Vanderbilt Law Review

Volume 60 | Issue 1 Article 7

1-2007

Rethinking the Substantive Due Process Right to Privacy: Grounding Privacy in the Fourth Amendment

Mary H. Wimberly

Rethinking the Substantive Due Process Right to Privacy: Grounding Privacy in the Fourth Amendment

I. INTRODUCTION 283
II. BACKGROUND OF THE LAW AND THE CONTROVERSY 286
A. *Fourth Amendment Search and Seizure* 287
1. Historical Roots 287
2. The Exclusionary Rule 290
3. The *Katz* Test: When the Fourth Amendment Applies 292
4. Reasonableness Test 294
5. Limitations to Application 295
B. *Fourteenth Amendment Substantive Due Process* 296
C. *Substantive Due Process Right to Privacy* 298
D. *Controversy over Substantive Due Process Right to Privacy* 302
III. A FOURTH AMENDMENT RIGHT TO PRIVACY 306
A. *Why the Fourth Amendment? The Fourth and Fourteenth Amendments Compared* 307
B. *Reinterpreting the Fourth Amendment to Find Privacy Protection* 309
C. *Applying Mid-Level Scrutiny* 313
D. *Fitting a Fourth Amendment Right to Privacy into the Court's Jurisprudence* 317
IV. CONCLUSION 321

I. INTRODUCTION

Little in the jurisprudence of the Supreme Court has spurred as much controversy as the Court's recognition of a constitutional right to privacy. While implicitly acknowledging that such a right is not listed in the text of the Constitution, in *Griswold v. Connecticut* the Court found that the right existed in the "penumbras" of the

amendments to the Constitution.[1] According to the Court, the right to privacy was present in "emanations" from the guarantees of the Bill of Rights.[2] This reasoning was notoriously extended to abortion in *Roe v. Wade*.[3] In order to invalidate state regulation of abortion, the *Roe* Court characterized abortion as an aspect of privacy,[4] which was a substantive, "fundamental" liberty protected under the Fourteenth Amendment.[5] In both of these decisions, the Court announced that an unlisted, substantive right to privacy was inherent in the Fourteenth Amendment's Due Process Clause.[6] This was an expansion of the Court's previously created doctrine, substantive due process.[7]

These decisions have since sparked a flurry of debate, among both Supreme Court Justices and legal scholars. Some scholars decry a constitutional right to privacy as wholly lacking textual support,[8] while others find such a right consistent with the purposes underlying the text.[9] Several Justices have also criticized these decisions.[10]

---

1. Griswold v. Connecticut, 381 U.S. 479, 484 (1965); *see also* Roe v. Wade, 410 U.S. 113, 152 (1973) ("The Constitution does not explicitly mention any right of privacy.").

2. *Griswold*, 381 U.S. at 484.

3. *Roe*, 410 U.S. at 153.

4. *Id.*

5. *Id.* at 152-53 (quoting Palko v. Connecticut, 302 U.S. 319, 325 (1937)).

6. *Id.*; *Griswold*, 381 U.S. at 484-86.

7. *Roe*, 410 U.S. at 167-68 (Stewart, J., concurring).

8. *See, e.g.*, ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 31 (1990), *quoted in* James W. Ely, Jr., *The Oxymoron Reconsidered: Myth and Reality in the Origins of Substantive Due Process*, 16 CONST. COMMENT. 315, 315 n.3 (1999) (describing substantive due process as a "momentous sham"); EDWARD S. CORWIN, THE TWILIGHT OF THE SUPREME COURT: A HISTORY OF OUR CONSTITUTIONAL THEORY 68-69 (1934), *quoted in* Wayne McCormack, *Economic Substantive Due Process and the Right of Livelihood*, 82 KY. L.J. 397, 401 (1994) (urging a common-sense procedural reading); JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 18 (1980), *quoted in* Ely, *The Oxymoron Reconsidered*, *supra*, at 315 n.1 (arguing that substantive due process is a contradiction in terms).

9. *See, e.g.*, RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION 208 (2004) ("[A] doctrine of 'substantive due process' restores rather than violates the original historic meaning of Section 1 of tbe Fourteenth Amendment. . . ."); Ely, *supra* note 8, at 320 ("Disagreements about the substantive dimensions of due process center on the meaning of the 'law of the land' clause [of the Magna Carta]. . . . [T]he expression 'law of the land' is sufficiently comprehensive to include substantive law as well as procedural safeguards."); McCormack, *supra* note 8, at 416 ("The Supreme Court's handling of a variety of 'procedural' due process cases shows that there is some need for a federal substantive definition of rights of property and liberty.").

10. For example, Justice Scalia voiced his concerns over substantive due process in *United States v. Carlton*, 512 U.S. 26, 39 (1994) (Scalia, J., concurring in the judgment) and *Albright v. Oliver*, 510 U.S. 266, 275-76 (1994) (Scalia, J., concurring). Justice White expressed his concern about cases "recognizing rights that have little textual support in the constitutional language" in *Bowers v. Hardwick*. 478 U.S. 186, 191 (1986), *overruled by* Lawrence v. Texas, 539 U.S. 558 (2003). In his dissent in *Griswold v. Connecticut*, Justice Black also argued against substantive due process. 381 U.S. at 511-13 (Black, J., dissenting). Furthermore, Judge Posner on the Seventh Circuit has also been highly critical of substantive due process, calling it an oxymoron. Ellis v. Hamilton, 669 F.2d 510, 512 (7th Cir. 1982), *quoted in* Ely, *supra* note 8, at 315 n.2.

Justice Scalia in particular has pointed out that the Court's substantive reading does not fit into the literal text of the Due Process Clause, which focuses on procedure.[11] As he has written, the Due Process Clause guarantees only two things: (1) certain procedures, either defined in constitutional text or inherent in the notion of fundamental fairness, and (2) adherence to the substantive guarantees explicitly articulated in specific constitutional provisions.[12] In other words, according to Scalia, the Fourteenth Amendment requires that one's life, liberty, and property not be taken away without due *process*; it does not state that certain *liberties* can never be taken away.[13] Any affirmative constitutional rights that are applicable to the states under this clause must be present in other substantive provisions of the Constitution.[14] The Court cannot manufacture substantive rights under the aegis of "due process,"[15] unless these rights can be traced to a specific constitutional provision.

Proponents of a substantive reading of the Due Process Clause argue that certain fundamental substantive rights are inherent in our system of government.[16] They further argue that the Due Process Clause was intended to have a substantive component.[17] Certain fundamental rights are protected by this clause, including the right to privacy.[18]

While scholars disagree on whether the right to privacy may be grounded in the Fourteenth Amendment, both sides of the debate seem to agree that the Due Process Clause includes substantive rights found in other provisions of the Constitution. This so-called "incorporation theory" provides that substantive provisions of most of the constitutional amendments have been incorporated into the Fourteenth Amendment's Due Process Clause, and therefore are applicable to the states.[19] Thus, if the Court found that one of the

---

11. *Albright*, 510 U.S. at 275-76 (Scalia, J., concurring).

12. *Id.*

13. *Lawrence*, 539 U.S. at 592 (Scalia, J., dissenting).

14. *Albright*, 510 U.S. at 276 (Scalia, J., concurring).

15. *See id.* ("Those requirements are not to be supplemented through the device of 'substantive due process.' ").

16. *See, e.g.*, Washington v. Glucksberg, 521 U.S. 702, 720-21 (1997) ("Due Process Clause specially protects those fundamental rights and liberties which are, objectively, deeply rooted in this Nation's history and tradition." (quotation marks and citation omitted)).

17. *See, e.g.*, BARNETT, *supra* note 9, at 208 ("[A] doctrine of 'substantive due process' restores rather than violates the original historic meaning of Section 1 of the Fourteenth Amendment. . . .").

18. *See, e.g.*, Griswold v. Connecticut, 381 U.S. 479, 485 (1965) ("The present case, then, concerns a relationship lying within the zone of privacy created by several fundamental constitutional guarantees.").

19. For a discussion of the incorporation doctrine regarding criminal procedures, see *Duncan v. Louisiana*, 391 U.S. 145, 149 n.14 (1968).

amendments incorporated into the Due Process Clause provided constitutional protection of privacy, then it could bridge the gap between the two sides of the debate over the substantive due process right to privacy.

The Fourth Amendment offers one such substantive provision, which may appropriately be applied to the states through the Fourteenth Amendment. The Fourth Amendment protects "the right of the people" to be free from "unreasonable searches and seizures."[20] Given that this amendment recognizes an affirmative right and acknowledges the need for people to be secure in their "persons, papers, houses, and effects,"[21] the Court should recognize the underlying privacy values of this amendment. In so doing, the Court should shift its analysis from a privacy right created by substantive due process to a privacy right grounded in the Fourth Amendment.

The Fourth Amendment speaks in terms of reasonableness. Reasonableness tests, by their nature, require some sort of balancing of interests. Therefore, the Court should borrow from its Equal Protection Clause jurisprudence and apply mid-level scrutiny to laws that invade this Fourth Amendment right to privacy.[22] In other words, the Court should consider whether the law substantially relates to an important, legitimate government interest.[23] Where there is no underlying legitimate interest, the intrusion is unreasonable, and the law therefore fails mid-level scrutiny.

Part II of this Note will provide a brief overview of the current law governing the search and seizure provision of the Fourth Amendment and the Fourteenth Amendment's substantive due process right to privacy. It will also describe the controversy surrounding substantive due process. Part III of this Note will offer a possible solution to this controversy by introducing a right to privacy based in the Fourth Amendment. This Note will then explain why mid-level scrutiny is the appropriate level of protection for the Fourth Amendment right to privacy. Finally, this Note will conclude by situating mid-level scrutiny within the Court's privacy jurisprudence.

II. BACKGROUND OF THE LAW AND THE CONTROVERSY

This Part provides background information about the law governing the doctrines discussed in this Note. It will begin with a

20. U.S. CONST. amend. IV.

21. *Id.*

22. *See* Clark v. Jeter, 486 U.S. 456, 461 (1988) ("To withstand intermediate scrutiny, a statutory classification must be substantially related to an important governmental objective.").

23. *See id.* at 461-62 (explaining the mid-level, or intermediate, scrutiny test).

discussion of the search and seizure provision of the Fourth Amendment, including its historical roots and the major Supreme Court decisions interpreting it. This Part will then explain the origins of substantive due process and the substantive due process right to privacy. Finally, this Part will offer a brief description of the controversy surrounding the substantive due process right to privacy.

A. Fourth Amendment Search and Seizure

1. Historical Roots

The Fourth Amendment was written with a clear purpose: a purpose based upon the colonial experience. The values underlying this amendment, as held by the American colonists, contributed in part to the American Revolution.[24] American colonists were extremely distrustful of two investigatory powers held by English officials: general warrants and writs of assistance.[25] These two powers were used to find "traitorous writings against the king of England or smuggled goods," and gave governmental officials legal authority to trespass on private property.[26] In 1761, Boston lawyer James Otis, Jr., representing Boston merchants, sued to stop the use of these legal devices.[27] In his argument Otis famously remarked:

> Now one of the most essential branches of English liberty, is the freedoms of one's house. A man's house is his castle; and while he is quiet, he is as well guarded as a prince in his castle. This writ, if it should be declared legal, would totally annihilate this privilege.[28]

The young John Adams attended Otis's oral argument, and later described this lawsuit as the ideological beginning of the American Revolution.[29]

After the American Revolution, the Framers sought to end the writ and general warrant system. This was the historical purpose

---

24. *See* PHILLIP A. HUBBART, MAKING SENSE OF SEARCH AND SEIZURE LAW: A FOURTH AMENDMENT HANDBOOK 37-38 (2005) ("[T]he U.S. Supreme Court has stated that the Crown's use of general warrants or writs of assistance during this period 'was a motivating factor behind the Declaration of Independence.' " (quoting Berger v. New York, 388 U.S. 41, 58 (1967)).

25. DARIEN A. MCWHIRTER, EXPLORING THE CONSTITUTION SERIES: SEARCH, SEIZURE, AND PRIVACY 1 (1994).

26. *Id.*

27. *Id.* at 2.

