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Substantive Due Process Analysis and the Lockean Liberal Tradition: Rethinking the Modern Privacy Cases

JEFFREY S. KOEHLINGER

The Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution. There should be, therefore, great resistance to expand the substantive reach of those Clauses, particularly if it requires redefining the category of rights deemed to be fundamental.

The fourteenth amendment provides that no state shall "deprive any person of life, liberty, or property, without due process of law." Originally, this clause ensured that every citizen received certain minimal procedural guarantees before his or her rights would be limited or taken away. In later decisions, however, the Supreme Court recognized a substantive element to the due process clause. This substantive due process analysis is "the judicial practice of constitutionalizing values that cannot fairly be inferred from the constitutional text, the structure of government ordained by the Constitution, or historical materials clarifying otherwise vague constitutional provisions." This nonoriginalist review enjoyed its greatest popularity in Eisenstadt v. Baird and Roe v. Wade, where the Supreme Court recognized the right of the individual to use contraceptives and the limited privacy right of a woman to an abortion. However, Justice White's pronouncement in Bowers v. Hardwick raises considerable doubt regarding the validity of substantive


2. U.S. CONST. amend. XIV; see also U.S. CONST. amend. V ("No person shall ... be deprived of life, liberty, or property, without due process of law ....").
4. Perry, Substantive Due Process Revisited: Reflections on (and Beyond) Recent Cases, 71 Nw. U.L. Rev. 417, 419 (1976) ("Prescriptively, substantive due process refers to the principle that a law adversely affecting an individual's life, liberty, or property is invalid, even though offending no specific constitutional prohibition, unless the law serves a legitimate governmental objective."); see also C. Wolfe, THE RISE OF MODERN JUDICIAL REVIEW 145 (1986) ("The doctrine of substantive due process is so called because the inquiry focuses not on the legal procedure by which one is convicted and punished ... for violating the law, but rather on the law itself and whether a person may legitimately be required to obey such a law.").
due process in the modern privacy cases. In addition, the Court's recent decision in *Webster v. Reproductive Health Services* suggests that a majority of the Court may no longer support the limited privacy right of a woman to an abortion on the grounds originally articulated in the *Roe* decision.

Because there is considerable agreement that the Supreme Court has failed to articulate a principled approach to its substantive due process decisions, the crucial issue is whether the Court can continue to examine governmental regulation of privacy interests under substantive due process analysis, or whether such analysis is an illegitimate and "lifeless" doctrine that should be abandoned altogether. This Note contends that the Court can continue to legitimately decide privacy cases like *Griswold v. Connecticut*, *Roe* and *Bowers*, but only if it follows a moral philosophy approach to substantive due process analysis in the privacy area that is firmly rooted in the Lockean liberal tradition.

Modern substantive due process analysis and the privacy rights it purportedly protects reflect a liberal tradition whose backbone is a natural rights philosophy most persuasively articulated by John Locke. The essential purpose of the Lockean liberal tradition is to ensure that civil society and

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7. According to one commentator, *Bowers* signals, if not the "second death" of substantive due process, at least an undermining of the doctrinal integrity and legitimacy of Supreme Court decisionmaking in the substantive due process area. See Conkle, *The Second Death of Substantive Due Process*, 62 Ind. L.J. 215, 216, 241 (1987); see also Rubenfield, *The Right of Privacy*, 102 Harv. L. Rev. 737, 739 (1989) ("Hardwick has exposed deep flaws in the prevailing jurisprudence and ideology of privacy. The constitutional ground has shifted; perhaps it is dissolving altogether.").


9. See id. at 3067 (Blackmun, J., dissenting).

10. "The Court has been unable to conclude whether privacy analysis is based on textual, consensus, traditional, or autonomy interests. No expressed theory offers even an approximate explanation of the various decisions, and the Court has apparently given up the attempt." Nichol, *Children of Distant Fathers: Sketching an Ethos of Constitutional Liberty*, 1985 Wis. L. Rev. 1305, 1306. Another commentator has charged:

The liberty established by *The Abortion Cases* has no foundation in the Constitution of the United States. It was established by an act of raw judicial power. Its establishment was illegitimate and unprincipled, the imposition of the personal beliefs of seven justices on the men and women of fifty states. The continuation of the liberty is a continuing affront to constitutional government in this country.

J. NOONAN, A PRIVATE CHOICE: ABORTION IN AMERICA IN THE SEVENTIES 189 (1979); see also R. SMITH, LIBERALISM AND AMERICAN CONSTITUTIONAL LAW 239 (1985) ("The current Court's reliance on its judgments of traditionally fundamental forms of privacy to decide which claims merit strict scrutiny is inarguably unpredictable.").

11. See Conkle, supra note 7, at 216.

12. 381 U.S. 479 (1965).

13. The moral philosophy approach to nonoriginalist review is by no means new or radical. Essentially it "would permit the Supreme Court to seek out and apply political-moral principles that properly ought to control the relationship between government and individual. ... [T]he Court is simply to engage in a process of reasoning that draws on considerations of political and moral philosophy." Conkle, supra note 7, at 230 (footnote omitted). For a fuller examination of this and other forms of nonoriginalist review, see G. STONE, L. SEIDMAN, C. SUNSTEIN & M. TUSHNET, CONSTITUTIONAL LAW 862-64 (1986); Conkle, supra note 7, at 230-37.
political institutions protect and promote, as far as is practicable, the "rational liberty" of the individual. This rational liberty can be described as the ability of each person to "reflect for himself on his circumstances and decide on the course that will best aid in achieving both his continued self-guidance and his distinctive happiness." The Lockean liberal tradition, with its emphasis on fostering the rational liberty of the individual, offers a much more principled and organized method for determining the substantive content of an individual's "life, liberty, and property" rights under the due process clauses than that currently utilized by the Supreme Court. Thus, substantive due process analysis that draws upon this Lockean liberal tradition can provide a proper benchmark for judging the correctness of the Court's modern privacy decisions, as well as a principled basis for deciding future cases.

Although the Court's decision in *Griswold* reached a result consistent with the fundamental principles of the Lockean liberal tradition, the Court failed to follow a proper Lockean approach in *Roe* and *Bowers*. This Note argues that rethinking *Roe* and *Bowers* under a Lockean moral philosophy approach to substantive due process produces defensible outcomes contrary to those reached by the Court. Part I summarizes the main tenets of the Lockean philosophical tradition that are most relevant to a defensible approach to substantive due process analysis in the privacy area. It also more fully explores the concept of rational liberty and its general implications for this analysis. As background for analyzing the modern privacy cases, Part II briefly demonstrates how these Lockean principles found their way into American constitutional theory at the Founding. Part III asserts that these principles provided the primary theoretical underpinnings for the Court's first major attempt at substantive due process analysis during the *Lochner* era, where the Court identified an individual's right to contract as a "liberty" interest protected by the due process clause of the fourteenth amendment. Finally, Part IV demonstrates the consistency of the Court's result in *Griswold* with the Lockean moral philosophy approach and postulates the proper outcomes for *Roe* and *Bowers*.

I. THE LOCKEAN LIBERAL TRADITION

To fully comprehend the Lockean philosophical tradition, one must first understand Locke's description of the law of nature and his picture of the

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15. *Id.* at 216.
17. "Locke has long been considered the political theorist who exerted the greatest influence
individual in the state of nature and in civil or political society. Although Locke wrote a number of philosophical works, the following discussion draws almost exclusively from Locke's *Two Treatises of Government* because this work is the classic example of the Lockean liberal tradition. A firm grasp of Locke's thought is important because it forms the backdrop against which past privacy decisions must be evaluated and new cases decided.

In general, the Lockean view of the law of nature is nearly identical to the view handed down through the classical liberal tradition. Locke writes, "I will not dispute now whether Princes are exempt from the Laws of their Countrey, but this I am sure, they owe subjection to the Laws of God and Nature. No Body, no Power can exempt them from the Obligations of that Eternal Law." For Locke, the law of nature is a natural and moral standard to which every individual must conform his actions both in the state of nature and in civil or political society. This view of the law of nature is important because it becomes the source of both the inalienable rights of the individual, as well as the social duties that accompany these rights.

Depicting the law of nature as a standard to which individuals must conform, Locke identifies those natural laws which are to govern the conduct of mankind. The first and foremost fundamental law is the preservation of mankind. As a natural corollary to this law and nearly equal in importance is the second law of nature, that of the preservation of each individual. Locke writes: "Every one as he is bound to preserve himself, and not to quit his Station wilfully; so by the like reason, when his own Preservation

upon our natural rights heritage. His stature in this respect has been virtually unquestioned." G. MACE, LOCKE, HOBBES, AND THE FEDERALIST PAPERS: AN ESSAY ON THE GENESIS OF THE AMERICAN POLITICAL HERITAGE 9 (1934).


19. *But see* R. ASHCRAFT, REVOLUTIONARY POLITICS AND LOCKE'S TWO TREATISES 9 (1986) (Because Locke's *Two Treatises* must be read within their historical context, one cannot claim that they represent anything more than a political manifesto in defense of the radical movement of the 1670s and 1680s of which Locke was a part.; *see also* G.J.A. POOCOCK, VIRTUE, COMMERCE, AND HISTORY (1985).

20. *See* Corwin, *The "Higher Law" Background of American Constitutional Law, 42 HARV. L. REV. 149, 168 (1928-29) ("Upon the observed uniformities of the human lot, classical antiquity erected the conception of a law of nature discoverable by human reason when uninfluenced by passion, and forming the ultimate source and explanation of the excellencies of positive law.").


25. *See id.* bk. II, § 16 ("by the Fundamental Law of Nature, Man being to be preserved, as much as possible, when all [of nature] cannot be preserv'd" (emphasis in original)).
comes not in competition, ought he, as much as he can, to preserve the rest of Mankind . . . .”26 And “[t]he State of Nature has a Law of Nature to govern it, which obliges every one: And Reason, which is that Law, teaches all Mankind, who will but consult it, that being all equal and independent, no one ought to harm another in his Life, Health, Liberty, or Possessions.”27

The final basis for Locke's natural rights philosophy is his view of the state of nature, which he describes as a state of complete freedom in which individuals

order their Actions, and dispose of their Possessions, and Persons as they think fit, within the bounds of the Law of Nature, without . . . depending upon the Will of any other Man. A State also of Equality, wherein all the Power and Jurisdiction is reciprocal, no one having more than another.28

But Locke does not stop there; instead, he emphasizes that freedom and equality are still subject to the laws of nature and that a man is free to do as he wishes as long as his actions do not endanger his life or the life of another.29

According to Locke, an individual’s natural rights result from the obligations that arise in the state of nature to preserve oneself and mankind: “This Freedom from Absolute, Arbitrary Power, is so necessary to, and closely joyned with a Man's Preservation, that he cannot part with it, but by what forfeits his Preservation and Life together.”30 Locke writes that because man is born “with a Title to perfect Freedom, and an uncontrouled enjoyment of all the Rights and Privileges of the Law of Nature, equally with any other Man, or Number of Men in the World,” he thus possesses “a Power . . . to preserve his Property, that is, his Life, Liberty and Estate, against the Injuries and Attempts of other Men . . . .”31

For the purposes of a Lockean moral philosophy approach to substantive due process analysis, the right to “liberty” is most important. According to Locke, liberty is essentially a “power.” He writes in his Essay Concerning Human Understanding that “so far as a man has power to think or not to think, to move or not to move, according to the preference or direction of his own mind, so far is a man free.”32 Hence, for Locke:

26. Id. bk. II, § 6 (emphasis in original).
27. Id. (emphasis in original).
28. Id. bk. II, § 4 (emphasis in original); see, e.g., J. Colman, John Locke's Moral Philosophy 178 (1983); J. Dunn, The Political Thought of John Locke 106 (1969); J. Gough, supra note 22, at 21.
29. J. Locke, supra note 18, bk. II, § 6; see also id. bk. II, § 4 (men may order their actions and possessions “within the bounds of the Law of Nature”).
30. Id. bk. II, § 23 (emphasis in original).
31. Id. bk. II, § 87; see also id. bk. II, §§ 6, 123.
This capacity for rational self-determination is the distinctive feature of human nature and also the essential element of moral responsibility.

... Liberty is essential to human happiness as both an end and a means. It is essential in itself, because without it we feel so uneasy that life becomes miserable, and it is a means, since with it we progress toward all our goods. It is also a defining characteristic of our humanity, an exercise of the capacity that sets us above animals, and the part of our human nature that enables us to act in accordance with the determinations of our reason.

Thus, under the Lockean conception of liberty, an individual is free only when he is able fully to exercise his rational faculties: The individual must accurately perceive and understand himself and the world around him; he must also be able to deliberate upon the choices presented by that experience and select and follow the chosen courses to the fullest extent possible.

This understanding of Lockean liberty has been identified by Rogers Smith as the "rational liberty view" of political philosophy. According to Smith, the primary concern of the rational liberty view is for individuals to improve their condition by increasing their understanding of their own social and personal situations, their capabilities and inclinations, and their opportunities and limits.

Smith identifies two important aspects of this portrait of human character and the moral basis of civil society that make it particularly appealing. First, because "people derive a sense of their moral obligations... from the social relations and moral rules prevalent in their communities" and "find satisfaction and feel free only by adopting a course of life that includes considerable immersion in the activities of some of these constitutive social forms," the rational liberty view has broad and lasting appeal:

Locke's conception of the moral man not as a mere pawn of powerful forces but as a being capable of self-understanding and of reasonable choice naturally supports conceptions of happiness and morality as things that can and must be attained in collaboration with the processes of nature and the pursuits of our fellow rational beings.

33. R. Smith, supra note 10, at 29; see also R. Ashcraft, Locke's Two Treatises of Government 102 (1987) ("Locke assumes that individuals possess the freedom to order their actions, because 'that freedom [is] the foundation of all the rest' of the moral actions they execute in the state of nature." (citation omitted)).
34. See R. Smith, supra note 10, at 5.
35. Id. at 214.
36. Id. at 206-07.
37. Id. at 207.
Second, Smith contends that despite the rational liberty view's emphasis on an individual's rational faculties, it is not an intellectually elitist view by any means because "the appropriate moral models ... are not great intellects per se but rather people of exceptional self-understanding and wise self-direction." 38

Although Locke is lauded for his defense of fundamental individual rights, he is less well-known for his insistence on the corresponding duties to society which accompany those rights. The first of these duties consists of observing the first two laws of nature: A man must preserve himself and, when his own preservation is not at stake, his neighbor and mankind in general. 39 Following this duty are several others. First, man has a duty to preserve society. 40 Second, and as a corollary to the first, each individual is obliged to regulate his actions so that those activities will not hinder the ability of others to exercise their rational liberty (i.e., reflection, rational deliberation, and self-direction). 41 Third, as a derivative of the duty of each individual to preserve mankind comes the general proscription against killing in any form except for preservation's sake. 42 Finally, in Locke's discussion of conjugal society and parental power, there emerges a natural law duty on the part of parents to care for their children until they reach the age of reason. 43

The amount of protection that these natural rights will receive when man enters into civil society 44 depends upon the ultimate purpose of that civil society. Initially, Locke emphasizes that the individual in civil society is obliged to follow the will of the majority. However, because the primary

38. Id. at 214.
39. J. Locke, supra note 18, bk. II, § 6; see also J. Tully, A Discourse on Property: John Locke and His Adversaries 45 (1980) ("This [first and fundamental law of nature] is translated into an individual duty to preserve oneself, and to preserve others when one's own preservation is not in question."); Reck, Natural Law in American Revolutionary Thought, 30 Rev. Metaphysics 686, 695 (1976-77).
40. Locke writes that "the first and fundamental natural Law, which is to govern even the Legislature it self, is the preservation of the Society, and . . . of every person in it." J. Locke, supra note 18, bk. II, § 134 (emphasis in original). "Society" for Locke differs from "mankind" in that society includes only those "agreeing with other Men to joyn and unite into a Community, for their comfortable, safe, and peaceable living one amongst another, in a secure Enjoyment of their Properties, and a greater Security against any that are not of it." Id. bk. II, § 95; see also id. bk. II, § 87; J. Tully, supra note 39, at 48-49.
41. R. Smith, supra note 10, at 217, 218.
42. See, e.g., J. Locke, supra note 18, bk. I, §§ 39, 56, 92, bk. II, § 6; see also J. Tully, supra note 39, at 118 ("Killing animals, therefore, is only justified if it is a necessary and obliquely intended consequence of the intended act of making use of the animal for support . . ."); infra notes 228-30 and accompanying text.
43. J. Locke, supra note 18, bk. II, § 56 (parents have "an obligation to preserve, nourish, and educate the Children, they had begotten" (emphasis in original)); see infra notes 161-63, 239-40 and accompanying text.
44. Locke defines civil society as "the consent of any number of Freemen capable of a majority to unite and incorporate into such a Society." J. Locke, supra note 18, bk. II, § 99.
purpose of civil society is the better protection of an individual's life, liberty and property.\textsuperscript{45} Locke is quick to limit society's power over the individual to certain specific spheres.\textsuperscript{46} Under the Lockean liberal tradition, the fundamental rights of the individual become identical to the interests of civil society because the majority in society would never take action arbitrarily or unnecessarily to limit these rights.\textsuperscript{47} Viewed in this light, the Lockean liberal tradition achieves "a firm and provocative formulation of the natural law philosophy in behalf of natural rights, with emphasis on the right to private property, on limited, constitutional government based on consent . . . in order to secure [the] lives, liberties, and estates [of the people]."\textsuperscript{48}

Locke's formulation of an individual's fundamental rights and corresponding duties is important for analysis of the modern privacy cases because it renders Locke's account of an individual's natural rights a limited one. Unlike the Hobbesian individual, the Lockean individual is not free merely to preserve himself alone;\textsuperscript{49} rather, the Lockean individual must also concern himself with those around him. While exercising his capacities for rational deliberation and self-direction, the Lockean individual must also ensure that his course of action does not unduly restrict or interfere with the capacity for rational liberty in others. This linking of individual liberty to the preservation of society, coupled with Locke's repeated emphasis on the interests of society (a primary interest being to foster the rational liberty of

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\footnote{45. See, e.g., J. Gough, \textit{supra} note 22, at 38 ("[Locke] equated the public good with the preservation of the property (i.e. the lives, liberties and estates) of individuals."); R. Smith, \textit{supra} note 10, at 213 (The rational liberty view authorizes the liberal political community to rightfully prohibit only those actions that endanger persons' continuing capacities for rational deliberation.); Aaron, \textit{Authority and the Rights of Individuals}, in G. Schmoller, \textit{supra} note 23, at 167 ("The state is made for the individual, and not the individual for the state."); Corwin, \textit{supra} note 20, at 389 ("[L]egislative supremacy is supremacy within the law, not a power above the law."); Von Leyden, \textit{supra} note 23, at 15 ("[P]olitical power for Locke is justified only in so far as it preserves men's natural rights, especially those of life and property.").

\footnote{46. See, e.g., Aaron, \textit{supra} note 45, at 167.

\footnote{47. To emphasize this point, Locke lays out several limits on the legislative power that governs society: It cannot be arbitrary over the lives or fortunes of the people; it must rule by standing, promulgated laws; it cannot take a man's property without his consent; it cannot levy taxes without the consent of the people; and it cannot transfer the legislative power to other hands. See J. Locke, \textit{supra} note 18, bk. II, §§ 135-42.

\footnote{48. Reck, \textit{supra} note 39, at 694. From the standpoint of rational liberty, "political institutions should, through democratic processes, elicit and enforce prevailing social standards of what constitutes minimally rational, deliberative conduct and of what preserves the ability to engage in it." R. Smith, \textit{supra} note 10, at 213.

\footnote{49. Hobbes writes:

The RIGHT OF NATURE, which Writers commonly call \textit{Jus Naturale}, is the Liberty each man hath, to use his own power, as he will himselfe, for the preservation of his own Nature; that is to say, of his own Life; and consequently, of doing any thing, which in his own Judgement, and Reason, he shall conceive to be the aptest means thereunto.


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the individual), are key pillars in the Lockean framework against which modern assertions of fundamental privacy rights under the Constitution must be judged.  

II. THE LOCKEAN LIBERAL TRADITION AND THE FOUNDING

A Lockean moral philosophy approach to substantive due process analysis is appropriate because the Lockean liberal tradition greatly influenced those who wrote about and occupied prominent leadership positions during the period of the American Founding.  

Like Locke, they accepted and articulated the classical natural law model in which the state of nature was one of peace and not strife, in which the laws of nature governed, and in which men were by nature equal, free

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50. As shall be demonstrated, this view requires that the Court first should scrutinize carefully the fundamental nature of the privacy interest asserted to determine whether it truly affects the individual’s capacity for rational deliberation and self-direction. If the asserted privacy interest does directly involve the individual’s rational liberty, it should be classified as “fundamental.” Accordingly, any state regulation of that privacy interest must survive a form of “strict scrutiny” review: The state must show that the capacity for rational deliberation and self-direction in others is significantly restricted or inhibited by the unregulated exercise of the asserted privacy interest.

If, however, the asserted privacy interest does not involve the individual’s capacity for rational liberty, it should not be classified as “fundamental.” Any state regulation of that privacy interest would be subject merely to a form of “rational basis” review: Although the state could not arbitrarily prohibit that activity, any rational purpose for the regulation would usually be sufficient. See infra note 119 and accompanying text.

51. [I]t is in Locke’s works that one finds the true integration into one edifice, and hence the full exploration of the meaning, of the three most important pillars supporting the Founders’ moral vision: Nature or “Nature’s God”; property, or the “pursuit of happiness”; and the dignity of the individual as rational human being, parent, and citizen.


52. As shall be demonstrated, the Lockean liberal tradition formed the theoretical framework for the Revolutionary writings, including the Declaration of Independence and the political theory of the Founding embodied in the Constitution. See, e.g., Corwin, supra note 20 (Lockean natural law forms the “higher law” background of American constitutional theory); Reck, supra note 39, at 688-89 (Locke was one of the natural law theorists from whom pre-revolutionary America drew heavily). But see G. MACE, supra note 17, at 10 (traditional views of the extent of Locke’s influence are unjustified when his thought is compared with that of the Declaration, Constitution, and Federalist Papers).


54. Most colonists would agree with Locke that the state of nature was chiefly characterized as “a State of Peace, Good Will, Mutual Assistance, and Preservation.” J. LOCKE, supra note 18, bk. II, § 19; see, e.g., C. ROSSITER, supra note 53, at 364.

55. Natural law in colonial America had four basic meanings: It was a set of moral standards to guide private conduct; it was a system of abstract justice to which the laws of men conformed; it was a line of demarcation around the proper sphere of political authority; and it was a source of natural rights. C. ROSSITER, supra note 53, at 368-69. It is with the latter two of these meanings that this discussion is concerned.
and thus entitled to and obliged to ensure mutual preservation.  

Hence, it is not surprising that for the colonists, as for Locke, a man's inalienable rights were the rights to "life, liberty; property, conscience, and happiness."  

The most obvious and well-known source of inalienable Lockean rights in American political theory during the Founding is the Declaration of Independence. First, the Declaration appeals to the right of any oppressed people under the "Laws of Nature" to return to a state of nature and construct anew a government which derives its powers from the "consent of the governed."  

Second, it affirms that all men in a state of nature or properly constituted civil society are "created equal" and are by implication "free." Finally, it enunciates the famous right to "Life, Liberty, and the pursuit of Happiness," and the charge that governments are instituted in order to "secure these rights."

By recognizing the right to "Life, Liberty, and the pursuit of Happiness" the colonists, like Locke, acknowledged that "there is a law higher than positive laws and actual political conduct, a supreme law by reference to which the latter may be evaluated and rectified." By "life," the colonists meant a right to self-preservation, that right which, according to Locke, was accorded to all by the laws of nature. By "liberty" they meant an entitlement to inalienable rights, that is, "a right to the rights of life and

56. See id. at 374.  
57. Id. at 377. Thus, as for Locke,  
[the rights of man, that is to say, not only depended on or sprang from natural law; they were natural law, at least so far as it could be understood by men. In the political theory of the American Revolution natural law was all but swallowed up in natural rights.  

Id. at 375 (emphasis in original). Such sentiments found their way into countless writings of the colonists in Revolutionary America. See, e.g., id. at 362-401.  
58. See, e.g., Reck, supra note 39, at 692 ("Locke's principles and phrases pervade American revolutionary writings; their presence in the Declaration of Independence has subjected its author to the charge of plagiarism.").  
59. Declaration of Independence para. 1 (U.S. 1776) [hereinafter "Declaration"]').  
60. Id.; see J. Locke, supra note 18, bk. II, § 95 ("Men being . . . by Nature, all free, equal and independent, no one can be put out of this Estate, and subjected to the Political Power of another, without his own Consent." (emphasis in original)).  
61. Declaration, supra note 59, at para. 1. Similar rights are enunciated in many of the state constitutions also ratified during this period. One particularly interesting statement occurs in the Virginia Declaration of Rights:  
That all men are by nature equally free and independent, and have certain inherent rights, of which, when they enter into a state of society, they cannot, by any compact, deprive or divest their posterity; namely, the enjoyment of life and liberty, with the means of acquiring property, and pursuing and obtaining happiness and safety.  

Virginia Declaration of Rights, § 1 (June 12, 1776); see also Massachusetts Declaration of Rights, art. I (March 2, 1780); N.H. Const. art. I (October 31, 1783); Pennsylvania Declaration of Rights, art. I (September 28, 1776); Vermont Declaration of Rights, art. I (July 8, 1777).  
the pursuit of happiness.”63 The most peculiar of the three rights is that of the “pursuit of Happiness.” Although one could argue that the colonists were merely referring to Locke’s third primary right of property,64 it is equally plausible that on a broader level the colonists were incorporating Locke’s concern for protecting the rational liberty of the individual. The pursuit of happiness can be equated with the rational liberty view in that the chief moral and political purpose of any civil society is the promotion of the capacities of all for reflective self-determination.65 Thus, the colonists formulated in the words of the Declaration of Independence a Lockean natural and inalienable rights philosophy that formed the basis of the American political order.66

Locke’s influence is pervasive in the Constitution as well. A close examination of the language, structure, and theoretical underpinnings behind the Constitution and Bill of Rights reveals that for the Founders, the form of government adopted could only be one whose chief aim was the preservation of these natural rights, which would, in turn, promote the general welfare of the nation.67 Thus, for the colonists, the Constitution was not a source of rights, but rather, an enumeration of “a nucleus or core of a much wider region of private rights, which, though not reduced to black and white, are as fully entitled to the protection of government as if defined in the minutest detail.”68 Once this cession of natural rights had occurred,

63. G. MACÉ, supra note 17, at 8. The colonists also concluded, like Locke, that the strongest basis for liberty would be found in a doctrine of inalienable rights, that is, rights that a man could not consent away, nor another arbitrarily restrict. See Glenn, Abortion and Inalienable Rights in Classical Liberalism, 20 AM. J. JURIS. 62, 80 (1975).

64. Rossiter argues that for the colonists, the pursuit of property was synonymous with their happiness. Accordingly, the colonists chose such a phrasing chiefly because at that time, they were experiencing unprecedented restrictions on their ability to dispose of their property. See C. Rossitter, supra note 53, at 379.

65. See R. SMITH, supra note 10, at 5.

66. This conclusion carries with it important consequences. As one author has noted: “The Declaration asserts that this order is based on theoretical truths, about justice or right, not merely on power. If inalienable rights are indefensible, then American politics is undercut at its root.” Glenn, supra note 63, at 63.

67. The preamble to the Constitution declares:

We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.

U.S. CONSTR. preamble; see also C. Rossitter, supra note 53, at 411 (“The only purpose that counted was that of the men who had instituted it: to seek protection for their ‘personal liberty, personal security, and private property.’”); Henkin, Privacy and Autonomy, 74 COLUM. L. REV. 1410, 1412 (1974) (“[T]he Constitution] only places limits on the infringement of private rights by government, both the rights specified and all others ‘retained by the people.’”).

68. Corwin, The Basic Doctrine of American Constitutional Law, 12 Mich. L. Rev. 247, 248 (1914); see also id. at 247-48 (“These rights are not, in other words, fundamental because
the Constitution became a "fundamental law" binding on all.69

However, this supremacy did not give the new government freedom to do as it pleased; rather, it could act only in certain limited areas that had been specifically enumerated in the text of the document itself.70 Although the Framers knew that "dependence on the people" would serve such an end, they further ensured the restriction of governmental power by dividing it between the state and federal government (federalism), and by then dividing it among different branches at each level (separation of powers).71 This system of checks and balances heeded Madison's warning that "[a]mbition must be made to counteract ambition,"72 and reflected the Lockean sentiment that government could legislate only for the good of society, which consisted of the preservation of the individual's life, liberty and property.73

Consistent with this view, Hamilton argued that even in its original and unamended form, "the Constitution is itself, in every rational sense, and to every useful purpose, A BILL OF RIGHTS."74 Despite such safeguards, the Constitution was amended in 1791 in an attempt to further delineate

they find mention in the written instrument; they find mention there because fundamental.")); THE FEDERALIST No. 2, at 37 (J. Jay) (C. Rossiter ed. 1961); Corwin, supra note 20, at 153 ("[These rights] owe nothing to their recognition in the Constitution—such recognition was necessary if the Constitution was to be regarded as complete."); Henkin, supra note 67, at 1412 ("The Constitution does not confer private rights; they are antecedent to and independent of the Constitution.").

69. Article VI provides, "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land." U.S. CONST. art. VI.

70. "[I]n relation to the extent of its powers . . . the proposed government cannot be deemed a national one; since its jurisdiction extends to certain enumerated objects only, and leaves to the several States a residuary and inviolable sovereignty over all other objects." THE FEDERALIST No. 39, at 245 (J. Madison) (C. Rossiter ed. 1961); see also U.S. CONST. amend. IX ("The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."); id. at amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the states respectively, or to the people.").

71. Madison writes:

In the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments. Hence a double security arises to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself.


72. Id. at 322.

73. See also THE FEDERALIST No. 85, at 521 (A. Hamilton) (C. Rossiter ed. 1961) (discussing how the Constitution ensures "additional securities to republican government, to liberty, and to property").

74. THE FEDERALIST No. 84, at 515 (A. Hamilton) (C. Rossiter ed. 1961). Arguing that the two primary objects of a bill of rights were "to declare and specify the political privileges of the citizens in the structure and administration of the government . . . [and] to define certain immunities and modes of proceeding which are relative to personal and private concerns," Hamilton concludes that "[a]verting therefore to the substantial meaning of a bill of rights, it is absurd to allege that it is not to be found in the work of the convention." Id.
those natural rights which were "retained by the people." Among other rights,75 the Bill of Rights set out that thoroughly Lockean provision that forms the basis of modern substantive due process analysis: "No person shall be . . . deprived of life, liberty, or property, without due process of law."76 Thus, the structure of the Constitution and the subsequent addition of the Bill of Rights emphasize the fundamentals of the Lockean liberal tradition that pervade our constitutional order.

Because the Lockean liberal tradition underlies the Revolutionary writings and political theory of the Founding embodied in the Constitution, it is particularly appropriate to use a Lockean moral philosophy approach as the proper guide to evaluating modern assertions of privacy rights. The colonists relied heavily on the Lockean liberal tradition to identify the substantive and procedural rights that formed the ideological basis of the American Revolution and that constituted the primary objects of the federal Constitution. In light of the Lockean liberal tradition's influence, any modern court attempting to decide whether an asserted privacy right is a liberty or property interest protected by the due process clauses should pay particular attention to its dictates. As one commentator has noted: "What is especially amazing about American political thought is not that it continues to employ the idiom and exhibit the mood of the Revolution, but that both idiom and mood seem adequate to deal with many present-day problems."77

III. THE LOCKEAN LIBERAL TRADITION AND ECONOMIC SUBSTANTIVE DUE PROCESS78

The Supreme Court implicitly followed a Lockean moral philosophy approach during the Lochner79 era when the Court first used substantive

75. The Bill of Rights protects the freedoms of speech, press, and religion, U.S. Const. amend. I, as well as the right to trial by jury, id. amend. VI, and protects against unreasonable searches and seizures, id. amend. IV, double jeopardy prosecutions, id. amend. V, and cruel and unusual punishments, id. amend. VIII.
76. Id. amend. V.
77. C. Rossiter, supra note 53, at 449. Professor Corwin has drawn a similar conclusion with respect to the constitutional freedoms protected by the Court: Locke, . . . in cutting loose in great measure from the historical method of reasoning, opened the way to the larger issues with which American constitutional law has been called upon to grapple in its latest maturity. Without the Lockian [sic] or some similar background, judicial review must have atrophied by 1890 in the very field where it is today most active . . . .
Corwin, supra note 20, at 393-94.
due process analysis to strike down legislation that it regarded as unduly restrictive of certain individual rights. Although the Court subsequently abandoned the use of substantive due process as a vehicle for evaluating the constitutional legitimacy of economic and social welfare legislation, the period nevertheless illustrates that the Court utilized a Lockean approach in examining the asserted economic liberties and countervailing societal interests.

The rationale used in *Lochner* derives primarily, if not exclusively, from three Lockean natural law concepts: the idea of rational liberty, the labor theory of value and the limits on legislative authority. When considered together, these three staples of the Lockean liberal tradition illustrate that the *Lochner* Court attempted to justify in implicit Lockean terms its decision to protect as fundamental the individual’s “right to make a contract.”

The theory of economic substantive due process developed gradually in the period following the Civil War. As early as the 1870s, members of the Supreme Court showed a willingness to limit legislative power concerning social welfare legislation. Ten years later in *Mugler v. Kansas* the Court claimed the right to examine the “substance” of state legislation. The Court laid the final groundwork in *Allgeyer v. Louisiana*, where, for the

80. During the *Lochner* period, the Court used the due process clause of the fourteenth amendment to strike down state welfare legislation which “restricted economic liberty in a way that was not reasonably related to a legitimate end.” J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW 343 (3d ed. 1986).


82. The economic liberties pressed before the Court during the *Lochner* era are significantly different from those raised by the modern privacy cases. The liberty of employer and employee to contract for the employee’s labor raises issues completely different from the liberty of a woman to have an abortion or of married couples to use contraceptives. Because the primary focus of this Note is a resolution of the issues raised by the modern privacy cases, discussion of whether the Court correctly decided *Lochner* under a Lockean moral philosophy approach is beyond its scope. *Lochner* is important here, however, because it illustrates that the Court implicitly recognized the propriety of attempting to resolve the relevant economic issues in Lockean terms.

83. In *Munn v. Illinois*, 94 U.S. 113 (1877), the Court noted: “Undoubtedly, in mere private contracts, relating to matters in which the public has no interests, what is reasonable must be ascertained judicially.” *Id.* at 134.

84. 123 U.S. 623 (1887).

85. *Id.* at 661.

86. 165 U.S. 578 (1897).
first time, it struck down a state law on substantive due process grounds.\footnote{The Court found the Louisiana law, which prohibited obtaining insurance on Louisiana property from certain companies that had not fully complied with Louisiana law, unconstitutional because it “depriv[ed] the defendants of their liberty without due process of law.” \textit{Id.} at 589.} The case is especially noteworthy for Justice Peckham’s enunciation of a liberty of contract that would eventually provide the backbone for economic substantive due process.\footnote{According to Peckham, the liberty protected by the fourteenth amendment included the liberty of the individual “to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary, and essential to his carrying out to a successful conclusion the purposes above mentioned.” \textit{Id.}}

The Court’s most controversial decision involving economic substantive due process and the decision most clearly evidencing the Lockean liberal tradition is \textit{Lochner v. New York.}\footnote{\textit{Id.} at 53 (citing \textit{Allgeyer}, 165 U.S. at 578). Further expanding the nature of this fundamental right to contract, Peckham noted: “Of course the liberty of contract relating to labor includes both parties to it. The one has as much right to purchase as the other to sell labor.” \textit{Id.} at 56.} Writing for a bare majority of the Court, Justice Peckham overturned a statute because it was “an illegal interference with the rights of all individuals, both employers and employés, to make contracts regarding labor upon such terms as they may think best, or which they may agree upon with the other parties to such contracts.”\footnote{\textit{Id.} at 53. Noting that the courts had not specifically described or determined the limit of the state's police powers, Peckham did note that they extended at least as far as to prevent the individual from making contracts “in violation of a statute, either of the Federal or state government” or “to let one's property for immoral purposes” or “to do any other unlawful act.” \textit{Id.} at 53-54.}

Following a Lockean moral philosophy approach, the Court examined both the true nature of the right asserted by the individual and the interests urged by the state to justify the restriction. In characterizing the rights of the individual, the Court noted that “[t]he general right to make a contract in relation to his business is part of the liberty of the individual protected by the Fourteenth Amendment of the Federal Constitution.”\footnote{\textit{Id.} at 61.} The Court also recognized that such a right was not unlimited but rather that it might in some instances be limited by the state in order to preserve the “safety, health, morals and general welfare of the public.”

Having identified the rights and interests on each side, Peckham turned to articulating a test by which the relative weight of each could be balanced.
First, the regulation had to have as its purpose a permissible governmental end.93 Second, assuming that the regulation was aimed at a proper governmental end, the Court would then scrutinize the connection between the end sought and the means employed by the state to achieve that end.94 The end result of this test "was the same as though the Court had held, in today's parlance, that liberty of contract was a fundamental right, to be restricted only in furtherance of the most compelling state interests. In effect, the Court applied strict scrutiny."95 Applying the test, the Court found that none of the state interests asserted survived strict scrutiny.96

As noted above, the rationale used in Lochner derives primarily from three Lockean natural law concepts: the idea of rational liberty, the labor theory of value and the limits on legislative authority. The Lockean idea of rational liberty is tied to man's position in the state of nature:97 It is the status of being free from restraint and violence from others . . . a Liberty to dispose, and order, as he lists, his Person, Actions, Possessions, and his whole Property, within the Allowance of those Laws under which he is; and therein not to be subject to the arbitrary Will of another, but freely follow his own.98

93. The Court articulated the test as follows:

In every case that comes before this court, therefore, where legislation of this character is concerned and where the protection of the Federal Constitution is sought, the question necessarily arises: Is this a fair, reasonable and appropriate exercise of the police power of the State, or is it an unreasonable, unnecessary and arbitrary interference with the right of the individual to his personal liberty or to enter into those contracts in relation to labor which may seem to him appropriate or necessary for the support of himself and his family?

Id. at 56. Since the Court refused to allow the redistribution of wealth or other paternalistic measures, the category of proper ends became quite narrow. See Sunstein, Lochner's Legacy, 87 Colum. L. Rev. 873, 877 (1987).

94. Peckham wrote:

The mere assertion that the subject relates though but in a remote degree to the public health does not necessarily render the enactment valid. The act must have a more direct relation, as a means to an end, . . . before an act can be held to be valid which interferes with the general right of an individual to be free in his person and in his power to contract in relation to his own labor.

Lochner, 198 U.S. at 57-58; see Sunstein, supra note 93, at 877.


96. The Court refused to uphold the statute's validity as a pure "labor law" because it failed the first part of the test in that it "involves neither the safety, the morals nor the welfare of the public, and that the interest of the public is not in the slightest degree affected by such an act." Lochner, 198 U.S. at 57. According to the Court, the regulation could only be upheld as a health law. However, the Court argued that the law bore no close relation to either the quality of the bread produced, id., or an improvement of the health, id. at 59, or cleanliness of the bakers, id. at 62.

97. Locke describes it as "a State of perfect Freedom to order their Actions, and dispose of their Possessions, and Persons as they think fit, within the bounds of the Law of Nature, without asking leave, or depending upon the Will of any other Man." J. Locke, supra note 18, bk. II, § 4 (emphasis in original); see supra notes 28-29 and accompanying text.

98. J. Locke, supra note 18, bk. II, § 57 (emphasis in original).
As a result, the rational liberty view requires that the primary political and moral purpose of society be the promotion of each individual's capacity for rational deliberation and self-direction. This rational self-direction includes not only the maintenance of "personal cognitive capacities" but also the particular course of action that an individual chooses for his life's work.99 Locke follows his theory of rational liberty with a theory to explain why that chosen life's work has value for the individual.

Locke's labor theory of value begins with the proposition that, "every Man has a Property in his own Person. This no Body has any Right to but himself."100 From this Locke argues that "[t]he Labour of his Body, and the Work of his Hands, we may say, are properly his[,]"101 and concludes: "Whatever he removes out of the State that Nature hath provided, and left it in, he hath mixed his Labour with, and joyned to it something that is his own, and thereby makes it his Property."102 Yet although the Lockean liberal tradition will not allow unbridled and unrestrained labor and accumulation of property, it sets the following limit: "As much as any one can make use of to any advantage of life before it spoils; so much he may by his labour fix a Property in. Whatever is beyond this, is more than his share, and belongs to others."103 Thus, the Lockean liberal tradition requires that the individual be given some latitude as to how vigorously he will pursue his chosen line of work.

Finally, because the proper end of civil society is the common good104 and the common good entails "the mutual Preservation of their Lives, Liberties and Estates,"105 there naturally emerge several important limits to the power of the legislature. For present purposes, the most important of these limitations is that the legislative power "is not, nor can possibly be

99. R. SMITH, supra note 10, at 237 ("[T]he liberties that can ordinarily be assumed to be integral to rational liberty would include . . . the right to pursue their preferred line of work subject to attaining suitable qualifications . . . .")
100. J. LOCKE, supra note 18, bk. II, § 27 (emphasis in original).
101. Id. (emphasis in original).
102. Id. (emphasis in original); see also id. bk. II, § 44 ("though the things of Nature are given in common, yet Man (by being Master of himself and Proprietor of his own Person, and the actions or Labour of it) had still in himself the great Foundation of Property" (emphasis in original)).

Having shown that man acquires property through his labor, Locke illustrates why such labor is important. He writes: ""Tis Labour then which puts the greatest part of Value upon Land, without which it would scarcely be worth any thing . . . ." Id. bk. II, § 43 (emphasis in original).
103. Id. bk. II, § 31.
104. "[T]he power of the Society, or Legislative constituted by them, can never be suppos'd to extend farther than the common good . . . ." Id. bk. II, § 131 (emphasis in original); see, e.g., Corwin, supra note 20, at 393 ("Locke, in the limitations which he imposes on legislative power, is looking rather to the security of the substantive rights of the individual—those rights which are implied in the basic arrangements of society at all times and in all places."); see also id. at 393.
105. J. LOCKE, supra note 18, bk. II, § 123 (emphasis in original).
absolutely Arbitrary over the Lives and Fortunes of the People” because “it being but the joynt power of every Member of the Society given up to that Person, or Assembly, which is Legislator, it can be no more than those persons had in a State of Nature before they enter’d into Society, and gave it up to the Community.”\textsuperscript{106} From the standpoint of rational liberty, “political institutions should, through democratic processes, elicit and enforce prevailing social standards of what constitutes minimally rational, deliberative conduct and of what preserves the ability to engage in it.”\textsuperscript{107} Therefore, to be valid, a legislative enactment must pursue the sole legitimate end of promoting the common good (i.e. better preserving the life, liberty and property of the individual), and the means must be narrowly tailored so as not to limit arbitrarily the individual’s capacity for rational liberty.

When considered together, Locke’s idea of rational liberty, the labor theory of value and the limits on legislative authority imposed by the Lockean liberal tradition illustrate that the \textit{Lochner} Court attempted to justify in implicit Lockean terms its decision to protect as fundamental the individual’s “right to make a contract.” First, the \textit{Lochner} Court attempted to determine the true nature of the liberty interest asserted. It found that the individual’s “personal liberty” is equivalent to his ability “to enter into those contracts in relation to labor which may seem to him appropriate or necessary for the support of himself and his family.”\textsuperscript{108} Second, the Court recognized as fundamental “the rights of individuals, both employers and employés, to make contracts regarding labor upon such terms as they may think best, or which they may agree upon with the other parties to such contracts.”\textsuperscript{109} These statements reflect two important Lockean principles: an individual must be free to exercise his capacity for rational liberty by selecting and pursuing his preferred line of work; in addition, the labor theory of value requires that he be given some latitude as to how vigorously he will pursue it.

Having found what it considered a fundamental liberty interest, the \textit{Lochner} Court subjected the asserted state interest to heightened scrutiny and concluded:

\begin{quote}
Statutes of the nature of that under review, limiting the hours in which grown and intelligent men may labor to earn their living, are mere
\end{quote}

\textsuperscript{106} \textit{Id.} bk. II, § 135 (emphasis in original). For a summary of the other limits on the legislative authority, see \textit{id.} bk. II, § 142.

\textsuperscript{107} R. Smth, supra note 10, at 213.

\textsuperscript{108} \textit{Lochner}, 198 U.S. at 56; see also \textit{Allgeyer}, 165 U.S. at 589 (The due process clause of the fourteenth amendment protects the right of the individual “to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary and essential” to his happiness and preservation.); \textit{Munn}, 94 U.S. at 142 (Field, J., dissenting) (Liberty under the fourteenth amendment must include the right “to pursue such callings and avocations as may be most suitable to develop[ing] . . . [an individual’s] capacities.”).

\textsuperscript{109} \textit{Lochner}, 198 U.S. at 61.
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meddlesome interferences with the rights of the individual, and they are not saved from condemnation by the claim that they are passed in the exercise of the police power and upon the subject of the health of the individual whose rights are interfered with, unless there be some fair ground, reasonable in and of itself, to say that there is a material danger to the public health or to the health of the employés, if the hours of labor are not curtailed. . . .

. . . .

It is manifest to us that the [law here] has no . . . direct relation to and no . . . substantial effect upon the health of the employé . . .

This result is also arguably consistent with the Lockean requirement that a legislative enactment pursue the sole legitimate end of better preserving the life, liberty and property of the individual and that the means not arbitrarily restrict the individual's capacity for rational liberty.

Thus, irrespective of the particular result reached, the Supreme Court's decision in Lochner illustrates that it implicitly adopted a Lockean approach in resolving the constitutionality of state regulation of an individual's asserted "right to contract." Although the Court has since rejected the Lochner Court's particular heightened scrutiny of economic welfare legislation in favor of a much more deferential rational basis review, Lochner's approach has nevertheless been carried over into the Court's analysis of governmental restrictions on non-economic personal liberties. Accordingly,

110. Id. at 61, 64.

111. It is also possible that the Lochner majority could have reached a different conclusion using the same Lockean approach. First, it is plausible that state regulation of maximum hours within a given occupation is not inconsistent with the rational liberty view so long as the individual remains free to choose the occupation that he desired and for which he was qualified. See id. at 69-70 (Harlan, J., dissenting). Second, it is plausible that limiting the working hours of bakers serves a legitimate societal interest in preserving that person's health (and, in the end, life) without arbitrarily restricting his capacity for rational liberty. See id. at 72-73. Nevertheless, despite the fact that the conclusions reached by both the majority and the dissent in Lochner are defensible in Lockean terms, the striking fact remains that the Court utilized a Lockean approach in resolving the issues before it.

112. The transition is noted in the oft-quoted case of United States v. Carolene Prods. Co., 304 U.S. 144 (1938). Initially, the Court noted its reluctance to pursue heightened scrutiny of pure welfare legislation. Such economic regulations were "not to be pronounced unconstitutional unless in light of the facts made known or generally assumed it is of such a character as to preclude the assumption that it rests upon some rational basis within the knowledge and experience of the legislators." Id. at 152. However, the Court went on in the footnote following this statement to argue that "[t]here may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth." Id. at 152 n.4.

The Court has also recognized that its recent utilization of substantive due process analysis in the privacy area stems from its earlier use of the doctrine during the Lochner era. See, e.g., Moore v. City of East Cleveland, 431 U.S. 494, 502 (1977); see also C. Wolfe, supra note 4, at 6 ("The initial backing off of the Court seemed to augur a new era of judicial deference, but, in fact, the focus of judicial activism simply shifted from economic affairs to civil liberties."); id. at 162 ("[T]he constitutional doctrine of substantive due process survived the demolition of economic due process perfectly intact." (emphasis in original)).
as shall be demonstrated, the Court has also merely transferred the Lockean concerns that gave life to the *Lochner* Court's "strict scrutiny" review of economic legislation to the Court's creation and increased protection of a fundamental right of privacy.

IV. THE LOCKEAN LIBERAL TRADITION AND THE PRIVACY CASES

The modern privacy cases reflect the Supreme Court's struggle to determine the existence and scope of a fundamental right to privacy. This right currently includes "certain rights of freedom of choice in marital, sexual, and reproductive matters." However, these cases fail to establish any principled approach to substantive due process analysis that would support and harmonize the Court's decisions. The attractiveness of a Lockean moral philosophy approach is that it provides the Court with a principled basis for deciding privacy cases, a basis which would temper the Court's past desire to recognize individual rights to the exclusion of other societal concerns, between which the due process clauses were intended to mediate.

Under the Lockean liberal tradition, an individual's natural law duty to preserve both the life of, and capacity for rational liberty in, his fellow man limits that individual's natural rights. Moreover, the Lockean liberal tradition repeatedly emphasizes the duty of the individual to conform his conduct to the legitimate interests of civil society. As a result, adherence to a Lockean moral philosophy approach to substantive due process analysis that incorporates these changes requires a court to approach the issues raised in the modern privacy cases in a manner somewhat different than that currently employed by the Supreme Court.

First, the Court should scrutinize carefully the fundamental nature of the privacy interest asserted to determine whether it truly affects the individual's capacity for rational deliberation and self-direction. If the asserted privacy interest does directly involve the individual's rational liberty, it should be

113. In the matter of abortion the words of the Constitution did not change, but on January 22, 1973, its meaning did. On that date Justice Harry Blackmun found in the Ninth Amendment's reservation of power to the People or in the Fourteenth Amendment's reference to liberty—he was not entirely sure in which—a liberty to consent to an abortion. On that date the Constitution came to mean that abortion was an American freedom.

114. J. NOWAK, R. ROTUNDA & J. YOUNG, supra note 80, at 684.

115. See supra note 10 and accompanying text.

116. See supra notes 39-43 and accompanying text.

117. See supra notes 44-46 and accompanying text.
classified as "fundamental." Accordingly, any state regulation of that privacy interest must survive a form of "strict scrutiny" review: The state must show that the capacity for rational deliberation and self-direction in others is significantly restricted or inhibited by the unregulated exercise of the asserted privacy interest. If, however, the asserted privacy interest does not involve the individual's capacity for rational liberty, it should not be classified as "fundamental." Any state regulation of that privacy interest would be subject merely to a form of "rational basis" review: Although the state could not arbitrarily prohibit that activity, any rational purpose for the regulation would usually be sufficient. Under this new approach, society's compelling interest in promoting the rational liberty of all will ensure that minority interests that do not unduly burden the capacities for rational deliberation and self-direction in others will be given at least as much, if not more, protection than is ensured by the Court's current approach. Thus, by rethinking the modern privacy cases under this Lockean moral philosophy approach, courts can achieve results that are more consistent, analytically sound and well-supported by a coherent moral philosophy.

A. The Origins of the Modern Privacy Right

The use of a Lockean moral philosophy approach is not new to constitutional analysis. Early in the development of American constitutional jurisprudence, courts accepted this approach as a legitimate means of constitutional review of legislative determinations. An example is Calder v. Bull where the Court used a Lockean moral philosophy approach to uphold a legislature's decision to order a new trial in a will contest because that action was not an ex post facto law forbidden the states by article I, section 10 of the Constitution. Writing for the Court, Justice Chase noted several important principles of the Lockean liberal tradition inherent in constitutional analysis:

The people of the United States erected their Constitutions, or forms of government, to establish justice, to promote the general welfare, to secure the blessings of liberty; and to protect their persons and property from violence. The purposes for which men enter into society will determine the nature and terms of the social compact; and as they are the foundation of the legislative power, they will decide what are the

120. For an example of the use of natural law principles in constitutional decisionmaking concerning the validity of slavery before the Civil War, see R. Cover, Justice Accused 31-116 (1975).
121. 3 U.S. (3 Dall.) 386 (1798).
122. Id. at 387, 389.
proper objects of it: The nature, and ends of legislative power will limit the exercise of it. 123

Using these principles, Justice Chase concluded, "An ACT of the Legislature (for I cannot call it a law) contrary to the great first principles of the social compact, cannot be considered a rightful exercise of legislative authority." 124

This Lockean moral philosophy approach to decisionmaking reemerged in several "privacy" decisions which were rendered during the Lochner period. In Meyer v. Nebraska, 125 Justice McReynolds noted that the scope of the liberty protected by the fourteenth amendment included not only those economic liberties identified in Lochner, 126 but also the right of the individual "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." 127 The Court took a similar Lockean approach in Pierce v. Society of Sisters, 128 where Justice McReynolds defended the liberty of parents and guardians "to direct the upbringing and education of children under their control. . . . The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations." 129

Finally, a broad concept of personal liberties protected by the due process clause of the fourteenth amendment was identified by Justice Harlan thirty-six years later in his dissenting opinion in Poe v. Ullman. 130 Rejecting the majority's decision to dismiss on justiciability grounds the appeals of three plaintiffs who alleged that a Connecticut law prohibiting the use of contraceptives by married couples violated their due process rights, Justice Harlan

123. Id. at 388 (emphasis in original).
124. Id. (emphasis in original). Although he concurred with the judgment of the Court, Justice Iredell did not believe that such a natural law jurisprudence was at all appropriate for the Court. He criticized it as illegitimate because "[t]he ideas of natural justice are regulated by no fixed standard" and "the ablest and purest men have differed upon the subject." Id. at 399 (Iredell, J., concurring). He concluded: "If . . . the Legislature of the Union, or the Legislature of any member of the Union, shall pass a law, within the general scope of their constitutional power, the Court cannot pronounce it to be void, merely because it is, in their judgment, contrary to the principles of natural justice." Id.
125. 262 U.S. 390 (1923). The Court reversed the conviction of a German teacher for violating a state law proscribing instruction in foreign languages to young children. Id. at 400-03.
127. Meyer, 262 U.S. at 399. Again, the rights articulated bear a striking resemblance to those ends deemed fundamental under the rational liberty view.
128. 268 U.S. 510 (1925). The Court invalidated an Oregon law which required all children to attend public schools. Id. at 534-35.
129. Id.
concluded that the statute was "an intolerable and unjustifiable invasion of privacy in the conduct of the most intimate concerns of an individual's personal life." Justice Harlan rejected the notion that due process was merely a procedural safeguard and claimed instead that its reach extended to all fundamental rights for the protection of which men enter into society. He also argued that its contents could not be determined by reference to any "formula" or "code," but rather insisted that due process "has represented the balance which our Nation, built upon postulates of respect for the liberty of the individual, has struck between that liberty and the demands of organized society."

These early "privacy" cases illustrate that a coherent and principled substantive due process analysis can occur when that analysis is grounded in a Lockean moral philosophy approach to discovering fundamental rights. First, Justice McReynold's opinions in Meyer and Pierce and Justice Harlan's opinion in Poe all properly identify the relative importance of the privacy interest asserted. The individual's interest in freedom from state interference with matters of marriage, procreation and child rearing all serve to advance the primary end of the Lockean liberal tradition: fostering the rational liberty of the individual (i.e., his capacity for rational deliberation and self-direction). Second, Justice Harlan's dissenting opinion in Poe recognizes the need to balance the properly analyzed liberty interests of the individual against the demands and interests of society, all of which are discoverable in the Lockean traditions out of which our country developed. Third, in Meyer, Pierce and Poe, the governmental regulation at issue did not survive strict scrutiny review because the state could not show that the capacities for rational liberty in others would be inhibited by unregulated pursuit of the asserted privacy interests. Rethinking the three landmark

131. Id. at 539 (Harlan, J., dissenting). Justice Harlan wrote: "[T]he intimacy of husband and wife is necessarily an essential and accepted feature of the institution of marriage, an institution which the State not only must allow, but which always and in every age it has fostered and protected." Id. at 553.

132. Id. at 541. Rejecting the suggestion that this liberty is a "series of isolated points," Justice Harlan described it as "a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints, and which also recognizes, what a reasonable and sensitive judgment must, that certain interests require particularly careful scrutiny of the state needs asserted to justify their abridgment." Id. at 543 (citations omitted).

133. Id. at 542. As if replying to Justice Iredell's criticism of natural law jurisprudence as too open-ended, Justice Harlan responded that the process has not been "one where judges have felt free to roam where unguided speculation might take them. The balance of which I speak is the balance struck by this country, having regard to what history teaches are the traditions from which it developed as well as the traditions from which it broke." Id. Assuming that the Lockean liberal tradition is a "tradition from which [our country] developed," then Justice Harlan would likely have accepted the Lockean liberal tradition as a primary, if not exclusive, source for discovering the content of substantive due process rights.
modern privacy cases in Lockean terms illustrates that the Lockean liberal tradition is a principled basis on which to ground a moral philosophy approach to constitutional decisionmaking in the privacy area.

B. Griswold v. Connecticut

The age of modern substantive due process analysis dawned with the Supreme Court’s decision in *Griswold*, where the Court finally decided the constitutionality of the Connecticut birth control law. Although the *Griswold* Court was unable to reach a consensus regarding the proper method for determining those liberties entitled to protection under the due process clause, the Lockean moral philosophy approach produces a convincing rationale in support of the *Griswold* Court’s ultimate decision to protect as fundamental a right of privacy in decisions regarding intimate aspects of the marital relationship. This result follows from the Lockean description of conjugal relationships and paternal (or parental) authority as distinct from political authority, and from the limited nature of any countervailing societal interests that would seek to limit these liberty interests.

The appellants in *Griswold* were two physicians who “gave information, instruction, and medical advice to married persons as to the means of preventing conception” in violation of the Connecticut statute. The Court, in an opinion authored by Justice Douglas, invalidated the statute as an impermissible restriction on the right of privacy of married couples, a liberty it claimed to be protected by the due process clause of the fourteenth amendment. Justice Douglas characterized the privacy interest as “an intimate relation of husband and wife and their physician’s role in one aspect of that relation.” Douglas claimed protection for this interest by finding that it lay within a “zone of privacy” that had been created by “penumbras” from several specific guarantees of the Bill of Rights. Since the Consti-

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135. 381 U.S. at 479.
136. *Id.* at 480 (emphasis in original). Although the statute on its face applied only to the use of contraceptives by any person, the appellants, both doctors, were found guilty of assisting the married couples in violating the Connecticut statute and were fined $100 each as accessories. *Id.*
137. *Id.* at 482.
138. *Id.* at 484-85. Justice Douglas found that these penumbras emanated from the first, third, fourth, fifth and ninth amendments. *See id.* at 482-85. He then concluded:

We deal with a right of privacy older than the Bill of Rights—older than our political parties, older than our school system. Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions.

*Id.* at 486.
tution protected this right of privacy, the government's use of the criminal law to regulate that relationship swept too broadly to survive constitutional scrutiny.\textsuperscript{139}

Because the justices in \textit{Griswold} could not reach any consensus regarding the proper method for determining those liberties entitled to protection under the due process clause, examination of several of the other opinions helps to flesh out the issues relevant to the Lockean moral philosophy approach. First, Justice Goldberg wrote separately to voice his belief that the primary source of this unenunciated right of privacy is the ninth amendment.\textsuperscript{140} Agreeing with Justice Harlan's \textit{Poe} dissent, Goldberg claimed that judges should determine whether an asserted privacy right is fundamental by reference to the "traditions and [collective] conscience of our people" and whether it "is of such a character that it cannot be denied without violating those "fundamental principles of liberty ... which lie at the base of all our civil and political institutions."	extsuperscript{141} Applying a strict scrutiny test under which the governmental interest must be "compelling" and the law in question "necessary" to the accomplishment of the governmental interest, Goldberg concluded that the statute swept "unnecessarily broadly, reaching far beyond the evil sought to be dealt with and intruding upon the privacy of all married couples."\textsuperscript{142}

Justice Harlan concurred in the result but wrote separately to reassert essentially the position he had articulated four years earlier in his dissent in \textit{Poe}.\textsuperscript{143} Harlan argued that "[t]he Due Process Clause of the Fourteenth Amendment stands ... on its own bottom,"\textsuperscript{144} and that the proper test for determining whether the asserted right is fundamental is by reference to values "implicit in the concept of ordered liberty."\textsuperscript{145} He claimed that judicial restraint in such a process could be achieved by "respect for the teachings of history," recognition of "the basic values that underlie our society" and "appreciation of the great roles that the doctrines of federalism and separation of powers have played in establishing and preserving American freedoms."\textsuperscript{146}

Justice White's concurring opinion comes closest to articulating a Lockean moral philosophy approach to substantive due process in the privacy area.

\textsuperscript{139} \textit{Id.} at 485.
\textsuperscript{140} \textit{Id.} at 487-93 (Goldberg, J., concurring).
\textsuperscript{141} \textit{Id.} at 493 (quoting Snyder v. Massachusetts, 291 U.S. 97, 105 (1934) and Powell v. Alabama, 287 U.S. 45, 67 (1932) (quoting \textit{Hebert} v. Louisiana, 272 U.S. 312, 316 (1926))). Under this approach, Goldberg found that the right of privacy was a fundamental personal right. \textit{Id.} at 494.
\textsuperscript{142} \textit{Id.} at 498 (emphasis added).
\textsuperscript{143} \textit{Id.} at 500 (Harlan, J., concurring); see supra notes 131-33 and accompanying text.
\textsuperscript{144} \textit{Griswold}, 381 U.S. at 500 (Harlan, J., concurring).
\textsuperscript{145} \textit{Id.} (quoting \textit{Palko} v. Connecticut, 302 U.S. 319, 325 (1937)).
\textsuperscript{146} \textit{Id.} at 501.
White would require a detailed examination of the nature of the privacy interest asserted, as well as strict scrutiny of the governmental or social interest asserted and the means chosen to achieve those ends. Applying these standards, White relied on *Meyer*, *Pierce* and other cases as having already established that the liberty entitled to protection under the fourteenth amendment included the right to be "free of regulation of the intimacies of the marriage relationship." Accordingly, he found the statute unconstitutional because of "the sweeping scope of [the] statute" and "its telling effect on the freedoms of married persons."

Justices Black and Stewart dissented from the decision, asserting that there was no basis for judicial protection of a right to privacy. Justice Black asserted that there is no basis for a judicial formulation of fundamental rights other than those found in the specifics of the first eight amendments. He expressed his disagreement with the approaches of Justices Goldberg, Harlan and White because each allowed judges to "roam at will in the limitless area of their own beliefs" and amounted to "merely using different words to claim for this Court and the federal judiciary power to invalidate any legislative act which the judges find irrational, unreasonable, or offensive." Justice Stewart dissented on essentially the same grounds as Justice Black, although his opinion dealt largely with Justice Goldberg's ninth amendment analysis.

These opinions identify two natural rights issues that must be analyzed under the Lockean moral philosophy approach. First, the Court defended a fundamental right of privacy within marriage to be free from state regulation regarding the intimacies of the marriage relationship. The Court held that this freedom includes the decision of whether to use contraceptives. Second, the Court found that there are no governmental interests strong enough to justify a total ban on the use of contraceptives by married individuals. This is an affirmation of the principle that government has a very limited role in regulating conduct within the marital relationship, a relationship that is essential to promotion and protection of an individual's rational liberty.

The first step under the Lockean moral philosophy approach is to identify the true nature of the privacy interest asserted. It emerges from Locke's

147. *Id.* at 503 (White, J., concurring).
148. *Id.* at 503-04.
149. *Id.* at 502-03 (emphasis added).
150. *Id.* at 507 (emphasis added).
151. See *id.* at 508-10 (Black, J., dissenting).
152. *Id.* at 525-26 (quoting Adamson v. California, 332 U.S. 46, 92 (1947) (Black, J., dissenting)).
153. *Id.* at 511.
154. See *id.* at 529-31 (Stewart, J., dissenting).
155. *Id.* at 482, 486; see also *id.* at 502-03 (White, J., concurring).
156. *Id.* at 485-86.
description of the marital relationship and his discussion of parental authority. Locke defines conjugal society as:

[A] voluntary Compact between Man and Woman: and tho' it consist chiefly in such a Communion and Right in one another's Bodies, as is necessary to its chief End, Procreation; yet it draws with it mutual Support, and Assistance, and a Communion of Interest too, as necessary not only to unite their Care, and Affection, but also necessary to their common Off-spring, who have a Right to be nourished and maintained by them, till they are able to provide for themselves.\(^{197}\)

Viewed in this way, the marriage relationship has several important features. First, it appears that the terms of the marriage agreement will be subject to negotiation.\(^{158}\) Second, the marriage relationship assists both husband and wife to define the courses they will pursue in life: "[I]t draws with it mutual Support, and Assistance, and a Communion of Interest too, as necessary . . . to unite their Care, and Affection . . . ."\(^{159}\) Accordingly, when the marriage relationship no longer serves any of these ends, Locke permits it to be terminated.\(^{160}\) In sum, the marriage relationship is important in the Lockean liberal tradition because it fosters the freedom of two distinct individuals to select and order their intimate personal relationships.

The parent-child relationship is one in which "Parents have a sort of Rule and Jurisdiction over [their children] when they come into the World, and for some time after, but 'tis a temporary one."\(^{161}\) Incumbent in this "rule and jurisdiction" is a positive duty or obligation to "nourish, preserve, and bring up their Off-spring."\(^{162}\) Hence, consistent with this overall natural rights philosophy, the parents' right to raise and direct the affairs of their
children within the marital relationship derives directly from their naturally imposed duty "to take care of their Offspring, during the imperfect state of Childhood." Therefore, although one aspect of parental authority is a positive duty to raise and nourish children, that duty also carries with it two very important rights. First, parents are entitled to make certain choices regarding the course of a child's education and upbringing. Second, they are given the opportunity to expose that child to the values and courses of conduct that the parents have selected as important through their own capacity for rational deliberation and self-direction.

When considered together, Locke's discussions of the marriage relationship and parental authority reveal the fundamental nature of the liberty interest at issue: privacy in marriage to be free from state regulation regarding the intimacies of the marriage relationship. Protecting freedom within the marital relationship promotes the rational liberty of the individual because it enables him to choose those courses of conduct essential to his emotional fulfillment. Similarly, the obligation and right of parents to raise their children also fosters rational liberty because it protects the freedom of parents to expose their children to those values and courses of action they find most important and fulfilling.

This characterization of the true nature of the liberty interest at issue in Griswold is evident in several of the Court's pronouncements. First, the Griswold Court recognized marriage as "a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred" and a relationship "that promotes a way of life, . . . a harmony of living . . . [and] a bilateral loyalty." Second, the Meyer Court recognized as fundamental the rights "to marry, establish a home and bring up children . . . and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men." Third, there is Justice Goldberg's recognition that "[t]he entire fabric of the Constitution and the purposes that clearly underlie its specific guarantees demonstrate that the rights to marital privacy and to marry and raise a family are of similar order and magnitude as the fundamental rights specifically protected."
Because the asserted privacy interest is fundamental, state regulation of that activity must serve a compelling state interest. The societal interests implicated in the area of parental and conjugal relations in the Lockean liberal tradition are similar to those identified by the Griswold Court. As in Griswold, it is possible that banning the use of contraceptives by married couples would support a societal interest in prohibiting "all forms of promiscuous or illicit sexual relationships, be they premarital or extramarital," provided it furthered the "Peace, Safety, and publick good of the People." This, however, is a very unlikely result under the rational liberty view because "[f]or such regulation to be sustained . . . it would have to be supported by a showing of compelling state interests, assertions that the capacities for rational self-direction of others would be too greatly endangered if a certain course is pursued." Because these premarital or extramarital relationships did not restrict the rational liberties of others (including married couples), the state's interest is minimal. Accordingly, a legislative prohibition on the use of contraceptives by married couples to promote society's interest in inhibiting premarital and extramarital relations falls for overbreadth because it interferes with society's deeper interest in protecting the marital freedoms to which a husband and wife are entitled.

Society also could assert that a ban on contraceptives furthers the chief end of marriage in the Lockean liberal tradition: procreation. The argument would be that a married couple has a natural duty to procreate and that contraception undermines and inhibits that end. This argument, however, is unpersuasive given the broader importance that the Lockean liberal tradition places on the marriage relationship. First, although Locke does concede that the civil magistrate "decides any Controversie that may arise between Man and Wife [concerning the ends of marriage,]" he denies such adjudicative or legislative power to "abridge the Right, or Power of either naturally necessary to those ends, viz. Procreation and mutual Support and Assistance whilst they are together . . . ." Thus, civil society cannot ban the use of contraceptives because it would undermine society's deeper interest in protecting marriage as a means for individuals to order their most intimate personal relationships. Second, the freedom to use contraceptives would actually assist parents in their duty to nourish and maintain their children. By having fewer children, parents can devote more time and resources to the physical, emotional and intellectual development of their existing children. Thus, there is no compelling societal interest in restricting the right of married couples to use contraceptives. Both society and the individuals

168. Griswold, 381 U.S. at 505 (White, J., concurring).
169. J. Locke, supra note 18, bk. II, § 131 (emphasis in original).
170. R. Smith, supra note 10, at 237.
171. See supra text accompanying note 157.
172. J. Locke, supra note 18, bk. II, § 83.
within the marital relationship instead benefit from broad freedoms in terms of procreation and child rearing because they foster individual rational liberty.\(^\text{173}\)

An analysis under the Lockean moral philosophy approach of the various interests asserted in the *Griswold* opinions produces a result wholly consistent with that actually reached by the Supreme Court in *Griswold*. The Lockean liberal tradition recognizes a fundamental right of privacy inherent in marital relationships and a right to freedom in decisionmaking concerning when to marry and divorce, how to raise children and matters of procreation, including contraception. Moreover, although the Lockean liberal tradition does allow the political authority to legislate for the public good, it would find, as did the *Griswold* Court, that legislation proscribing the use of contraceptives by married couples serves no compelling state interest. In fact, such regulation wrongfully interferes with the liberties of married couples and is contrary to the best interests of society in fostering the rational liberty of the individual.

**C. Roe v. Wade**

In *Roe*\(^\text{174}\) the Supreme Court protected as fundamental a limited privacy right in women regarding the decision of whether to abort an unborn fetus. The Court's overarching protection of this fundamental right of privacy, however, is indefensible under a Lockean moral philosophy approach. While women may have a fundamental right of privacy in the abortion decision based on their rights to rational liberty, society has a sufficiently compelling interest that justifies legislative regulation of this privacy interest: the unborn fetus' potential capacity to exercise rational liberty. An examination of the *Roe* decision and corresponding Lockean principles implicated by a proper Lockean approach to substantive due process will show the error of the Court's result.

Jane Roe challenged the constitutionality of the Texas criminal abortion statutes which proscribed all abortions except those procured or attempted upon medical advice for the purpose of saving the life of the mother.\(^\text{175}\) In

\[^{173}\text{Locke writes that "all the ends of }\textit{Marriage [should] be obtained under Politick Government, as well as in the state of Nature . . . ." Id. (emphasis in original). Accepting the earlier discussion which pointed to a large measure of freedom for husband and wife in conjugal and parent-child relationships outside political society, this statement entails the same result within political society.}\]

\[^{174}\text{410 U.S. at 113.}\]

\[^{175}\text{The case was filed by an unmarried, pregnant woman who wished to terminate her pregnancy by abortion. The district court ruled that the Texas statutes were facially unconstitutional due to vagueness and overbreadth. All parties took protective appeals to the Court of Appeals for the Fifth Circuit which ordered the appeals held in abeyance pending decision by the U.S. Supreme Court. Id. at 120-22.}\]
holding the Texas statutes unconstitutional, Justice Blackmun surveyed the history of abortion and concluded that abortion had been an historically accepted procedure.176 Blackmun then recited and rejected three arguments that had been advanced to explain the historic enactment of abortion laws.177

Finally, Blackmun examined the nature of the pregnant woman's interest, concluding that "the right of personal privacy includes the abortion decision, but that this right is not unqualified and must be considered against important state interests in regulation."178 Based on these considerations, Blackmun adopted a strict scrutiny approach to analyzing the state interests in conflict with this fundamental right and concluded that the state's interests could only override the abortion right when compelling and narrowly drawn to express only legitimate state interests.179

Turning to the other side of the balance, Blackmun rejected the state's argument that the fetus was a "person" within the language and meaning of the fourteenth amendment.180 He also rejected the state's argument that a compelling interest in the life of the fetus existed from conception,181

176. Id. at 129-47.
177. See id. at 147-52. First, Blackmun rejected that the laws were "the product of a Victorian social concern to discourage illicit sexual conduct[,]" because the state had not advanced that justification and "no court or commentator has taken the argument seriously," and because such a justification was not a proper state purpose in the first place. Id. at 148 (footnote omitted). Second, Blackmun argued that although the state did have valid interests in ensuring that the procedure was performed under safe conditions, especially in the late stages of pregnancy, the state's interest in "protecting the woman from an inherently hazardous procedure . . . has largely disappeared." Id. at 149. Finally, Blackmun responded that there was considerable dispute whether the asserted interest in protecting the potential life that exists from the moment of conception was a purpose behind enacting the statutes. He concluded that it was this justification around which the case and the constitutionality of the statute centered. Id. at 151-52.

178. Id. at 154. In analyzing the nature of the privacy right asserted, Justice Blackmun noted that in the past the right of privacy had included such individual interests as marriage, procreation, contraception, family relationships and child rearing and education. Id. at 152-53. He then concluded that "the Fourteenth Amendment's concept of personal liberty and restrictions upon state action" or "the Ninth Amendment's reservation of rights to the people" was broad enough to include the woman's decision to keep or terminate a pregnancy. Id. at 153.

Blackmun further articulated the nature of the privacy right asserted by identifying the potential harms in denying a woman that choice. These included: medical harm from pregnancy and distress for the woman and family of an unwanted child; the burdens of child care; and the potential of a continuing social stigma associated with unwed motherhood. Id.

Despite such interests, Blackmun rejected an argument based on past privacy decisions that "one has an unlimited right to do with one's body as one pleases." Id. at 154. He based this rejection on the state's interests in "safeguarding health, in maintaining medical standards, and in protecting potential life." Id.

179. Id. at 155.

180. In rejecting this argument, Blackmun placed special emphasis on the fact that "no case could be cited that holds that a fetus is a person within the meaning of the Fourteenth Amendment." Id. at 157. Blackmun then examined the uses of the word "person" in the Constitution and argued that "the use of the word is such that it has application only postnatally." Id.

181. Blackmun rejected the necessity of deciding whether life begins at conception since "those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus." Id. at 159.
although Blackmun did recognize the state’s limited interest in protecting the life and health of the mother.  

Balancing the alleged interests of the state in protecting prenatal life against a woman’s alleged right of privacy, Blackmun concluded that the latter generally outweighed the former and articulated a trimester approach to accommodate these interests.  

During the first trimester, when the nonviable fetus is not considered a “person” and the abortion procedure presents few risks to the health of the mother, she has unlimited power to terminate a pregnancy.  

During the second trimester, when the abortion procedure involves greater risks to the health of the mother, the state can regulate the procedure in ways reasonably related to the health of the mother.  

Finally, during the third trimester, the state may totally proscribe abortion where it can establish a compelling interest in protecting potential human life.  

Justice Stewart, while concurring in the judgment, wrote separately to emphasize a reversal from his position in Griswold. Arguing that the Griswold decision could be rationally understood only as “holding that the Connecticut statute substantively invaded the ‘liberty’ that is protected by the Due Process Clause of the Fourteenth Amendment,” he concluded that “Griswold stands as one in a long line of . . . cases decided under the doctrine of substantive due process, and I now accept it as such.”  

Justice Rehnquist dissented from the decision on several grounds, chiefly that the broad right of privacy recognized by the majority was not part of the liberty protected by the due process clause of the fourteenth amendment.  

182. “[I]t is reasonable and appropriate for a State to decide that at some point in time another interest, that of health of the mother . . . becomes significantly involved.” Id.

183. See id. at 162-66.

184. Id. at 163.

185. Id. Blackmun noted three examples of permissible state regulation: requirements as to the qualifications of the person performing the abortion; requirements as to the facility in which the abortion will take place; and requirements as to the licensing of the individual to perform the abortion or the licensing of the facility. Id.

186. Blackmun found the compelling point for the state’s interest at the point of viability “because the fetus then presumably has the capability of meaningful life outside the mother’s womb[,]” giving it “both logical and biological justifications.” Blackmun then articulated the scope of this regulation: “If the State is interested in protecting fetal life after viability, it may go so far as to proscribe abortion during that period, except when it is necessary to preserve the life or health of the mother.” Id. at 163-64.

187. See supra note 154 and accompanying text.

188. Roe, 410 U.S. at 168 (Stewart, J., concurring). Stewart placed great emphasis on the Eisenstadt holding that the due process clause protected “the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.” Id. at 169-70 (quoting Eisenstadt v. Baird, 405 U.S. 438, 453 (1972) (emphasis in original)). He concluded that if such a right were protected as a personal liberty under the due process clause, it had also to include the decision whether to terminate a pregnancy. Id. at 170.

189. Id. at 172-73 (Rehnquist, J., dissenting). Rehnquist felt that the Court articulated an
Justice Blackmun's opinion identifies several "natural rights" issues that must be analyzed under a Lockean moral philosophy approach to the abortion question. First, the Court held, as noted above, that a woman possesses a right of privacy, discoverable in either the ninth or fourteenth amendments, which includes the right to decide whether to terminate a pregnancy. Second, in analyzing the societal interests, the Court found that an unborn fetus is not a "person" with rights guaranteed protection under the fourteenth amendment because "the unborn have never been recognized in the law as persons in the whole sense." However, the Court did recognize that a woman's right of privacy is not unlimited and that the state does have an "important and legitimate interest in protecting the potentiality of human life."

The first step under the Lockean moral philosophy approach is to determine whether the asserted privacy interest is fundamental. Although Locke never specifically mentions abortion in either of his two treatises, some of Locke's pronouncements lead to the conclusion that a woman could have a fundamental property and liberty right to control of her own body. Specifically, Locke's discussion of the rights of a woman in the state of nature and in both parental and conjugal relationships bears a striking resemblance to the fundamental right of privacy articulated in Roe. This right of privacy derives from a woman's right of rational liberty which emerges from Locke's destructive refutation of Filmer's argument for patriarchy and from a constructive argument based on parental and conjugal relationships.

Locke's argument against Filmer's position begins with the assertion that, based on Genesis 3:16, God did not affirmatively give man a grant of political power over woman. Rather, God merely suggested or foretold an empirical relationship which man subsequently adopted:

God, in this Text, gives not, that I see, any Authority to Adam over Eve, or to Men over their Wives, but only foretels what should be the

overly broad formulation of the rights protected by the due process clause. He accepted the assertion that "the liberty, against deprivation of which without due process the Fourteenth Amendment protects, embraces more than the rights found in the Bill of Rights." However, Rehnquist argued that since that liberty is guaranteed against deprivation only without due process of law, the Court should continue to apply the rational basis test it has traditionally applied to such social and economic legislation. "[Roe] involved a fundamental moral question . . . concerning the human personhood and rights of biological human life . . . and thus implicated the most fundamental principles of the regime—the right to life, liberty, and pursuit of happiness." C. Wolfe, supra note 4, at 308.

190. "[Roe] involved a fundamental moral question . . . concerning the human personhood and rights of biological human life . . . and thus implicated the most fundamental principles of the regime—the right to life, liberty, and pursuit of happiness." C. Wolfe, supra note 4, at 308.
192. Id. at 162.
193. Id.
194. "To the woman he said, 'I will greatly increase your pains in childbearing; with pain you will give birth to children. Your desire will be for your husband, and he will rule over you.'" Genesis 3:16 (New International Version).
Womans Lot, how by his Providence he would order it so, that she should be subject to her husband, as we see that generally the Laws of Mankind and customs of Nations have ordered it so; and there is, I grant, a Foundation in Nature for it.  

Although Locke could not deny that he lived in a world where subjection of women was an evident reality, he maintained that God did not, by divine grant of authority, give to men any kind of political authority over women in a state of nature.

Locke expands a woman's individual rights when he argues that a mother has independent title to honor from her children. Here Locke takes exception to Filmer's construction of the commandment to "honor thy father and thy mother" as meaning that only the father is entitled to honor and that he has an absolute monarchical power. Noting that the Scripture refers to both mother and father, Locke concludes: "[T]he mother [has] by this Law of God, a right to Honour from her Children, which is not Subject to the Will of her Husband . . . ." With these two propositions, Locke further expands a woman's rights by joining the protection against political dominion by a woman's husband with a positive right of the woman to be honored by her children.

Locke's denouncement of Filmer concludes with the assertion that, based on Genesis 1:28, God did not give man alone sole dominion over the goods of the earth. Instead, Locke uses this verse to articulate the roots of a right in women to private property. Locke notes, "God blessed them, and said unto them, Have Dominion." Even though Locke accepts the fact that social custom, and perhaps the dictates of natural law, require that a woman be, to some extent, subject to the authority of her husband, he still recognizes that she should possess some right to property. Thus, although Locke's chief purpose in the first treatise is to refute Filmer's argument from Scripture for absolute monarchy, there emerges at least the
roots of a theory of "feminism" which supports a woman's right to privacy.

If the argument for a right to abortion rested solely on Locke's first treatise, it would easily fall to the criticism that Locke intended merely to refute a theory of patriarchy, not to establish positively property and liberty interests in women. When combined with Locke's description of a woman's role in parental and conjugal relationships, however, a positive argument for a right of privacy in the woman emerges. Locke begins this discussion in the second treatise by immediately rejecting any notions of patriarchy and affirmatively reasserting the equality of women: "[I]f we consult Reason or Revelation, we shall find she hath an equal Title. . . . For whatever obligation Nature and the right of Generation lays on Children, it must certainly bind them equal to both the concurrent Causes of it." 201 Although at times Locke refers to paternal and not parental authority, it is nonetheless clear that he places woman on an equal footing with her husband regarding their roles as parents.

Locke's analysis of the conjugal relationship produces a much more comprehensive argument for the individual rights of women. Locke asserts that the conjugal relationship does not result from a decision by a man to marry a woman but rather in "a voluntary Compact between Man and Woman," 202 who are two contracting equals. Although conjugal society arises out of the need for procreation and persists among humans for a much longer time than for animals because of the long-term dependency of children on their parents, Locke suggests it need not be permanent:

[I]t would give one reason to enquire, why this Compact, where Procreation and Education are secured, and Inheritance taken care for, may not be made determinable, either by consent, or at a certain time, or upon certain Conditions, as well as any other voluntary Compacts, there being no necessity in the nature of the thing, nor to the ends of it, that it should always be for Life . . . . 203

Locke further expands a woman's rights to include that of divorce as long as her procreative and supportive responsibilities have been fulfilled. 204 In addition to a limited right of divorce, Locke asserts that a husband's right of decision is limited only to matters of common concern. Therefore, a wife is entitled to hold property interests distinct from the control of her husband: "[The husband's power] leaves the Wife in the full and free possession of what by Contract is her peculiar Right . . . . [T]he Wife has,

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201. Id. bk. II, § 52.
202. Id. bk. II, § 78.
203. Id. bk. II, § 81 (emphasis in original).
204. See, e.g., Butler, supra note 195, at 144 ("Though conjugal society among human beings would be more persistent than among other species, this did not mean that marriage would be indissoluble.").
in many cases, a Liberty to separate from him . . .”

Indeed, Locke’s comments in his chapter on conquest indicate an even stronger assertion of a woman’s right to hold property: “For as to the Wife’s share, whether her own Labour or Compact gave her a Title to it, ‘tis plain, Her Husband could not forfeit what was hers.”

Having established the basis for both liberty and property rights in women, Locke discusses what these rights involve. Since Locke never explicitly discusses women in his description of the state of nature, the argument for a right of abortion must assume that Locke’s references to “man” and “mankind” are generic terms which include both men and women. Given this assumption, the logical conclusion is that a woman has broad liberty and property rights, including a “fundamental” right to privacy and control of her own body:

> [E]very Man has a Property in his own Person. This no Body has any Right to but himself. The Labour of his Body, and the Work of his Hands, we may say, are properly his. Whateover then he removes out of the State that Nature hath provided, and left it in, he hath mixed his Labour with, and joyned to it something that is his own, and thereby makes it his Property.

Indeed, “[t]he argument that a woman has a right to do with her body as she wishes is then to be understood as a claim of an unlimited or absolute right over herself, where no one else is affected.”

205. J. Locke, supra note 18, bk. II, § 82 (emphasis in original); see also Butler, supra note 195, at 145 (“Locke distinguished between the property rights of husband and wife. All property in conjugal society was not automatically the husband’s. A wife could have property rights not subject to her husband’s control.”).

206. J. Locke, supra note 18, bk. II, § 183; see also Butler, supra note 195, at 145 (“Locke’s patriarchy was limited, though. The husband’s power of decision extended only to those interests and properties held in common by husband and wife.”).

207. See Butler, supra note 195, at 149 (“Locke believed that women shared the basic freedom and equality characteristic of all members of the species. Women were capable of rational thought; in addition, they could make contracts and acquire property. Thus it appeared that women were capable of satisfying Locke’s requirements for political life.”). But see Clark, Women and John Locke; or, Who Owns the Apples in the Garden of Eden?, 7 CAN. J. PHI. 699, 718 (1977) (“[W]omen’s rights are dependent on men’s rights. They do not have independent rights, and the reason for this is that they could not be regarded as independent persons with full property rights if the exclusive right of the male to dispose of property is to be maintained.”); id. at 719 (“[L]ocke leaves [women] in the family, born in the state of nature and necessarily left unchanged in civil society . . . . [H]e clearly accepted the premise that there is a natural inequality of the sexes and that the male is by nature superior.”); W. Kendall, John Locke and the Doctrine of Majority Rule 121 (1959) (“[I]t seems highly improbable that Locke was thinking in terms of extending those [equal] rights to women.”).

208. J. Locke, supra note 18, bk. II, § 27 (emphasis in original); see e.g., J. Tully, supra note 39, at 105 (“Man . . . is said to be the proprietor of two items. He has a property in, or is the proprietor of his person and, he is also the proprietor of the actions of his person.”).

209. Glenn, supra note 63, at 75; see also C. Macpherson, The Political Theory of Possessive Individualism: Hobbes to Locke 199 (1962) (“Locke’s astonishing achievement was to base the property right on natural right and natural law, and then to remove all the natural law limits from the property right.”).
in her own person (which would also include her body) with the right to property in the labor of her body (which presumably includes an unborn fetus whose development and nourishment is a product of the labor of her body), creates a possible justification for the right of a woman to decide whether to abort a fetus.

This position can be strengthened if protecting the right of a woman to decide whether to abort a fetus serves to foster the reflective deliberation and self-direction essential to her rational liberty. The primary concern of the rational liberty view is to promote that conduct which "is part of reflective self-direction and maintains the capacity for self-governance in the actor and others." Accordingly, the concept of rational liberty bears a striking resemblance to Justice Blackmun's arguments that:

The detriment that the State would impose upon the pregnant woman by denying this choice altogether is apparent. Specific and direct harm medically diagnosable even in early pregnancy may be involved. Maternity, or additional offspring, may force upon the woman a distressful life and future. Psychological harm may be imminent. Mental and physical health may be taxed by child care. There is also the distress, for all concerned, associated with the unwanted child, and there is the problem of bringing a child into a family already unable, psychologically and otherwise, to care for it. In other cases, as in this one, the additional difficulties and continuing stigma of unwed motherhood may be involved.

According to this view, refusing a woman the right to decide whether to abort a fetus might greatly circumscribe her liberty interests in directing the course of her life.

The argument for a broad right to abortion can be strengthened further by arguing that Locke's views on the status of an unborn fetus are consistent with Roe's conclusion that an unborn fetus is not a "person." According to Locke, the development of deliberative capacities is the primary purpose of rational liberty. Therefore, it is not surprising that Locke defines "personhood" as essentially the ability to think or reason. Accordingly, Locke writes that:

\[\text{[the Freedom then of Man and Liberty of acting according to his own Will, is grounded on his having Reason, which is able to instruct him}\]

\[\text{210. R. Smith, supra note 10, at 226.}\]
\[\text{211. Roe, 410 U.S. at 153.}\]
\[\text{212. "[A person] is a thinking intelligent being, that has reason and reflection, and can consider itself as itself, the same thinking thing, in different times and places; which it does only by that consciousness which is inseparable from thinking, and, as it seems to me, essential to it . . ." J. Locke, supra note 32, bk. II, ch. 27, § 11 (footnotes omitted).}\]
\[\text{The reason for focusing on rationality as the criterion of personhood is that all natural rights and duties flow from it. "Thus we are born Free as we are born Rational; not that we have actually the Exercise of either: Age, that brings one, brings with it the other too." J. Locke, supra note 18, bk. II, § 61 (emphasis in original).}\]
in that Law he is to govern himself by, and make him know how far he is left to the freedom of his own will.213

Combined with Locke's various statements in the second treatise that children do not have the ability to reason,214 this definition could mean that an unborn fetus does not have the ability to reason and thus is not a "person." This is borne out in his discussion of property, and in several other instances, where Locke is careful to make a distinction between the born and the unborn: "[N]atural Reason . . . tells us, that Men, being once born, have a right to their Preservation, and consequently to Meat and Drink, and such other things, as Nature affords for their Subsistence . . . ."215 Implicit in this statement is Locke's assumption that an unborn fetus has no liberty or property rights (including preservation), and as such, is merely the product of the labor of a Twoman's body and hence subject to her control. This rejection of personhood in the unborn fetus, coupled

213. J. LOCKE, supra note 18, bk. II, § 63 (emphasis in original). Such a characterization of Locke's view of personhood is consistent with modern critical interpretations of Locke's thought. See, e.g., J. COLMAN, supra note 28, at 188-89 ("It is, therefore, a consciousness of free actions which properly constitutes the person . . . . In this sense the individual can be said to be the Tauthor of himself and therefore to have a property in his person."); J. TULLY, supra note 39, at 109 ("A child becomes a free man on attaining the age and use of reason, and the free man becomes a free agent and a person in thinking and acting. The criterion of personhood is the consciousness which always accompanies thought and action."); Behan, Locke on Persons and Personal Identity, 9 CAN. J. PHILOS. 53, 61-62 (1979) ("Locke's idea of moral man is the idea of a corporeal rational creature, a 'corporeal rational Being' . . . [who] need satisfy only two criteria to be considered legally a person: the individual must possess legal rights and must be the subject of legal duties."). But see C. MACPHERSON, supra note 209, at 232-38 (arguing that rationality for Locke was really the private appropriation of land and the materials it yields).

Such a characterization of personhood is also consistent with modern philosophical views on the subject. One commentator has noted that "the idea of a chooser, a decider, who has full capacity for rational decision and choice, seems to be central to our idea of a holder of rights." McCloskey, The Right to Life, 84 MIND 403, 413-14 (1975); see also id. at 414, 417; Richards, The Individual, the Family, and the Constitution: A Jurisprudential Perspective, 55 N.Y.U. L. REV. 1, 9 (1980) (The development of a capacity for individual choice, the central criterion for becoming a person, consists in "self-critically deciding, as a free and rational being, which of one's first-order desires will be developed and which disowned, which capacities cultivated and which left fallow, with what or with whom in one's life one will or will not identify, and what goals to strive toward.").

Such an argument has been recognized by the Court within the abortion context. See, e.g., Belotti v. Baird, 443 U.S. 622, 635 (1979) ("[D]uring the formative years of childhood and adolescence, minors often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them." (citation omitted)).

214. J. LOCKE, supra note 18, bk. II §§ 57-60; see J. COLMAN, supra note 28, at 188 ("Children below a certain age . . . have not the use of reason and are, therefore, not free. This means that they are not capable of a law and cannot be held responsible for their deeds. Consequently, they do not count as persons in the forensic sense of that term." (footnote omitted)); J. TULLY, supra note 39, at 106 ("Locke explains in the Two Treatises that to be capable of law is to be able to use or to exercise one's own reason; this is the condition of being free, or a free man. Children lack this ability and so are not free. . . . Children are not, therefore, persons." (citations omitted)).

215. J. LOCKE, supra note 18, bk. II, § 27 (emphasis added).
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with no right to preservation until birth and Locke's argument that women are free individuals entitled to liberty and property rights, suggest that Locke's writings may support a broad and fundamental right to privacy in abortion decisions, a right which lies at the heart of the Roe decision.

However, consideration of the countervailing societal interests implicated by a broad and fundamental right to privacy in the abortion decision results in a conclusion that the asserted privacy right is likely not fundamental. First, the assertion that a woman's "privacy" rights include control over the future of an unborn fetus is inconsistent with the Lockean liberal tradition's fundamental premise concerning the origin of her liberty and property rights. An individual's liberty and property rights arise not from his relationship to his fellow man, but rather from his relationship to God, author and creator of the world in which he finds property.216 "For Men being all the Workmanship of one Omnipotent, and infinitely wise Maker; All the Servants of one Sovereign Master, sent into the World by his order and about his business, they are his Property, whose Workmanship they are, made to last during his, not one anothers Pleasure."217 Although an individual has property in his person and all things with which he mixes his labor, that property in the first instance belongs to God. This leads to some remarkable consequences:

They who say the Father [and implicitly the Mother] gives Life to his Children . . . do not, as they ought, remember God, who is the Author and Giver of Life: 'Tis in him alone we live, move, and have our Being . . . . 

To give Life to that which has yet no being, is to frame and make a living Creature, fashion the parts, and mould and suit them to their uses, and having proportion'd and fitted them together, to put into them a living Soul. He that could do this, might indeed have some pretence to destroy his own Workmanship. But is there any one so bold, that dares thus far Arrogate to himself the Incomprehensible Works of the Almighty?218

216. See R. Ashcraft, supra note 33, at 85-86 ("[H]uman beings have a relationship to property (the earth) that is conditional, not absolute, and those conditions must be defined in terms of God's purposes in permitting the use of His property.").

217. J. Locke, supra note 18, bk. II, § 6; see, e.g., J. Tully, supra note 39, at 109 ("[A man's] body and his limbs are God's property: the actions he uses them to make are his own."); id. at 58-59 (arguing Locke saw God and not man as the creator of man so that no man might have any absolute right over another); McCloskey, supra note 213, at 404 ("Locke argued for the right to life on theistic grounds, namely, that we are God's property, that we therefore lack the right to take life, our own or that of another person . . . .").

218. J. Locke, supra note 18, bk. I, §§ 52-53 (emphasis in original); see also R. Ashcraft, supra note 33, at 72 ("[F]athers neither give life to their children nor have they power to take it away . . . . Locke's position is that no plausible reading of the purposes of the Law of Nature can be invoked to justify the assertion of the unlimited power of fathers.").
A woman's labor confers no additional rights over the product of her labor other than the right not to have that product taken away. The mere fact that it is the labor of a woman's body that supports the growth of the fetus does not give her an unlimited or fundamental property right in it. At most, her labor merely gives her the right not to have the fetus taken away. Moreover, Locke's assertion that "[t]o give life to that which has yet no being" recognizes that the life of the fetus does begin at the moment of conception. Thus, although a woman may have certain liberty and property rights, these rights do not extend over the life or death of her children and do not, in fact, extend as far as an unborn fetus, whom God, more than the parents, has created.

Second, Locke's description of "inalienable" rights also supports a more limited interpretation of a woman's liberty and property rights. A Lockean inalienable right cannot "be separated from one's person or nature." Implicit in the inalienable right to liberty is a distinction between freedom and license: "Freedom does not include the right or the rightful power to alienate inalienable rights. . . . Because the idea of inalienable rights necessarily precludes my having 'absolute arbitrary power' over myself, neither I nor anyone else may arbitrarily dispose of me as I or they wish." There

220. See Hafen, supra note 116, at 535 (arguing that it is "a complete perversion of the liberty of parenthood to believe that a woman may terminate a pregnancy because of some variation on the theme of a 'parental' right" on the grounds that if the fetus is "significant enough to give rise to such a lofty claim, it is significant enough to bar an abortion as the earliest form of child abuse.").
221. This argument has been accepted by the Supreme Court. See, e.g., Prince v. Massachusetts, 321 U.S. 158, 170 (1944) ("Parents may be free to become martyrs themselves. But it does not follow that they are free, in identical circumstances, to make martyrs of their children before they have reached the age of full and legal discretion when they can make that choice for themselves."); Parham v. J.R., 442 U.S. 584, 631 (1979) ("Notions of parental authority and family autonomy cannot stand as absolute and invariable barriers to the assertion of constitutional rights by children."); see also Byrn v. New York City Health and Hosps. Corp., 31 N.Y.2d 194, 206, 286 N.E.2d 887, 892, 335 N.Y.S.2d 390, 397 (1972) (Burke, J., dissenting) ("Human beings are not merely creatures of the State, and by reason of that fact, our laws should protect the unborn from those who would take his life for purposes of comfort, convenience, property or peace of mind rather than sanction his demise.").
222. Glenn, supra note 63, at 66.
223. Id. at 73; see also J. Tully, supra note 39, at 115 ("It does not follow . . . that the rightholder can consent to transfer something that is his own. His person, action, liberty and life are his property, yet these inalienables cannot be taken with consent.").

Glenn then argues convincingly that such an approach to inalienable rights is the only one that makes good sense: Locke thought that the chances for freedom were better if it were firmly established that government may not justify killing or enslaving its citizens on the ground that it did so with their consent. Locke is right if we admit that, while both may be difficult, it is easier to determine whether a government kills or enslaves its citizens than whether it does so with their consent.

Glenn, supra note 63, at 80; see also Byrn, 31 N.Y.2d at 207, 286 N.E.2d at 893, 335 N.Y.S.2d at 398 (Burke, J., dissenting) (Arguing that the Declaration of Independence "restated the natural law" and "was intended to serve as a perpetual reminder that rulers, legislators, and Judges were without power to deprive human beings of their rights.").
emerges from this distinction a conflict with the broad view of a woman’s liberty previously mentioned:

If one has such a right to consent to doing anything to oneself one would then have a right to alienate his inalienable rights . . . . If one has an unlimited right to do with one’s body as one sees fit, then one cannot at the same time also have inalienable rights which limit, as we have shown, what one can do with it. Therefore the woman’s right over her own body argument denies the distinction between inalienable freedom and license by denying the ethical and logical assumption on which it is based. That assumption is that we do not have the right to alienate our inalienable rights.224

Quite apart from the societal interests in preserving the life of the unborn fetus because it is a potential person,225 the Lockean liberal tradition significantly narrows the true nature of a woman’s liberty interest in controlling her body. Thus, it is highly likely that the Lockean liberal tradition would not recognize a fundamental right to privacy in the abortion decision because the unlimited claim of a woman to control her body “is a claim to license but to a license which is so greatly expanded that it abolishes inalienable freedom.”226

Even assuming that the woman’s asserted privacy interest is fundamental, there are compelling societal interests that justify state regulation of the abortion decision.227 First, there is the proscription under the Lockean liberal tradition against killing except when absolutely necessary. Second, in contrast to Roe, Locke’s idea of rational liberty compels the conclusion that the notion of “personhood,” that is, the ability to reason, does extend to an unborn fetus who is endowed with the potential to reason. Finally, similar to the Roe Court’s assertion that the state does have an interest in protecting the potentiality of human life, the Lockean liberal tradition requires that each individual in a state of nature or civil society, especially a parent, preserve mankind in general. This obligation must include an unborn fetus, who, from the time of conception has the potential to live and to reason. Although each interest standing alone is likely insufficient to constitute a compelling state interest, when combined and analyzed as a

224. Glenn, supra note 63, at 75.
225. See infra notes 227-38 and accompanying text.
226. Glenn, supra note 63, at 75.
227. Roe differs significantly from Griswold in that Roe involves strong countervailing interests in the preservation of the unborn fetus, while Griswold involves only the liberty interests of married individuals. See, e.g., Steinberg v. Brown, 321 F. Supp. 741, 746 (N.D. Ohio 1970) (“The difference between an abortion case and Griswold is clearly apparent, for here there is an embryo or fetus incapable of protecting itself. There, the only lives were those of two competent adults.”); Byrne, 31 N.Y.2d at 209, 286 N.E.2d at 894, 335 N.Y.S.2d at 400 (1972) (Burke, J., dissenting) (“Here [in the abortion situation] there are three people with different interests involved. The man, the woman and the foetus. The foetus has the superior ‘right to life’ rather than the particular female’s or male’s concern to avoid responsibility.”).
whole, these societal interests convincingly justify state regulation of the abortion decision.

First, by grounding the ultimate foundation of property rights in God as the creator and author of life, Locke must conclude that, as a general proposition, one ought not to kill, since this constitutes a destruction of God’s property. This is true for animals and other creatures, as well as for mankind in general: “Every one as he is bound to preserve himself, and not to quit his Station wilfully; so by the like reason when his own Preservation comes not in competition, ought he, as much as he can, to preserve the rest of Mankind ...” From these considerations, Locke concludes that each individual is under a duty to preserve mankind, as well as a duty to respect what preserves life, liberty and property in another.

The second societal interest is the value of children and unborn fetuses as potential reasoning and deliberative members of society. As noted above, Locke argues that a man has property in his own person. Moreover, we have seen that due to the Lockean liberal tradition’s emphasis on the development of an individual’s deliberative capacities, Locke defines personhood as a consciousness that accompanies thought and action, essentially the ability to reason. If one were to pursue a strict interpretation of the Lockean liberal tradition, one might very well conclude that an unborn fetus is not a person according to Locke’s definition and hence is not entitled to any protection under natural law. When one looks deeper into Locke’s views on the nature of children and the parent-child relationship, as well as the full implications of the rational liberty view, however, a different conclusion is reached.

228. J. Locke, supra note 18, bk. I, §§ 39, 56, 92.
229. Id. bk. II, § 6 (emphasis in original); see also R. Ashcraft, supra note 33, at 101-02 (“[T]here is a moral standard that God has given to individuals in their natural condition prohibiting them from taking any action that would harm another individual. And, positively, natural law obliges them to act in a manner that will preserve mankind in general.” (emphasis in original)).
230. See, e.g., J. Dunn, supra note 28, at 107 (Men are proscribed from killing unless “it serves some good purpose, both because the law of nature enjoins the preservation of all men ‘as much as possible,’ and also as an instance of the general prohibition on the waste of natural resources.” (footnote omitted)); W. Kendall, supra note 207, at 79 (“It is a law of nature which emphasizes the claims upon the individual of the broader interests of his fellow men, living and unborn, and ... one which fixes attention upon the individual’s duty to satisfy those claims.” (emphasis in original) (footnote omitted)); McCloskey, supra note 213, at 408-09 (“Equally important is the claim that the natural law ethic establishes that it is intrinsically and hence always wrong to take (innocent) life.” (emphasis in original)); R. Ashcraft, supra note 19, at 260 (“In the Two Treatises ... this owner/object relationship functions as a prohibitive injunction against any humanly advanced claims to exercise a right of destruction over God’s ‘property,’ at least in the absence of any direct divine order to do so.”).
231. J. Locke, supra note 18, bk. II, § 27; see supra note 208 and accompanying text.
232. See supra notes 212-13 and accompanying text.
Since Locke links natural rights to the individual’s capacity for rational deliberation and self-direction, Locke attributes natural rights to children, and by extension fetuses, because each possesses the same potential to develop into fully rational members of society. For a theorist who was primarily concerned with the rights of individuals capable of deliberation and rational self-direction, but who did not believe that young children possess that ability, Locke spent an extraordinary amount of time discussing the nature of children and their corresponding political and natural relations to their parents. Given his belief that children do not possess these abilities, the most startling of Locke’s claims is that a child’s worth is grounded not in his bodily existence, but rather in his potential to reason:

The Power, then, that Parents have over their Children arises from that Duty which is incumbent on them, to take care of their Off-spring, during the imperfect state of Childhood. To inform the Mind, and govern the Actions of their yet ignorant Nonage, till Reason shall take its place . . . .

Thus, we are born Free, as we are born Rational; not that we have actually the Exercise of either: Age that brings one, brings with it the other too.

Therefore, under the Lockean liberal tradition, children possess a liberty interest in their potential personhood: “Every Man is born with a double Right: First, A Right of Freedom to his Person, which no other Man has a Power over, but the free Disposal of it Lies in himself. Secondly, A Right, before any other Man, to inherit, with his Brethren, his Fathers

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233. See supra note 214 and accompanying text.
234. J. Locke, supra note 18, bk. II, §§ 58-61 (emphasis in original). Several commentators have reached similar conclusions. See, e.g., Butler, supra note 195, at 146 (“No immature child could be expected to take part in the social compact. Yet children’s inability to participate in politics would not preclude their right to consent to government when they reached adulthood.”); Richards, supra note 213, at 10 (“In fact, although people differ widely in their actual exercise of autonomous capacities, the idea of human rights does not require actual autonomy, but only the capacity for it.”).

This conclusion has also been reached by at least one modern philosophical writer. See McCloskey, supra note 213, at 415 (“Yet the pressure to attribute rights to infants is considerable, and this is, I suggest, because of their potentiality. Indeed, many of their rights, and the duties which spring from them, derive from their potentialities as free, rational, creative beings . . . .”).

The Supreme Court has implicitly recognized that it is the ability to reason that entitles a minor to rights when the Court allowed a limited right of abortion without parental consent in Bellotti. The Court stated that “if the minor satisfies a court that she has attained sufficient maturity to make a fully informed decision, she then is entitled to make her abortion decision independently.” 443 U.S. at 650; see also Parham, 442 U.S. at 627 (“Constitutional rights do not mature and come into being magically only when one attains the state-defined age of majority.”); Corkey v. Edwards, 322 F. Supp. 1248, 1253 (W.D.N.C. 1971) (“Whether possessing a soul from the moment of conception or mere protoplasm, the fertilized egg is, we think, ‘unique as a physical entity,’ . . . with the potential to become a person.” (citation omitted) (emphasis added)).
Children thus have natural rights, including the right to nourishment and education from their parents, because they have the potential to mature and develop into fully rational members of civil society.

Under the Lockean liberal tradition, an unborn fetus has the same rights as a child. Locke earlier asserted that a parent has no right to take the life of his or her born children because God, not the parents, is the author and giver of life. As a result, Locke would reject any argument that parents have a right to destroy an unborn fetus that is not yet physically viable. His statement that it is God who “give[s] Life to that which has yet no being” implicitly recognizes that life begins at conception. Because an unborn fetus is “alive” just like a living child, it possesses the same potential to reason as that living child. Thus, unlike the Roe Court, which concluded that an unborn fetus is not a person within the meaning of the fourteenth amendment, Locke would find that because personhood actually consists in the ability to deliberate and engage in rational self-direction, an unborn fetus deserves protection as a “person” because it, like children already born, possesses this potential and is thus a part of mankind.

Since an unborn fetus is a person as that term would be applied to children already born, it follows that an unborn fetus is entitled to the same rights and protections that parents are obliged to provide for children already born. As noted above, Locke places parents under a positive duty to protect and provide for their offspring. Under this theory of “liberal paternalism,” parents are not given absolute or wide-ranging power of direction, but rather are required to exercise this authority solely to develop the child’s potential to become a free, rational “person.” Accordingly,

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235. J. Locke, supra note 18, bk. II, § 190 (emphasis in original).
236. See supra notes 216-21 and accompanying text.
237. This conclusion is also consistent with the views of another natural law theorist, St. Thomas Aquinas: “[T]he natural law position of Thomas [Aquinas] on abortion primarily constitutes a refusal to discriminate among potential human beings on the basis of their varying physical potentialities. Once conceived, the fetus is recognized as man because he has a man’s potential for rationality.” Gerber, Abortion: Two Opposing Legal Philosophies, 15 Am. J. Juris. 1, 8 (1970); see also R. Smith, supra note 10, at 26 (“[I]n the Second Treatise . . . the promotion of man’s rational capacities is at the heart of [Locke’s] views on political goals.”) (emphasis added).
238. As Gerber notes, “He [the fetus] is not ‘inferior’ any more than an infant in his mother’s arms or a child in grade school is inferior to adult humanity.” Gerber, supra note 237, at 21.
239. See supra notes 39-43, 162-63 and accompanying text. The Supreme Court recognized this argument when it claimed: “It is cardinal with us that custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder.” Prince, 321 U.S. at 166.
240. Richards, supra note 213, at 14-15; see also id. at 42 (“But the liberal paternalist theory of parenthood, stated by Locke, requires that parents, as part of their basic moral duties, prepare children for rational independence, including the capacity to evaluate critically, as free and rational individuals, what life to lead.”) (citations omitted)).
241. This argument has been recognized by the Court: “This affirmative process of teaching, guiding, and inspiring by precept and example is essential to the growth of young people into mature, socially responsible citizens.” Belotti, 443 U.S. at 638.
an unborn fetus has the same rights to preservation, nourishment, and rational education as an already born child.

The rational liberty view requires that society’s primary duty be to protect and foster the capacity for rational liberty of all persons. Because the foregoing discussion has demonstrated that an unborn fetus is a potential person (because it has the potential capacity for rational liberty), it follows that it, too, is entitled to society’s protection. Accordingly, there emerges a societal interest sufficiently compelling to justify state regulation of a woman’s fundamental right to privacy regarding the abortion decision. Protecting a woman’s right to an abortion restricts and inhibits the potential capacity for rational deliberation in an unborn fetus. The woman’s fundamental interest in her own rational liberty (control of her own body) may be restricted in order to foster the potential capacity of an unborn fetus for rational liberty.

An analysis under the Lockean moral philosophy approach of the various interests asserted in the Roe opinions produces a result wholly inconsistent with that reached by the Supreme Court in Roe. The Lockean liberal tradition does recognize a woman’s potential fundamental right of privacy in her own body and the corresponding decision of whether to have an abortion. However, because that decision operates to inhibit the unborn fetus’ potential capacity to exercise rational liberty, society has a compelling interest which justifies legislative regulation of a woman’s privacy interests.

D. Bowers v. Hardwick

In Bowers the Supreme Court rejected an argument that the right of privacy included the right of an individual to engage in consensual homosexual sodomy. The Court’s rejection of this right of privacy is indefensible under a Lockean moral philosophy approach which, in fact, bears a striking resemblance to the analysis and conclusions reached by Justices Blackmun and Stevens, the dissenters in Bowers. Specifically, a reexamination of Locke’s views concerning personhood, the marriage relationship, and the limited nature of the countervailing societal interests in this area parallel the arguments advanced by Justices Blackmun and Stevens for a fundamental right to engage in consensual homosexual sodomy.

The state charged Hardwick with violating a Georgia sodomy statute when the police discovered Hardwick having sexual relations with another

241. See R. Smith, supra note 10, at 217 ("The rational liberty view commissions us to act so that we do not harm the capacities for rational understanding and self-control of ourselves or others . . . ." (emphasis added)).
243. See id. at 190.
adult male in the privacy of his own home. After the District Attorney refused to pursue the matter, Hardwick brought suit in federal court to challenge the constitutionality of the statute "insofar as it criminalized consensual sodomy." The district court granted the state's motion to dismiss, but a divided panel of the Court of Appeals for the Eleventh Circuit reversed, holding that "the Georgia statute violated [Hardwick's] fundamental rights because his homosexual activity is a private and intimate association that is beyond the reach of state regulation by reason of the Ninth Amendment and the Due Process Clause of the Fourteenth Amendment." The Supreme Court granted certiorari to resolve a conflict in the circuits over this issue.

Initially, Justice White's majority opinion rejected the argument that "the Court's prior cases ... construed the Constitution to confer a right of privacy that extend[ed] to homosexual sodomy and for all intents and purposes ... decided this case." White stated that none of the past formulations for identifying fundamental rights would extend a fundamental right to homosexual sodomy. He characterized this claim as "facetious" because state statutes have historically forbidden sodomy, because "proscriptions against that conduct have ancient roots," and because sodomy has consistently been a crime at common law. White expressed hesitancy to "expand the substantive reach of [the Due Process] Clauses, particularly if it requires redefining the category of rights deemed to be fundamental.

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244. The Georgia statute, GA. CODE ANN. § 16-6-2 (1984), defines the illegal conduct as follows: "(a) A person commits the offense of sodomy when he performs or submits to any sexual act involving the sex organs of one person and the mouth or anus of another...." Bowers, 478 U.S. at 188 n.1.

245. Bowers, 478 U.S. at 188.

246. Id. at 189.

247. Id. at 189 & n.3.

248. Id. at 190. Justice White argued that none of the rights announced in the earlier privacy cases bore any resemblance to the asserted right of homosexuals to engage in consensual sodomy. Because "[n]o connection between family, marriage, or procreation on the one hand and homosexual activity on the other has been demonstrated," White found unsupportable "any claim that these cases nevertheless stand for the proposition that any kind of private sexual conduct between consenting adults is constitutionally insulated from state proscription." Id. at 191.

249. Justice White focused on two famous formulations: those which were "implicit in the concept of ordered liberty," and those liberties "deeply rooted in this Nation's history and tradition." Id. at 191-92 (quoting Palko, 302 U.S. at 325 and Moore v. City of East Cleveland, 431 U.S. 494, 503 (1977) (opinion of Powell, J.).

250. Id. at 192-94.

251. Id. at 195. White gave two reasons for this hesitancy. First, he felt the Court "[w]as most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution." Id. at 194. Second, he felt that in attempting to discover such rights, "the Judiciary necessarily takes to itself further authority to govern the country without express constitutional authority." Id. at 195.
result because "the homosexual conduct occurs in the privacy of the home." Finally, he rejected Hardwick's argument that "the presumed belief of a majority of the electorate in Georgia that homosexual sodomy is immoral and unacceptable" did not provide a rational basis for the statute.

Two Justices filed dissenting opinions. These opinions are examined in considerable detail because the proper Lockean analysis closely parallels the analysis and conclusions reached by each. In the first, Justice Blackmun argued that two distinct but closely related rationales protected Hardwick's claim. First, Blackmun noted that the Court "has recognized a privacy interest with reference to certain decisions that are properly for the individual to make." He pointed out:

The fact that individuals define themselves in a significant way through their intimate sexual relationships with others suggests, in a Nation as diverse as ours, that there may be many "right" ways of conducting those relationships, and that much of the richness of a relationship will come from the freedom an individual has to choose the form and nature of these intensely personal bonds.

Second, Blackmun noted that the Court "has recognized a privacy interest with reference to certain places without regard for the particular activities

252. Id. The Court rejected Hardwick's analogy to Stanley v. Georgia, 394 U.S. 557 (1969), which protected possessing and reading obscene materials within the privacy of the home because that conduct was closely tied to the first amendment, while Hardwick's was not. White also expressed concern over determining the scope of such a right to voluntary sexual conduct between consenting adults because, "it would be difficult ... to limit the claimed right to homosexual conduct while leaving exposed to prosecution adultery, incest, and other sexual crimes even though they are committed in the home." Bowers, 478 U.S. at 195-96.

253. White responded: "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." Bowers, 478 U.S. at 196.

Chief Justice Burger and Justice Powell concurred in the opinion of the Court. Justice Burger wrote separately to underscore his belief "that in constitutional terms there is no such thing as a fundamental right to commit homosexual sodomy." Id. at 196 (Burger, C.J., concurring). Burger's opinion made a brief survey of the "millenia of moral teaching" on the subject. See id. at 196-97. Justice Powell wrote separately to emphasize his belief that because the statute imposed a sentence of up to 20 years for a single act, the respondent might have been protected by the eighth amendment. Admitting that the question was not properly before the Court because respondent had not been tried, convicted, or sentenced, Powell nevertheless noted that under Georgia law a single act of sodomy carried with it potential penalties comparable to other "serious felonies" such as aggravated battery, first degree arson and robbery. See id. at 197-98 (Powell, J., concurring).

254. Id. at 204 (Blackmun, J., dissenting) (emphasis in original). Although Justice Blackmun conceded that the privacy cases can be characterized by their connection to the family, he argues that "[w]e protect those rights not because they contribute, in some direct and material way, to the general public welfare, but because they form so central a part of an individual's life." Id.

255. Id. at 205 (emphasis added). Thus, Blackmun concludes, "[W]hat the Court really has refused to recognize is the fundamental interest all individuals have in controlling the nature of their intimate associations with others." Id. at 206.
in which the individuals who occupy them are engaged." Finally, Blackmun asserted that the majority's improper characterization of the liberty interest at stake had caused it to give too little scrutiny to the interests advanced by the state.

Dissenting on slightly different grounds, Justice Stevens placed special emphasis on the fact that the statute "express[ed] the traditional view that sodomy [was] an immoral kind of conduct regardless of the identity of the persons who engage in it." Accordingly, he felt the analysis should proceed through consideration of two issues. The first issue was whether the state could totally proscribe the described activity "by means of a neutral law applying without exception to all persons subject to its jurisdiction." If not, the second was whether the state could still defend the statute "by announcing that it will only enforce the law against homosexuals." Answering the first issue in the negative, Stevens noted that "when individual married couples are isolated from observation by others, the way in which they voluntarily choose to conduct their intimate relations is a matter for them—not the State—to decide." Stevens also answered the second issue

256. Id. at 204 (emphasis in original). Blackmun pointed out that "[j]ust as the right to privacy is more than the mere aggregation of a number of entitlements to engage in specific behavior, so too, protecting the physical integrity of the home is more than merely a means of protecting specific activities that often take place there." Id. at 206. Blackmun rejected the majority's reading of Stanley as "entirely unconvincing" because he sees that decision as anchored in "the Fourth Amendment's special protection for the individual in his home." Id. at 207. Thus, he concluded: "[T]he right of an individual to conduct intimate relationships in the intimacy of his or her own home seems to me to be the heart of the Constitution's protection of privacy." Id. at 208.

257. First, Blackmun rejected the State's interest in protecting the general public health and welfare because nothing in the record indicated that the conduct proscribed by the statute was "physically dangerous, either to the persons engaged in it or to others." Id. at 209.

Second, Blackmun rejected an argument that the condemnation of consensual sexual sodomy by certain religious groups gave the legislature power to proscribe the conduct since "[t]he legitimacy of secular legislation depends instead on whether the State can advance some justification for its law beyond its conformity to religious doctrine." Id. at 211.

Finally, Blackmun rejected any argument that the statute was a morally neutral exercise of legislative power to protect the public environment: Consensual homosexual sodomy was protected because it did not involve interference with "the rights of others, for the mere knowledge that other individuals do not adhere to one's value system cannot be a legally cognizable interest . . . let alone an interest that can justify invading the houses, hearts, and minds of citizens who choose to live their lives differently." Id. at 213 (citation omitted).

258. Id. at 216 (Stevens, J., dissenting).

259. Id.

260. Id. at 217-18. Stevens argued that this conclusion followed from two principles that had been clearly established by prior privacy cases. 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." Id. at 216. Second, "individual decisions by married persons [or unmarried individuals], concerning the intimacies of their physical relationship, even when not intended to produce offspring, are a form of 'liberty' protected by the Due Process Clause of the Fourteenth Amendment." Id. Thus, