
*Constitutional Morality and the Rise of Quasi-Law:
A Symposium*

Reflections on Judicial Duty

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In this timely study Bruce Frohnen and George Carey uncover serious lapses in the operation of our federal government—lapses which constitute a depressing failure to be true to the Constitution. The authors charge all three branches of the federal government with neglect of their constitutional duties and, all too often, exceeding their constitutional authority. Congress has delegated law-making responsibilities to administrative agencies and has not exercised oversight of the agencies it has created. Presidents have usurped lawmaking functions through executive orders, and the Supreme Court has failed to check the reach of the legislative and executive branches. I applaud the authors' efforts to call attention to these serious problems.

While I agree with the Frohnen and Carey concerning the Court's failure to check the excesses of the executive and legislative branches, especially during the New Deal, I respectfully disagree that the Supreme Court has exceeded its judicial power. To make their case, our authors focus on just one highly controversial and unpopular case, *Roe v. Wade*. I will argue that the Court in this matter has remained within its constitutional boundaries, following common law and its own self-imposed rules.

To make their case, the authors characterize the Court's decision as recognizing a "right to an abortion."¹ That is not quite right. The Court

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¹ Bruce P. Frohnen and George W. Carey, *Constitutional Morality and the Rise of Quasi-Law* (Cambridge, MA: Harvard University Press, 2016), 201. Page numbers from this book are hereafter cited within parentheses in the text.

has long recognized a significant “right to privacy,” which, like any fundamental right, can be set aside if the public interest is sufficiently compelling to warrant restrictions on the right. In *Roe*, the Court extended that limited right to abortion cases. This essay reflects a concern that the authors’ criticisms of *Roe* threaten that right to privacy. We are not talking about harmful acts done in private. Rather, the right to privacy protects individual self-determination and control over one’s major life decisions, so long as they harm no other person and have no serious impact on the public welfare. I will argue that this right was so widely understood at the ratification of the Bill of Rights and the Fourteenth Amendment that it did not seem necessary to make it explicit.

I will also address the authors’ complaints concerning the standard for judicial review, the Court’s lack of a theoretical framework, and the Court’s identification of and treatment of fundamental rights. Finally, although it was not a topic raised by Frohnen and Carey, I will briefly examine the argument that the early-term fetus is a person under the Fourteenth Amendment—an argument that the Court in *Roe* acknowledged would justify a ban on abortion. Since that seems an unlikely outcome any time soon, I also suggest more charitable responses to those who seek abortions, some of which may even persuade women to carry a fetus to term.

Judicial Duty

Frohnen and Carey begin their examination by questioning the Court’s authority to review state restrictions on abortion and assert that “legal scholars look in vain for the constitutional grounding of judicial review” (278, n. 67), relying on Philip A. Hamburger, *Law and Judicial Duty*. However, Hamburger only asserts that such scholars, if they exist, are looking in the wrong place: judicial review is grounded in common law concepts of judicial duty. Hamburger traces the origins of judicial review to medieval times, where a hierarchy of laws required judges to declare lesser laws unenforceable if a higher law required the action. It also requires judges “to hold unconstitutional acts unlawful.”²

Frohnen and Carey also assert that the Court has abandoned its duty along with “the morality that prevailed at the time of the founding.” They again quote Hamburger, maintaining that this morality was “‘so clearly evident’ . . . that ‘it could be left implicit’ . . .” (200), but Ham-

² Philip A. Hamburger, *Law and Judicial Duty* (Cambridge, MA: Harvard University Press, 2008), 19-30. See also *id.* at 606.

burger also maintains that individual rights were taken for granted and likewise left implicit. He criticizes Americans who look only to “the express surface” of the Constitution and who favor “formal judicial enforcement of formal guarantees of constitutional rights” at the expense of implicit “assumptions underlying such rights and enforcement.” He advises Americans to search beyond “formal guarantees of constitutional rights,” and he laments the loss of “the inexplicit assumptions underlying such rights.” We ignore “not only assumptions about particular provisions of American constitutions, but also, more basically, about the authority of the people, the obligation of their intent, and the duty of the judges.”³

Frohnen and Carey seem to agree with Hamburger on this point (106-107), yet when they examine *Roe* and the problem of “quasi-law,” they attack judicial review as an American “invention” which allows an “extremely malleable understanding of judicial power” (200). This ignores the more spectacular American invention of a government with checks and balances and the Court’s significant role within that framework. If the Court fails to declare over-reaching laws unconstitutional, the more dangerous branches—including federal and state executives and legislative bodies—are free to impose ever more burdensome laws on the people.

Finally, the Court recognizes limits on its power to declare governmental acts unconstitutional. First, and often forgotten, it can act only when someone cares enough to bring a case before it. This keeps some cases out of the federal system, but large interest groups often push for a nation-wide response and file in federal courts. Second, the Court accepts common law precepts that required “English judges . . . to decide in accord with the law of the land, including their constitution” and to exercise judgment free of influence from others and from the judge’s personal biases.⁴ Third, to avoid intruding on the legislative sphere, the Court has adopted additional rules requiring dismissal of cases lacking a true controversy under Article III of the Constitution and requiring it to limit decisions to the narrowest grounds available.⁵

Griswold v. Connecticut, the most direct precedent for *Roe*, illustrates the Court’s insistence on that last point. A doctor sought a declaratory

³ *Id.* at 615. See also *id.* at 17.

⁴ *Id.* at 609.