28. HUBBART, *supra* note 24, at 366 (quoting Transcript of Oral Argument of James Otis Jr. Against the General Writs of Assistance, Petition of Lechmere (February 1761)). Otis's argument in its entirety is presented in Appendix II of Professor Hubbart's book. *Id.* at 365-67.

29. JOHN CLARK RIDPATH ET AL., JAMES OTIS, THE PRE-REVOLUTIONIST at Chapter II (1998), *available at* http://www.worldwideschool.org/library/books/hst/biography/jamesotisthepre%2D revolutionist/chap3.html (quoting a speech by John Adams).

behind the Fourth Amendment.[30] Madison submitted the original proposal in June of 1789[31] and it was similar to provisions in the original constitutions of Virginia, New York, North Carolina, Massachusetts, New Hampshire, Pennsylvania, and Vermont.[32]

There was some debate in the First Congress as to whether this amendment should be made up of one clause, as proposed by Madison, or two clauses, as proposed by the Virginia Convention.[33] The one-clause version "provided, in effect, that the subject right could only be violated by the issuance of general warrants—thereby confining the guaranteed freedom to a prohibition against general warrants."[34] On the other hand, the two-clause version "widened the scope of the guarantee to protect a general freedom from unreasonable searches and seizures, and expressly outlawed general warrants as, in effect, an infringement of such freedom."[35] The House eventually adopted the two-clause version.[36] The final version therefore provided for a general right to be free from unreasonable searches, as well as an express prohibition of general warrants.

The first Supreme Court decision to interpret the Fourth Amendment came almost 100 years after its adoption, in the 1886 case *Boyd v. United States*.[37] In *Boyd*, a federal District Attorney filed a civil information for seizure and forfeiture of property imported into the United States in violation of the customs revenue laws.[38] The District Judge, under the authority of the Act of June 22, 1874, issued an order requiring the claimants to produce the invoice for the allegedly illegally imported goods.[39] Though this was a civil proceeding, and there was no traditional search or seizure, the Court had to consider whether "compulsory production of a man's private papers in a proceeding to forfeit his property for alleged fraud against

---

30. *See* HUBBART, *supra* note 24, at 75-76. Hubbart wrote:

> [T]he two purposes that the Framers wished to accomplish in adopting the Fourth Amendment . . . were: (1) to end the abuse of general exploratory searches wrought by the general writs of assistance regime by constitutionalizing the special writs or special warrants practice of the common law; and (2) to empower the federal courts to enforce the Fourth Amendment as a legal guarantee.

Id. at 75.

31. THE COMPLETE BILL OF RIGHTS: THE DRAFTS, DEBATES, SOURCES, AND ORIGINS 223 (Neil H. Cogan ed., 1997).

32. *Id.* at 233-35.

33. *Id.* at 225 (quoting the House Debates on August 17, 1789).

34. HUBBART, *supra* note 24, at 75-76.

35. *Id.*

36. THE COMPLETE BILL OF RIGHTS, *supra* note 31, at 225 (quoting the House Resolution of August 24, 1789).

37. Boyd v. United States, 116 U.S. 616 (1886).

38. *Id.* at 617, 634.

39. *Id.* at 618.

the revenue laws [constitutes] an 'unreasonable search and seizure' within the meaning of the Fourth Amendment of the Constitution[.]"[40]

The Court concluded that both the Fourth and Fifth Amendments were implicated by this question.[41] The two amendments "run almost into each other," according to the Court, where there is "any forcible and compulsory extortion of a man's own testimony or of his private papers to be used as evidence to convict him of crime or to forfeit his goods. . . ."[42] Both involve "compelling a man to produce evidence against himself."[43] Even though there was no actual search or seizure in the *Boyd* case, and the proceeding was not criminal, the Court nevertheless found that where a government action contains the "substance and essence" of an actual search and seizure, and "effects their substantial purpose," a search and seizure has occurred.[44] In explaining its reasoning, the Court applied the doctrines of long usage[45] and liberal construction[46] and held:

> The principles laid down in this opinion affect the very essence of constitutional liberty and security. They reach farther than the concrete form of the case then before the court, with its adventitious circumstances; they apply to all invasions on the part of the government and its employes [sic] of the sanctity of a man's home and the privacies of life. It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offence; but it is the invasion of his indefeasible right of personal security, personal liberty and private property. . . .[47]

Thus the Court would not be bound by an overly technical constitutional interpretation. Instead, the Court demonstrated an interest in protecting the underlying value of the Fourth and Fifth Amendments: privacy.[48]

---

40. *Id.* at 622.

41. *Id.* at 621.

42. *Id.* at 630.

43. *Id.* at 630-31. For further explanation of the interrelated nature of the two amendments, see *id.* at 633-35.

44. *Id.* at 635.

45. *See id.* at 622 ("No doubt long usage, acquiesced in by the courts, goes a long way to prove that tbere is some plausible ground or reason for it in the law, or in the historical facts which have imposed a particular construction of the law favorable to such usage.").

46. *See id.* at 635. The Court described the doctrine of liberal construction:

> [C]onstitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon.

Id.

47. *Id.* at 630.

48. M.C. SLOUGH, PRIVACY, FREEDOM, AND RESPONSIBILITY 46 (1969).

2. The Exclusionary Rule

After *Boyd*, cases involving the Fourth Amendment were few and far between until the 1960s.[49] There were, however, a few significant cases during this quiet period. The first major case, *Weeks v. United States*,[50] considered how to handle violations of the Fourth Amendment in criminal trials. The Court noted that if evidence illegally obtained could be used against a criminal defendant at trial, then "the protection of the Fourth Amendment declaring his right to be secure against such searches and seizures is of no value, and, so far as those thus placed are concerned, might as well be stricken from the Constitution."[51] The Court's solution to this problem was to create what has become known as the "exclusionary rule."[52] Under this rule, evidence obtained through an unreasonable search or seizure of a criminal defendant's person or property may not be used at trial against that defendant.[53] This was intended as a prophylactic rule[54] and demonstrated the Court's strong interest in enforcing the Fourth Amendment's guarantees.

Over the next forty years, however, a majority of the Court backed away from this strong enforcement policy. In its 1928 decision *Olmstead v. United States*, the Court concluded that wiretapping was not a search or seizure.[55] The Court reasoned that the Fourth and Fifth Amendments were exceptions to the common law rule that "the admissibility of evidence is not affected by the illegality of the means by which it was obtained."[56] Where the amendments did not apply, the common law rule governed.[57] The Court therefore had to decide whether the Fourth or Fifth Amendments applied to the case. In

---

49. As Professor Hubbart wrote:

> Over 400 cases on the Fourth Amendment were decided by the U.S. Supreme Court from 1791-2004. Only five of these cases were decided prior to 1900, and only 91 were decided in the twentieth century prior to the landmark decision of *Mapp v. Ohio* [1961], which applied the Fourth Amendment exclusionary rule to the states. The balance, over 300 cases or 75% of the total, are post-*Mapp* decisions rendered during a scant 43 year period, 1961-2004.

HUBBART, *supra* note 24, at 13 (footnotes omitted). For a summary review of all major Fourth Amendment Supreme Court cases, see WILLIAM W. GREENHALGH, THE FOURTH AMENDMENT HANDBOOK: A CHRONOLOGICAL SURVEY OF SUPREME COURT DECISIONS (2d ed. 2003).

50. Weeks v. United States, 232 U.S. 383 (1914).

51. *Id.* at 393.

52. *Id.* at 398.

53. *Id.*

54. Stone v. Powell, 428 U.S. 465, 482 (1976); HUBBART, *supra* note 24, at 336.

55. Olmstead v. United States, 277 U.S. 438, 464 (1928), *overruled by* Katz v. United States, 389 U.S. 347 (1967).

56. *Id.* at 467.

57. *Id.*

making this analysis, the Court found that the Fifth Amendment did not apply unless the Fourth Amendment had been violated,[58] and the Fourth Amendment had not been violated because there was "no entry of the houses of [sic] offices of the defendants."[59] Therefore, the common law rule was the default, and the evidence obtained through wiretapping was admissible.[60]

This opinion was a departure from the doctrine of liberal construction previously used in *Boyd*. While the *Olmstead* majority paid lip service to this doctrine, the Court went on to say, "[The doctrine of liberal construction] can not justify enlargement of the language employed beyond the possible practical meaning of houses, persons, papers, and effects, or so to apply the words search and seizure as to forbid hearing or sight."[61] This rigid interpretation of the constitutional language prompted Justice Brandeis to dissent from the holding in the case, and his dissent has since become famous for emphasizing the values underlying the Fourth Amendment.[62] Justice Brandeis wrote:

> [The Framers of the Constitution] conferred, as against the Government, *the right to be let alone*—the most comprehensive of rights and the right most valued by civilized men. To protect that right, every unjustifiable intrusion by the Government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment. And the use, as evidence in a criminal proceeding, of facts ascertained by such intrusion must be deemed a violation of the Fifth.[63]

Here, Justice Brandeis recognized the Fourth Amendment privacy values that were first articulated by the Court in *Boyd*, and further explained the interplay between the Fourth and Fifth Amendments. In his view, where the Fourth Amendment was violated, the Fifth Amendment constitutionally mandated the exclusionary rule.

About twenty years later, in *Wolf v. Colorado*,[64] the Court took one step forward and two steps back in its Fourth Amendment jurisprudence. In its step forward, the Court found that the Fourteenth Amendment extended the protections of the Fourth Amendment to the states, and described "[t]he security of one's privacy against arbitrary intrusion by the police" as "the core of the

---

58. *Id.* at 462.

59. *Id.* at 464.

60. *Id.* at 468-69.

61. *Id.* at 465.

62. MCWHIRTER, *supra* note 25, at 16-17.

63. *Olmstead*, 277 U.S. at 478-79 (Brandeis, J., dissenting) (emphasis added).

64. Wolf v. Colorado, 338 U.S. 25 (1949), *overruled on other grounds by* Mapp v. Ohio, 367 U.S. 643 (1961).

Fourth Amendment."[65] Unfortunately, in its two steps back, the Court held, "[I]n a prosecution in a State court for a State crime the Fourteenth Amendment does not forbid the admission of evidence obtained by an unreasonable search and seizure."[66] In other words, the exclusionary rule was not applicable to the states. Justices Douglas, Murphy, and Rutledge each dissented from this holding. Justice Rutledge argued in his dissent that "the Amendment without the sanction is a dead letter," and emphasized, "The view that the *Fourth Amendment itself* forbids the introduction of evidence illegally obtained in federal prosecutions is one of long standing and firmly established."[67] Though this argument differed slightly from Brandeis's finding that the Fifth Amendment demanded exclusion, both Justices believed that the exclusionary rule was constitutional.

Justice Rutledge's view was finally adopted by a majority of the Court in the 1961 decision *Mapp v. Ohio*.[68] The Court held, "[A]ll evidence obtained by searches and seizures in violation of the Constitution is, *by that same authority*, inadmissible in a state court."[69] Thus, the exclusionary rule was constitutional and applied to the states as well as the federal government.[70]

3. The *Katz* Test: When the Fourth Amendment Applies

Once the Court decided to exclude evidence obtained in violation of the Fourth Amendment, it then had to figure out how to recognize when evidence had been unlawfully obtained. This

---

65. *Id.* at 27-28.

66. *Id.* at 33.

67. *Id.* at 47-48 (Rutledge, J., dissenting) (emphasis added).

68. *Mapp*, 367 U.S. at 660.

69. *Id.* at 655 (emphasis added).

70. The constitutionality of the exclusionary rule was called into question in the Court's 1976 decision, *Stone v. Powell*, where the Court held, "[W]here the State has provided an opportunity for full and fair litigation of a Fourth Amendment claim, the Constitution does not require that a state prisoner be granted federal habeas corpus relief on the ground that evidence obtained in an unconstitutional search or seizure was introduced at his trial." Stone v. Powell, 428 U.S. 465, 481-82 (1976). The Court based its reasoning on the fact that "[p]ost-*Mapp* decisions have established that the rule is not a personal constitutional right." *Id.* at 486. However, this case appears to be the outlier. As Justice Brennan pointed out in his dissent:

> However the Court reinterprets *Mapp*, and whatever the rationale now attributed to *Mapp's* holding or the purpose ascribed to the exclusionary rule, the prevailing constitutional *rule* is that unconstitutionally seized evidence *cannot be admitted* in the criminal trial of a person whose federal constitutional rights were violated by the search or seizure. The erroneous admission of such evidence is a violation of the Federal Constitution—*Mapp* inexorably means at least this much, or there would be no basis for applying the exclusionary rule in state criminal proceedings. . . .

