadly as showing "an emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex."[84]

Although *Lawrence*'s broad definitions of the liberty interests involved and its limitations on the use of tradition seemingly are a resounding rejection of the conservative trilogy of *Bowers, Michael H.,* and *Glucksberg*, the case has not been so read by lower courts.[85] Many lower courts[86] refuse to view *Lawrence* as a fundamental rights case at

79. *Id.* at 567.

80. *Id.* at 567, 571.

81. *Id.* at 571-72.

82. *Id.* at 572 (quoting County of Sacramento v. Lewis, 523 U.S. 833, 857 (1998) (Kennedy, J., concurring)).

83. *Id.* at 571-72.

84. *Id.* at 572 (citing *Lewis*, 523 U.S. at 857 (Kennedy, J., concurring)).

85. *See* Abigail Alliance For Better Access to Developmental Drugs v. von Eschenbach, 445 F.3d 470, 477 n.8 (D.C. Cir. 2006) (citing cases); *see also infra* note 86.

86. *See, e.g.*, Muth v. Frank, 412 F.3d 808, 817-18 (7th Cir.), *cert. denied* 126 S.Ct. 575 (2005); Williams v. Att'y Gen. of Ala., 378 F.3d 1232, 1236 (11th Cir. 2004); Lofton v. Sec'y of the Dep't of Children & Family Servs., 358 F.3d 804, 815-16 (11th Cir 2004), *cert. denied* 543 U.S. 1081(2005); Loomis v. United States, 68 Fed. Cl. 503, 517-19 (2005); Hernandez v. Robles, 2006 WL 1835429 (N.Y. 2006) (Graffeo, J., concurring); Martin v. Ziherl, 607 S.E.2d 367, 370 (Va. 2005); State v. Clinkenbeard, 123 P.3d 872, 878 (Wash. Ct. App. 2005); *see also* Lawrence v. Texas, 539 U.S. 558, 586 (2003) (Scalia, J., dissenting). These courts appear to give a very cramped interpretation of *Lawrence*. In addition to the broad language quoted in the text, the opinion states the issue as "whether the petitioners were free as adults to engage in the private conduct in the exercise of their liberty under the Due Process Clause . . . ." *Lawrence*, 539 U.S. at 564. To answer that question, the Court reviews many of its earlier fundamental rights cases, *id.* at 564-66 (discussing *Griswold, Eisenstadt* and *Roe*), not cases decided under a rational basis standard. Additionally, the Court quotes the *Bowers* Court's statement of the issue as "whether the Federal Constitution confers a *fundamental right* upon homosexuals to engage in sodomy . . . . " *Id.* at 566 (emphasis added). The *Lawrence* Court found that statement failed "to appreciate the extent of the liberty at stake" and overruled the Bowers decision. *Id.* at 567. In overruling *Bowers,* the Court focused on the *Bowers*' historical review, *id.* at 567-73, and referred to the subsequent broad language of the Court in *Casey* as casting doubt on *Bowers*. *Id.* at 573-74. That analysis implies that the *Bowers* Court erred by failing to find a right entitled to heightened scrutiny, rather than by overvaluing the justification offered by the State. That implication is reinforced by the Court's endorsement of Justice Stevens' dissent in *Bowers*. *Id.* at 577-78. In Stevens' view, the Court's fundamental rights case law precluded criminalization of sodomy as to all citizens. *Bowers*, 478 U.S. at 216-18 (Stevens, J., dissenting). The *Lawrence* Court's conclusion that there was "no legitimate state interest which [could] justify its intrusion into the personal and private life of the individual," *Lawrence*, 539 U.S. at 578, is not necessarily inconsistent with heightened review. First, the Court might have meant that because there was no legitimate justification, there was no need to inquire if the State's justification was compelling or outweighed the appellants' liberty interest. Second, the Court might have meant that although society's interest in morality is legitimate, there is no sufficient interest to justify intrusion into the personal and private life of the individual, an interest subject to heightened protection. *See* Dale Carpenter, *Is Lawrence Libertarian?*, 88 MINN. L. REV. 1140, 1157 (2004). Finally, the phrase could have been used in the same sense in which Justice Stevens used it in his *Bowers* dissent, an

all because the Court does not speak of creating a fundamental right and is viewed as applying a rational basis test based upon its conclusion that, "[t]he Texas statute furthers *no legitimate state interest* which can justify its intrusion into the personal and private life of the individual."[87] Because the conservative approach appears to remain dominant, the next section will highlight its shortcomings.

B. Problems with "History and Tradition" as the Basis for Defining Fundamental Rights

The primary advantage of the "history and tradition" test is its greater objectivity, binding judicial discretion so that the courts do not interfere with the democratic process.[88] Actual application of the test, however, has proven that the greater objectivity is more theoretical than real. First, the definition of the right being asserted will often determine the outcome. For example, is there a tradition of government non-interference with private intimate relations between consenting adults or a tradition supporting sodomy?[89] Second, even where there is agreement concerning the right involved, historical research often will be disputed.[90] There can be disagreement about the relevant time as well as the relevant sources.[91] Lastly, traditions are often conflicting. For example, there is a tradition outlawing adultery or sodomy, but there is also

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analysis the Court specifically found should be controlling. *Lawrence*, 539 U.S. at 578. In *Bowers*, after finding that prior cases precluded application of the sodomy statute to the public generally, Justice Stevens analyzed whether the State could justify selective enforcement of the law. *Bowers*, 478 U.S. at 218-20 (Stevens, J., dissenting). Justice Steven found no "legitimate interest" for doing so. *Id.*

This author speculates that the Court intended heightened review, but was afraid to say so explicitly. The Supreme Court has stated that classifications that burden fundamental rights are subject to heightened review. *See, e.g.*, Romer v. Evans, 517 U.S. 620, 631 (1996); Zablocki v. Redhail, 434 U.S. 374, 388 (1978). By protecting homosexual conduct, the Court may have feared they effectively would have made homosexuals a protected class. The Court clearly was not prepared to address the consequences of such a holding, going out of its way to clarify that its decision did not address the constitutionality of state laws prohibiting gay marriages. *See, e.g.*, *Lawrence*, 539 U.S. at 567, 578; *id.* at 585 (O'Connor, J., concurring).

87. *Lawrence*, 539 U.S. at 578 (emphasis added).

88. *See* Cass R. Sunstein, *The Right to Marry*, 26 CARDOZO L. REV. 2081, 2105-06 (2005); Crump, *supra* note 4, at 863.

89. *Compare Lawrence*, 539 U.S. 558 (2003) *with Bowers*, 478 U.S. 186, *rehearing denied* 478 U.S. 1039 (1986), *overruled in* Lawrence v. Texas, 539 U.S. 558 (2003). Justice Scalia's lowest level of specificity test is designed to overcome this shortcoming. However, Justice Scalia's test is itself malleable. Results vary depending on how factually detailed one makes the statement of the issue and which facts are excluded when moving to the next level of abstraction. *See* Laurence H. Tribe & Michael C. Dorf, *Levels of Generality in the Definition of Rights*, 57 U. CHI. L. REV. 1057, 1092-93 (1990). More fundamentally, the lowest level of specificity test is inconsistent with Supreme Court precedent. *See, e.g.*, Loving v. Virginia, 388 U.S. 1 (1967) (interracial marriage); Griswold v. Connecticut, 381 U.S. 479 (1965) (contraceptives); Roe v. Wade, 410 U.S. 113 (1973) (abortion).

90. *See* Rebecca L. Brown, *Tradition and Insight*, 103 YALE L. J. 177, 202-03 (1993); Tribe & Dorf, *supra* note 89, at 1087-89; ELY, *supra* note 3, at 60, 103.

91. *See* Marybeth Herald, *A Bedroom of One's Own: Morality and Sexual Privacy After* Lawrence v. Texas, 16 YALE J. L. & FEMINISM 1, 11 (2004). This is particularly true when issues involve medical and technological advances unanticipated by earlier generations. *Id.* at 12; *see also* Crump, *supra* note 4, at 862-63.

a tradition of non-enforcement of such laws; there is a tradition respecting equality, but also a tradition of subjecting various groups to a variety of forms of ostracism or prejudice.[92] Not surprisingly, Justices often will resolve these conflicts based on what best furthers their own predilections.[93]

The fundamental problem with the "history and tradition" test, however, is not its failure to achieve increased objectivity, but its inconsistency with the structure of the Constitution. As Professor Ely observed, tradition's "overtly backward-looking character highlights its undemocratic nature: it is hard to square with the theory of our government the proposition that yesterday's majority . . . should control today's."[94] This is especially true when yesterday's majority was composed primarily, if not solely, of white, wealthy, straight men.[95] Moreover, if the only rights receiving protection were those historically and currently valued by society, there would be no need for the fundamental rights doctrine,[96] at least other than to provide protection from the maverick state. This would ignore the Court's Constitutional role as a protector of minority interests, and is inconsistent with the Fourteenth Amendment's anti-majoritarian purposes.[97]

This article does not suggest that tradition, if one can be agreed upon, is irrelevant. Tradition, representing the combined wisdom of generations, often will have much to recommend it.[98] Moreover, if the Court breaks too radically from ongoing traditions, it risks institutional credibility.[99] What is objectionable is the blind adherence to tradition. Although some traditions are worthy, others reflect ignorance, prejudice, or inequalities in power.[100] One should learn from history, not mechanically follow it. It is for this reason that this article recommends adoption of a right to privacy defined more specifically and considers tradition only as part of its sliding scale review, and then only if the circumstances upon which the tradition was based have not changed.[101]

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92. *See* Brown, *supra* note 90 at 203; ELY, *supra* note 3, at 61.

93. *See* Wolf, *supra* note 11, at 126-128; Brown, *supra* note 90, at 210-11.

94. ELY, *supra* note 3, at 62. Professor Ely further argues that if the Framers wanted to freeze tradition, they would have wrote out the tradition rather than seek to protect it through open-ended language. *Id.*

95. Wolf, *supra* note 93, at 126-27.

96. *See Michael H.*, 491 U.S. at 140-41 (Brennan, J., dissenting); Wolf, *supra* note 11, at 115.

97. *See* THE FEDERALIST NO. 10 (James Madison); THE FEDERALIST NO. 78 (Alexander Hamilton); ELY, *supra* note 3, at 62; Niles, *supra* note 14, at 118; Crump, *supra* note 4, at 861.

98. *See* Sunstein, *supra* note 88, at 2106.

99. *See* Poe v. Ullman, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting).

100. *See* Sunstein, *supra* note 88, at 2106; Niles, *supra* note 14, at 141. The fact that the government has a longstanding tradition of violating individual rights does not make it legitimate. *See id.*, Tribe & Dorf, *supra* note 89, at 1088.

101. *See infra* notes 207-12 and accompanying text.

C. The Appropriate Standard of Review

Once a fundamental right is found, the Court repeatedly has stated that the government cannot infringe upon that right unless the infringement is narrowly tailored to serve a compelling state interest.[102] In the absence of a fundamental right, the government can justify its action by demonstrating a mere rational basis for its conduct.[103] Because "the review standard for ordinary liberties is so deferential, and the standard for preferred liberties so rigid,"[104] outcomes often are ordained by the designation of rights as fundamental or not.[105]

Despite the clarity of the Court's doctrine, there is much in the Court's language and practice that suggests balancing of interests is appropriate. Indeed, Justice Harlan's influential opinion in *Poe*[106] seemingly required a balancing of interests. He opined, "'liberty' is not a series of isolated points," but a "rational continuum."[107] It includes not only freedom from arbitrary restraints, but also "recognizes, what a reasonable and sensitive judgment must, that certain interests require particularly careful scrutiny of the state needs asserted to justify their abridgment."[108] Justice Harlan further argued that due process, through the course of the Court's decisions, "represent[s] the balance which our Nation, built upon postulates of respect for the liberty of the individual, has struck between that liberty and the demands of an organized society."[109]

One technique the Court has employed to balance interests is to impose a "substantial" or "undue" burden threshold for determining whether a fundamental right has been infringed. The paradigm example is Justice O'Connor's plurality opinion in *Planned Parenthood of Southeastern Pennsylvania v. Casey*.[110] In *Casey*, Justice O'Connor reaffirmed the fundamental right to choose an abortion.[111] However, she opined that,

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102. *See supra* note 6.

103. *See supra* note 7.