⁵ *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 346-347 (1936) (Brandeis, J., joined by Stone, Roberts and Cardozo). The Court still frequently cites the “Ashwander rules.”

judgment that Connecticut could not prosecute him for making contraceptives available to married women. The Court dismissed his case because he was under no threat of arrest.⁶ Eighteen years later, another doctor and two patients filed a similar challenge. The Court dismissed for lack of an immediate danger to the parties: it was common knowledge that the state did not enforce the challenged law, and contraceptives were available in local drug stores.⁷ To get the Court to look at the law, someone would need to get arrested.⁸ Planned Parenthood decided to open a clinic. Authorities then arrested the director and the medical director, and the Court finally accepted review.⁹

Of course, one can also find examples where the Court has drifted away from its self-imposed restraints. Frohnen and Carey rightly complain, along with some who agree with the result in *Roe*, that the Court went too far when it discussed appropriate regulation for each trimester of pregnancy.¹⁰ Blackmun, writing the majority opinion, may have hoped to offer helpful guidance, but the result resembled legislation. The Court has since stepped away from the trimester rules.¹¹

The Precedents for a Right to Privacy

Honoring precedent is closely related to the common law duty to make an impartial decision. It requires soul-searching to ignore esteemed judges who trod the same path in earlier times. Moreover,

⁶ *Tileston v. Ullman*, 318 U.S. 44, 46 (1943) (per curiam). The Court also ruled that the doctor had no standing to assert the rights of his patients, a view modified in *Barrows v. Jackson*, 346 U.S. 249 (1953) (allowing a property owner to challenge restrictive racial covenants based on the purchaser's rights) and *NAACP v. Alabama*, 357 U.S. 449 (1958) (allowing organizations to assert their members' rights).

⁷ *Poe v. Ullman*, 367 U.S. 497 (1961). In a plurality opinion Frankfurter labeled it a "test case," lacking "immediacy" as required by the Ashwander rules (see *supra* note 4). Brennan concurred on grounds that there was no need to adjudicate rights prior to a state effort to prosecute plaintiffs. Four Justices dissented.

⁸ Ryan C. Williams, *The Paths to Griswold*, 89 *Notre Dame L. Rev.* 2155 (2014), at 2164.

⁹ *Griswold v. Connecticut*, 381 U.S. 479 (1965).

¹⁰ E.g., Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade*, 63 *N.C.L. Rev.* 375 (1985). Accessed at <https://scholarship.law.unc.edu/nclr/vol63/iss2/4/>.

¹¹ *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992). The plurality opinion was prepared by O'Connor, Kennedy, and Souter. Stevens joined Blackmun's concurring opinion which would have retained *Roe* without any amendments. Chief Justice Rehnquist had planned to overrule *Roe*. The Court consisted of eight Justices nominated by Republican presidents, and the only Justice nominated by a Democrat, White, had dissented in *Roe*. However, five Justices called to service by Republican Presidents seemed unbothered by external political pressure.

precedents help those seeking to comply with the law. Justice Stewart provides a relevant example of respect for precedent. Although he dissented in *Griswold*, he applied it in a later case dealing with a more public distribution of contraceptives, and he went further in *Roe*.¹² He relied on *Griswold* as establishing a right of a woman to be free of undue governmental restrictions on the decision of whether to bear or beget a child, and that “includes the right of a woman to decide whether or not to terminate her pregnancy.”¹³

It is often argued that the Constitution contains no explicit provision for a right to privacy. Nonetheless, the Court has decided several landmark cases recognizing a right to determine certain private matters. Had the Court not recognized the implicit right to privacy,¹⁴ the following could still be true:

- Nebraska, Iowa, and Ohio forbade teaching a foreign language to children below the eighth grade.¹⁵
- Oregon required parents to send their children between age eight and sixteen to public schools only.¹⁶
- Hawaii imposed onerous regulations on private “foreign language schools,” destroying their essential character.¹⁷
- Oklahoma required sterilization after a third conviction for a felony involving “moral turpitude,” a term defined to punish chicken thieves but not embezzlers.¹⁸
- New Mexico refused to admit to the bar an otherwise qualified applicant based on “moral turpitude,” primarily because as a youth, he was active in the Communist Party. All witnesses appearing before the Board of Bar Examiners had testified to his good character.¹⁹
- Alabama required the NAACP to identify its members.²⁰ Other

¹² *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972).

¹³ *Roe v. Wade*, 410 U.S. 113, 169-170 (1973) (Stewart, J., concurring).

¹⁴ Cases are listed in chronological order based on the date of decision.

¹⁵ *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923); *Bartels v. Iowa*, 262 U.S. 404 (1923).

¹⁶ *Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925).

¹⁷ *Farrington v. Tokushige*, 273 U.S. 284, 298 (1927).

¹⁸ *Skinner v. Oklahoma*, 316 U.S. 535 (1942). The Court relied on the equal protection clause and found no rational purpose in exempting white-collar criminals. In most cases it would give greater deference to state laws. However, the law involved “one of the basic civil rights of man” and declared “Marriage and procreation are fundamental.” Cf., *Buck v. Bell*, 274 U.S. 200, 207 (1927) (upholding Virginia’s law permitting sterilization of institutionalized feeble-minded individuals).

¹⁹ *Schwartz v. Board of Bar Examiners of New Mexico*, 353 U.S. 232 (1957).

²⁰ *NAACP v. Alabama*, 357 U.S. 449 (1958).

states also were allowed to require unpopular organizations to produce membership lists, harming individuals who may not have wanted the exposure.

- Connecticut prohibited the use of contraceptives, even for married couples.²¹
- Virginia and sixteen other states prohibited interracial marriage.²²
- Georgia prohibited the mere possession of obscene material in one's home.²³
- Massachusetts made it a crime to give away nonprescription contraceptives.²⁴

Nothing in the Constitution explicitly protects us from such laws. Some came close to invading First Amendment rights. Others could not be enforced without policing bedrooms or other intimate spaces. The Court found the public interest in these laws was too tenuous to justify the intrusion on rights clearly understood, even though they were not explicit in the Constitution.