Id. at 510 (Brennan, J., dissenting) (emphasis in original). Since the exclusionary rule is still applied to the states, it must be constitutional in origin.

determination required two threshold questions: When does the Fourth Amendment apply, and how is it violated?[71] The Court provided an answer to the first question in its 1967 decision, *Katz v. United States*.[72] In *Katz*, the defendant was convicted in federal court of violating a federal law that prohibited transmitting wager information over the telephone.[73] At trial, the Government introduced "evidence of the petitioner's end of telephone conversations, overheard by FBI agents who had attached an electronic listening and recording device to the outside of the public telephone booth from which he had placed his calls."[74] The petitioner claimed that the trial judge should have excluded this recording, as it violated the Fourth Amendment.[75]

Like the *Olmstead* case, there was no traditional search or seizure of the defendant or his personal effects. Unlike the *Olmstead* case, however, the Court refused to be bound by an overly technical reading of the Fourth Amendment that limited its scope to a person's home. As the *Katz* Court noted, "[T]he Fourth Amendment protects people, not places."[76] Therefore, the Court held, "The Government's activities in electronically listening to and recording the petitioner's words violated the privacy upon which [the defendant] justifiably relied while using the telephone booth and thus constituted a 'search and seizure' within the meaning of the Fourth Amendment."[77] Since the FBI agents conducted this search and seizure without a warrant,[78] and warrantless searches are "*per se* unreasonable"[79] (subject to only a few exceptions, none of which applied), the Court reversed the conviction.[80]

Justice Harlan wrote a concurrence to clarify the exact legal test that the *Katz* majority was using, and his opinion has subsequently been treated by courts and scholars as the applicable law.[81] While agreeing with the majority that the Fourth Amendment protects people and not places, Justice Harlan pointed out that the

71. Charles E. Moylan, Jr., *Introduction* to GREENHALGH, *supra* note 49, at 1.

72. Katz v. United States, 389 U.S. 347 (1967).

73. *Id.* at 348.

74. *Id.*

75. *Id.*

76. *Id.* at 351.

77. *Id.* at 353.

78. *Id.* at 356.

79. *Id.* at 357.

80. *Id.* at 359.

81. Because Justice Harlan's concurrence provides a clearer analytical model than the majority's opinion, it has subsequently been used by the Court as the *Katz* test. *See, e.g.*, Kyllo v. United States, 533 U.S. 27, 33 (2001) (citing Harlan's concurrence as the applicable law); Minnesota v. Carter, 525 U.S. 83, 97 (1998) (Scalia, J., concurring) (describing the law in *Katz* as the "test enunciated by Justice Harlan's separate concurrence").

analysis still "requires reference to a 'place.' "[82] Therefore, to answer the question of when the Fourth Amendment applies, Justice Harlan wrote, "[T]here is a twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable.' "[83] If both of these questions are answered in the affirmative, then the Fourth Amendment applies.

4. Reasonableness Test

Once the Court has determined that the Fourth Amendment applies, then it must decide whether the contested search or seizure was reasonable.[84] The Court has taken a variety of approaches in determining whether a search is reasonable.[85] Generally, a warranted search is reasonable, so long as the warrant is valid and executed properly.[86] However, if the warrant is not valid because it lacked probable cause, then the search is valid only so long as the officer executing the warrant was acting in good faith.[87] In such a case, the determination of reasonableness is based largely on the perceptions of the officer executing the warrant.[88]

Where there is no warrant, or the validity of the existing warrant is in question, the Court sometimes invokes a balancing test to determine the reasonableness of the search.[89] This balancing test is used to determine whether the exclusionary rule applies,[90] and

---

82. *Katz*, 389 U.S. at 361 (Harlan, J., concurring).

83. *Id.*

84. U.S. CONST. amend. IV.

85. *See* HUBBART, *supra* note 24, at 85-108 (describing three main approaches: historical, balancing-of-the-interests, and common law reasoning).

86. This would meet the requirements of the second clause of the Fourth Amendment.

87. United States v. Leon, 468 U.S. 897, 920-22 (1984); United States v. Peltier, 422 U.S. 531, 542 (1975).

88. *Leon*, 468 U.S. at 922-23. As Justice Stevens pointed out, however, this formulation allows an unreasonable search to be made reasonable based on the good faith of the executing officer. *Id.* at 960 (Stevens, J., dissenting).

89. The Court fluctuates somewhat on the importance of the warrant, depending on the facts of the case. For example, in *Katz v. United States*, the Court wrote, "[S]earches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions." Katz v. United States, 389 U.S. 347, 357 (1967). For lists of the cases invoking this formulation, see HUBBART, *supra* note 24, at 161-64 nn.1-3. On the other hand, the Court has also recognized a general balancing approach for warrantless searches: "Thus, the permissibility of a particular law enforcement practice is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests." Delaware v. Prouse, 440 U.S. 648, 654 (1979) (citations omitted).

90. *See, e.g.*, *Leon*, 468 U.S. at 920-21 (using language indicative of balancing when determining whether the exclusionary rule applies); *Peltier*, 422 U.S. at 542 (same).

considers two factors: "(1) the high importance of individual privacy or personal security and the degree of intrusion into that interest represented by the search or seizure in question, as against (2) the promotion of legitimate governmental interests served by such intrusion."[91] The Court demonstrated the balancing test in *Winston v. Lee*:

> Where the Court has found a lesser expectation of privacy . . . the Court has held that the Fourth Amendment's protections are correspondingly less stringent. Conversely, however, the Fourth Amendment's command that searches be "reasonable" requires that when the State seeks to intrude upon an area in which our society recognizes a significantly heightened privacy interest, a more substantial justification is required to make the search "reasonable." Applying these principles, we hold that the proposed search in this case [for a bullet lodged inside the defendant that could implicate him in a robbery] would be "unreasonable" under the Fourth Amendment.[92]

Two elements of this approach should be emphasized. First, the government must have a legitimate interest in the information.[93] Second, the more intrusive a search or seizure is, the greater scrutiny the Court will use in determining whether the search or seizure was reasonable.[94] Thus, questions of legitimacy and reasonableness are inherent in the Court's Fourth Amendment analysis.

5. Limitations to Application

Like most provisions of the Constitution, government action, not private action, is necessary to implicate the guarantees of the Fourth Amendment. A government acts through its employees or through private individuals who function as "agent[s] of the Government or with the participation or knowledge of any governmental official."[95] The Fourth Amendment is not implicated when an independent, private third party conducts the actual search.[96] As explained by the Court in *Katz*, "[T]he protection of a person's *general* right to privacy—his right to be let alone by other people—is, like the protection of his property and of his very life, left

---

91. HUBBART, *supra* note 24, at 97. For a list of cases using the balancing approach, see *id.* at 97 n.41.

92. Winston v. Lee, 470 U.S. 753, 767 (1985) (citations omitted).

93. HUBBART, *supra* note 24, at 97.

94. *See, e.g.*, Kyllo v. United States, 533 U.S. 27, 31 (2001) (emphasizing the "core" of the Fourth Amendment as a "right of a man to retreat into his own home and there be free from unreasonable governmental intrusion" (citation omitted)); *Winston*, 470 U.S. at 759 ("A compelled surgical intrusion into an individual's body for evidence, however, implicates expectations of privacy and security of such magnitude that the intrusion may be 'unreasonable' even if likely to produce evidence of a crime.").

95. United States v. Jacobsen, 466 U.S. 109, 113 (1984) (quoting Walter v. United States, 447 U.S. 649, 662 (1980) (Blackmun, J., dissenting)).

96. *Id.*

largely to the law of the individual States."[97] There is no constitutional right to be free from intrusion by other lay people—there is only protection from *governmental* invasions.

Additionally, the individual seeking relief from the unlawful search or seizure must be the same person whose "rights were violated by the challenged search or seizure."[98] The defendant in a criminal prosecution cannot assert the Fourth Amendment rights of a third person,[99] even if that third person is a co-conspirator.[100] The Court has therefore rejected the concept of "target standing," whereby a defendant may assert Fourth Amendment protections merely because that defendant is the target of a criminal prosecution.[101] The defendant must have "personal standing" to challenge a search or seizure.[102]

B. Fourteenth Amendment Substantive Due Process

The doctrine of substantive due process, on the other hand, is based on the Due Process Clause of the Fourteenth Amendment and dictates that certain liberties are, to varying degrees, protected from governmental intrusion.[103] In other words, certain liberties that are not explicitly listed in the Constitution are nevertheless protected by substantive due process. The degree of protection depends on the relative importance of the liberty interest involved. There are two levels of judicial scrutiny available: the rational basis test and the compelling interest test.[104] The default is the rational basis test, which asks: (1) whether there is a rational legislative objective underlying the contested state regulation, and (2) whether there is a rational or direct relation between the chosen regulation and the legislative objective.[105] If a right is "fundamental," however, a court will apply the

97. Katz v. United States, 389 U.S. 347, 350-51 (1967).

98. United States v. Padilla, 508 U.S. 77, 81 (1993) (citations omitted).

99. *Id.*

100. *Id.* at 82.

101. Rakas v. Illinois, 439 U.S. 128, 132-34 (1978).

102. *Id.*

103. Tennessee v. Lane, 541 U.S. 509, 562 (2004) (Scalia, J., dissenting); Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 846-47 (1992).

104. *See* Webster v. Reproductive Health Services, 492 U.S. 490, 548 (1989) (Blackmun, J., concurring in part and dissenting in part) ("[These tests] are judge-made methods for evaluating and measuring the strength and scope of constitutional rights or for balancing the constitutional rights of individuals against the competing interests of government.").

105. *See* Romer v. Evans, 517 U.S. 620, 632 (1996) ("In the ordinary case, a law will be sustained if it can be said to advance a legitimate government interest, even if the law seems unwise or works to the disadvantage of a particular group, or if the rationale for it seems tenuous."); Williamson v. Lee Optical of Okla., Inc., 348 U.S. 483, 488 (1955) (explaining that the

compelling interest test, which requires that the law is "narrowly tailored to serve a compelling state interest."[106] The rational basis test is highly deferential and is easily met, while the compelling interest test is quite demanding and rarely met. At times, however, these two tests are not so clearly distinguishable.

According to several scholars,[107] the first appearance of substantive due process was in the now famous 1857 Dred Scott case.[108] The Court most notoriously used substantive due process to strike down a state regulation in *Lochner v. New York*.[109] In *Lochner*, the Court professed to use the rational basis test to invalidate a state law that regulated the number of hours that a baker could work per week.[110] Justice Peckham, writing for the majority, found that there was "no such direct relation to and no such substantial effect upon the health of the employe [sic], as to justify us in regarding the section as really a health law."[111] The Court found that the law was an impermissible regulation of terms of employment, which violated the freedom of contract.[112] This decision was not at all deferential to the choices of the state legislature, and seemed to apply something greater than the rational basis test. As a result, Justice Holmes dissented from the Court's opinion, rejecting the majority's decision to second-guess the legislature.[113] He noted that the temptation for courts to legislate is particularly strong in the area of substantive due process, and should therefore be avoided.[114]

The concerns that Justice Holmes voiced in his dissent about the demanding nature of the *Lochner* version of the rational basis test

---

rational basis test looks for two things: "an evil at hand for correction," and a finding that "it might be thought that the particular legislative measure was a rational way to correct it").

106. Reno v. Flores, 507 U.S. 292, 302 (1993).

107. *Casey*, 505 U.S. at 998 (Scalia, J., concurring in the judgment in part and dissenting in part) (quoting DAVID P. CURRIE, THE CONSTITUTION IN THE SUPREME COURT 271 (1985)); BORK, *supra* note 8, at 31. *But see* McCormack, *supra* note 8, at 406 (arguing that, in *Nebbia v. New York*, 291 U.S. 502 (1934), the Court indicated that *Lochner* was an improper use of judicial power, and this created the need to distinguish permissible procedural due process from illegitimate substantive due process). The Due Process Clause itself was derived from Chapter 39 of the Magna Carta. Ely, *supra* note 8, at 320.