104. Ira Lupu, *Untangling the Strands of the Fourteenth Amendment*, 77 MICH. L. REV. 981, 1030 (1979).

105. *Id.* at 1029-30; *see also* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 417 (1997). The two-tiered approach appears to be particularly popular among the conservative justices. That approach avoids the always-feared subjective decision-making required by a balancing of interests. It also discourages a court, realizing that the compelling interest test makes most government regulation improper, from finding a right fundamental in the first instance.

106. 367 U.S. 497 (1961).

107. *Id.* at 543 (Harlan, J., dissenting).

108. *Id.*; *see also* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 848 (1992) (plurality opinion); Moore v. City of E. Cleveland, 431 U.S. 494, 502 (1977) (plurality opinion); Roe v. Wade, 410 U.S. 113, 169 (1973).

109. *Poe*, 367 U.S. at 542; *see also Glucksberg*, 521 U.S. at 765; *Casey*, 505 U.S. at 850; *Moore*, 431 U.S. at 501 (plurality opinion).

110. 505 U.S. 833 (1992); *see also Glucksberg*, 521 U.S. at 767 n.8 (Souter, J., concurring); *Youngberg*, 457 U.S. at 320; Zablocki v. Redhail, 434 U.S. 374, 386-87 (1978).

111. *Casey*, 505 U.S. at 846.

> [t]he fact that a law which serves a valid purpose . . . has the incidental effect of making it more difficult or more expensive to procure an abortion cannot be enough to invalidate it. Only where the state regulation imposes an undue burden on a woman's ability to make this decision does the power of the State reach into the heart of the liberty protected by the Due Process Clause.[112]

The Court necessarily also balances interests when applying an intermediate standard of review. In *Carey v. Population Services International*,[113] although invalidating a restriction on the distribution of contraceptives to persons under sixteen, the Court explicitly indicated that a lower level of scrutiny was appropriate when minors claimed an infringement of their right to privacy.[114] The Court also has found intermediate review appropriate in cases deciding when the government may involuntarily administer anti-psychotic drugs to a mentally ill patient.[115] In such cases, the court must find (1) the government interest *important*; (2) "involuntary medication will *significantly further* those concomitant state interests"; (3) "involuntary medication is *necessary* to further those interests"; and (4) "administration of the drugs is *medically appropriate*."[116] Similarly, in *Moore v. City of East Cleveland*,[117] the Court, invalidating a local regulation limiting who could live together, stated, "[w]hen the government intrudes on choices concerning family living arrangements, this Court must examine carefully the importance of the governmental interests advanced and the extent to which they are served by the challenged regulation."[118]

The Court even has explicitly balanced interests. In *Youngberg v. Romeo*,[119] the Court found that an involuntarily committed mental patient had a liberty interest in minimally adequate training.[120] The Court defined adequacy "as that training which is reasonable in light of identifiable liberty interests and the circumstances of the case."[121] *Youngberg* was cited in *Cruzan*.[122] The Court in that case stated, "determining that a person has a 'liberty interest' under the Due Process Clause does not end the inquiry, 'whether respondent's constitutional rights have been vio-

112. *Id.* at 874 (citations omitted). Applying this standard, Justice O'Connor found that although the spousal notification provision was invalid, the 24-hour waiting period, informed consent and reporting and record-keeping requirements were not. *Id.* at 881-91.

113. 431 U.S. 678 (1977).

114. *Id.* at 693 n.15 (The Court reasoned that lesser scrutiny was appropriate because the right of privacy implicated "'the interest in independence in making certain kinds of decisions', and the law has generally regarded minors as having a lesser capability of making important decisions." (quoting Whalen v. Roe, 429 U.S. 589, 599-600 (1977))).

115. *See* Sell v. United States, 539 U.S. 166, 180-81 (2003).

116. *Id.*

117. 431 U.S. 494 (1977) (plurality opinion).

118. *Id.* at 499 (citing Poe v. Ullman, 367 U.S. 497, 554 (1961) (Harlan, J., dissenting).

119. 457 U.S. 307 (1982).

120. *Youngberg*, 457 U.S. at 318-19.

121. *Id.* at 319 n.25.

122. 497 U.S. 261, 279 (1990).

lated must be determined by balancing [the] liberty interests against the relevant state interests."[123]

Perhaps it was not coincidence that in the two most recent Supreme Court substantive due process decisions, *Lawrence*[124] and *Troxel v. Granville*,[125] the Court didn't even state what standard of review it was applying.[126] The Court finally may have begun to recognize the limits of tiered analysis and acknowledge its frequent practice of balancing interests. Nonetheless, lower courts have consistently cited to traditional doctrine.[127] They require the government to demonstrate that an infringement of a fundamental right is narrowly tailored to achieve a compelling government interest.[128] It is for this reason that tiered analysis is critiqued below.

D. Problems with the Tiered Review

The primary problem with tiered review is its inflexibility.[129] As Justice Harlan recognized, liberty is a "rational continuum."[130] It makes little sense to assume that unless a regulation must be narrowly tailored to a compelling government interest it is valid except if irrational, no matter how overbroad or how much it infringes an individual's liberty. The problem is particularly acute when tiered review is combined with the Court's narrow definition of fundamental rights.[131] For example, consider a law that makes it illegal for overweight people to eat pies, cake, ice cream, bread, potatoes, or pasta. The Court would have a difficult time identifying a right to be overweight or to eat those foods as fundamental under its current jurisprudence and the government has a rational basis for the regulation—to reduce the health risks attendant to

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123. *Cruzan*, 497 U.S. at 279.

124. 539 U.S. 558 (2003).

125. 530 U.S. 57 (2000).

126. *See* Note, *Assessing the Viability of a Substantive Due Process Right to In Vitro Fertilization*, 118 HARV. L. REV. 2792, 2807-08 (2005).

127. *See, e.g.*, Abigail Alliance for Better Access to Developmental Drugs v. von Eschenbach, 445 F.3d 470 (D.C. Cir. 2006); Williams v. Att'y Gen. of Ala., 378 F.3d 1232, 1240 (11th Cir. 2004); Littlefield v. Forney Indep. Sch. Dist., 268 F.3d 275, 288 (5th Cir. 2001); Hodgkins v. Peterson, No. 1:04-CV-569-JDT-TAB, 2004 WL 1854194, at *7-*8 (S.D. Ind. Jul. 23, 2004); Loomis v. United States, 68 Fed. Cl. 503, 517 (2005); State v. Clinkenbeard, 123 P.3d 872, 878-79 (Wash. Ct. App. 2005); State v. J.P., 907 So.2d 1101, 1109-1110 (Fla. 2004); State v. Saunders, 381 A.2d 333, 341 (N.J. 1977). *But cf.* Doe v. Heck, 327 F.3d 492, 519 (7th Cir. 2003) (citation omitted) (recognizing that "it is well established that when a fundamental constitutional right is at stake, courts are to employ the exacting strict scrutiny test," but questioning if *Troxel v. Granville* means courts are to apply some other standard of heightened scrutiny to claims alleging violation of the fundamental right to familial relations).

128. *See supra* note 127.

129. *Cf.* Dennis v. United States, 341 U.S. 494, 524 (1951) (Justice Frankfurter stated that it is better to decide by "candid and informed weighing of the competing interests . . . than by announcing dogmas too inflexible for the non-Euclidian problems to be solved").

130. *See* Poe v. Ullman, 367 U.S. 497, 543 (1961) (Harlan, J., dissenting).

131. Of course, the Court has tried to narrowly define rights, in part, because under the two-tiered approach, government regulation has little chance of surviving when the Court finds a right to be fundamental. *See supra* note 102-04 and accompanying text.

excess weight.[132] Yet, the statute seems to be drastically overbroad and infringe significant liberty interests.[133] Perhaps, recognition of the difficulties created by tiered review's inflexibility explains the Supreme Court's sometime disingenuous application of its enunciated standard.[134] Nonetheless, it is better to candidly acknowledge the weighing of competing interests. Only then can we "actually increase the possibility of accountability and ultimately hope to reduce the power of idiosyncratic decisionmaking."[135]

The fact that the Court's application of tiered review often is disingenuous is reason enough to reject it. However, the Court's repeated refusal to acknowledge the realities of balancing and overrule tiered review also has created practical problems in the lower courts. First, fear that a valid government interest might not survive the tightest fit of strict scrutiny makes courts disinclined to find a liberty interest in the first instance.[136] Indeed, this fear, combined with Supreme Court warnings about its reluctance to create new fundamental rights,[137] virtually paralyzes courts from recognizing rights by analogy.[138] Consequently, an individual effectively can challenge a regulation infringing a liberty interest not specifically recognized by the Court only if she is willing to

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132. It might be argued that paternalistic concerns should not be considered legitimate even under rational basis review. However, the government could still justify the regulation as rational by claiming that the increased risk of the overweight person's suffering sudden heart failure endangers other drivers.

133. A possible response to this hypothetical is that it is just that—a hypothetical; that we can trust legislators not to enact such a silly law. One reply is that the framers of the Constitution established a tripartite system of government precisely because they didn't trust legislators always to act wisely. *See* THE FEDERALIST NO. 78, at 476-77 (Alexander Hamilton) (Bantam Ed. 2003); *Williams*, 378 F.3d at 1240 n.11. However, the problems suggested by the hypothetical are not limited to silly laws. Consider a law banning the use of drugs. If the liberty interest at stake is defined by reference to the statute, as suggested by Chief Justice Rehnquist in *Glucksberg*, no fundamental right is involved. 521 U.S. 702, 720 (1997). The government has an obvious legitimate basis for the regulation, for example to reduce the incidence of driving while impaired. However, the statute's application to a bed-ridden terminal cancer patient for whom the drug is the best or only form of relief from excruciating pain seems to infringe significant liberty interests. *Cf.* Gonzales v. Raich, 545 U.S. 1 (2005) (holding that application of Controlled Substance Act to users of marijuana for medical purposes, despite state law allowing such use, did not violate Commerce Clause); *see also* Note, *Last Resorts and Fundamental Rights: The Substantive Due Process Implications of Prohibitions on Medical Marijuana*, 118 HARV. L. REV. 1985, 1985-87 (2005); *infra* notes 263-70 and accompanying text.

134. *See supra* notes 106-126 and accompanying text.

135. Brown, *supra* note 90, at 215.

136. *See, e.g.*, *Williams*, 378 F.3d at 1240 (declining to find a right to sexual privacy by consenting adults because such a right would subject activities such as incest, prostitution, and obscenity to strict scrutiny, something the court was not prepared to do). A possible problem created by this reluctance to subject a regulation to strict scrutiny is what might be called a tyranny of labels. A court fearing strict scrutiny in one context might reject an asserted fundamental right that it might wish to recognize in another. For example, in *Kelley v. Johnson*, 425 U.S. 238 (1976), the Court, upholding a police regulation on personal grooming, rejected the asserted liberty interest in choice of one's hair length. One might question whether a law requiring all citizens to shave their heads, which might be justified as reducing the incidence of head lice (even in the absence of an epidemic, or even an increase in frequency), should be upheld merely because it is rational.

137. *See supra* note 50.

138. *See, e.g.*, *von Eschenbach*, 445 F.3d at 487 (Griffith, J., dissenting).

incur the costs of litigation through an appeal to the Supreme Court. Additionally, lower courts have repeatedly refused to recognize a right to private consensual sexual relations among adults, a liberty interest seemingly found by the Court in *Lawrence*,[139] because the Court did not specify it was applying strict scrutiny.[140] If the Court continues its trend of not identifying the standard of review it is applying, the law in the lower courts will only be further distorted.

It is time that Supreme Court policy and lower court practice be harmonized as to both the identification of fundamental rights and the standard of review to apply to such rights. To do this, there needs to be a better conceptualization of the area and a more honest statement of the standard of review actually applied. The proposals in the following section seek to do just that.

II. A PROPOSED APPROACH TO PRIVACY RIGHTS UNDER SUBSTANTIVE DUE PROCESS

A. The Conceptualization of Privacy Rights

The conceptualization proposed by this article is heavily influenced by the writings of John Locke[141] and John Stuart Mill.[142] As suggested earlier, the beginning premise is that the Constitution should be viewed as a pact between individuals and the government to forgo certain rights that are necessary to further society's interests, but with a reservation of rights in certain private areas where the government does not belong.[143] Broadly speaking,[144] the government, to further society's interests, has a right to regulate the individual's interaction with the larger world. It should be presumed, however, that the government does not properly control the world of the self, defined as one's thoughts, feelings, bodily integrity, and private intimate relationships[145] with consenting adults.[146]

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139. *See supra* note 86; *see also* Carpenter, *supra* note 86, at 1155; Paul M. Secunda, *Lawrence's Quintessential Millian Moment and Its Impact on the Doctrine of Unconstitutional Conditions*, 50 VILL L. REV. 117 (2005); Herald, *supra* note 91, at 38 (all finding such a right).