One additional example of an implicit right might surprise you. Children could still be attending segregated schools. After all, as suggested by the esteemed Judge Learned Hand, the Equal Protection Clause of the Fourteenth Amendment says nothing about school integration.

Nonetheless, the Court in *Brown v. Board of Education* found it implicit in the Constitution that there was no acceptable justification for state laws denying children dignity and self-respect based on race, skin color, or a history of slavery. *Brown* allowed the “separate but equal” standard to remain in force in other cases.²⁵

Perhaps I should admit to a personal bias here. At a time when many states banned homeschooling, I devoted much time and effort to urging legislators to extend the privacy cases to parents' right to choose homeschooling for their children. Legislators responded and liberalized their laws. Finally, I believe privacy rights may soon save us from other unwelcome laws. For example, in the not too distant future, some state may seek to control population growth by limiting the number of children a person may conceive; another may require contraceptives

²¹ *Griswold v. Connecticut*, 381 U. S. 479 (1965).

²² *Loving v. Virginia*, 388 U. S. 1, 12 (1967).

²³ *Stanley v. Georgia*, 394 U. S. 557, 564 (1969).

²⁴ *Eisenstadt v. Baird*, 405 U. S. 438 (1972).

²⁵ Learned Hand, *The Bill of Rights: The Oliver Wendell Holmes Lectures* (Harvard Univ. Press, 1958), 54-55. *Brown* did not overrule *Plessy v. Ferguson*, 163 U.S. 537 (1896) (upholding separate but equal public transportation laws).

for persons under the age of twenty-five.²⁶ A state may offer various justifications for such laws. Perhaps the laws reduce carbon emissions by limiting the population. Perhaps legislators believe children with immature parents tend to have more health and educational problems. It is to be hoped that the Court will find the right to privacy prevails despite such justifications.

The Ninth Amendment

Of course, there must be some constitutional basis for an implied right. The Ninth Amendment provides a starting point. Admittedly, it offers little textual guidance: “The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.” Scholars have offered conflicting interpretations for almost every word.²⁷ At the very least, however, it seems that the Founders assumed the existence of unenumerated rights. But does it imply a Court role in enforcing those unidentified rights?

To uncover what is implicit in the Ninth Amendment, one might look at a significant group of Americans who would not support a constitution without a bill of rights, the antifederalists. They were not opposed to a federal government, but they wanted strong protections for their hard-won liberties. As Frohnen and Carey succinctly summarize the antifederalist position: “they argued for increased protection of ordered liberty in the face of federal republican majorities” (83-84). They also firmly believed that restraint on a government comes first, even for governments with limited powers, because power corrupts.²⁸ One leading anti-federalist, Richard Henry Lee, argued that a bill of rights represents *the “fundamental compact”* between the people and Congress.²⁹ In his view, “the liberty of a nation depends, not on planning the frame of gov-

²⁶ Justice White, concurring, suggested that rejecting the right to privacy would give states power to require sterilization of couples after two children were born. *Griswold v. Connecticut*, 381 U.S. 469, 496-497 (1965).

²⁷ See Ryan C. Williams, *The Ninth Amendment as a Rule of Construction*, 111 *Columbia L. Rev.* 498, 500, 505-506 (2011).

²⁸ During the North Carolina convention, July, 1788, William Goudy declared that “We know that private interest governs mankind generally. Power belongs originally to the people; but if rulers be not well guarded, that power may be usurped from them. People ought to be cautious in giving away power.” Jackson Turner Main, *The Antifederalists: Critics of the Constitution, 1781-1788* (Chapel Hill: the University of North Carolina Press, 1961), 127. See also, *id.* at 9-10; 127-28; Herbert J. Storing, ed., *The Complete Anti-Federalist* (Chicago and London: University of Chicago Press, 1981), 4:273; Paul Leicester Ford, ed., *Pamphlets on the Constitution of the United States* (Brooklyn, 1888), 5.

²⁹ R.H. Lee, *letter IV*, in Storing, *supra* note 27, at 2: 248-249.

ernment . . . but on prescribing due limits to [its] powers.”³⁰ In short, a bill of rights takes priority over the framing. Storing observes:

is this not putting the cart before the horse? . . . how can the *foundation* of government be laid in *reservations* against that very government? To answer that question is to grasp the Anti-Federalist case for a bill of rights in its most fundamental aspect.³¹

Antifederalists wanted to protect “that residuum of human rights, which is not intended to be given up to society, and which indeed is not necessary to be given for any good social purpose.”³² They were united on this point. An Old Whig observed that “the very same objections have been made, and the very same alterations proposed by different writers, who . . . know nothing at all of each other.”³³ “A Plebeian” saw “a remarkable uniformity in the objections to the constitution” especially concerning a bill of rights.³⁴ The Preamble to the Bill of Rights acknowledges the antifederalist position “to prevent misconstruction or abuse of its [the Government’s] powers.”³⁵ In his collection of antifederalist papers, Morton Borden noted “almost to a man” the antifederalists demanded a bill of rights.³⁶

Federalists countered that the draft constitution already has a bill of rights,³⁷ that checks and balances provide sufficient restraints,³⁸ and that the large number of popular factions would restrain federal power.³⁹ They argued that the federal government possesses only the powers delegated to it. For example, it lacks authority “to regulate literary publi-

³⁰ *Essays by The Impartial Examiner*, Storing, *supra* note 27, at 5:179. Others agreed. See *Brutus II*, Storing, *supra* at 2:373.

³¹ Storing, *supra* note 27, at 1:68.