108. Scott v. Sandford, 60 U.S. 393 (1857).

109. Lochner v. New York, 198 U.S. 45 (1905), *abrogated by* West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937).

110. *Id.* at 52, 56-57.

111. *Id.* at 64.

112. *Id.*

113. *See id.* at 75 (Holmes, J., dissenting) (writing that he did not believe it was his duty to interfere with the decisions of the majoritarian legislature).

114. *See id.* at 76 ("I think that the word liberty in the Fourteenth Amendment is perverted when it is held to prevent the natural outcome of dominant opinion. . . .").

were later vindicated.[115] The *Lochner* majority's rational basis test was clearly no longer good law in *Williamson v. Lee Optical of Oklahoma, Inc.*[116] Although the Court found Oklahoma's law "needless" and "wasteful," it nevertheless held, "[I]t is for the legislature, not the courts, to balance the advantages and disadvantages of the new requirement."[117] The Court further stated, "The day is gone when this Court uses the Due Process Clause of the Fourteenth Amendment to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought."[118]

Despite concerns that the judiciary might encroach upon the legislature, the Justices of the Supreme Court have seemed willing to make an exception for particularly important rights. For example, even Justice Holmes wrote in his *Lochner* dissent:

> I think that the word liberty in the Fourteenth Amendment is perverted when it is held to prevent the natural outcome of a dominant opinion, unless it can be said that a rational and fair man necessarily would admit that the statute proposed would infringe fundamental principles as they have been understood by the traditions of our people and our law.[119]

The Court subsequently brought this exception into being by recognizing privacy as a fundamental right, protected by substantive due process.[120]

C. Substantive Due Process Right to Privacy

While the individual's interest in privacy certainly predates the Constitution and the Bill of Rights,[121] courts did not immediately associate privacy interests with legal protection. The first American legal scholars[122] to recognize this interest as an independent legal

---

115. In *Ferguson v. Skrupa*, 372 U.S. 726, 730 (1963), the Court found:

> The doctrine that prevailed in *Lochner*, *Coppage*, *Adkins*, *Burns*, and like cases—that due process authorizes courts to hold laws unconstitutional when they believe the legislature has acted unwisely—has long since been discarded. We have returned to the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws.

116. Williamson v. Lee Optical of Oklahoma, Inc., 348 U.S. 483, 487-88 (1955).

117. *Id.* at 487.

118. *Id.* at 488.

119. *Lochner*, 198 U.S. at 76 (Holmes, J., dissenting) (quotation marks omitted).

120. Griswold v. Connecticut, 381 U.S. 479, 484-85 (1965).

121. *Id.* at 486.

122. 62A AM. JUR. 2D *Privacy* § 2 (2006). This entry indicated:

> [I]t was not until the publication in 1890 of a law review article by Warren and Brandeis (later Justice Brandeis) that tbe right was introduced and defined as an independent right and the distinctive principles upon which it is based were formulated. That article . . . synthesized at one stroke a whole new category of legal rights and initiated a new field of jurisprudence.

"right" were Samuel Warren and Louis Brandeis in *The Right to Privacy*.[123] In this article, Warren and Brandeis discussed how the right to privacy had been latently present in the common law, ancillary to property rights.[124] The scholars argued that the courts should recognize and protect the interest in privacy as a distinct right.[125]

After this article's publication, courts began to formally recognize the invasion of privacy as a cause of action in tort.[126] As Professor M.C. Slough noted, "Within less than three years following publication of the Warren-Brandeis article, two lower courts had at least conceded the existence of a legal right to privacy."[127] Congress followed suit, enacting a series of laws to delineate the realms of privacy that a person has the ability to defend through suits in tort. Some of the major federal statutes involving privacy rights[128] include the Fair Credit Reporting Act,[129] the Privacy Act of 1974,[130] the Right to Financial Privacy Act,[131] the Video Privacy Protection Act,[132] and the Computer Matching and Privacy Protection Act of 1988.[133] Each of these acts regulates the use and distribution of personal information for reasons other than those for which the information was originally collected.[134] However, these acts are limited in scope: They protect against certain uses of information under statutory, not constitutional, authority. Thus, they are not generally applicable to state matters.

In its pivotal 1965 decision, *Griswold v. Connecticut*, the Supreme Court elevated the right to privacy beyond statutory and tort

---

Id.

123. Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

124. *See id.* at 204 ("Although the courts have asserted that they rested their decisions on the narrow grounds of protection to property, yet there are recognitions of a more liberal doctrine.").

125. *See id.* at 205 ("But if privacy is once recognized as a right entitled to legal protection, the interposition of the courts cannot depend on the particular nature of the injuries resulting.").

126. 62A AM. JUR. 2D *Privacy* § 5 (2006). *See also supra* note 18 (listing applicable cases).

127. SLOUGH, *supra* note 48, at 31.

128. These are the statutes listed in 62A AM. JUR. 2D *Privacy* § 19 (2006). For a more detailed description of the federal privacy statutes, see Joel R. Reidenberg, *Privacy in the Information Economy: A Fortress or Frontier for Individual Rights?*, 44 FED. COMM. L.J. 195, 209-20 (1992) (Section II of the Article).

129. 15 U.S.C. §§ 1681a-x (2000).

130. 5 U.S.C. § 552a (2000).

131. 12 U.S.C. § 3401 (2000).

132. 18 U.S.C. § 2710 (2000).

133. 5 U.S.C. § 552a (2000) (amending the Privacy Act of 1974).

134. *See* 62A AM. JUR. 2D *Privacy* § 19 (2006) (listing and describing major federal privacy laws).

law into the realm of constitutional protection.[135] On appeal was a lower court decision in which the executive and medical directors of the Planned Parenthood League of Connecticut were found guilty, as accessories, of violating a law prohibiting the use of contraceptives.[136] Though the "right to privacy" is found nowhere in the language of the Constitution,[137] the Court found that it was nevertheless present in "emanations" from the various constitutional guarantees.[138] As the Court stated, "[S]pecific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance . . . [and these v]arious guarantees create zones of privacy."[139] The regulation of contraception was therefore an unwarranted intrusion into this zone of privacy, and was held unconstitutional.[140]

The Court reaffirmed this holding in its 1973 decision, *Roe v. Wade*.[141] Plaintiff Roe was an unmarried pregnant woman who wished to have an abortion without being subject to state criminal prosecution.[142] While admitting that "the Constitution does not explicitly mention any right of privacy,"[143] the Court, consistent with its finding in *Griswold*, held that "personal rights that can be deemed 'fundamental' or 'implicit in the concept of ordered liberty' are included in [the] guarantee of personal privacy."[144] Thus, the Court concluded:

> This right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, *as we feel it is*, or, as the District Court determined, in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy.[145]

---

135. *See* Griswold v. Connecticut, 381 U.S. 479, 484-86 (1965) ("[T]he right of privacy which presses for recognition here is a legitimate one.").

136. *Id.* at 480.

137. Roe v. Wade, 410 U.S. 113, 152 (1973).

138. *Griswold*, 381 U.S. at 484.

139. *Id.*

140. *Id.* at 485-86.

141. *Roe*, 410 U.S. 113.

142. *Id.* at 120.

143. *Id.* at 152.

144. *Id.* (citations omitted).

145. *Id.* at 153 (emphasis added). While the Ninth Amendment mentions rights "retained by the people," courts rarely, if ever, use this amendment to strike down laws. BARNETT, *supra* note 9, at 234-35. Scholars such as Professor Barnett suggest courts look to the Ninth Amendment as a source for rights such as privacy. *See id.* at 224-52 (arguing why a presumption of constitutionality of laws conflicts with the mandate of the Ninth Amendment). Further, Justice Black, in his *Griswold v. Connecticut* dissent, indicated that the historical purpose of this amendment was to "assure the people that the Constitution in all its provisions was intended to limit the Federal Government to the powers granted expressly or by necessary implication." 381

The Court recognized the right to have an abortion as a fundamental liberty, protected as part of the right to privacy inherent in the Fourteenth Amendment.[146] It reasoned that "[w]here certain 'fundamental rights' are involved . . . regulation limiting these rights may be justified only by a 'compelling state interest.' "[147] In other words, fundamental rights are judicially protected by strict scrutiny.

Since *Griswold* and *Roe*, Court decisions have retreated somewhat from *Roe*'s expansive description of constitutionally protected "fundamental rights." To try to add an element of objectivity to its fundamental rights analysis, the Court adopted a standard of tradition[148] in *Washington v. Glucksberg*,[149] *Moore v. East Cleveland*,[150] and *Michael H. v. Gerald D.*[151] In these cases, the Court found that tradition did not protect the right to suicide,[152] but did protect the "nuclear family" and its natural extensions,[153] and the "marital family."[154] Furthermore, in *Planned Parenthood v. Casey*, the Court announced the undue burden standard, which stated that only those laws that unduly burden fundamental rights are unconstitutional.[155] In *Casey*, the Court found that the state's regulations requiring informed consent[156] and a twenty-four hour waiting period prior to receiving an abortion[157] were not unduly burdensome on a woman's fundamental right to choose an abortion, but that a regulation requiring spousal notification created an undue burden and was therefore constitutionally invalid.[158] The Court has thus varied in how strictly it applies the compelling interest test to state regulations affecting privacy rights.

U.S. at 520 (Black, J., dissenting). In any event, this Author believes that the Fourth Amendment is a more appropriate source for the right to privacy, because of its more specific language and roots in privacy values.

146. *Roe*, 410 U.S. at 153; *see also* Stanley v. Georgia, 394 U.S. 557, 564 (1969) ("For also fundamental is the right to be free, except in very limited circumstances, from unwanted governmental intrusions into one's privacy.").

147. *Roe*, 410 U.S. at 155.

148. A right may be characterized as fundamental only if it has been historically and traditionally valued as such.

149. Washington v. Glucksberg, 521 U.S. 702, 720-21 (1997).

150. Moore v. East Cleveland, 431 U.S. 494, 503 (1977).

151. Michael H. v. Gerald D., 491 U.S. 110, 122 (1989).

152. *Glucksberg*, 521 U.S. at 735.

153. *Moore*, 431 U.S. at 504. The Court found that "[t]he tradition of uncles, aunts, cousins, and especially grandparents sharing a household along with parents and children has roots equally venerable and equally deserving of constitutional recognition." *Id.*

154. *Michael H.*, 491 U.S. at 124.

155. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 874 (1992).

156. *Id.* at 887.

157. *Id.*

158. *Id.* at 898.

The distinction between the rational basis test and the compelling interest test was again muddied in the Court's 2003 decision, *Lawrence v. Texas*.[159] In *Lawrence*, two men were arrested in their private home for engaging in homosexual sodomy, which was criminalized as "deviate sexual intercourse" by the Texas Penal Code.[160] The Court purported to follow the rational basis test, but rather than merely deferring to the legislature, the Court instead struck down the Texas law criminalizing homosexual sodomy, holding, "The Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual."[161] The Court did not consider whether the legislature could possibly have had a rational motive, but instead discussed the legitimate role of government and balanced this with the privacy interests of the individual.[162] This case demonstrates that the Court may find that certain privacy interests, though not "fundamental," are important enough to deserve more protection than the extremely deferential version of the rational basis test.

D. Controversy over Substantive Due Process Right to Privacy

The Court's efforts to determine which liberties are subject to judicial protection under the Due Process Clause have prompted quite a bit of criticism. Scholars generally disapprove of three things: the Court's subjectivity, its contradictory constitutional construction, and its politicization. To begin, scholars have criticized the Court's subjective interpretation of the word "liberty."[163] Given the breadth of possible interpretations for the word "liberty," the Court has naturally struggled to define the outer limits of this term.[164] As Chief Justice Rehnquist emphasized, "As a general matter, the Court has always been reluctant to expand the concept of substantive due process because the guideposts for responsible decisionmaking in this

---

159. Lawrence v. Texas, 539 U.S. 558 (2003).

160. *Id.* at 562-63.

161. *Id.* at 578.