140. *See, e.g.*, Muth v. Frank, 412 F.3d 808, 817-18 (7th Cir.) *cert. denied* 126 S.Ct. 575 (2005); Lofton v. Sec'y of the Dep't of Children & Family Servs., 358 F.3d 804, 815-16 (11th Cir. 2004) *cert. denied* 543 U.S. 1081 (2005); Loomis v. United States, 68 Fed. Cl. 503, 517-19 (2005); Stanhardt v. Arizona, 77 P.3d 451, 457 (Ariz. Ct. App. 2003); State v. Clinkenbeard, 123 P.3d 872, 878 (Wash. Ct. App. 2005).

141. *See* LOCKE, *supra* note 14.

142. *See* JOHN STUART MILL, ON LIBERTY (Legal Classics Library Ed. 1992) (1859).

143. *See supra* note 14 and accompanying text.

144. Precise definition of the areas the government does not belong is not possible without some recourse to intuition. *See* Tom Gerety, *Redefining Privacy*, 12 HARV. CIV. RTS.-CIV. LIBERTIES L. REV. 233, 236-42 (1977). Yet, as Justice O'Connor observed in *Casey*, "[l]iberty must not be extinguished for want of a line that is clear." Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 869 (1992) (plurality opinion).

145. What constitutes an "intimate" relationship cannot be defined precisely. To decide whether a group is sufficiently personal to warrant protection under the right to intimate association, the Court considers "'factors such as size, purpose, selectivity, and whether others are excluded from critical aspects of the relationship.'" Boy Scouts of Am. v. Dale, 530 U.S. 640, 698 n.26 (2000) (quoting Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte, 481 U.S. 537, 546 (1987)).

In effect, those areas are viewed as controlled by private governments, that of the individual and the consenting adults.[147]

The Supreme Court on many occasions has endorsed this "right to be let alone" or "area the government does not belong."[148] As early as 1928, Justice Brandeis stated:

> The makers of our Constitution . . . recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men.[149]

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146. It may seem anomalous to include intimate relations, which are necessarily dependant on another, as part of the world of the self. However, intimacy is necessary for the full development of the self. Intimacy requires the ability to care and be cared for and "has a great deal to do with the formation and shaping of an individual's sense of his own identity." Kenneth L. Karst, *The Freedom of Intimate Association*, 89 YALE L.J. 624, 633-36 (1980). The Supreme Court itself has observed that Constitutional protection for such relationships is warranted and "reflects the realization that individuals draw much of their emotional enrichment from close ties with others." Roberts v. Jaycees, 468 U.S. 609, 619 (1984); *see also* Lawrence v. Texas, 539 U.S. 558, 578 (2003) *Casey*, 505 U.S. at 851. Almost by definition, private intimate relations exclude the outside world and hence should exclude the government.

Professor Ely has questioned why food, housing or jobs are not considered fundamental rights, suggesting that the Court only favors "upper middle class" rights. *See* ELY, *supra* note 3, at 59. Certainly, it might be argued that jobs, housing, or food, in some sense, are necessary to the development of the self. They are at least fundamental to a person's existence. While these interests are important, the right to privacy should not cover them. The purpose of the Bill of Rights, including the Due Process Clause, was to protect the individual from government excesses, *see, e.g.*, Michael C. Dorf, *Incidental Burdens on Fundamental Rights*, 109 HARV. L. REV. 1175, 1187-88 (1996), not to define a minimal level of subsistence to be enforced by the judiciary. Moreover, privacy is concerned with preventing the government from infringing on the individual's prerogative. The proper decision-maker concerning government benefits, obviously, must be the government. *See infra* notes 146-148 and accompanying text. By contrast, if government regulations allocated jobs universally or defined what foods must be eaten, the government would need to justify this infringement of individual prerogative. Of course, the government can choose to, and to some extent does, provide for minimum subsistence. However, that is more properly decided by consensus through the legislature, the branch of government that controls the purse, rather than by judicial fiat. *See* Dorf, *supra,* at 1235; Crump, *supra* note 4, at 903.

147. *Cf.* MILL, *supra* note 142, at 22 ("Over himself, over his body and mind, the individual is sovereign.").

148. *See, e.g.*, *Lawrence*, 539 U.S. at 578; *Casey*, 505 U.S. at 847; Carey v. Population Servs. Int'l., 431 U.S. 678, 685 (1977); Eisenstadt v. Baird, 405 U.S. 438, 453 n.10 (1972); Stanley v. Georgia, 394 U.S. 557, 564 (1969); Griswold v. Connecticut, 381 U.S. 479, 494 (1965).

149. Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis J., dissenting), *overruled by* Katz v. United States, 389 U.S. 347 (1967) and Berger v. New York, 388 U.S. 41 (1967). It is logical to ask if there is textual support for the asserted right to be let alone. The most logical source is the Ninth Amendment. U.S. CONST. amend. IX ("The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people."). However, the Supreme Court has shown little inclination to use that Amendment and the weight of legislative history suggests the Amendment was designed to protect state, not individual, rights. *See* Kurt T. Lash, *The Lost Original Meaning of the Ninth Amendment*, 83 TEX L. REV. 331 (2004); Kurt T. Lash, *The Lost Jurisprudence of the Ninth Amendment*, 83 TEX. L. REV. 597, 598-600 (2005); Russell L. Caplan, *The History and Meaning of the Ninth Amendment*, 69 VA. L. REV. 223, 227-28 (1983). The right to be let alone also can be supported by the overall structure of the Constitution

There are many reasons to protect this realm of private decision-making. First, the individual has the most information concerning their personal preferences. Second, self-definition is an end in itself and is necessary for complete development and happiness.[150] Third, the freedom to develop oneself can lead to genius that benefits society.[151] Conversely, the inability to control one's life can lead to unrest and divisiveness that undermines societal stability. Fourth, government control of private decisions risks the tyranny of the majority feared by Madison and the other Framers.[152] For that matter, the whole concept of deliberative democracy is meaningless if there is no individuality because the self is formed by the state.[153]

Although there is no bright line between the "public" and "private" worlds, analogy may be made to the concept of boundaries in psychology. Just as one knows that a mother should not order food for an adult child in a restaurant, the government should not decide in which private sexual acts consenting adults can engage. The goal in both situations is to allow the individual to become fully actualized. Although neither the mother nor the government can or are under an obligation to make the individual happy, they should allow the necessary condition for happiness, proper ego boundaries,[154] to develop.

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and its concern for individual rights. Although the "right to be let alone" may not be specifically enumerated, the Constitution is a short document that can't be expected to have specified every right protected. *See* Poe v. Ullman, 367 U.S. 497, 540 (1961) (Harlan, J., dissenting); BARNETT, *supra* note 14, at 259; J. Braxton Craven, Jr., *Personhood: The Right to be Let Alone*, 1976 DUKE L.J. 699, 704 n.35. Nor does the enumeration of some rights necessarily preclude protection for others. For example, if someone you know to be a "clean freak" lends you their car and tells you not to have any food or drink in the car, not to write with pencil, pen or marker while in the car, and not to take any non-toilet trained babies in the car, you should know that taking your dog in the car and leaving its poop on the passenger seat is beyond the bounds of your authorization, despite its lack of specification. A full discussion of the textual and historical support for fundamental rights is beyond the scope of this article. It is enough to observe that the Supreme Court repeatedly has recognized that the Constitution does protect certain unenumerated fundamental rights. *See supra* note 4.

150. *See, e.g.*, MILL, *supra* note 142, at 102, 106; RUEVEN BAR-LEVAV, THINKING IN THE SHADOW OF FEELINGS 193, 330 (1988).

151. *See* MILL, *supra* note 142, at 117-18.

152. *See supra* note 140.

153. *See* James E. Fleming, *Securing Deliberate Autonomy*, 48 STAN. L. REV. 1, 23 (1995); Note, *Last Resorts and Fundamental Rights: The Substantive Due Process Implications of Prohibitions on Medical Marijuana*, 118 HARV. L. REV. 1985, 1987 (2005).

154. Ego boundaries, as psychoanalytic thinkers define them, are the boundaries conceived to exist between the self and the outside world. *See* Matthew Maibaum, *A Lewinian Taxonomy of Psychiatric Disorders*, THE INT'L SOC'Y FOR GESTALT THEORY & ITS APPLICATIONS, 2001, http://gestalttheory.net/archive/maibaum.html; BAR-LEVAV, *supra* note 150, at 330; CHARLES BRENNER, AN ELEMENTARY TEXTBOOK OF PSYCHOANALYSIS 59 (rev. ed. Anchor Books 1974) (1955). It would probably be more accurate to speak of self-boundaries than of ego boundaries, but the latter phrase is the psychoanalytic term or art. *See* Maibaum, *supra*. Strong boundaries are a prerequisite for a fully developed self and allow the individual to achieve true intimacy and happiness. *See* BAR-LEVAV, *supra* note 150, at 150, 158-59, 193, 330-31; JOHN BRADSHAW, BRADSHAW ON: THE FAMILY 43, 47, 55 (1988).

B. Non-Private Areas

Admittedly, the phrase "area where the government doesn't belong" is amorphous and specifying the area as including one's thoughts, feelings, bodily integrity and one's intimate relationships doesn't fully remedy this problem. Perhaps what best clarifies what should be considered private is a description of what is not private. For the reasons explained below, the government should be presumed to act where it belongs[155] when it provides government benefits, regulates commercial activity and activity in public areas,[156] and seeks to prevent harm to others.[157]

1. Government Benefits

There can be no privacy right to government benefits, under this article's conceptualization because rights dependent on the government, by definition, can't be an area the government does not belong. A denial of benefits also does not interfere with fundamental rights in the same way as regulation of such rights—individuals can do as they wish and they are in no worse a position than if the government did not exist. For similar reasons, there is no obligation on behalf of the government to publicly fund fundamental rights.[158] Although the government does not have the obligation to support private choices, it should not be able to deny benefits to which an individual would otherwise be entitled, absent a rational relation to the purposes of the benefit.[159] For example, although the government does not have an obligation to fund abortions, it would be improper for it to deny food stamps to persons who have had an abortion.

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155. The presumption may be rebutted when the purpose of the government action is to infringe individual rights. Improper purpose should be presumed if the government lacks a rational basis for its actions. *See* State v. Clinkenbeard, 123 P.3d 872, 878 (Wash. Ct. App. 2005) (discussing rational basis review for a challenged statute).

156. The government also "belongs" in the area of foreign affairs. This is specifically provided for in the Constitution and necessarily involves the government. U.S. CONST. art. 1, § 8, cls. 3, 10, 11; U.S. CONST. art. 2, § 2, cl. 2. Apparently, this is so obvious that the Court has never had to address a fundamental rights challenge in this area. A proper role of the government also includes resolution of competing fundamental rights. *See* JOHN LOCKE, TWO TREATISES OF GOVERNMENT 324 (Peter Laslett ed., Cambridge University Press 1988) (1689).

157. Government action in an area it belongs often will affect rights in an area it does not belong. For example, a law that limits the amount that can be charged for an abortion, a commercial regulation, can impact the women's right to choose whether to have a child and infringe her right to bodily integrity. In such cases, this article recommends evaluation of the government action under a sliding scale analysis. *See infra* notes 237-54 and accompanying text.

158. *See, e.g.*, Rust v. Sullivan, 500 U.S. 173, 196-200 (1991); Youngberg v. Romeo, 457 U.S. 307, 317 (1982); Harris v. McRae, 448 U.S. 297, 314-17 (1980); Maher v. Roe, 432 U.S. 464, 469 (1977).

159. To this extent, substantive due process interacts with equal protection. *See* Zablocki v. Redhail, 434 U.S. 374, 395 (1978) (Stewart, J., concurring); Loving v. Virginia, 388 U.S. 1, 12 (1967); *cf.* Schware v. Bd. of Bar Examiners, 353 U.S. 232, 238-39 (1957) (finding that denial of admission to bar must have rational connection to applicant's fitness or qualifications to practice law).