³² Richard Henry Lee, *Objections* (A Letter to Edmund Randolph, Governor of Virginia), New York, October 16, 1787, in Richard H. Lee, ed., *Life and Correspondence of Richard Henry Lee* (Philadelphia: H.C. Carey and I. Lea, 1825), 2:78-81.

³³ *An Old Whig, Essay VII*, (Philadelphia) *Independent Gazette*, November 28, 1787, 27-30, at 29, 30.

³⁴ *Address by a Plebeian, New York, 1788*, in W.B. Allen, Gordon Lloyd, & Margie Lloyd, eds., *The Essential Antifederalist* (Lanham, MD: University Press of America, 1985, 2002 ed.), 31-40, at 38.

³⁵ Transcription of the 1789 Joint Resolution of Congress Proposing 12 Amendments to the U.S. Constitution, The U.S. Bill of Rights, The Preamble to the Bill of Rights, accessible at <https://www.archives.gov/founding-docs/bill-of-rights-transcript>.

³⁶ Morton Borden, ed., *The Antifederalist Papers* (East Lansing: Michigan State University Press, 1965), x.

³⁷ *The Federalist* No. 84 (Alexander Hamilton), providing examples from Article I, Section 10.

³⁸ *The Federalist* No. 51 (James Madison).

³⁹ *Ibid.*

cations,” and therefore a provision for freedom of press is unnecessary.⁴⁰ They argued that an aristocratic tradition would check the exploitation of power, and the larger domain of the federal government improves chances that the best leaders will fill the offices. They argued that people will not vote for tyrants,⁴¹ a bill of rights is needed only to limit the absolute power of kings,⁴² there is no need for protection “against our *own* encroachments on *ourselves*.” through elected legislators,⁴³ and “[t]he Confederation has no bill of rights.”⁴⁴

None of this impressed the antifederalists. When told a bill of rights was unnecessary, Patrick Henry asked if it would take too much paper and charged the federalists with being “a bit sophistical.”⁴⁵ Many feared future expansion of federal power: “The powers, rights, and authority granted to the general government . . . are as complete . . . as that of any state government—Life, liberty, and property, are under its control.”⁴⁶

However, prominent federalist lawyers also raised some worrisome legal issues. They warned that enumeration of rights implied completeness and some rights could be overlooked and thus lost.⁴⁷ Such an argu-

⁴⁰ James Wilson, in Storing, *supra* note 27, 1:65-66. See also John Bach McMaster, and Frederick D. Stone, eds., *Pennsylvania and the Federal Constitution, 1777-1778* (Historical Society of Pennsylvania, 1888), 144, 354. Wilson was to make this point again as a Supreme Court Justice.

⁴¹ Fabius [John Dickenson], *The Letters of Fabius, in 1788, on the Federal Constitution . . .*, in Ford, *supra* note 27, at 214-15.

⁴² *The Federalist* No. 84. Hamilton was not the only one to make this argument. See e.g., James Iredell, in Ford, *supra* note 27, at 335.

⁴³ Noah Webster, *Bill of Rights* (NY 1788), in Webster, *A Collection of Essays and Fugitive Writings* (1790) (facsimile reproduction, Delmar, New York: Scholars’ Facsimiles & Reprints, 1977), 45-47.

⁴⁴ *The Federalist* No. 38. Madison also observed that when the Articles of Confederation were proposed, there were “objections and amendments suggested by the several States” but in the end “not one is found which alludes to the great and radical error which on actual trial has discovered itself.” Despite a deep respect for Madison and his role in the adoption of the Bill of Rights, I find this argument lame.

⁴⁵ Patrick Henry, Storing, *supra* note 27, at 5:16.37 & 5:249.

⁴⁶ Brutus, II, to the citizens of the State of New-York, Nov. 1, 1787, in J.R. Pole, ed., *The American Constitution: For and Against: The Federalist and Anti-Federalist Papers* (New York: Hill and Wang, 1987), 40.

⁴⁷ See, e.g., Hamilton, *The Federalist* No. 84; James Wilson, in McMaster and Stone, *supra* note 39, at 254; Aristides [Alexander Contee Hanson], “Remarks on the Proposed Plan of a Federal Government, Addressed to the Citizens of the United States of America, And Particularly to the People of Maryland,” [n.d.], in Ford, *supra* note 27, 241-42. Wilson’s view was perhaps the most significant. He was a member of the Continental Congress, had signed both the Declaration and the Constitution, and would be appointed a Justice of the first Supreme Court.

ment alarmed antifederalists; the draft constitution already enumerated a few rights—the very language some federalists claimed comprised an adequate bill of rights.⁴⁸ Federalist lawyers also suggested that including any right would imply a federal power: for example, a provision for freedom of the press implied power over the press.⁴⁹ The antifederalists needed more than a bill of rights. Such documents use only broad and general commands. The antifederalists needed a way to preserve basic rights that may not be explicit in a bill of rights.

To assure ratification of the Constitution, the federalists promised a bill of rights and honored that promise within months after the new Congress assembled.⁵⁰ The Ninth and Tenth Amendments addressed the worrisome legal problems raised by the federalists, and assure us that the people retain their rights and powers. But what are they? Some legal analysts believe that the question invites judges to impose their personal views on the matter. Thus, even those who insist on examining the original intent of the framers avoid looking for an answer. One well-known “originalist” has called the Ninth Amendment “a meaningless inkblot.”⁵¹ However, redacting any part of the Constitution is a failure to do the work required to figure out its meaning. What lawmakers and courts should ask is, what rights were exercised at the framing that were not made explicit in the Constitution? And what powers were held by the people and the states?