162. *Id.*

163. BARNETT, *supra* note 9, at 233. As Professor Barnett explains:

> With [the Court's current substantive due process jurisprudence], judges now find themselves having to pick and choose among the unenumerated liberties of the people to find those that justify switching the presumption and those that do not. Courts are placed in the uneasy position of making essentially moral assessments about different exercises of liberty. A liberty to use birth control pills is protected, but a liberty to use marijuana is not. The business of performing abortions is protected, but the business of providing transportation is not.

Id.

164. *See id.* (describing the Court's difficulty in outlining the parameters of substantive due process).

unchartered area are scarce and open-ended."[165] Even when the Court does try to add objectivity to its analysis, such efforts often lead to more confusion.

For example, the Court's introduction of the element of tradition in *Washington v. Glucksberg*,[166] *Moore v. East Cleveland*,[167] and *Michael H. v. Gerald D*[168] was intended to add objectivity to the Court's fundamental rights analysis.[169] Instead, however, cases decided under the tradition analysis were inconsistent with prior precedent, particularly regarding the justification for certain decisions. In some cases, the fundamental nature of marriage seemed to dominate,[170] while in similar cases, individual privacy was the basis for decision.[171]

The cases involving reproductive rights have created even more confusion, particularly after the introduction of the undue burden standard in *Casey*.[172] Despite heavy judicial reliance on the *Roe* trimester framework,[173] the Court summarily dismissed it as a valid basis for analysis in *Casey*.[174] *Casey*'s undue burden standard was introduced as a replacement by a three Justice opinion[175] and previously had been articulated by Justice O'Connor in her dissent in *City of Akron v. Akron Center for Reproductive Health I*.[176] Justice O'Connor further defined "undue burden" rather unhelpfully as a "substantial obstacle."[177] Thus, this standard does not offer much guidance in predicting what regulations will be permitted.

---

165. Albright v. Oliver, 510 U.S. 266, 271-72 (1994) (quoting Collins v. Harker Heights, 503 U.S. 115, 125 (1992)).

166. Washington v. Glucksberg, 521 U.S. 702, 720-21 (1997).

167. Moore v. East Cleveland, 431 U.S. 494, 503 (1977).

168. Michael H. v. Gerald D., 491 U.S. 110, 122 (1989).

169. *See* Bowers v. Hardwick, 478 U.S. 186, 191-92 (1986) (describing the tradition approach as an effort by the Court to add objectivity to its fundamental rights analysis, so that the Court is not merely imposing its own values on the constitutional text), *overruled by* Lawrence v. Texas, 539 U.S. 558 (2003).

170. *See Michael H.*, 491 U.S. at 124 (finding the personal interests of the biological father subordinate to those of the married couple).

171. *See* Eisenstadt v. Baird, 405 U.S. 438, 453 (1972) (finding personal privacy interests unaffected by the married status of a person).

172. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 874 (1992).

173. *See* Roe v. Wade, 410 U.S. 113, 164-66 (1973) (describing the trimester framework in Section XI of opinion); *Casey*, 505 U.S. at 872 ("Most of our cases since *Roe* have involved the application of rules derived from the trimester framework.").

174. *Casey*, 505 U.S. at 873.

175. *Id.* at 843-44.

176. City of Akron v. Akron Ctr. for Reproductive Health 1 *(Akron I)*, 476 U.S. 447, 463 (1986) (O'Connor, J., dissenting), *overruled by Casey*, 505 U.S. at 87.

177. *Casey*, 505 U.S. at 877.

179. *Id.* at 887.

Under the undue burden standard, *Casey* authorized a regulation requiring informed consent,[179] overruling previous decisions to the contrary.[180] *Casey* also permitted a mandatory twenty-four hour waiting period,[181] even though this also had previously been held unconstitutional.[182] However, the Court struck down a regulation requiring spousal notification as unduly burdensome.[183] The only distinction between these regulations appears to be the Court's subjective determination of what constitutes an undue burden. Thus, it is debatable whether the undue burden standard added anything helpful[184] to the Court's already confused abortion jurisprudence.[185]

Furthermore, the subjective nature of the Court's analysis seems particularly concerning given the unclear constitutional basis for its decision-making. Rather than doing the intellectual heavy-lifting and basing its analysis in constitutional interpretation, the Court has instead turned to policy justifications. In *Griswold*, though claiming not to sit as a "super-legislature," the Court nevertheless supported its decision to strike down a law against contraception use by recognizing the "sacred precincts of marital bedrooms."[186] Similarly, in *Roe v. Wade*, the Court grounded its reasoning in a lengthy historical analysis of the policies surrounding abortion.[187] Due to the fundamental and important nature of the reproductive rights involved, the Court found the state's regulation of abortion unconstitutional.[188]

Subsequent uses of this policy analysis have led the Court to seemingly arbitrary distinctions between permitted and prohibited abortion regulations. For example, the Court held that the state may prohibit the use of public facilities, personnel, and funds to procure abortions,[189] but the state may not prohibit a particular method of

---

180. Thornburgh v. Am. Coll. of Obstetricians and Gynecologists, 476 U.S. 747, 760 (1986), *overruled by Casey*, 505 U.S. at 870; *Akron I*, 462 U.S. at 444; *see also Casey*, 505 U.S. at 870 (acknowledging that the Court's decision overrules *Thornburgh* and *Akron I*).

181. *Casey*, 505 U.S. at 887.

182. *Akron I*, 462 U.S. at 450; *see also Casey*, 505 U.S. at 885 (acknowledging that the Court's decision overrules *Akron I*).

183. *Casey*, 505 U.S. at 898.

184. As Justice Blackman noted, "[T]he *Roe* framework is far more administrable, and far less manipulable, than the 'undue burden' standard adopted by the joint opinion." *Id.* at 930 (Blackmun, J. concurring in part, concurring in judgment in part, and dissenting in part).

185. Chief Justice Rehnquist recognized "the confused state of this Court's abortion jurisprudence." *Id.* at 944 (Rehnquist, C.J., concurring in judgment in part and dissenting in part).

186. Griswold v. Connecticut, 381 U.S. 479, 482, 485 (1965).

187. Roe v. Wade, 410 U.S. 113, 129-52 (1973) (Sections VI and VII of the opinion).

188. *Id.* at 166.

189. Webster v. Reprod. Health Servs., 492 U.S. 490, 509-10 (1989); Maher v. Roe, 432 U.S. 464, 469 (1977).

abortion.[190] Additionally, while a state may require that doctors perform tests on fetuses regarding age, weight, and lung maturity,[191] a state may not require that the fetal remains be disposed of in a humane manner.[192] These decisions demonstrate that the Court has encountered difficulty in establishing the appropriate parameters for abortion rights under substantive due process.

The Court's confused abortion and privacy rights jurisprudence has created political controversy that threatens to undermine the legitimacy and quality of the Court. In every judicial confirmation hearing since Robert Bork (the first nominee to outright deny the legitimacy of *Griswold*),[193] the Senate has grilled judicial nominees about their views on privacy and abortion.[194] This has turned confirmation proceedings into even more of a political game than they were before. As Justice Scalia wrote in his dissent in *Casey*, "*Roe* fanned into life an issue that has inflamed our national politics in general, and has obscured with its smoke the selection of Justices to this Court in particular, ever since."[195] The politicization of the Court has naturally called into question the independence of the judiciary from the other political branches.

Further, critics have found particularly problematic the inherently contradictory nature of the Court's interpretation. The Fourteenth Amendment, by its very own language, grants no protection over life, liberty, or property; it merely guarantees procedures.[196] The outcome of the requisite process is in no way determined by the clause; only the procedures are implicated.[197] The Court's substantive reading, in effect, erases the words "without due process of law" from the Fourteenth Amendment, leaving only "no state shall . . . deprive any person of life, liberty, or property." As a

190. Stenberg v. Carhart, 530 U.S. 914, 930-31 (2000).

191. *Webster*, 492 U.S. at 513, 519-20.

192. City of Akron v. Akron Ctr. for Reprod. Health, 462 U.S. 416, 451-52 (1983), *overruled by* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 883 (1992).

193. *See* BORK, *supra* note 8, at 290-91 (acknowledging that his criticism of *Griswold* triggered the campaign against him regarding his views on privacy).

194. Transcripts of the hearings and debates for confirmed judges are available at Supreme Court Nominations Confirmed, http://www.loc.gov/rr/law/confirmed.html (last visited Nov. 2, 2006), and transcripts for the judges that were not confirmed are available at Supreme Court Nominations Not Confirmed, http://www.loc.gov/rr/law/notconfirmed. html (last visited Nov. 2, 2006). For the Chairman's initial questioning of Judge Bork regarding the *Griswold* case, see *Nomination of Robert H. Bork to be Associate Justice of the Supreme Court of the United States: Hearings Before the S. Comm. on the Judiciary*, 100th Cong. 112-21 (1989), *available at* http://www.loc.gov/rr/law/nominations/bork/hearing-pt1.pdf.

195. *Casey*, 505 U.S. at 995-96 (Scalia, J., concurring in judgment in part and dissenting in part).

196. *See supra* discussion at text accompanying notes 8-15.

197. BARNETT, *supra* note 9, at 206.

result, the Court has had to come up with an otherwise redundant description of a procedural reading of the Due Process Clause—*procedural* due *process*[198]—to distinguish it from its oxymoronic substantive due process construction.[199]

Given this controversy, the Court should look to a better constitutional interpretation, such that it may more legitimately recognize the right to privacy. If the Court were to find a constitutional provision that could more easily be read to provide for some protection of privacy, then perhaps it could win over some of its critics. A clearer constitutional foundation would remedy the oxymoronic substantive due process problem at least with respect to privacy, and the Court's subjectivity would be more easily forgivable involving a more specific constitutional provision. The Fourth Amendment provides this foundation.

III. A FOURTH AMENDMENT RIGHT TO PRIVACY

The Court should ground the right to privacy in the Fourth Amendment. This amendment may be more easily interpreted as encompassing a right to privacy and provides a more legitimate constitutional construction. Having recognized the right to privacy, the Court should apply mid-level scrutiny to laws that infringe this right. To explain how this would be accomplished, this Part first demonstrates why the Fourth Amendment is a preferable source for a right to privacy than the Fourteenth Amendment. It then explains how the Court could interpret the Fourth Amendment to provide for a right to privacy. Next, this Part explains why mid-level scrutiny is the appropriate protection for this right, and concludes by explaining how this analysis would fit into the Court's existing privacy jurisprudence.

198. *Id.* at 207.

199. Ellis v. Hamilton, 669 F.2d 510, 512 (7th Cir. 1982); MARKUS DIRK DUBBER, THE POLICE POWER: PATRIARCHY AND THE FOUNDATIONS OF AMERICAN GOVERNMENT 213 (2005).

A. Why the Fourth Amendment? The Fourth and Fourteenth Amendments Compared

> The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.
>
> —United States Constitution, Fourth Amendment
>
> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
>
> —United States Constitution, Fourteenth Amendment, Section 1

The constitutional right to privacy should be founded in the Fourth Amendment. There are two main reasons why the Court should shift the focus of its privacy analysis from the Fourteenth Amendment to the Fourth Amendment. First, the words "persons, houses, papers, and effects" in the Fourth Amendment can be (and have been) rationally interpreted to include elements of privacy, and do so more easily than the words "life, liberty, or property" in the Fourteenth Amendment. Secondly, the Fourth Amendment, unlike the Fourteenth Amendment, defines a substantive, affirmative right.

The Fourth Amendment was written to protect privacy, as evidenced by the history of searches and seizures predating the Fourth Amendment, as well as the Court's interpretations of the amendment itself.[200] Although the Court declined to find a general right to privacy against invasions by other private citizens in the Fourth Amendment in *Katz v. United States*, the Court was silent as to a generalized right to privacy against state action.[201] Historically, scholars have recognized the Fourth Amendment as the amendment most protective of privacy interests. As Professor Slough explained, "The nearest to an explicit recognition of a right to privacy in the Constitution is contained in the language of the [F]ourth [A]mendment. . . ."[202] Similarly, Professor William Cuddihy wrote, "The [Fourth] Amendment's first clause, which explicitly renounces all unreasonable searches and seizures, overshadows the second clause, which implicitly renounced only a single category, the general

200. *See supra* discussion section II.A.1.