A denial of benefits in such a case is tantamount to a fine and must be treated as a regulation of the fundamental right.[160]

2. Commercial Activity

There is no privacy right to commercial activity under this article's proposal. It is difficult to characterize commercial activity as private.[161] It is engaged in with others and does not by itself involve any sense of intimacy. More importantly, one of the primary reasons for the "more perfect union" was the need for the government to be able to regulate commercial transactions.[162] Periods of laissez-faire economics proved economic regulation necessary to prevent harm to others. Thus, regulation of commerce, specifically provided for in the Constitution,[163] must be treated as an area in which the government belongs.[164] A return to Lochnerism is not a risk of this article's proposal.[165]

3. Activity in Public Areas

Tautologically, activity in public areas is not private. As part of the Lockean pact, the government has the right to regulate the individual's interaction with the larger world.[166] Public areas represent the commons and demand regulation by the people rather than the individual. This would explain why public nudity can be prohibited and why environmental regulations are legitimate. The paradigm non-public area, of course, is the home.[167] The government's ownership interest also allows it to make rules on government owned property. For example, the government is not under any obligation to permit abortions to be conducted in public hospitals.[168]

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160. See *infra* notes 177-207 and accompanying text for treatment of government regulations of fundamental rights.

161. *See* Paris Adult Theatre v. Slaton, 413 U.S. 49, 65 (1973); Mark C. Niles, *Ninth Amendment Adjudication: An Alternative to Substantive Due Process Analysis of Personal Autonomy Rights*, 48 UCLA L. REV. 85, 149 (2000); MILL, *supra* note 142, at 170.

162. *See* THE FEDERALIST NOS. 11-13 (Alexander Hamilton); Gonzales v. Raich, 545 U.S. 1, 16 (2005); Niles, *supra* note 161, at n.120.

163. U.S. CONST. art. I, § 8, cl. 3.

164. To offset an infringement of privacy rights, however, the government must have a rational basis to believe the marketplace needs regulation. *See Clinkenbeard*, 123 P.3d at 878. This article also would require the government's justification to be the actual, rather than a hypothesized, reason for the regulation. LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1307 n.13 (2nd ed. 1988). Where the activity the government seeks to regulate has been ongoing, a court should require documentation for the need for the regulation. *See* Hodgkins v. Peterson, No. 1:04-CV-569-JDT-TAB, 2004 WL 1854194, at *8 (S.D. Ind. July 23, 2004).

165. Lochnerism, named after *Lochner v. New York*, 198 U.S. 45, 64 (1905), here refers to the Court's use of substantive due process to replace a state's reasonableness assessment with its own on matters of economic policy.

166. *See* Niles, *supra* note 161, at 111 & n.14.

167. *See* Lawrence v. Texas, 539 U.S. 558, 562 (2003).

168. *See* Webster v. Reprod. Health Servs., 492 U.S. 490, 507 (1989).

4. Harm to Others

The basic role of the government in the Lockean system is to prevent harm to others, both physical and economic.[169] Without the impartial magistrate that is the government, power rather than justice would determine rights.[170] Mill also recognized that the individual's natural rights ended where they caused harm to others.[171] This principle is hardly controversial and the Supreme Court has recognized that it is a government function to protect non-consenting parties from harm.[172] This is just part of the government's police powers.

However, the concept of harm to others needs to be refined, lest this exclusion eliminates all fundamental rights. Unless one is a hermit living in the woods, all actions can cause some harm to others. A person's choice to discontinue life-support affects all who know him or her. Knowledge that an individual engages in sodomy may offend or cause psychological harm to those with conservative sexual preferences. An important limiting principle was suggested by Hobbes—that one's rights as against another should be limited by what he would allow other men against himself.[173] Thus, finding a person's appearance or habits offensive to contemplate should not be considered harm to others because others would not want their appearance or habits subject to approval of the individual.[174] Another limiting principle, suggested by Mill, is that harm to others cannot be solely derivative of the harm to the individual.[175] This limitation is necessary because any decision one makes can harm oneself and therefore harm someone who cares about you. A third limitation is that harm to others generally must result from action, not omission.[176] This follows from common law principles and protects against laws such as one requiring donation of body parts to another.

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169. *See* LOCKE, *supra* note 156, at 276 ("*Civil Government* is the proper Remedy for the inconveniences of the State of Nature, which must certainly be Great, where Men may be Judges in their own Case, since 'tis easily to be imagined, that he who was so unjust as to do his Brother an Injury, will scarce be so just as to condemn himself for it."); BARNETT, *supra* note 14, at 70-71.

170. *See* LOCKE, *supra* note 156, at 271-72.

171. *See* MILL, *supra* note 142, at 21-22, 140.

172. The government also has an interest in preventing harm to minors or incompetent persons. Such persons can be deemed incapable of a valid consent. *See Paris Adult Theatre*, 413 U.S. at 57.

173. *See* THOMAS HOBBES, LEVIATHAN 188, 190 (C.B. McPherson ed., Penguin Books 1968) (1651).

174. *See* TRIBE, *supra* note 164, at 1409. Professor Tribe finds this result completely analogous to recognized First Amendment principles. *Id.* "The expression of ideas or emotions cannot be shut off to protect unwilling viewers or hearers without 'a showing that substantial privacy interests are being invaded in an essentially intolerable manner,' since any 'broader view . . . would effectively empower a majority to silence dissidents simply as a matter of personal predilections.'" *Id.* (citations omitted).

175. *See* MILL, *supra* note 142, at 26.

176. *See id.* at 24-25.

C. Standard of Review

This article recommends a multi-factored sliding scale standard of review in which the balance is presumptively predetermined in two categories of cases. Specifically, when the government regulates in an area that it belongs, and there is no significant effect on privacy rights, the government regulation is presumed valid unless irrational. By contrast, when the government directly regulates in an area it does not belong, the regulation is presumed invalid unless it is narrowly tailored to achieve a compelling justification. This mirrors current rational basis and compelling interest review. More commonly, however, the government will regulate in an area in which it belongs, but the regulation will have a substantial effect on privacy rights. In that case, a court should directly balance interests using factors described below, giving deference to the legislative determination.[177] This approach resembles that of the Court under the First Amendment,[178] the constitutional provision most closely analogous to privacy rights.[179] The section below describes the sliding scale, its relevant factors and presumptive categories, and responds to criticism of balancing jurisprudence.

1. The Sliding Scale

Common sense dictates that the more central the right and the greater the infringement, the more compelling should be the government justification and the tighter the fit should be between the regulation and the justification.[180] A weak justification or poor fit relative to the privacy infringement creates an inference that the regulation was improperly motivated or irrational.[181] That alone should be sufficient to invalidate it.[182] To determine the suggested balance and ferret out improper

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177. Deference is appropriate to the legislative determination because it represents the results of the democratic process. Although deference is a vague term, the Court has had much experience giving it meaning when reviewing lower court decisions. *See* Anderson v. City of Bessemer City, 470 U.S. 564, 574 (1985).

178. In the First Amendment context, incidental restrictions on speech that do not have a significant effect on free expression are upheld unless irrational. *See* Arcara v. Cloud Books, Inc., 478 U.S. 697, 702-04 (1986); Citizen Publ'g Co. v. United States, 394 U.S. 131, 140 (1969); Dorf, *supra* note 146, at 1201. Laws that discriminate on the basis of content or viewpoint are subject to strict scrutiny. *See* Boos v. Barry 485 U.S. 312, 321-22 (1988); Alan Brownstein, *How Rights Are Infringed: The Role of Undue Burden Analysis in Constitutional Doctrine*, 45 HASTINGS L.J. 867, 920 (1994). An incidental restriction on speech that targets or disproportionately effects expressive activity is subject to balancing. *See Arcara*, 478 U.S. at 710; United States v. O'Brien, 391 U.S. 367, 377 (1968); Dorf, *supra* note 146, at 1202.

179. The First Amendment protects free expression, in part, because it allows for self-actualization, much like privacy rights. *See* C. Edwin Baker, *The Scope of First Amendment Freedom of Speech*, 25 UCLA L. REV. 964, 995 (1978); THOMAS I. EMERSON, TOWARD A GENERAL THEORY OF THE FIRST AMENDMENT 5 (1966).

180. *See* Washington v. Glucksberg, 521 U.S. 702, 772 n.12 (1997) (Souter, J., concurring); Poe v. Ullman, 367 U.S. 497, 543 (Harlan, J., dissenting); Niles, *supra* note 161, at 132-33.

181. *See* ELY, *supra* note 3, at 145-47; Niles, *supra* note 161, at 133 & n.155; Turner v. Safley, 482 U.S. 78, 89-90 (1987).

182. *See Casey*, 505 U.S. at 877 (plurality opinion); Dorf, *supra* note 146, at 1182-83; TRIBE, *supra* note 164, at 1312.

motivation, courts should consider the importance of the right infringed and the extent of the infringement, the alternatives available to the individual, the directness of the infringement, as well as the justification and fit. Because privacy protection is, in part, designed to protect against the tyranny of the majority,[183] the court also should consider whether those affected are underrepresented or if there are other reasons to question the validity of the democratic process. Finally, to ensure institutional stability and avoid the tyranny of the minority, tradition may be considered. Although the Court does not acknowledge applying a balancing test, these factors have support in the case law.[184] The application of these factors will be illustrated in Part III.

a. Importance of the Right Infringed and the Extent of the Infringement

This article does not suggest that fine gradations between rights are possible. However, few would argue that an invasion of bodily integrity in the form of a restriction on hair length is indistinguishable from a law requiring all individuals to donate a kidney. The primary determinant for measuring the importance of the right infringed should be the consequence the regulation has on the life of the individual.[185] This is one reason the right to choose whether to have a child is so valued. Having a child alters your way of life dramatically. A child requires years of financial and emotional support and reduces the parent's freedom of movement and activity.[186] Although for most, the rewards of parenthood far outweigh the burdens, for those where that is not true, parenthood can negatively reshape their lives.[187] In any event, pregnancy also has extreme consequences for the woman's bodily integrity. Women experience weight gain, distortion of their bodies, emotional changes, fatigue, and often sickness.

No matter how important is the right infringed, if the extent of infringement is small, the consequences to the individual are diminished. Thus, a ban on abortions must be treated much more seriously than a regulation requiring a 24-hour waiting period before an abortion is performed. The Court explicitly recognized this factor in *Casey*.[188]

183. *See Casey*, 505 U.S. at 847 (citing *Poe*, 367 U.S. at 541 (Harlan, J., dissenting)).

184. *See infra* notes 185-217 and accompanying text.

185. *See, e.g., Eisenstadt*, 405 U.S. at 453; Jed Rubenfeld, *The Right of Privacy*, 102 HARV. L. REV. 737, 783-84 (1989).

186. *See* Karst, *supra* note 146, at 641 n.90.

187. For some, placing the child up for adoption may reduce the burden of having a child. However, for many, psychologically or morally, that is not a valid option. *Id.*

188. *Casey*, 505 U.S. at 886-87; *see also Zablocki*, 434 U.S. at 386; *id.* at 396 (Stewart, J., concurring).

b. Alternatives Available to the Individual

Closely related to the effect on the life of the individual are the alternatives available to the individual despite the government regulation.[189] For this reason a ban on the sale of condoms should not be treated the same as a ban on the sale of all contraceptives. The latter makes sexual intercourse a much greater risk and has much greater potential to significantly alter the life of the individual. For similar reasons, a federal regulation might be treated slightly more harshly than an identical state regulation. Although the option to move to another state is not available for many, the option to move to a different country, for most, is even more theoretical than real.[190] Also relevant to the availability of alternatives is the penalty imposed.[191] If the consequence of violating the law is only a small fine, the option of a knowing violation remains an option. A penalty requiring, or even allowing for, years of imprisonment effectively removes that option.

c. The Directness of the Infringement

To the individual whose rights are infringed, it may not matter if the infringement is direct or incidental. Nonetheless, this factor is relevant to determine whether the government regulation should be treated as the cause of the infringement as well as whether the government had an improper purpose.[192] If the infringement is too indirect, it may not be considered the proximate cause of the individual's injury. For example, environmental regulations may force a business to close, which in turn may deprive one of the laid-off workers from having the money to fund an abortion. This should not give rise to a claim for violation of the worker's privacy rights. It is equally clear that the environmental regulation, with such an indirect affect on privacy rights, could not have been motivated by a purpose to infringe those rights.

d. Justification and Fit

When considering the government's justification, the Court should only consider the legislature's actual purpose, not merely some hypothesized purpose. As explained by Professor Tribe:

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189. *Cf. Turner*, 482 U.S. at 90 (explaining that a relevant factor in determining the reasonableness of prison restrictions infringing a constitutional right is "whether there are alternative means of exercising the right that remain open to prison inmates").