Note also that Amendments One through Eight assume that certain rights *were already in place*. Only the First Amendment explicitly limits the federal government: “Congress shall make no law” establishing religion or restricting it, or abridging free speech or press, or the right to petition the government. Even though these are the most sacred of rights, it seems likely that the drafters wished to avoid any suggestion that the federal Constitution would interfere with state constitutions

⁴⁸ Williams, *Ninth Amendment*, supra note 26, at 512.

⁴⁹ Id. at 511. Again, this was James Wilson’s argument. See also Storing, supra note 27, at 1:69.

⁵⁰ The Constitution was ratified in 1788. Congress convened March 1789 and sent The Bill of rights to the states by September. It was ratified in 1791.

⁵¹ See Williams, *Ninth Amendment*, supra note 26, at 500, 505-506; Harry V. Jaffa, *Storm Over the Constitution* (Lanham, MD: Lexington Books, 1999), 47. Jaffa relies on Douglas Kmiec, *The Attorney General’s Lawyer: Inside the Meese Justice Department* (New York: Praeger, 1992), 42. Kmiec quotes Madison who declared that the Bill of Rights “will be an impenetrable bulwark against every assumption of power in the legislative or executive.” Id. at 35. Kmiec also noted an expectation that the Ninth Amendment would be judicially enforced. Id. at 37; 1 *Annals of Cong.* 439.

containing provisions supporting churches.⁵² In contrast, Amendments Two through Eight use the passive voice, and the First, Second, Fourth, Sixth, and Seventh Amendments refer to the “the right of the people” or simply to “the right.” To guarantee *the* right to bear arms or *the* right to a speedy and public trial implies that these are natural rights that need no codification. The Supreme Court has not examined the Bill of Rights along these lines,⁵³ nor should it, as more limited grounds are available to decide these cases. However, public officials and citizens might take a broader view, and sometimes they do.⁵⁴ Moreover, early state courts often enforced the Bill of Rights even when their state constitutions had no such provisions.

Due Process under the Fourteenth Amendment

Although the Ninth Amendment provides a basis for deciding privacy cases, the Supreme Court has chosen the Due Process Clause of the Fourteenth Amendment. It declares that “[n]o state shall make . . . any law which shall . . . deprive any person of . . . liberty . . . without due process of law.” Frohnen and Carey accuse the Court of relying “arbitrarily” on this language to find unenumerated rights (202). However, prior to ratification, “due process” was widely used and understood as a term that included substantive rights.⁵⁵ Significantly, the first party platforms of the Republican Party claimed due process imposed strong substantive obligations, including requiring the national government to abolish slavery in the territories:

[W]e hold it to be a self-evident truth, that all men are endowed with the

⁵² See Patricia Lines, *Freedom of Conscience and Education at the Founding*, Dissertation, Catholic University of America, 1999. See Appendix B, “Colonial and First State Provisions on Religion and Conscience,” reviewing provisions in effect before and after the ratification of the Constitution.

⁵³ Commentators often cite *Barron v. Baltimore*, 332 U.S. 243 (1833) as holding that the Bill of Rights does not apply to states. However, the Court in *Barron* only reviewed the Fifth Amendment’s requirement of just compensation for private property taken for public use. *Id.* at 250-251. It is noteworthy that after *Barron*, state courts continued to apply the Fifth Amendment to cases brought before them. See Alex McBride, *Landmark Cases/ Barron v. Baltimore (1833)*, https://www.thirteen.org/wnet/supremecourt/antebellum/landmark_barron.html.

⁵⁴ Legislators would be wise to avoid passing laws that may infringe on constitutional rights to avoid costly and unnecessary litigation. The administrative arm, likewise, might refuse to enforce a patently unconstitutional law. For example, Jefferson refused to enforce the Sedition Act. Congress finally repealed it. In my state prosecutors refused to charge homeschooling parents, and the state legislature finally liberalized the law.

⁵⁵ See Ryan C. Williams, *The One and Only Substantive Due Process Clause*, 120 Yale L.J. 408 (2010).

inalienable right to life, liberty, and the pursuit of happiness, and that the primary object and ulterior design of our Federal Government were to secure these rights to all persons under its exclusive jurisdiction; that, as our Republican fathers . . . ordained that no person shall be deprived of life, liberty, or property, *without due process of law*, it becomes our duty to maintain this provision of the Constitution against all attempts to violate it for the purpose of establishing Slavery.⁵⁶

These same Republicans pushed through the Fourteenth Amendment. Eight years after ratification, the Court examined the new Due Process Clause and identified an unenumerated right: a right to privacy. The Court observed that under the Constitution people agreed to be governed by laws that assure the common good, but “this does not confer power upon the whole people to control rights which are *purely and exclusively private*.” While a majority upheld the law in question, two Justices were ready to find a state law and even a state constitution violated the Fourteenth Amendment.⁵⁷ A few years later, the Court again endorsed the idea of substantive due process, observing that in America, bills of rights had “become bulwarks also against arbitrary legislation” and should not be restricted by “ancient customary English law.” Due process was not to be limited to procedures: it extends to “*the very substance of individual rights to life, liberty, and property*.”⁵⁸ In two more years, the Court declared unconstitutional a federal law making the refusal to produce private papers a presumption of guilt, citing common law practice and history surrounding the American Revolution. The Court also noted that the Fourth Amendment prohibits unreasonable search and seizure and the Fifth prohibits self-incrimination. While neither were directly applicable, both were relevant to the personal security of the citizen. As the Court put it, the two amendments “almost run into each

⁵⁶ Republican Platform 1856, accessed at <https://www.presidency.ucsb.edu/documents/republican-party-platform-1856> (emphasis added). In 1860 they repeated this mandate and asserted that Congress had no authority “to give legal existence to Slavery in any Territory,” again citing the Fifth Amendment. Republican Platform of 1860, section 8, accessed at <https://www.presidency.ucsb.edu/documents/republican-party-platform-1860>.