201. Katz v. United States, 389 U.S. 347, 350-51 (1967).

202. SLOUGH, *supra* note 48, at 44.

warrant. . . . Privacy was the bedrock concern of the [Fourth A]mendment, not general warrants."[203] The Court has also recognized the privacy values underlying the Fourth Amendment, as evidenced by its decisions in *Boyd v. United States*, *Weeks v. United States*, *Wolf v. Colorado*, and *Mapp v. Ohio*.[204]

Additionally, a purely textualist comparison between the words in the Fourth Amendment and those in the Fourteenth Amendment reveals that the Fourth Amendment is more susceptible to an interpretation involving privacy than the Fourteenth. For instance, when choosing between the word "person" in the Fourth Amendment and "liberty" in the Fourteenth Amendment, the Court should choose the word "person," since it is more rationally subject to an interpretation that includes privacy. The concept of "person" may be said to include those private aspects of one's personal life that makes a person an individual,[205] whereas the concept of "liberty" implies the freedom to do *anything*.[206] As articulated in *Bolling v. Sharpe*, "Liberty under law extends to the full range of conduct which the individual is free to pursue, and it cannot be restricted except for a proper governmental objective."[207] Thus, "person" invokes ideas of privacy and autonomy, while "liberty" invokes more generalized notions of freedom.

Secondly, while the language of the Fourteenth Amendment provides procedural protections, the Fourth Amendment's language provides a substantive guarantee. The affirmative guarantees of the

---

203. HUBBART, *supra* note 24, at 76 (quoting William Cuddihy, The Fourth Amendment: Origins and Original Meaning 602-1790 (1990) (unpublished Ph.D. dissertation 1547, Claremont Graduate School)).

204. *See supra* notes 37-70 and accompanying text.

205. Webster's Third International Dictionary's definition of a "person" includes: "an individual human being," "the individual personality of a human being" and "a being characterized by conscious apprehension, rationality, and a moral sense." WEBSTER'S THIRD INTERNATIONAL DICTIONARY 1686 (1993). The Oxford English Dictionary's definition includes "[t]he self, being, or individual personality of a man or woman, esp. as distinct from his or her occupation, works, etc." OXFORD ENGLISH DICTIONARY, http://dictionary.oed.com. Finally, Black's Law Dictionary defines a person simply as "a human being." BLACK'S LAW DICTIONARY 1178 (8th ed. 2004).

206. Webster's Third International Dictionary defines "individual liberty" as "the liberty of those persons who are free from external restraint in the exercise of those rights which are considered to be outside the province of a government to control." WEBSTER'S THIRD INTERNATIONAL DICTIONARY, *supra* note 205, at 1152. As defined by the Oxford English dictionary, "liberty" is "[t]he condition of being able to act in any desired way without hindrance or restraint; faculty or power to do as one likes" and "[u]nrestrained action, conduct, or expression." OXFORD ENGLISH DICTIONARY, *supra* note 205. Black's Law Dictionary defines "personal liberty" as "[o]ne's freedom to do as one pleases, limited only by the government's right to regulate the public health, safety, and welfare." BLACK'S LAW DICTIONARY, *supra* note 205, at 937.

207. Bolling v. Sharpe, 347 U.S. 497, 499-500 (1954).

Constitution are limited in number and scope;[208] therefore, where an affirmative right is specifically listed, the Court should take special notice and give effect to the substantive language. The Fourth Amendment demonstrates a constitutional commitment of certain areas—"persons, houses, papers, and effects"—to an elevated protection. This protection is set forth in affirmative terms; that is, "the *right of the people* to be secure . . . against unreasonable searches and seizures."[209] It presupposes an underlying affirmative right of privacy, which is protected from unreasonable searches and seizures. Significantly, this right is absolute: It "*shall not be violated.*"[210] The command of the Fourth Amendment is unqualified and unequivocal.

This differs from the Fourteenth Amendment, which restricts only the *method* of governmental interference, when it says: "[N]or shall any State deprive any persons of life, liberty, or property, without due process of law."[211] While the Fourth Amendment asserts an affirmative right of the people, the Fourteenth Amendment's language limits the government's powers. The word "shall" is used in both amendments, but the Fourteenth Amendment's language does not limit the state with regard to *which* substantive liberties it may regulate; instead, it limits the *procedures* the state may use when interfering with those liberties.[212] Therefore, the Court should look to a broader reading of the Fourth Amendment to find a right to privacy, instead of an oxymoronic reading of the Fourteenth Amendment.

B. Reinterpreting the Fourth Amendment to Find Privacy Protection

The language of the Fourth Amendment may be interpreted to create a right to privacy. The amendment is made up of two clauses: one clause defines a substantive right, and the other clause provides for a procedural protection of that right. The two clauses are separated by the conjunction "and," indicating that they are independent from each other.[213] The first clause states that "the right of the people to be secure in their persons, houses, papers, and effects, against

208. For the provisions of the Constitution that provide for affirmative rights, see U.S. CONST. art. I §§ 9-10, art. IV § 2, amends. I-VIII, X, XIII, § 1, XIV § 1, XV § 1, IXX, XXIV.

209. U.S. CONST. amend. IV (emphasis added).

210. *Id.* (emphasis added); *see also* Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 392 (1971) ("[The Fourth Amendment] guarantees to citizens of the United States the absolute right to he free from unreasonable searches and seizures carried out by virtue of federal authority.").

211. U.S. CONST. amend. XIV § 1.

212. *See supra* discussion at text accompanying notes 196-99.

213. U.S. CONST. amend. IV; *see also* THE CHICAGO MANUAL OF STYLE R. 5.181, at 191 (15th ed. 2003) (explaining that "and," when used as a coordinating conjunction, joins independent clauses); *supra* Section II.A.1 (describing the historical roots of the Fourth Amendment).

unreasonable searches and seizures, *shall not be violated*."[214] The second clause reads, "[A]nd no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."[215]

The first clause of the Fourth Amendment defines a "right of the people." This language articulates an affirmative, substantive right, and also suggests that something more than the procedural safeguards defined in the second clause may be needed to ensure that the right is not violated.[216] To prevent unreasonable searches and seizures, the Court should find that certain laws in and of themselves violate the "right of the people to be secure in their persons, houses, papers, and effects."[217] Enforcement of these laws would encourage police to conduct searches or seizures that are unreasonable, because the government's interest in regulation does not justify the intrusion into its citizen's privacy. In other words, the laws themselves do not justify the intrusion; as such, these laws should be struck down.

This reading suggests that a court's determination of whether a search or seizure is reasonable necessarily requires an inquiry into the substance of the law sought to be enforced. The rationale behind this interpretation is grounded in values-based Fourth Amendment reasoning.[218] The Amendment protects the "indefeasible right of personal security, personal liberty and private property,"[219] "the right to be let alone—the most comprehensive of rights and the right most valued by civilized men,"[220] and the "right to be secure against rude invasions of privacy by state officers."[221] In the words of Justice Brandeis, "To protect that right *every unjustifiable intrusion* by the government upon the privacy of the individual, *whatever the means employed*, must be deemed a violation of the Fourth Amendment."[222] Thus, to protect these values, the Court must look to the substance of the law that the government seeks to enforce.

An analytical analogue can be found in the Court's recognition of a legislative privilege in the Speech and Debate Clause of Article

214. U.S. CONST. amend. IV (emphasis added).

215. *Id.*

216. *See supra* discussion at text accompanying note 203.

217. U.S. CONST. amend. IV.

218. That is, a reading of the Fourth Amendment that gives effect to the values underlying the amendment. *See supra* discussion at text accompanying notes 37-70.

219. Boyd v. United States, 116 U.S. 616, 630 (1886).

220. Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

221. Mapp v. Ohio, 367 U.S. 643, 660 (1961).

222. *Olmstead*, 277 U.S. at 479 (Brandeis, J., dissenting) (emphasis added).

I.[223] In *United States v. Johnson*, the Court explained, "The legislative privilege, protecting against possible prosecution by an unfriendly executive and conviction by a hostile judiciary, is one manifestation of the 'practical security' for ensuring the independence of the legislature."[224] The Court concluded, "We see no escape from the conclusion that such an intensive judicial inquiry . . . violates the express language of the Constitution and the policies which underlie it."[225] Thus, the *Johnson* majority interpreted the Speech and Debate Clause of Article I broadly, and considered the values underlying the constitutional text to recognize a legislative privilege. The Court should interpret the Fourth Amendment in the same way to recognize a right to privacy.

Current Fourth Amendment jurisprudence involves procedural guarantees, and assumes the reasonableness of the underlying substantive law sought to be enforced. Instead of making this assumption, the Court should reinterpret the Fourth Amendment using its reasoning in *Lawrence v. Texas*.[226] *Lawrence* presented a theory of the proper role of the legislature: to preserve the public health, safety, and morals.[227] While the vast majority of laws are correctly considered reasonable because they are created to prevent a public harm, a few laws are not reasonable because there is no public harm to protect. This Note proposes that judges should use intermediate scrutiny to assess the validity of laws implicating government intrusion into personal privacy.[228]

The Fourth Amendment right to privacy would function like a prophylactic already in place for the Fourth Amendment: the exclusionary rule.[229] Whereas the exclusionary rule reflects an effort by the Court to prevent warrantless searches and seizures, this right to privacy would allow the Court to protect the autonomous individual from improper governmental interference. Also, like the *Miranda* warning requirement under the Fifth Amendment,[230] the Fourth

223. U.S. CONST. art. I, § 6.

224. United States v. Johnson, 383 U.S. 169, 179 (1966).

225. *Id.* at 177.

226. Lawrence v. Texas, 539 U.S. 558 (2003).

227. *See id.* at 562, 578 (emphasizing the distinction between the private realm of the individual and the public realm of government).

228. *See infra* Section III.C.

229. Stone v. Powell, 428 U.S. 465, 482 (1976).

230. Miranda v. Arizona, 384 U.S. 436, 498-99 (1966); *see also* Chavez v. Martinez, 538 U.S. 760, 770-71 (2003) (describing the privilege against self-incrimination as an "evidentiary privilege that protects witnesses from being forced to give incriminating testimony, even in noncriminal cases, unless that testimony has been immunized from use and derivative use in a future criminal proceeding before it is compelled").

Amendment right to privacy guarantees the underlying substantive privacy values and prevents unreasonable searches.

The judiciary is the branch best situated to protect Fourth Amendment privacy interests. As famously asserted by Chief Justice Marshall in *Marbury v. Madison*, "It is emphatically the province and duty of the judicial department to say what the law is."[231] As part of this duty, courts must strike down those federal and state statutes that violate the Constitution.[232] This view is consistent with the Framers' intent to create an independent judiciary to act as a check on the majoritarian legislature.[233] Thus, when it comes to protecting rights guaranteed by the Constitution, courts have traditionally taken on the role as protector. Therefore, a court, in recognizing a Fourth Amendment right to privacy, would be fulfilling its traditional role.

This interpretation of the Fourth Amendment would admittedly be a departure from the Court's traditional Fourth Amendment jurisprudence. However, this would be less of a departure from realistic interpretations of the text of the Fourth Amendment than was the substantive reading of the Due Process Clause of the Fourteenth Amendment in the context of privacy. Other aspects of substantive due process are outside the scope of this Note, but the Fourth Amendment provides a more legitimate foundation for the right to privacy.

A Fourth Amendment right to privacy would have several benefits. First, the holdings of the major cases involving privacy rights would not have to change. Mid-level scrutiny would lead to very similar results.[234] Further, this reading would hopefully win over supporters from those opposed to the substantive due process right to privacy. While there is still room for subjectivity in the Court's analysis, the subjectivity and balancing is demanded by the reasonableness standard present in the langnage of the Fourth Amendment. In other words, a subjective determination of reasonableness is necessary because of the *actual constitutional text*,

231. Marbury v. Madison, 5 U.S. 137, 177 (1803).

232. *See, e.g.*, Duncan v. Louisiana, 391 U.S. 145, 147-48 (1968) (describing the incorporation of the Bill of Rights into the Fourteenth Amendment, and application of these guarantees by the Court to the states).

233. *E.g.*, Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 407 (1971) (Harlan, J., concurring in the judgment) ("But it must also be recognized that the Bill of Rights is particularly intended to vindicate the interests of the individual in the face of the popular will as expressed in legislative majorities. . . ."); BARNETT, *supra* note 9, at 131 (quoting Oliver Elsworth's speech to the Connecticut ratification convention on January 7, 1788); *id.* at 138 (quoting Thomas Jefferson's Letter to James Madison on March 15, 1789); *id.* at 141 (quoting THE FEDERALIST NO. 78, 466 (Alexander Hamilton)).