190. A local regulation leaves even more geographic options available to the individual than a federal or state regulation. *See* Moore v. City of E. Cleveland, 431 U.S. 494, 550 (1977) (White, J., dissenting). Nonetheless, once one goes below the federal level, a competing consideration offsets, to some extent, the availability of other geographic options. Specifically, the greater the number of locations that do not have the challenged restriction, the weaker is the local government's argument that the regulation is needed. *See Poe*, 367 U.S. at 526 (Harlan, J., dissenting).

191. *See, e.g.*, Loving v. Virginia, 388 U.S. 1, 10 (1967); Lofton v. Sec'y of the Dep't of Children & Family Servs., 358 F.3d 804, 817 (11th Cir. 2004); State v. J.P., 907 So. 2d 1101, 1110 (Fla. 2004).

192. *See Zablocki*, 434 U.S. at 391 (Burger, J., concurring); Dorf, *supra* note 146, at 1182-83.

> Knowing why government chose to enact a particular requirement, and why it is being enforced on a given occasion, bears on the way in which the requirement is likely to be perceived and hence the degree of affront it is likely to carry; it bears on the extent to which government's action is likely to chill protected choices in adjacent areas by persons who will inevitably understand not only what government has demanded but the principle on which government appears to have acted; it illuminates the degree to which invalidation of the requirement would serve to educate government itself with respect to the sorts of designs those in power should resist; and it assists courts in the inevitably difficult task of deciding how much weight to give to an alleged concern, recognizing that the history of how an argument found its way into a case—whether by hindsight or more genuinely—sheds at least some light on how the doubts regarding the argument's validity ought to be resolved.[193]

While a legislature can always reenact the invalidated regulation, providing a record that the purpose was as the government attorney hypothesized, many legislators would not be willing to engage in such a charade. In any event, the reason for deference to the legislature is that it represents the democratic process.[194] If the hypothesized purpose was not what the legislature intended, there should be no deference.

Given the importance of the rights at stake, the Court should require the government to provide support for the need for its regulation unless judicial notice would be proper.[195] The greater the infringement, the weaker the justification, and the poorer the fit, the greater should be the government's burden for evidentiary support. A record would be instrumental in determining the government's actual purpose and help evaluate the weight of the government's interest. For example, if the government justifies a regulation prohibiting midwives from providing abortion services based on safety concerns, it would be significant if midwife abortions led to complications in fifty percent or .0001 percent of abortions.

Assuming the government has a valid justification, a court must still consider the fit between the regulation and the government's asserted purpose.[196] Of course, perfect fit is rarely possible. The degree to which the fit is imperfect, however, should be used to diminish the weight of the government's justification. If the regulation is seriously underinclusive, it suggests that the asserted purpose either was not the true purpose or is not especially weighty. If a regulation is significantly over-

193. TRIBE, *supra* note 164, at 1307 n.13.
194. *See* Atkins v. Virginia, 536 U.S. 304, 323 (2002).
195. *See Turner*, 482 U.S. at 97; Stanley v. Georgia, 394 U.S. 557, 566-67 (1969); *Hodgkins*, 2004 WL 1854194, at *8.
196. *See Zablocki*, 434 U.S. at 396 (Stewart, J., concurring).

inclusive,[197] there are individuals whose rights are infringed for no apparent reason. In that case, the government should be required to pass a more tailored regulation.

The most common and significant justification that the government asserts is to prevent harm to minors[198] and non-consenting adults.[199] In analyzing this justification, a court should consider the severity of the injury, how speculative it is, and how directly it affects others. In judging the severity of the injury, physical injury presumptively should be considered more significant than economic or psychological injury. Whatever the severity of the injury, it should be downgraded by the likelihood that it will not occur.[200] When the severity of the injury, downgraded for its speculativeness, is small, or the injury is too indirect, an inference is raised that the injury was not the true purpose of the government regulation or, even if the true purpose, is insufficient to outweigh a significant infringement of privacy rights. This would be particularly true to the extent the fit was poor.

e. Likelihood of Defects in the Democratic Process

The principal argument against balancing and judicial scrutiny of legislative judgments is that it interferes with the democratic process.[201] Accordingly, when there are potential defects in the democratic process, greater judicial scrutiny is justified.[202] The primary factor to consider here, derived from *Caroline Products*' famous footnote four,[203] is whether the individuals whose rights are infringed were underrepresented in the legislative process.[204] It is likely that legislators tend to undervalue the interests of minority groups to which they do not be-

197. A regulation should not be considered over-inclusive if there is no reasonably satisfactory alternative to eliminate the over-inclusiveness that still achieves the government purpose. For example, consider a drug regulation that prohibits marijuana distribution. Even if the government is not concerned with distribution to someone who uses marijuana for medical purposes, the regulation is not necessarily over-inclusive to the extent it covers a distributor to such a person if the exclusion of such a person would defeat enforcement of the statute. Such might be true if uncertainty as to a distributor's customers prevented arrest for possession of large amounts of marijuana. Admittedly, determining the necessity of what might otherwise be considered over-inclusive often will be a difficult fact question.

198. Minors are presumed to be incapable of informed consent. The government also has an interest in ensuring that adult consent is informed and real. *See Paris Adult Theatre*, 413 U.S. at 57.

199. For Mill, prevention of harm to others is the only justification for infringing an individual's liberty interests. *See* MILL, *supra* note 142, at 24.

200. *Cf. Zablocki*, 434 U.S. at 395 (Stewart, J., concurring) ("The invasion of constitutionally protected liberty and the chance of erroneous prediction are simply too great.").

201. Iddo Porat, *The Dual Model of Balancing: A Model for the Proper Scope of Balancing in Constitutional Law*, 27 CARDOZO L. REV. 1393, 1429 (2006).

202. *See* United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938).

203. *Carolene Prods.*, 304 U.S. at 152 n.4 ("[P]rejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.").

204. *See* Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943, 984 (1987).

long.[205] Greater scrutiny also is justified when the interests infringed may not have been fully considered given the hurly-burly of politics, or belong to unpopular groups.[206]

f. Tradition

As suggested earlier, tradition is not a valid test for defining fundamental rights.[207] Nonetheless, it may be useful to consider tradition, to the extent one can be agreed upon,[208] when balancing individual rights and government interests. Traditions are likely to be wise as they represent the considered judgment of many people over an extended period.[209] Knowledge of historical traditions also can inform judgments about legislative intent.[210] Finally, institutionally, the Court would lose respect if its judgments regularly were in opposition to public sentiment.[211] Tradition loses its persuasive force, however, to the extent the assumptions underlying the tradition have changed. For example, if the basis for the tradition against acknowledging gay marriages is the inability of gay couples to have children, innovations in artificial reproductive methods diminish the weight to be given to that tradition.[212]

2. Presumptive Categories

Presumptive categories are not truly exceptions to the sliding scale approach. Rather, they are situations where a rebuttable presumption exists as to the result of the balancing process. Again, the two categories where rebuttable presumptions exist are where government action in an area it belongs does not have a significant effect on individual rights, and where the government directly infringes privacy rights.

a. Government Activity Where It Belongs that Does Not Have a Significant Effect on Individual Rights

The threshold requirement of a significant effect to trigger heightened or full sliding scale review when the government operates in an area it belongs recognizes that almost any government regulation can indi-

205. *Id.* at 984 n.243 (explaining that the Court plays a representation-reinforcing role) (citing ELY, *supra* note 3, at 88-104).

206. Aleinikoff, *supra* note 204, at 984.

207. *See supra* notes 88-97 and accompanying text.

208. *See* Sunstein, *supra* note 88, at 2106; *supra* notes 88-93 and accompanying text.

209. *See id.*

210. *See* Brown, *supra* note 90, at 189.

211. *See Poe*, 367 U.S. at 542 (Harlan, J., dissenting).

212. Often, there may be disagreement about whether the premises behind a tradition have changed. For example, is there an increased recognition that gay couples may have children from prior heterosexual marriages or a greater frequency of adoption by gay couples that would undermine the assumption that gay marriages do not involve children? The burden of establishing that postulates upon which a tradition is based are no longer valid should be upon the person seeking to diminish the significance of the tradition. Conversely, the person relying on tradition should have the burden of establishing the tradition. In any event, tradition is not intended to be a binding, or even a critical factor, but merely a variable worth considering.

rectly or incidentally affect privacy interests. For example, laws against theft can prevent a poor thief from obtaining the funds necessary for an abortion. A husband who murders his wife might assert that the homicide laws interfere with his right to choose with whom to have an intimate relation. It would not be efficient to require extended review of such due process challenges, and in the absence of a significant effect, the constitutional right to privacy is, at most, only marginally implicated.[213]

The question remains, however, what is a significant effect? No precise definition is possible and once again, a certain measure of intuition is required. Nonetheless, some general principles suggest themselves. The more remote the effect, the fewer the number of people affected, the greater the alternatives available to the individual, the less likely a regulation should be considered significant.[214] The Court already imposes similar threshold requirements in the privacy and First Amendment areas.[215] Application of the significant effect requirement should prove no more elusive.

b. Direct Regulation of Privacy Interests

When the government directly regulates in an area it does not belong, the regulation should be presumed invalid unless the government can satisfy the traditional strict scrutiny test. When a law singles out protected conduct and is not narrowly tailored to serve a compelling government interest, "it is a fair inference that the law's principal purpose is the illegitimate one of frustrating the exercise of a right."[216] Again, that alone should be sufficient to invalidate the law.[217]

3. Criticisms of the Sliding Scale Approach Do Not Recommend Against Its Adoption

A sliding scale or balancing approach is not without its critics.[218] They argue that such an approach is too unpredictable, is just an excuse for justices to legislate their personal preferences, usurps the role of the legislature, and actually waters down protection of important rights.[219]

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213. Of course, the government action still must be rational. *See* Washington v. Glucksberg, 521 U.S. 702, 766 (1997) (Souter, J., concurring); Daniels v. Williams, 474 U.S. 327, 331 (1986); *Poe*, 367 U.S. at 543 (Harlan, J., dissenting).

214. To this extent, this category involves balancing. However, the threshold is designed to allow dismissal of the extreme cases, such as the hypothetical situations posited in the text, without any significant litigation. In cases of doubt, the assumption should be that there is a significant effect so that the matter can be decided after a more detailed sliding scale review.

215. *See supra* notes 110-12, 163.

216. *See* Dorf, *supra* note 146, at 1235.

217. *See supra* note 182.

218. *See, e.g.*, Aleinikoff, *supra* note 204, at 943; Crump, *supra* note 4, at 906; Porat, *supra* note 201, at 1395.

219. *See* Aleinikoff, *supra* note 204, at 984-94; Crump, *supra* note 4, at 906, 910; Michael A. Scaperlanda, *Illusions of Liberty and Equality: An "Alien's" View of Tiered Scrutiny, Ad Hoc Balancing, Governmental Power, and Judicial Imperialism*, 55 CATH. U. L. REV. 5, 9, 31-33 (2005).

These arguments cannot justify courts' continued adherence to tiered review. A balancing test can be unpredictable and an excuse for justices to legislate their personal preferences. However, virtually all constitutional interpretation is value-laden.[220] Indeed, the Framers probably recognized as much, which likely is one reason why the Framers subjected judges to two layers of approval.[221]

Certainly, existing law is not better. One commentator has gone so far as to describe the Court's current approach as "like the methods of modern alchemy, conjuring up mystical formulae to conceal the sleight of hand by which a judge transforms the base metal of personal inclinations into the gold of fundamental rights."[222] The recommended approach, by providing transparency, should reduce unpredictability as well as judicial discretion. "By candidly acknowledging and celebrating the exercise of judgment, we can actually increase the possibility of accountability and ultimately hope to reduce the power of idiosyncratic decisionmaking." [223]

The more serious criticism of balancing is that it is undemocratic—by substituting the judgment of nine justices for the representatives of the people, balancing usurps the role of the legislature.[224] First, this article's proposal does not call for the Court to substitute its judgment for that of the legislature. The Court should give deference to legislative findings. Nor can the Court affirmatively legislate. It can only protect rights from government infringement. The need for the Court to fulfill its role as the primary protector of individual rights is particularly acute given the reality that Congress and state legislatures often don't consider the Constitutionality of the laws they pass.[225] However, it is not necessary to view the judiciary as better equipped to protect individual rights than the legislature.[226] It is obvious that the protection of important rights by two branches of the government is better than protection by just one. A multi-branch veto to legislation viewed as infringing rights may stymie majority preferences and to that extent seem undemocratic. However, the Framers were concerned with abuses of power and consequently created a government with a system of checks and balances.[227] This arti-

220. *See* ELY, *supra* note 3, at 67; Tribe & Dorf, *supra* note 89, at 1060, 1062.

221. *See* Brown, *supra* note 90, at 220 n.230.