⁵⁷ *Munn v. Illinois*, 94 U.S. 113, 123-124 (1876) (emphasis added). *Munn* concerned regulation of warehouses, much of it established in detail in the state constitution. It was overruled in *Wabash, St. Louis & Pacific Railway Co. v. Illinois*, 118 U.S. 557 (1886) (state regulation of railroads invaded congressional regulatory authority). However, *Munn* remains instructive as to the intent of those who ratified the Fourteenth Amendment.

⁵⁸ *Hurtado v. California*, 110 U.S. 516, 532 (1884) (Emphasis added). The Court upheld a state law that allowed a conviction for murder without a grand jury indictment, so long as other safeguards assured the charges were sufficient to proceed to trial.

other” and throw light on each other.⁵⁹ By the early twentieth century, the Court was finding unconstitutional state laws that unduly intrude upon private decisions. These early opinions, decided by those who participated in the ratification of the Fourteenth Amendment, deserve considerable respect in interpreting the intent of the drafters.

Fundamental Rights and the Standard for Review

As the Court extended the concept of substantive due process, it also found a need to give priority to some rights. Laws that do not impinge on fundamental rights require a rational relation to a legitimate state interest, but most state laws easily pass this test. Only arbitrary and capricious laws were stricken. Over time, the Court identified some rights as so fundamental that they require some compelling purpose to justify the law. What constitutes a fundamental right and what state purpose is compelling has developed on a case-by-case basis, and this formula did not arrive all at once. Most of Amendments One through Eight have been found to be fundamental. The privacy cases are the only other type of case to receive strict scrutiny under the Fourteenth Amendment’s Due Process Clause.

Frohnen and Carey complain that the Court has failed to provide a theoretical framework for determining what is a fundamental right, or how such a right can apply to abortion (201). They are correct, but the Court’s judicial duty requires it to decide only cases brought properly before it and to decide such cases as narrowly as possible. That makes a theoretical framework impossible; it requires a case-by-case development of the principles guiding the Court.

In the earliest of the privacy cases, the Court nominally required a rational basis, and declared the laws before it reasonable or unreasonable, but it was doing more than that. In 1923 in *Meyer v. Nebraska*, the Court provided its first guidance on what made privacy rights fundamental:

While this Court has not attempted to define with exactness the liberty thus guaranteed, the term has received much consideration . . . Without doubt, it denotes not merely freedom from bodily restraint, but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.⁶⁰

⁵⁹ *Boyd v. United States*, 116 U. S. 616, 633 (1886).

⁶⁰ *Meyer v. Nebraska*, 262 U. S. 390, 399 (1923). The Court cited earlier cases for each point, including *Lochner*. It is likely that a right to make contracts could be protected

It is almost impossible to criticize this decision. The earliest Americans fled their native lands not just to achieve religious freedom, but also to educate their children in accord with their religious beliefs. That right was widely understood upon adoption of the Ninth Amendment and was still fresh in people's minds when the nation adopted the due process requirements in the Fourteenth Amendment. The examples provided in *Meyer*—earning a living, education, marriage, raising children, worship, and “privileges long recognized at common law”—all involve personal decisions affecting one's entire life. People usually take for granted their right to make such decisions. As it turns out, not much more has been added to this list for almost a century.

As noted, the Court nominally used a rational basis test in the first of these cases. However, the emergence of a stricter standard was evident even then. It is rational for a state to require children to be educated in a way that promotes a shared understanding of the nation's history. Under a rational basis test, the Court could have upheld the Nebraska law. Moreover, the Court actually suggested a stricter standard for review: Some “emergency” might justify infringement of the right at stake:

That the State may do much, go very far, indeed, in order to improve the quality of its citizens, physically, mentally and morally, is clear; but the individual has certain fundamental rights which must be respected. . . . No emergency has arisen which renders knowledge by a child of some language other than English so clearly harmful as to justify its inhibition with the consequent infringement of rights long freely enjoyed. We are constrained to conclude that the statute as applied is arbitrary and without reasonable relation to any end within the competency of the State.⁶¹

When the Court reviewed Oregon's law compelling attendance at public schools only, it cited this precedent without any discussion of the reasonableness of the state law. Again it noted that there were “no peculiar circumstances or present emergencies” to justify outlawing private religious and secular schools.⁶²

Griswold, dealing with Connecticut's anti-contraception law, generated disagreement among the Justices over how to identify a fundamental right. Douglas delivered the opinion of the Court, ruling that the issue “concerns a relationship lying within the zone of privacy created by several fundamental constitutional guarantees,”⁶³ but he also ac-

against unreasonable laws. For example, it seems likely that the Court would void a law nullifying any contract signed on a holiday as an arbitrary and irrational law.

⁶¹ *Meyer v. Nebraska*, 262 U. S. 390, 401, 403 (1923).

⁶² *Pierce v. Society of Sisters*, 268 U. S. 510 (1925).