234. For a detailed discussion of how this would happen, see *infra* Section III.C.

and not because of a judicially-created doctrine of recognizing certain liberties as fundamental.

Additionally, this approach does not create a generalized right to privacy based on various constitutional guarantees, but instead creates a "buffer zone" around the specific guarantee of privacy in the Fourth Amendment. Even Professor Bork has noted approvingly, "Courts often give protection to a constitutional freedom by creating a buffer zone, by prohibiting a government from doing something not in itself forbidden but likely to lead to an invasion of a right specified in the Constitution."[235] Where decisions are not squarely confined to a literal reading of the constitutional text, Professor Bork wrote, "[They] at least enforce[] values found in actual provisions of the Constitution."[236] The practice of creating protections around the guarantees of the Constitution has been recognized and regarded as legitimate.[237]

C. Applying Mid-Level Scrutiny

As mentioned above, the language of the Fourth Amendment demands a balancing of interests through a standard of reasonableness. The two tests currently available in the Court's substantive due process jurisprudence are the rational basis test and the compelling interest test. However, it is almost impossible for a law to fail the rational basis test,[238] and it is equally difficult for a law to pass the compelling interest test.[239] Therefore, the Court should borrow from its Equal Protection jurisprudence and adopt intermediate, or mid-level, scrutiny[240] for the Fourth Amendment right to privacy. This intermediate level of scrutiny is more balanced than the other two options and actually allows a court to weigh

---

235. BORK, *supra* note 8, at 97.

236. *Id.* at 114. Bork continued later to say, "Whatever line-drawing must be done starts from a solid base, the guarantee of freedom of speech, of freedom from unreasonable searches and seizures, and the like." *Id.* at 118.

237. For examples of the prophylactic doctrines in place for the Fourth and Fifth Amendments, see *Stone v. Powell*, 428 U.S. 465, 482 (1976) and *Miranda v. Arizona*, 384 U.S. 436, 498-99 (1966).

238. *See* Williamson v. Lee Optical of Okla., Inc., 348 U.S. 483, 487-88 (1955) ("But the law need not be in every respect logically consistent with its aims to be constitutional. It is enough that there is an evil at hand for correction, and that it might be thought that tbe particular legislative measure was a rational way to correct it.").

239. *See* Reno v. Flores, 507 U.S. 292, 302 (1993) ("[Substantive due process] forbids the government to infringe certain 'fundamental' liberty interests *at all*, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest.").

240. *E.g.*, Clark v. Jeter, 486 U.S. 456, 461 (1988) ("To withstand intermediate scrutiny, a statutory classification must be substantially related to an important governmental objective.").

competing interests.[241] Such scrutiny would require the courts to consider whether a law that infringes upon privacy interests is "substantially related to an important governmental objective."[242] If the state has a legitimate and important governmental interest in regulating the prohibited activity, then the privacy invasion is justified. If the state does not have such an interest, however, the privacy invasion is not justified and the law violates the Fourth Amendment right to privacy.

This mid-level scrutiny is similar to the test applied in *Lawrence v. Texas*[243] and is perhaps a more accurate description of the level of scrutiny the Court actually applied in that case. As Justice O'Connor explained in her *Lawrence* concurrence, "When a law "exhibits such a desire to harm a politically unpopular group," the Court has "applied a more searching form of rational basis review."[244] This is evidenced in the *Lawrence* case itself, where the Court found that a law banning homosexual sodomy "furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual."[245] This language suggests the Court was in fact using a balancing approach—more like mid-level scrutiny—to reach its decision.

Other language in *Lawrence* demonstrates the Court's willingness to provide greater protection for privacy interests. The Court held, "Liberty protects the person from unwarranted government intrusions into a dwelling or other private places."[246] It also found, "Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct."[247] Because it was basing its decision on the Fourteenth Amendment texts, the Court described the privacy interests at stake in this case as "liberty" interests. However, one could easily substitute the word "privacy" for "liberty" in this case, without changing the substantive meaning of the language, and find substantial support for the application of mid-level scrutiny to laws affecting privacy rights.

---

241. *See id.* ("Between these extremes of rational basis review and strict scrutiny lies a level of intermediate scrutiny. . . ."); Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 566 (1980) (defining what is known as intermediate scrutiny, in the First Amendment commercial speech context, as the balancing of four factors).

242. *Clark*, 486 U.S. at 461; *see also* Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 220 (1995) (describing an identical test for intermediate scrutiny).

243. Lawrence v. Texas, 539 U.S. 558 (2003).

244. *Id.* at 580 (O'Connor, J., concurring) (citations omitted).

245. *Id.* at 578 (majority opinion).

246. *Id.* at 562.

247. *Id.*

One can also look to the Court's Fourth Amendment jurisprudence to find support for something greater than the rational basis test as a means to protect privacy. As the Court noted in *Winston v. Lee*, "[W]hen the State seeks to intrude upon an area in which our society recognizes a significantly heightened privacy interest, a more substantial justification is required to make the search 'reasonable.' "[248] Mid-level scrutiny would help determine when the government was not justified in interfering with these areas of heightened privacy interests.

Mid-level scrutiny also reflects a theory about the proper role of the government in a democratic society. The very purpose of the legislature is to interfere with the private lives and decisions of its citizens to benefit the larger society. Where there are genuine competing interests to resolve, the legislature may intervene and resolve the conflict. As explained by Charles Bufford,

> It thus appears that the inalienable rights of every one are subject to such regulation by legislation as tends to prevent him in the exercise of his own inalienable rights from unreasonably infringing upon those of others, and to secure to him the same uninterrupted enjoyment of his own inalienable rights as others enjoy.[249]

Similarly, Professor Christopher Tiedeman wrote, "The object of government is to impose that degree of restraint upon human actions, which is necessary to the uniform and reasonable conservation and enjoyment of private rights."[250] Where the *public* welfare is at issue, the legislature has the power to define those harms that will not be tolerated, under threat of criminal prosecution.[251] The state has a legitimate interest, inherent in its traditional police power, in prosecuting those crimes that trump the individual's interest in privacy. However, this legitimacy presupposes that there is some *harm*.[252] Normally, the legislature is given great deference to define

---

248. Winston v. Lee, 470 U.S. 753, 767 (1985).

249. Charles Bufford, *The Scope and Meaning of Police Power*, 4 CAL. L. REV. 269, 272 (1916).

250. CHRISTOPHER TIEDEMAN, A TREATISE ON THE LIMITATIONS OF POLICE POWER IN THE UNITED STATES CONSIDERED FROM BOTH A CIVIL AND CRIMINAL STANDPOINT 1 (1886), *available at* INFOTRAC.

251. *See* Noble State Bank v. Haskell, 219 U.S. 104, 111 (1911) ("It may be said in a general way that the police power extends to all the great public needs. . . . It may be put forth in aid of what is sanctioned by usage, or held by the prevailing morality or strong and preponderant opinion to he greatly and immediately necessary to the public welfare."); Chicago, Burlington & Quincy Ry. Co. v. Illinois, 200 U.S. 561, 592 (1906) ("We hold that the police power of a State embraces regulations designed to promote the public convenience or the general prosperity, as well as regulations designed to promote the public health, the public morals or the public safety.").

252. *See* Williamson v. Lee Optical of Okla., Inc., 348 U.S. 483, 488 (1955) ("It is enough that *there is an evil at hand for correction*, and that it might be thought that the particular legislative measure was a rational way to correct it." (emphasis added)).

harm,[253] but courts should impose some rational boundaries. Where there is neither a discernible personal or societal injury involved nor a public forum requiring state regulation, the state may not impute harm on a purported victim and criminalize the perpetrator for that hypothetical harm.[254] In other words, the state does *not* have a legitimate interest in pure, abstract moralizing.[255]

The "pure moralizing" line is admittedly somewhat simplistic: All crimes are based on a moral system.[256] Because society thinks it is wrong to kill another human being, the state defines murder as a social harm and criminalizes it. Therefore, the state must be given deference in defining harm and the means for its prevention, whether its laws concern the general welfare of society or a direct injury to an individual.[257] This follows the Lockean theory of harm and police power as articulated by Professor Randy Barnett.[258] Where there is a

---

253. As Justice O'Connor explained in her *Lawrence* concurrence, "Under our rational basis standard of review, 'legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest.' " Lawrence v. Texas, 539 U.S. 558, 579 (2003) (O'Connor, J., concurring).

254. *See* HOWARD GILLMAN, THE CONSTITUTION BESIEGED: THE RISE AND DEMISE OF LOCHNER ERA POLICE POWERS JURISPRUDENCE 49 (1993), *quoted in* BARNETT, *supra* note 9, at 331 ("An exercise of legislative powers would be considered valid only if it could reasonably be justified as contributing to the general welfare. The adjudicative task was to give meaning to this standard."); TIEDEMAN, *supra* note 250, at 291 ("No law can make vice a crime, unless it becomes by its consequence a trespass upon the rights of the public."), *quoted in* BARNETT, *supra* note 9, at 329; Bufford, *supra* note 249, at 276 ("[T]his regulatory power does not authorize interference with individual freedom or individual property to protect individuals from doing injury to themselves, unless consequences harmful to the public, tend to result therefrom.").

255. *Lawrence*, 539 U.S. at 578 (adopting Justice Stevens's view in his *Bowers* dissent); Bowers v. Hardwick, 478 U.S. 186, 216 (1986) (Stevens, J., dissenting) ("First, the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice. . . ."), *overruled by Lawrence*, 539 U.S. 558; *see also Bowers*, 539 U.S. at 212 (Blackmun, J., dissenting) ("Petitioner and the Court fail to see the difference between laws that protect public sensibilities and those that enforce private morality."); BARNETT, *supra* note 9, at 331 ("On the other hand, were the state allowed the power to prohibit any purely private activity *on the sole ground* that a majority of the legislature deems it to be immoral, there would be no limit on state power since no court could review the rationality of such a judgment.").

256. *See, e.g.*, *Bowers*, 478 U.S. at 196 ("The law, however, is constantly based on notions of morality, and if all laws representing essentially moral choices are to be invalidated under the Due Process Clause, the courts will be very busy indeed.").

257. *See* THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE UNITED STATES OF THE AMERICAN UNION 572 (The Lawbook Exchange, Ltd. 1999) (1st ed. 1868) (describing the police power of the state as necessary "to prevent offences against the State" and "conflict of rights"); 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND: OF PUBLIC WRONGS 162 (1st ed. 1765-69), *available at* http://www.yale.edu/lawweb/avalon/blackstone/blacksto.htm (describing police power as necessary to maintain peace between neighbors).

258. *See* BARNETT, *supra* note 9, at 323-34 (describing Locke's theory as setting forth the proposition that the police power of the state is derived from the need for a governmental entity to resolve conflicting private interests and prevent one person from harming another).

discernible conflict or harm, the state has met its burden to demonstrate a legitimate interest that overrides the individual privacy interest. However, where the only identifiable interest in regulation is moralizing, and the promotion of private, rather than public, interests, the regulation is presumptively invalid.[259] Absent a demonstration that the state is addressing a direct injury or larger social harm, regulations that ban conduct that "neither harmed others nor took place in the public sphere where government must balance competing uses by different citizens" are illegitimate.[260]

D. Fitting a Fourth Amendment Right to Privacy into the Court's Jurisprudence

This Fourth Amendment right to privacy would follow the balance between the government's interests in regulating conduct and the individual's interest in privacy that courts have already recognized in a number of other contexts. For example, a similar balance is struck at the trial level with evidentiary privileges. The Supreme Court has used the authority granted to it by Rule 501 of the Federal Rules of Evidence to recognize several testimonial privileges.[261] For example, in *Jaffee v. Redmond*, the Court recognized a psychotherapist-patient privilege, finding that the interest in protecting confidential communications outweighed the interest in disclosure.[262] Similarly, in *Trammel v. United States*, the Court found the relationship between spouses was "rooted in the imperative need for confidence and trust," and therefore continued to recognize a spousal privilege.[263] Other commonly recognized privileges include: "priest and penitent, attorney and client, and physician and patient."[264]

Additionally, the language that the Court would use to analyze cases under the Fourth Amendment right to privacy would not differ drastically from the language it used when characterizing the substantive due process right to privacy. For example, in *Casey*, the Court reasoned:

---

259. This rationale parallels the injury in fact requirement for purposes of standing. A psychological or moral injury is not enough; one must be actually harmed to have standing to bring suit in federal court under Article III of the Constitution. *See, e.g.*, Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992) (describing the three requirements for Article III standing).

260. BARNETT, *supra* note 9, at 334. *See* JOHN STUART MILL, ON LIBERTY 52 (Edward Alexander ed. 1999) (4th ed. 1869) ("[T]he only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant.").

261. FED. R. EVID. 501.

262. Jaffee v. Redmond, 518 U.S. 1, 11 (1996).

263. Trammel v. United States, 445 U.S. 40, 51 (1980).

264. *Id.* at 51.

> Our law affords constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education . . . . These matters, 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.[265]

The Court's uses of "personal dignity," "autonomy," and "personhood" are significant because they may easily be linked to the Fourth Amendment word "person." Therefore, a shift in analysis from the Fourteenth Amendment's concept of "liberty" to the Fourth Amendment's concept of "person" would not be very difficult. This could similarly be accomplished in *Lawrence*, where the Court says, "Liberty presumes an *autonomy of self* that includes freedom of thought, belief, expression, and certain intimate conduct."[266] The notion of "autonomy of self" would in fact more suitably be attributed to the values underlying "person." Therefore, the language of the Court related to privacy would not dramatically change.

While the language describing the underlying right to privacy would remain largely the same, the Court would have to revisit more carefully its highly politicized and controversial holdings regarding laws that impute harm on the individual. It would have to apply mid-level scrutiny to these cases. Examples include the Court's holdings allowing the regulation of suicide in *Glucksberg*[267] and prohibiting the regulation of reproduction as described in *Eiscnstadt*,[268] *Roe*,[269] and *Casey*.[270]

Regarding suicide, the Court in *Glucksberg* found a statute banning suicide constitutional, using the tradition element of its substantive due process analysis.[271] Under a Fourth Amendment analysis, the Court could similarly find that regulation of suicide is constitutional. A person's privacy is infringed when a state prohibits suicide; however, the state has a legitimate interest in "preserving the lives of those who can still contribute to society and enjoy life."[272] This is because this governmental interest goes beyond merely interfering with a person's private choices: It reflects a systematic state interest in preserving the lives of its citizens, which helps maintain a healthy

---

265. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 851 (1992) (emphasis added).

266. Lawrence v. Texas, 539 U.S. 558, 562 (2003) (emphasis added).

267. Washington v. Glucksberg, 521 U.S. 702, 735 (1997).

268. Eisenstadt v. Baird, 405 U.S. 438, 440 (1972).

269. Roe v. Wade, 410 U.S. 113, 164-66 (1973) (Section XI of the opinion).

270. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992).

271. 521 U.S. at 728.

272. *Id.* at 729 (quoting Brief for Respondents 35 n.23).

society. The Court has recognized suicide as a legitimate societal harm and "serious public-health problem,"[273] and therefore, the state's interest in regulating suicide defeats the privacy interests of the individual.

A situation like *Eisenstadt*,[274] in which the state regulates the distribution of contraceptives, presents a different problem because the sale of contraceptives is commercial. Given the public nature of this transaction, the state has an interest in regulating it as commerce. Thus, the sale and purchase of contraceptives is not clearly purely private conduct and is not easily distinguishable from engaging in prostitution[275] or running an adult movie theater,[276] which are both subject to state regulation due to the competing public interests involved. The display and sale of contraceptives, just like the display and sale of adult toys or movies, is public. One could argue that there is a social harm in such a display. Therefore, the Court must distinguish these activities on other grounds.

First of all, one could fashion a First Amendment argument that distinguishes the permissible advertisement and display of contraceptives from the impermissible advertisement and display[277] of obscene materials. In fact, this argument has been used successfully in the past. In *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, the Court held that a state may not "completely suppress the dissemination of concededly truthful information about entirely lawful activity, fearful of that information's effect upon its disseminators and its recipients."[278] In *Carey v. Population Services International*, the Court applied this rule to a Virginia law banning the advertisement of contraceptives, and struck down the statute as violative of the First Amendment.[279] Thus, the government cannot criminalize the public *display* of contraceptives.

This leaves the physical *sale* of contraceptives. In order to distinguish this from the sale of, for example, illegal drugs, the Court must look at the legislative purposes behind the statutes. A statute that criminalizes the sale of illegal drugs is presumably aimed at eliminating the social harm that is the *use* of those drugs. Following this reasoning, a statute that criminalizes the sale or distribution of contraceptives must be aimed at the *use* of those contraceptives. As

273. *Id.* at 730.

274. 405 U.S. at 440.

275. *See* Lawrence v. Texas, 539 U.S. 558, 578 (2003) (indicating the regulation of prostitution is a legitimate state interest).

276. Renton v. Playtime Theatres, Inc., 475 U.S. 41, 52 (1986).

277. Miller v. California, 413 U.S. 15, 27 (1973).

278. Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, 425 U.S. 748, 773 (1976).

279. Carey v. Population Servs. Int'l, 431 U.S. 678, 700 (1977).

the Court noted in *Carey*, "Indeed, in practice, a prohibition against all sales, since more easily and less offensively enforced, might have an even more devastating effect upon the freedom to choose contraception."[280] Since the public nature of the display of contraceptives is protected under the First Amendment, the only reason a state might have for regulating the sale of contraceptives is in fact to prohibit the use of contraceptives. The regulation of this public activity is effectively a regulation of the private use of the contraceptives, and therefore should be treated as such. Since there is no additional harm in the actual sale itself (as distinguished from, for example, prostitution where the actual sale involves the exchange of sex for money), there is no legitimate interest in prohibiting the sale, and the regulation fails mid-level scrutiny.

The next logical step is to consider how this framework applies to the regulation of abortion. One could make an *Eisenstadt* argument: a ban on the performance of abortions is an effective ban on a woman's ability to have an abortion and therefore is illegitimate. Whether a woman's ability to have an abortion is protected would require the application of mid-level scrutiny. The Court would have to ask whether the state had an important, legitimate interest in prohibiting abortion. Applying the harm test, the Court could reaffirm its decision in *Casey* and find that there is no regulable harm prior to fetus viability.[281] This is an appropriate line to draw regarding the permitted, legitimate state interests in regulation, because, as the Court held:

> [T]he concept of viability, as we noted in *Roe*, is the time at which there is a realistic possibility of maintaining and nourishing a life outside the womb, so that *the independent existence of the second life* can in reason and all fairness be the object of state protection that now overrides the rights of the woman.[282]

Thus, there is a regulable harm after fetal viability, when there is an "independent existence of a second life," which creates a competing interest for the legislature to resolve. While the state always has a legitimate interest in regulations promoting the health of the mother, the state does not have a legitimate interest in protecting fetal life before viability.[283]

Admittedly, this line is a subjective one. The Fourth Amendment's use of the word "reasonable," however, necessarily requires the Court to make a value judgment, and determine whether an imputed harm is a legitimate one. Thus, the Court must determine

---

280. *Id.* at 688.

281. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 870 (1992).

282. *Id.* (emphasis added).

283. Roe v. Wade, 410 U.S. 113, 162-63 (1973).

legally when to recognize the competing interest of the fetus. As Justice Blackmun indicated in *Roe*, the determination of when life begins is a moral, religious, and philosophical decision.[284] Like religious choices,[285] this determination must be left largely to the individual. However, like the legal determination of when a child becomes an adult,[286] the law must recognize that, at some point, there can be little doubt as to whether life has begun. The Court recognized this point as the time of viability, when the fetus could survive outside of the womb, and is therefore alive as an independent second life. This decision reflects a balancing of the interests involved. Thus, the mother's right to privacy applies up to the point when a fetus is viable. After this point, the state's interest in regulation outweighs the individual's privacy interests.

Regulations involving the waiting period, informed consent, and spousal notification should receive similar treatment. Instead of applying the undue burden standard, the Court should consider whether there is a legitimate state interest in these regulations. Since the marital relationship is privileged in court, and traditionally has been treated as private,[287] the state does not have a legitimate interest in dictating what communications take place between husband and wife. Therefore, the spousal consent regulations would remain void. Those regulations involving a waiting period and informed consent may be permitted so long as they relate to the legitimate state interest of providing for healthy choices and protecting the mother against harm.[288] Thus, the Court's holding in *Casey* should remain undisturbed.

IV. CONCLUSION

In conclusion, the Court should reinterpret the right to privacy as a protection arising out of the Fourth Amendment rather than the Fourteenth Amendment. This would require the Court to rethink the constitutional justification for its privacy jurisprudence, but would not require the Court to overrule its previous decisions. The mid-level scrutiny that the Court would use to protect this right would produce nearly the same holdings as the court's prior privacy cases.

So why make this change in the constitutional basis for the right to privacy? Because the Fourth Amendment offers a more

284. *Id.* at 159-61.

285. Wallace v. Jaffree, 472 U.S. 38, 53 (1985).

286. Roper v. Simmons, 543 U.S. 551, 574 (2005).

287. Trammel v. United States, 445 U.S. 40, 51 (1980).

288. *See supra* text accompanying notes 179-83.

legitimate constitutional foundation for two main reasons. First of all, the Fourth Amendment includes substantive language, in which it is more appropriate to base an affirmative right than the procedural language of the Fourteenth Amendment Due Process Clause. Secondly, the language of the Fourth Amendment is more susceptible to interpretations involving privacy, and has historically been interpreted to encompass values of privacy.

In accepting a Fourth Amendment right to privacy, the Court must recognize that the determination of the reasonableness of a search requires an inquiry into the substantive law sought to be enforced through the search. If the underlying law does not justify the invasion into privacy, then the search is unreasonable. To prevent the police from conducting unreasonable searches, therefore, a law that does not meet mid-level scrutiny should be struck down as violating the right to privacy.

Mid-level scrutiny is the appropriate level of protection for this right because the word "reasonable" in the Fourth Amendment suggests a balancing of interests. Whereas the rational basis test and the compelling interest test presume either the legitimacy or the illegitimacy of the law in question, mid-level scrutiny requires a closer look at the interests involved. This scrutiny asks whether the governmental interest behind the contested law is legitimate, which invokes an analysis of whether the law in question addresses a public harm.

Adopting a mid-level scrutiny approach would reflect a basic theory regarding the scope of police power. Under this systematic view of police power, the state may interfere with the private lives of its citizens only where there is a legitimate public interest in governmental regulation. When there is a legitimate public interest, the state's regulatory power trumps the privacy interests of its citizens. Where there is neither harm nor competing public values to resolve, the state cannot interfere.

At the core of this right to privacy is the basic proposition that society has consented to a majoritarian system of governance over general liberties and the reconciliation of competing interests, but society has not consented to governance over choices related to basic personal autonomy where the public welfare is not implicated. The Framers recognized this when they wrote the Fourth Amendment, and the Court should give effect to the absolute right articulated in this amendment by recognizing a Fourth Amendment right to privacy.

Mary Helen Wimberly[*]

[*] J.D. Candidate, Vanderbilt University, May 2007; B.A., Duke University, May 2004. I would like to thank my mother, Helen Wimberly, and my sister, Caroline Wimberly, for their humor and their support, and my father, Jim Wimberly, Jr., for his insightful comments throughout my note-writing process. I would also like to thank Ashley Grovert, Michelle Brooks, Sarah Statz, and Jessica Justema for putting up with me while I was hiding away in my apartment writing. Many thanks also to Professor Donald Hall for generously giving up his time to read through a draft of my note, to Professors Lisa Bressman, Rebecca Brown, and Richard Nagareda for providing guidance in the early stages of my note's development, and to Scott Atkinson, Jessica Lyons, Devon Largio, and the *Law Review* staff and editors for their help throughout the editing process. A big thank you also goes to Trish Luna, for her tireless dedication to the *Law Review*. Finally, I would like to especially thank Professor Thomas McCoy for his provocative and passionate teaching of constitutional law.

***