222. Crump, *supra* note 4, at 805.

223. Brown, *supra* note 90, at 215; *see also* OLIVER WENDELL HOLMES, *The Path of the Law*, *in* COLLECTED LEGAL PAPERS 184 (1920) ("[Judges] themselves have failed adequately to recognize their duty of weighing considerations of social advantage. The duty is inevitable, and the result of the often proclaimed judicial aversion to deal with such considerations is simply to leave the very ground and foundation of judgments inarticulate, and often unconscious . . . .").

224. *See* Aleinikoff, *supra* note 204, at 984.

225. *See* Brown, *supra* note 90, at 186 (citing James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 155-56 (1893)).

226. *Cf.* ELY, *supra* note 3, at 67 (although recognizing undemocratic potential of legislature, questioning whether there is any reason to believe that the judiciary is any better).

227. *See* Tribe & Dorf, *supra* note 89, at 1064.

cle's proposal merely asks the judiciary to fulfill its role in that system. Moreover, given the vagueness of the language of the Fourteenth Amendment, reliance on precedent may be the best way to achieve predictability and consistency.[228] There is no one better to interpret precedent than the Supreme Court.[229]

The argument that balancing waters down the protection of the most important rights is somewhat disingenuous as those least interested in protecting individual rights are the ones who typically present it.[230] In any event, important rights will be protected if in fact it is agreed that they are truly important. Indeed, balancing may result in greater protection of important rights because courts, fearing the restrictiveness of strict scrutiny, will no longer need to avoid calling important rights fundamental.

The fact is that balancing is the way most people resolve issues. They consider the pros and cons of a course of action and try to decide which outweighs the other. Balancing "is the mark of a reasonable, rational, subtle mind."[231] The Supreme Court balances in numerous areas,[232] including in the area of fundamental rights.[233] This article only asks that the balancing process involving privacy rights be done explicitly and clearly.

III. APPLICATIONS OF THE PROPOSED STANDARD

This section applies the suggested proposal to several of the actual substantive due process issues confronting the courts today.[234] Although I would like to pretend that the proposal provides complete predictability and is totally value-neutral, that would be nonsense. Judgment is required for all Constitutional questions and such judgment necessarily is affected by the decision-makers' values and experiences. What recommends the suggested approach is its transparency. Competing interests are identified and reasons for their weighting are specified. Litigators will know how to build an appropriate factual record. Admittedly, unresolved questions abound. However, the more the Court resolves these

228. *Id.*
229. *Id.* at 1065.
230. *See* Aleinikoff, *supra* note 204, at 1004.
231. *Id.* at 962.
232. *See id.* at 963-73.
233. *See supra* notes 106-26 and accompanying text.
234. Without knowing the specific regulation enacted, the purpose of the enactment, or the factual record presented, it is not possible to resolve all issues that might arise. Alternative bases for constitutional challenge, such as the Equal Protection Clause, also are beyond the scope of this paper.

issues with clarity, the easier it will be to answer the remaining unresolved questions.[235]

A. Abortion

There is little question that regulation of abortion impacts important fundamental rights—the rights to bodily integrity and to choose one's intimate relations.[236] It is equally clear that the government is acting where it belongs when it regulates abortions. Bans on abortions, in at least some contexts, are commercial regulations, designed to prevent harm to others, and control activity in public places. Accordingly, a balancing of interests is required under this article's proposal. This section concludes that a ban on all abortions is unconstitutional. Although analysis of every type of lesser regulation is beyond the scope of this article, treatment of such regulations should mirror existing law. After all, the Court's undue burden standard is itself a balancing test.[237]

1. Extent of Infringement

A complete ban on abortions, as suggested earlier,[238] can have a huge effect on the life of the individual. Pregnancy plays havoc with a woman's body and parenthood involves a lifetime of emotional and financial commitments. There are few, if any, adequate alternatives for someone wanting an abortion. Giving birth and placing the child up for adoption may limit the lifetime effects on the mother, but does nothing to eradicate the infringement on the woman's bodily integrity. It also carries significant emotional consequences for the mother as well as the child. Abstinence is obviously unsatisfactory and birth control is not foolproof or available to some. The penalty for illegal abortions has traditionally been penal[239], making civil disobedience an unsatisfactory option. A complete ban is a direct regulation of the rights of women, a group that remains under-represented in the legislative branch. Although historically abortions may have been prohibited, recent tradition is to the contrary.[240]

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235. For example, if the Court barred adultery prosecutions in the case of spousal consent, *see infra* notes 274-76 and accompanying text, it likely would preclude an action for statutory rape when there was parental consent, *see infra* note 280 and accompanying text.

236. Rubenfeld, *supra* note 13, at 739-40.

237. Although the analysis would be similar, as with all balancing tests, one can disagree about the conclusions. *See id.* at 878 ("Even when jurists reason from shared premises, some disagreement is inevitable . . . . That is to be expected in the application of any legal standard which must accommodate life's complexity.").

238. *See supra* notes 186-88 and accompanying text.

239. *See* Reva Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 STAN. L. REV. 261, 314 (1992).

240. *See Planned Parenthood*, 505 U.S. at 846.

2. Government Justifications

The government might seek to justify a ban on abortions as necessary to prevent harm to others, whether the fetus, the husband or the mother, to preserve the sanctity of human life, to prevent overreaching by unscrupulous practitioners of desperate or emotionally distraught women, or to regulate public morality. None of these justifications for a ban on abortions should be considered sufficient to offset a ban's significant infringement of individual rights.

a. Harm to Others

Harm to the fetus as a justification for a ban on abortions falters because a fetus is not a person and does not have rights under the Constitution.[241] If it were otherwise, states not only could forbid abortions, but would be compelled to, at least unless the health of the mother was implicated.[242] Similarly, a pregnant woman who consumed alcohol or caffeine might be arrested for child abuse. Nor can the government imbue the fetus with rights at the expense of an existing person's constitutional rights. As Professor Dworkin explains:

> The suggestion that states are free to declare a fetus a person . . . assumes that a state can curtail some persons' constitutional rights by adding new persons to the constitutional population. The constitutional rights of one citizen are of course very much affected by who or what else also has constitutional rights, because the rights of others may compete or conflict with his. . . .
>
> . . . If a state could declare trees to be persons with a constitutional right to life, it could prohibit publishing newspapers or books in spite of the First Amendment's guarantee of free speech, which could not be understood as a license to kill.[243]

Although a fetus cannot be imbued with rights, it might be argued that "killing" a fetus harms society by diminishing the value of life. This argument, however, has more in common with political sound bites than legal reasoning.[244] The "value of life" is employed selectively. For example, those who oppose abortion often support the death penalty.[245] The Court itself did not let the "sanctity of human life" stop it from im-

241. *Id.* at 860.

242. Ronald Dworkin, *Unenumerated Rights: Whether and How* Roe *Should Be Overruled,* 59 U. CHI. L. REV. 381, 398-99 (1992).

243. *Id.* at 400-01.

244. When vetoing expanded federal support for embryonic stem cell research, President Bush, a strong proponent of the death penalty and opponent of abortion, said the bill violated his principles on the sanctity of human life. *See* Sheryl Gay Stolberg, *First Bush Veto Maintains Limits on Stem Cell Research,* N.Y. TIMES, July 20, 2006, at A1.

245. *See* Arthur L. Rizer III, *Does True Conservatism Equal Anti-Death Penalty?,* 6 HOWARD SCROLL SOC. JUST. L. REV. 88, 115 (2004).

plicitly recognizing a right to die.[246] Moreover, abortion no more diminishes the value of life than prohibitions on abortion reduce the value of having children raised by people who want them. In any event, such abstract harm cannot outweigh the very real, direct, and substantial infringement of women's privacy rights.[247]

Abortion can harm the interests of a potential father who desperately wants to become a parent. The problem, however, is that when a mother and father disagree about whether to have a child, the view of only one can prevail. As between the two, the balance weighs in favor of the woman who physically bears the child and who is most affected by the pregnancy.[248]

Finally, abortions can harm the women who choose to have them.[249] However, if a woman's privacy interests mean anything, it must mean that a woman has the right to decide whether the potential harms to her from an abortion are outweighed by her desire to discontinue the pregnancy.[250]

b. Commercial Justifications

The government has an interest in regulating the commercial arena.[251] If the legislature found that abortion providers were taking advantage of women seeking abortions, it would be justified to impose reasonable regulations in the form of licensing, safety requirements, or even price regulation. If evidence showed that providers, interested in a quick profit, pressured women to have abortions that they later regretted,

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246. *See* Cruzan v. Dir. Mo. Dep't of Health, 497 U.S. 261, 280 (1990).

247. *See Casey*, 505 U.S. at 914-16 (Stevens concurring in part, dissenting in part).

248. *See id.* at 896 (plurality opinion); Radhika Rao, *Reconceiving Privacy: Relationships and Reproductive Technology*, 45 UCLA L. REV. 1077, 1109 (1998). This is not to suggest that the government doesn't have any interest in protecting the rights of the father. A regulation that encourages a woman to consult the father that does not threaten the abuses identified by Justice O'Connor in *Casey*, 505 U.S. at 888-93, should be permissible. For example, a law might require the abortion provider, at the time an appointment is made, to suggest consultation with the father or discuss the impact the abortion decision has on others. Such a law would not significantly infringe the woman's privacy interests, yet would encourage communication with and the involvement of the father, which if nothing else, should lead to more stable relationships.

249. *See* Andrew A. Adams, *Aborting* Roe*: Jane Roe Questions the Viability of* Roe v. Wade, 9 TEX. REV. L. & POL. 325, 331-32 (2005).

250. Again, while the government interest in protecting the mother isn't sufficient to ban an abortion, it could justify reasonable regulations to ensure that the woman's consent is informed and considered. Although this article disagrees with *Casey*'s conclusion that a 24-hour waiting period does not unduly burden women's right to an abortion (particularly given the district court's findings of fact, *see Casey*, 505 U.S. at 885-86 (plurality opinion)), it would view a one-or two-hour waiting period, with an exception for medical emergencies, as permissible. For many women, the 24-hour wait would significantly increase the difficulty in obtaining an abortion and, absent more than anecdotal evidence, this article would assume that the government's interest could be served almost as well by the lesser wait. If the government was able to develop a record that showed that a significant percentage of women regretted having an abortion and would have changed their mind if required to wait 24 hours, the balance could come out differently. Requiring abortion clinics to develop follow-up records for this purpose should be permissible.

251. *But see supra* note 164.

a ban on commercial abortions might be justified. There is no reason to believe this currently to be the case. The government certainly has not developed evidence establishing such a problem. Finally, even if such evidence were developed, and given the extent of the infringement it would have to be a strong record, the government could not justify extending the ban on abortions on that basis to provision of abortion by free clinics.

c. Justifications Based Upon Public Activity or Effects

A government ban on abortions also might be based upon its police power to regulate public places and public morality. The obvious limitation of this justification is its inapplicability to abortions performed in private. As suggested earlier, the offense created by the mere knowledge that abortions are being conducted cannot support a ban on abortions.[252] The government should be able to ban abortions in government owned buildings, public places, or even places open to public view.[253] In such places, the privacy interests of the individual are diminished and the infringement generally will not be significant given the alternatives available, i.e., private abortions. Making abortions unavailable in public hospitals may deprive low-income women, particularly in rural areas, of the abortion option. Nonetheless, the government has the right not to support abortions under this article's proposal.[254]

In short, although numerous regulations affecting the abortion decision might be possible, a complete ban of abortion would be invalid under this article's proposal.

B. Gay Marriage

The initial question when analyzing a ban on gay marriages is whether there is an infringement of any protected right. Although under traditional doctrine, marriage is a fundamental right,[255] this article's pro-

252. *See supra* note 174 and accompanying text.

253. For example, the government should be able to require abortion providers to have blinds on their windows.

254. *See supra* note 158.