⁶³ *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965). The Court took a similar approach

knowledge that “we deal with a right of privacy older than the Bill of Rights.”⁶⁴ Goldberg, joined by Warren and Brennan, agreed that a right could be fundamental, even if not specified in the Bill of Rights, based on precedent and “the language and history of the Ninth Amendment.”⁶⁵ Harlan thought the language based on explicit rights was too restrictive, and would urge voiding a law based on the Fourteenth Amendment if it “violates basic values ‘implicit in the concept of ordered liberty.’”⁶⁶ White concurred in the judgment, but wished to rest on the narrow ground that precedent had identified marital privacy as fundamental. Black, joined by Stewart, dissented. He observed that had the doctor only advised his patients, without supplying contraceptives, he would have found the state violated the Free Speech Clause of the First Amendment.⁶⁷ Stewart, joined by Black, grumbled that the majority opinion cites six amendments, but he can find nothing in them that guarantees a right to privacy.⁶⁸ Such differences are a consequence of each justice’s exercising a judicial duty to provide his or her independent judgment in a difficult case. Despite their differences, all agreed that some rights are fundamental and seven agreed that marital privacy was a fundamental right and the invasion of that privacy required substantial justification.⁶⁹

Roe v. Wade, decided eight years later, again had seven Justices agreeing that the case required stricter review. Blackmun, writing for the majority, ruled that:

Where certain “fundamental rights” are involved, the Court has held that regulation limiting these rights is justified only by a “compelling state interest” . . . and that legislative enactments must be narrowly drawn to express only the legitimate state interests at stake.⁷⁰

Although the Court found the developing fetus is not a “person”

in cases as early as 1886. See *Boyd v. United States*, 116 U.S. 616, 630 (1886), *supra*, note 58 and accompanying text.

⁶⁴ *Griswold*, *id.* at 486. Frohnen and Carey rightly mock Douglas’s favorite metaphor of a “penumbra” here. The area affected by overlapping penumbras would not cast light, but darker shadows.

⁶⁵ *Id.* at 486-487.

⁶⁶ *Id.* at 499-500. The inner quoted material is from *Palko v. Connecticut*, 302 U.S. 319, 325 (1937). However, the principle quoted did not help the appellant in that case, which decided that the Fourteenth Amendment does not incorporate the Fifth Amendment’s prohibition on double jeopardy.

⁶⁷ *Id.* at 507-527.

⁶⁸ *Id.* at 527-528.

⁶⁹ White further noted that the State offered only one possible justification—to discourage promiscuous or illicit sex—which made no sense applied to the married couple bringing the case. *Id.* at 502-506.

⁷⁰ *Roe v. Wade*, 410 U.S. 113, 154 (1973).

under the Fourteenth Amendment,⁷¹ it is growing ever closer to personhood and the state's interest grows correspondingly stronger. The Court's critical distinction between a viable and a nonviable fetus was based on a number of diverse sources. As examples, it noted Saint Augustine's view that not until quickening was the embryo *animatus* and endowed with a soul,⁷² common law did not consider abortion prior to quickening to be a crime,⁷³ and early-term abortion was not regarded as a serious crime at the Founding.⁷⁴ This suggests that the practice remained among those "powers" retained by the people under the Ninth and Tenth Amendments. Blackmun found that the pregnant woman's fundamental right to end her pregnancy extended to "approximately the end of the first trimester." Regulation up to this point would require a compelling justification. He should have stopped there, but he went further to suggest a different approach for the next two trimesters. Our authors rightly discuss this aspect of the case under the rubric of "quasi-law" (200-203).

In *Planned Parenthood of Southeastern Pennsylvania v. Casey* the Court rejected this guidance.⁷⁵ Three Justices adopted a different standard of review, holding that state regulation of abortion could not place an "undue burden" on a woman's right to abort a nonviable fetus. The plurality would invalidate a law if enacted for "the purpose or effect of placing a substantial obstacle in the path of a woman" seeking an abortion at that point.⁷⁶ The *Casey* opinion considered a number of state regulations, upholding some and finding others violated the woman's rights. Two examples illustrate what is "undue" and what is acceptable. The Court struck down the requirement that the woman obtain the consent of her husband, noting that in a functioning marital partnership the parties will discuss the decision; in other situations a woman may be dealing with an absent or abusive husband. The Court upheld a requirement for informed consent followed by a twenty-four-hour wait to allow time for

⁷¹ The Court examined the use of the word "person" in the Constitution from classical Greek and Roman thinking to the present to reach this conclusion. *Id.* at 157-158.

⁷² *Id.* at 133, note 122.

⁷³ *Id.* at 132.

⁷⁴ *Id.* at 135.

⁷⁵ *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992). The plurality opinion was prepared by O'Connor, Kennedy, and Souter. Stevens joined Blackmun's concurring opinion which would have retained *Roe* without adoption of the new standard for review proposed by the plurality. Chief Justice Rehnquist had been counting on overruling *Roe*. Eight Justices had been nominated by Republican presidents and the single Justice nominated by a Democrat, White, had dissented in *Roe*.

⁷⁶ *Id.* at 877.

contemplation.

Basically, the undue burden test is a balancing test. Whether the Court articulates it or not, it has weighed the state's declared public interest against the burden on a person claiming a right. The early school cases balanced the state's interest in assuring well-educated citizens against the parents' right to determine the education of their children. Another school case of more recent vintage readily admits the Court is weighing the state interest against the burden on individuals. In *Wisconsin v. Yoder*, the free exercise of religion was at stake. While the Amish were willing to send their children to school through the eighth grade, their religious beliefs imposed a duty to prepare children at age 14 and 15 for an agricultural life and for their responsibilities as members of the Amish community. Pitted against this was the state's significant interest in compelling education to age sixteen. The Court explicitly endorsed a "balancing process" and held, *as applied* to the Amish—and only the Amish—Wisconsin's compulsory education law was invalid.⁷⁷

There is an inherent conflict in any Constitution containing a Bill of Rights. To enter into a constitutional democracy, the people agree to be subject to laws made through their representative government. At the same time, that power is restricted by rights guaranteed to individuals. How does one resolve this conflict? Too much emphasis on legislative power may pave the way for mob rule and too much emphasis on rights may make it difficult to govern well. A middle way considers both how urgent is the need for the law in question and how onerous is the burden it places on the individual. In the case of an early abortion, some of the public, but not all, may consider it wrong, but none are actually injured. The undue burden test balances the right of the woman to exercise control over her body and her future against a state's interest in maintaining a reverence for potential human life. Because the situation is in flux, requiring a woman to continue a pregnancy after the fetus is viable is a somewhat lesser burden in terms of a woman's confinement, but a significant burden remains. States could mitigate that burden by offering the woman medical and financial assistance and arranging for adoption of her baby. Finally, when a viable fetus leaves the womb, he or she is a "person" entitled to due process protection as much as the mother, and the balancing scales of justice tip in favor of the helpless infant. Indeed, failure to care for a living baby following a partial-birth abortion⁷⁸

⁷⁷ *Wisconsin v. Yoder*, 406 U.S. 205, 214 (1972).

⁷⁸ Partial-birth abortion involves inducing birth and—one cringes to learn this—sometimes involves procedures likely to damage or kill the emerging infant. Usually

should be treated as homicide. Were state laws to allow neglect of such a baby, they violate the baby's constitutional right to due process.

I see no point in excoriating the Court for identifying a right to privacy—meaning a right to determine one's basic goals in life when those goals injure no other person. If one were to consider what rights the people might have retained in the Ninth Amendment—those rights that were considered inalienable and widely understood, and needed no explicit mention in the Bill of Rights—there seems to be no better answer than that given by the Court. It is a right which allows one to marry, have or not have children, guide the education of one's own children, find work and earn one's daily bread, and to enter into contracts and other agreements with others without undue interference from state legislatures and Congress. All of this is subject to reasonable regulation, of course.

There are challenges to *Roe* and progeny that do not threaten the privacy cases. For example, some groups hope to convince the Court to find that the fetus is a "person" under the Fourteenth Amendment. Blackmun readily admitted that the *Roe* opinion "collapses" if that were the case.⁷⁹ The success of that effort is difficult to predict. The *Roe* Court found that the word "person" as it appears most often in the Constitution applies only to those already born, and no use of the word provides "any assurance, that it has any possible pre-natal application."⁸⁰ The Court also noted more liberal law and practices with respect to abortion for most of the nineteenth century, and a number of lower federal court and state court decisions that concluded that "person" in the Fourteenth Amendment does not include the unborn.⁸¹ While admitting that such observations do not completely settle the issue, the Court also noted disagreement on the question from various disciplines, with most religious groups regarding the question as a matter of conscience, while the Catholic Church and some non-Catholics believed life begins at conception. Seven Justices in *Roe* tacitly accepted that analysis while neither of the two dissenting Justices objected to it.⁸² Justice Antonin Scalia, who joined the Court several years later, maintained in an interview that the persons in the Fourteenth Amendment "clearly means walking-around

partial-birth abortion is chosen when doctors have determined that the fetus is seriously deformed and unlikely to live.

⁷⁹ *Roe v. Wade*, 410 U.S. at 156.

⁸⁰ *Roe*, at 157.

⁸¹ *Id.* at 158.

⁸² *Id.* at 171-178 (Rehnquist, dissenting); *Doe v. Bolton*, 410 U.S. 179, at 221-223 (White, dissenting).

persons.”⁸³ Right to life groups may persuade the Court to reexamine the issue this year, although it seems unlikely.⁸⁴ In contrast, a mainstream conservative view appears in an amicus brief filed in the same case by 207 Republican members of Congress. They do not urge overturning existing precedent, but focus on the need to regulate the clinics more stringently, citing numerous examples of poor practices that may harm women using those clinics.⁸⁵

It may be more fruitful to adopt more charitable ways to approach the issue. If abortion at any stage is a crime, some women will manage to secure one anyway, often without medical safeguards. States today seem overwhelmed with the difficulties of maintaining basic public safety. Why add to the list of crimes that will be enforced unevenly if at all? Why not develop programs to encourage and support women experiencing an unwanted pregnancy to give birth? Could not private organizations offer support to pregnant women to bear the fetus to birth and facilitate adoption for the baby? Such actions could reduce the number of abortions and lessen the number of unwanted children raised by unhappy mothers with inadequate resources. No one likes abortion, but there are limits to what lawmakers can do. We do not send people to jail for suicide attempts, blasphemy, fornication, or adultery. The seven cardinal sins: pride, greed, lust, envy, gluttony, wrath, and sloth do not warrant public enforcement, probably because we could not possibly capture all the wrongdoers. Some sins are best left to conscience, hopefully after careful thought and good advice from a wise counselor.

⁸³ Interview of April 27, 2008, with Leslie Stahl on 60 Minutes, accessed at <https://www.cbsnews.com/video/justice-scalia-on-60-minutes-part-2/>.

⁸⁴ See, e.g., Brief of *Amicus Curiae* Illinois Right to Life, *June Medical Services v. Gee* (Nos. 18-1323 & 18-1460). While the Court does cite *amici curiae* briefs in possibly as many as twenty percent of cases, many such briefs are filed, and this one would require the Court to decide more than the issues placed before it, a violation of its self-imposed rules. The Court may also worry about the extension of the ruling to federal and local governments, which do not include fetuses in census counts or other estimates of population, or for assistance to families. Statutory and common law also tend to impose different criminal and civil penalties for injury to fetuses and postnatal persons. If the fetus is a person entitled to equal protection with other persons, some issues become heart-breaking and mind-boggling. For example, how to decide what to do for a sexually abused and pregnant thirteen-year-old girl, or who deserves preference if a pregnancy threatens the life of the woman?

⁸⁵ Brief *Amici Curiae* of 207 Members of Congress, *June Medical Services v. Gee* (Nos. 18-1323 & 18-1460).