255. *See* Turner v. Safley, 482 U.S. 78, 95 (1987); Zablocki v. Redhail, 434 U.S. 374, 384 (1978); Loving v. Virginia, 388 U.S. 1, 12 (1967). Even under traditional doctrine, there is the question whether the fundamental right to marriage is limited to relationships between members of the opposite sex. A number of courts have said that it is. *See, e.g.*, Hernandez v. Robles, No. 05239, 2006 WL 1835429 (N.Y. July 6, 2006); Lewis v. Harris, 908 A.2d 196 (N.J. 2006). If so, a ban on gay marriage need only have a rational basis. This interpretation of the fundamental right to marriage seems to be a strained and result-oriented reading of Court precedent. In no case, recognizing a fundamental right to marriage, has the court suggested such a limitation. Indeed, the Court has said, "the right to marry is of fundamental importance *for all individuals*." *Zablocki*, 434 U.S. at 384 (emphasis added). The Court has recognized that marriages are "expressions of emotional support and public commitment" that for many have "spiritual significance, *Turner*, 482 U.S. at 95-96, and are "one of the vital personal rights essential to the orderly pursuit of happiness by free men." *Zablocki*, 434 U.S. at 383; *Loving*, 388 U.S. at 12. These reasons to treat marriage as fundamental are equally applicable to gay marriages. Furthermore, if marriage was limited to relationships of the

posal would not consider marriage a protected privacy right. Rather, it is just a benefit provided by the government. Accordingly, a government can choose not to support gay marriages, refusing to give it official recognition.[256] What the government cannot do is deprive gays of benefits because they are not married unless it has a rational basis unrelated to infringing gays' privacy rights.[257] Given the literally hundreds of rights that follow from marriage, the government would be hard-pressed to justify each and every one.[258] For example, there doesn't seem a rational basis for denying gay couples' access to their "significant other" in public hospitals that limit visitation to relatives. Similarly, it is hard to justify depriving gay couples the right of inheritance without a will. The Court in *Hernandez v. Robles*,[259] attempted to justify these types of discrimination as rationally related to inducement of marriage and its attendant benefits to children. Such a justification is bootstrapping. It is equivalent to saying that only persons who have not had an abortion are "bubbas." The benefit of government recognition as a bubba can be rationally justified as supporting childbirth which is necessary for the continuation of our society. The government can't then say only bubbas can receive food stamps and justify it as inducing bubbadom and its attendant benefits to society.

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opposite sex based on the traditional definition of marriage, it could just as well be limited to relationships of the same race. That position was rejected in *Loving*.

Of course, under traditional doctrine if there were a fundamental right for gays to marry, a government ban on such marriages would be subject to strict scrutiny. *See supra* note 6. Given the number of childless heterosexual marriages and homosexual marriages with children, the typical child-based justifications for treating gay marriages differently could not satisfy the narrow tailoring required by that test. *See* Lawrence v. Texas, 539 U.S. 558, 605 (2003) (Scalia, J., dissenting); *Hernandez*, 2006 WL 1835429 (Kaye, J., dissenting); Goodridge v, Dep't of Pub. Health, 798 N.E.2d 941, 961-64 (Mass. 2003) (finding procreation or child-rearing justifications unable to meet rational basis scrutiny).

Contrary to the suggestions of some, see Elizabeth F. Emens, *Monogamy's Law: Compulsory Monogamy and Polyamorous Existence*, 29 N.Y.U. REV. L. & SOC. CHANGE 277, 279-80 nn.6, 8, 13-15, recognition of gay marriages would not necessitate acceptance of polygamous marriages. In the latter case, consent is not easily refused. *See Lawrence,* 539 U.S. at 569, 578. Without a valid consent, the government can deny recognition of polygamous marriages because they run the risk of psychological harm to existing spouses. Lack of consent would also distinguish denial of marriage to one's pet or favorite flower. *See* Sunstein, *supra* note 88, at 2083.

256. *See supra* note 158 and accompanying text. In any event, the government might justify its support of only heterosexual marriage as rationally related to its interest in supporting stability where accidental children are possible. *See, e.g.*, Morrison v. Sadler, 821 N.E.2d 15, 24 (Ind. 2005).

257. *See supra* note 159-160 and accompanying text. There is a question whether a ban on gays' right to marry does infringe their privacy rights. This article believes that denying gays the right to marry infringes the individual's choice in intimate sexual relationships, a right recognized in *Lawrence*. *See supra* note 86. If one believes *Lawrence* did not recognize such a right, or that this right is not significantly infringed, the ban on gay marriage would fall under my first presumptive category, *see supra* notes 155-57 and accompanying text, and be valid. One taking that position might suggest that whether or not the state recognizes gay marriage, the individual is free to have sexual relationships with whom they wish. This article would reject that argument as an exercise in semantics. The reality is that depriving gays of the benefits of marriage is punishing them for their sexual preferences. *See* Alaska Civil Liberties Union v. State, 122 P.3d 781, 788 (Alaska 2005).

258. *See, e.g.*, Hernandez v. Robles, No. 05239, 2006 WL 1835429, at *2 (N.Y. July 6, 2006) (counsel identified 316 benefits based upon marriage); *Goodridge*, 798 N.E.2d at 955-57 (Mass. 2003); *Lewis*, 908 A.2d at 196.

259. No. 05239, 2006 WL 1835429, at *21 (N.Y. July 6, 2006).

Even if one agrees that the unwillingness to allow gays to marry deprives them of many benefits without a rational basis unrelated to infringing gays' privacy rights, there remains the question of remedy. It may be that the proper remedy simply is to invalidate each of the benefits dependent on marriage that discriminate against gays. However, if the purpose of such benefits is to encourage stable, committed relationships, the proper relief may be to invalidate bans on gay marriage,[260] or require the enactment of a civil union provision providing gay couples with identical privileges as married heterosexuals.[261]

C. Medical Marijuana

The government's general regulation of recreational drugs is not jeopardized by this article's proposal. Such regulations would be valid under my first presumptive category.[262] The government's interest in preventing harm to others clearly outweighs the indirect and limited infringement on privacy rights and precluding drug enforcement would be a clear break from tradition.[263] The difficult issue is whether the ban should apply to users of recreational drugs such as marijuana for medical purposes. Of course, if there were other reasonable alternatives to marijuana to deal with the medical concerns, the ban should apply to such users. The denial of one drug when equivalent ones are available does not affect the life of the individual one iota more than the ban on marijuana use for recreational users. However, what if the only satisfactory relief from pain is provided by marijuana? This article would put the burden of establishing the unique medical benefits of marijuana on the user. Given the findings of the attorney general that marijuana does not have such unique uses, the burden would be heavy.[264] If the individual user were able to sustain that burden, this article likely would preclude the government from prosecuting such an individual for possession or use of small amounts of the drug.

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260. The conclusion suggested in text is not dependent upon finding gays a protected class. Rather, it follows from a lack of a rational basis for depriving gays of many of the benefits from marriage other than to punish them for their choice of committed, intimate relationship.

261. *See* Baker v. State, 744 A.2d 864, 886 (Vt. 1999); *see also* VT. STAT. ANN. tit. 15, ch. 23; *Lewis*, 908 A.2d at 196.

262. *See supra* notes 155-57 and accompanying text.

263. The life of the recreational user will not be dramatically altered by a ban on recreational drugs, particularly given the availability of prescription drugs and alcohol. On the other hand, the government has an interest in preventing the secondary effects from marijuana use such as theft, assault, driving under the influence and accidental injuries. These effects are concerns even if the individual is using drugs in the privacy of her own home.

264. This article does not address the appropriate forum for an individual user's challenge. It may be that the individual should first challenge the attorney general's findings in an administrative forum. *See* Gonzales v. Raich, 545 U.S. 1, 33 (2005); County of Santa Cruz v. Ashcroft, 279 F. Supp. 2d 1192, 1203 (N.D. Cal. 2003).

Assuming marijuana uniquely relieved pain, a ban on its use would significantly affect the individual's interest in bodily integrity.[265] Given that the government is acting in an area it belongs (commercial regulation, preventing harm to others), a sliding scale analysis is appropriate. By assumption, the extent of the infringement would be great and there would be no satisfactory alternatives available to the individual. Although the infringement would be indirect,[266] the government's interest would not be especially strong. Many of the alleged harms from marijuana use are indirect, speculative, or unlikely to occur. For example, it is not clear what effect marijuana use has on crime and most marijuana users do not get into car accidents.[267] One also might question how strong the government's interest is when it does not regulate alcohol, a substance with very similar effects to marijuana. This is not to suggest that the government has no interest in marijuana enforcement.[268] Rather, that it is not sufficiently strong to outweigh the medical marijuana users' significant privacy interest in controlling their pain.[269] The government might argue that an exemption for medical marijuana would undermine the government's general drug enforcement efforts. Nonetheless, even if this interest was sufficient to outweigh the individual's privacy interest, given the experience with medical marijuana exemptions in other coun-

265. Although the Court has never held that relief from pain implicated an individual's privacy rights, five justices in *Glucksberg*, suggested there was a fundamental right to use physician-recommended medication to alleviate pain and suffering to control the circumstances of their death. *See* Washington v. Glucksberg, 521 U.S. 702, 737 (1997) (O'Connor, J., concurring, joined by Ginsberg, J.); *id.* at 743, 745 (Stevens, J., concurring); *id.* at 777 (Souter, J., concurring); *id.* at 790 (Breyer, J., concurring). In *Regina v. Parker*, 49 O.R.3d 481 (Ont. C.A. 2000), the Canadian court explicitly found that a ban on the use of medical marijuana infringed the individual's right to bodily integrity.

266. Normally, the indirectness of the infringement would suggest that the government had a proper purpose. This is certainly true with respect to the Narcotics Act generally. One wonders, however, whether the inclusion of marijuana as a schedule one drug (a drug subject to abuse, devoid of legitimate medical uses, and lacking accepted safety under medical supervision 21 U.S.C. 812) in 1970 wasn't, at least in part, motivated by animus toward the "hippie" generation.

267. *See* Marcia Tiersky, *Medical Marijuana: Putting the Power Where it Belongs*, 93 NW. U.L. REV. 547, 574 (1999).

268. Even the Canadian Justice who found the use of medical marijuana protected under the Canadian Constitution found that the government did have a valid interest in marijuana enforcement generally. *See* Regina v. Clay, 49 O.R.3d 577, 592 (C.A. Ont. 2000). Obviously, the more dangerous the drug, the stronger the government's interest. Thus, an exemption for marijuana use does not mandate an exemption for cocaine or heroine use.

269. The remaining sliding scale factors are not especially helpful. The users of medical marijuana may be under-represented in the legislature, but legislators likely would view their interests sympathetically. Although there is at least a recent tradition of regulating marijuana, that tradition would have little weight given that the premise on which the tradition was based, the lack of a unique medical use, has changed by assumption. Moreover, an increasing number of states have recognized the medical benefits of marijuana, *see* Note, *Last Resorts and Fundamental Rights: The Substantive Due Process Implications of Prohibitions on Medical Marijuana,* 118 HARV. L. REV. 1985, 2005 n.107 (2005) and the U.N. Single Convention on Narcotic Drugs (1961) which requires marijuana to be listed as a controlled substance, exempts use for medical purposes. *See Clay*, 49 O.R.3d 577, 590 (C.A. Ont. 2000). If anything, the experience in other countries raises questions about the government's need for regulation.

tries,[270] the burden should be on the government to demonstrate the validity of this concern.

D. Criminal Sexual Conduct

This article's proposal will not have a significant practical effect on prosecution of criminal sexual conduct cases. The two primary types of statutes that might be invalidated, fornication and adultery statutes, are currently rarely enforced.[271] Cases involving rape, prostitution, and incest would proceed largely unchanged.

1. Fornication

A fornication statute could not properly be enforced under this article's proposal as to consenting adults having sex in private.[272] Such a statute directly infringes on the individual's privacy rights. Because the government would be acting in an area it did not belong, it would need to demonstrate a justification that was narrowly tailored to achieve a compelling government interest. The government could not credibly claim any such compelling interest given such statutes' history of non-enforcement.[273]

The government could regulate public exhibition of sexual acts. That is an area the government belongs and does not significantly infringe any privacy rights. Such regulation would be presumptively valid. The government also could deny certain benefits to persons having private sexual relations with a consenting adult. For example, a public university could preclude professors from fornicating with students. There are rational reasons unrelated to infringing the professors' privacy rights for such a denial, including fear of sexual harassment suits or perceived

270. *See supra* note 269. For a description of the Canadian system for exemption of medical marijuana, see Marijuana Medical Access Regulations, SOR/2001-227, discussed in R. Wood, [2006] N.B.J. No. 254, 1, 7-8 (N.B.C. June 20, 2006).

271. *See* Karst, *supra* note 146, at 670, 674. The non-enforcement of criminal statutes does not moot the question of its constitutionality. The constitutionality of criminal statutes also can affect civil liability. For example, in *Martin v. Ziherl*, 269 Va. 35 (Va. 2005), the plaintiff alleged that the defendant engaged in sexual relations with her knowing that he was infected with the herpes virus and that he was contagious, and failed to inform her of those facts. If the fornication statute was constitutional, the plaintiff would have been guilty of criminal conduct and, under a Virginia law analogous to the "unclean hands" doctrine, her tort action would have been barred. *Martin*, 269 Va. at 38. The Court found the statute unconstitutional, reversed the lower court decision, and allowed the plaintiff's tort case to proceed. *Id.* at 38, 42-43.

272. If it is true that *Lawrence* recognized a right to private consensual sex between consenting adults, as this article has argued, *see supra* note 86, fornication statutes would be invalid under existing law also. Even if *Lawrence* didn't recognize such a right, it could be argued that the right to beget a child, a right the Court has recognized, *see, e.g.*, Lawrence v. Texas, 539 U.S. 558, 565 (2003); Eisenstadt v. Baird, 405 U.S. 438, 453 & n.10 (1972), necessarily includes the right to do what is a prerequisite for that right. *See* State v. Saunders, 381 A.2d 333, 339-40 (N.J. 1977).

273. *See* Poe v. Ullman, 367 U.S. 497, 554 (Harlan, J., dissenting). The government has a strong interest in ensuring that the sexual relations are truly consensual. However, the rape statutes fully protect that interest.

bias by other students.[274] The school also could want an announced policy so that students wouldn't erroneously confuse faculty concern for sexual advances.

2. Adultery

Adultery statutes directly interfere with private sexual relations between consenting adults. The government, however, could assert that it is seeking to prevent harm to the spouse and children of the adulterer. A sliding scale analysis would then be appropriate. To the extent the adulterer is deprived of sexual relations with someone she cares deeply for, it is a significant infringement. The infringement is direct. The harm asserted by the government is speculative, indirect, and does not involve physical injury. There also would be an issue with fit. If the adulterer has no children and the spouse has not complained or consented, there does not appear to be reason for the statute. On the other hand, divorce is an alternative that would avoid application of the statute, there is a tradition against adultery, and, unfortunately, adulterers probably are not under-represented in the legislature. What might be the deciding factor is the history of non-enforcement of adultery statutes.[275] As with fornication statutes, that seriously undermines the government's assertion of need.[276]

3. Rape

Under this article's proposal a basic rape statute would be valid. A rape statute does not interfere with any privacy right[277] and the government has a strong interest in preventing harm to the non-consenting party. Less clear is the proposal's effect on statutory rape provisions. By definition, statutory rape does not involve consenting adults, and the government has an interest in protecting minors from harm. Nonetheless, the Court has recognized that minors also have constitutional rights, including the right to privacy.[278] A statutory rape statute does burden the minor's right to intimate relations. Although, the minor may be deemed incapable of a valid consent, by analogy to the abortion cases, [279] a statutory rape statute, to be constitutional, might need to have an exemption

274. In the case of a teacher-student relationship, there also would be a question if consent could be easily refused. *See Lawrence*, 539 U.S. at 578; Rubenfeld, *supra* note 13, at 756-57.

275. *See supra* note 271.

276. The government might alternatively justify prohibitions on adultery as a rational condition on the benefit of marriage. However, it is unclear that such a condition is ever specified, and if it was, why the remedy should be criminal prosecution rather than the elimination of the benefit of marriage, i.e., divorce.

277. Rape, by definition, does not involve private consensual conduct.

278. *See* Carey v. Population Serv. Int'l, 431 U.S. 678, 692 (1977).

279. *See, e.g.*, Bellotti v. Baird, 443 U.S. 622, 631-32 (1979); Hodgson v. Minnesota, 497 U.S. 417 (1990). Admittedly, the abortion cases are not a perfect analogy. Statutory rape statutes do not impose the same infringement on the individual as a ban on abortion. Rather than significantly interfering with the mother's bodily integrity and imposing lifetime consequences, a statutory rape statute only requires lesser forms of sexual gratification for a finite period of time.

for when there is parental or judicial consent.[280] The need for such an exemption would be strongest in cases involving little disparity in the ages of the sexual partners. In such cases, intimacy is common and no longer has the same tradition of disapproval.

4. Prostitution

Laws against prostitution should be valid. The government can justify prostitution laws as commercial regulation necessary to preserve public morals and prevent harm to others. Ostensibly, prostitution laws interfere with private intimate relations between consenting adults. However, there is a question whether sex for a fee can be considered truly intimate. Even if such laws were analyzed under the sliding scale, the balance probably would favor the government. The interference with privacy rights are indirect and of limited significance for most.[281] Alternatives are available to individuals—sex with willing participants, masturbation, prostitutes in Nevada or foreign countries, and there is a tradition of laws banning prostitution. The government's concerns with public morality, crime, and health risks are real. Although the injuries are indirect and somewhat speculative, they can be severe. Regulation rather than prohibition can limit these effects. Nevertheless, the government's choice for a complete ban probably should be given deference given the relatively limited infringement of privacy rights and the tradition of criminalizing prostitution.

5. Incest

Laws prohibiting the paradigmatic cases of incest would be unchanged by this article's proposal. Minors are not capable of consent and the government has obvious interests in avoiding the psychological harm to the minor and the potential physical harms to any offspring produced by the incestuous relationship.[282] A more difficult question is how to treat incest involving adults. Here there is no question that there is interference with the individual's right to private intimate relations with consenting adults. The infringement is direct and for some is significant because it deprives the individual of intimate relations with one who may be the love of his or her life. For such a person, there is no substitute and the infringement lasts a lifetime, not merely until adulthood. Nonethe-

280. Under current law, failure to include a parental approval provision also might violate a parents' presumptive right to control their child's upbringing. *See* Troxel v. Granville, 530 U.S. 57, 65-69 (2000).

281. Perhaps a truly repulsive person might argue that prostitution is the only avenue for them to have sex with another. However, it is unclear how the individual could carry his burden of proof and doubtful that a court would want to suggest that someone is incapable of attracting a person of the opposite sex because of their appearance.

282. Obviously, an exemption in the case of parental consent is unnecessary when the parent is the party guilty of incest. Even if the adult is another relative, a parental consent provision should be unnecessary. Unlike in the case of statutory rape, conflicts of interests are involved when the accused is a relative and incest has a long and ongoing tradition of societal disapprobation.

less, the government has an interest in preventing offspring with increased likelihood of birth defects and decreased intelligence. Although such harm is speculative, the physical harm may be severe. The government could also argue that the consent is not valid when one of the incestuous parties is in a position of trust or if consent might otherwise be difficult to refuse.[283] There might be an applied challenge in a case where children are not possible or there is no blood relationship,[284] and there is no reason to question the validity of the consent. However, given the tradition against incest and the deference due to the government, the incest statutes should be facially valid.

E. Artificial Reproduction

The government can regulate the commercial aspects of artificial reproduction with nothing more than a rational basis unrelated to infringing privacy rights. However, a ban on artificial reproduction should be invalid. For many seeking birth artificially, there is no alternative method to have a child. Depriving someone of the parent-child relationship is a tremendous infringement of the individual's privacy rights. It is a direct interference that has lifetime consequences. There also is no tradition of outlawing artificial reproduction techniques. If it were shown that there was a much greater chance of abnormalities through artificial methods of birth or if a population control problem of much greater dimension than currently exists developed, the government might be able to justify a ban on artificial reproduction. However, given the significant infringement of privacy rights, the government would be required to develop a strong record to that effect.

F. Sale of Sex Toys

Several cases have upheld a ban on the sale of sex toys.[285] These cases would remain good law under this article's proposal. A state's ban on the sale of sex toys has a *de minimus* affect on an individual's privacy rights. For most, the use or non-use of sex toys does not significantly

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283. *See supra* note 274.

284. For example, some incest statutes cover relatives by adoption. *See, e.g.*, ALA CODE § 13A-13-3 (2006); LA. REV. STAT. ANN. § 14:78.1 (2006); TENN. CODE ANN. § 39-15-302 (2005); TEX PENAL CODE ANN. § 25.02 (2005). There also is a question whether the possible harms justify prohibitions of incestuous relationship involving first or second cousins. *See* Robin L Bennett, et. al., *Genetic Counseling and Screening of Consanguinous Couples and Their Offspring: Recommendations of the National Society of Genetic Counselors*, 11 J. GENETIC COUNSELING 97 (2002) (first cousins are only 1.7-2.8% more likely than unrelated parents to have children with birth defects or mental retardation); Richard Coniff, *Go Ahead, Kiss Your Cousin: Heck, Marry Her If You Want To*, DISCOVER, Aug. 2002, *available at* http://www.discover.com/issues/aug-02/features/featkiss/ ("first-cousin marriages entail roughly the same increased risk of abnormality that a woman undertakes when she gives birth at 41 rather than at 30"); Denise Grady, *Few Risks Seen to the Children of 1st Cousins*, N.Y.TIMES, April 4, 2002, at A1 (stating that medical geneticists have known "for a long time that there was little or no harm in cousins marrying and having children").

285. *See, e.g.*, Williams v. Att'y Gen. of Ala., 378 F.3d 1232, 1250 (11th Cir. 2004); Pleasureland Museum, Inc. v. Beutter, 288 F.3d 988 (7th Cir. 2002).

affect their life. There are alternatives available to the individual, including traditional sex or manual stimulation. Sex toys generally even can be bought from other states without leaving one's home. The state easily can justify the sales ban as maintaining public morals and eliminating the secondary effects of the sale of such devices.[286] However, a statute prohibiting the private use or possession of sex toys should be problematic.[287] Obviously, private use cannot be directly justified by public morals or the secondary effect of sales. Nor could a state justify the ban on use as necessary to prevent sales. Unlike drugs, the sale of sex toys generally is not done surreptitiously on the streets. Direct enforcement of the sales ban is relatively easy. Although for most, the effect of the ban is not significant, for some, sex toys are used therapeutically to alleviate sexual dysfunction.[288] Absent any reasonable justification, this minor infringement of privacy rights should be sufficient to invalidate a prohibition on use.

CONCLUSION

If consistency has any value, the Court's fundamental rights/right to privacy jurisprudence is bankrupt. The Court fluctuates between alternative tests to determine whether a fundamental right exists. The dominant test in the lower courts, the "tradition test," lacks its promised objectivity, conflicts with the structure of the Constitution, and is incompatible with Court precedent. The standard of review for fundamental rights is even more problematic. The Court's language and practice are inconsistent. Hornbook law states that a law that infringes privacy rights must be narrowly tailored to further a compelling government interest. Yet, in many cases the Court applies an open-ended balancing test. This dichotomy between language and practice confuses lower courts and effectively paralyzes them from finding new fundamental rights.

This article has suggested a Lockean conceptualization of the right to privacy—a pact between individuals and the government to forego certain rights that are necessary to further society's interests, but with a reservation of rights in certain private areas where the government does not belong. The areas the government does not belong include one's thoughts, feelings, bodily integrity, and private intimate relationships. By contrast, the government acts in a proper area when it provides government benefits, regulates commercial activity and activity in public places, and seeks to prevent harm to non-consenting parties. A denial of government benefits is valid unless it has no rational basis other than to harm privacy interests. Government regulation infringing privacy inter-

286. *Pleasureland Museum*, 288 F.3d at 993 n.1.

287. *Cf.* Stanley v. Georgia, 394 U.S. 557, 567-68 (1969) (Prohibition of private possession of obscene material cannot be justified as "necessary incident to statutory schemes prohibiting distribution" of obscene material).

288. *See* Herald, *supra* note 91, at 23-26.

ests is judged by a balancing test which considers the importance of the right infringed, the extent of the infringement, the alternative available to the individual, the directness of the infringement, the government's justification and how closely the regulation fits the government's needs, the likelihood of defects in the democratic process, and tradition. Where the government regulates in an area it belongs and doesn't significantly infringe privacy rights the balance is presumed to allow the regulation unless irrational. Where the government infringes rights in an area it does not belong, the regulation is presumed invalid unless the government demonstrates that its regulation is narrowly tailored to further a compelling government interest. In the majority of cases, where government regulation is in an area it belongs but significantly infringes privacy rights, detailed balancing is required. Balancing is what people do; it is what the Court does.[289] It is time for the Court to openly and honestly acknowledge its practice and provide clear guidance to the lower courts.

The recommended approach was applied to resolve a number of privacy issues facing the courts. Admittedly, one can legitimately disagree with the conclusions reached. Nonetheless, what recommends the suggested methodology is its clarity. Competing interests are identified and the reasons for their weighting are specified. Litigators will know how to build an appropriate factual record, and lower courts will have a blueprint for analysis. Most importantly, a uniform approach would bring some measure of consistency to an area that for too long has lacked it.

289. *See supra* note 144 and accompanying text.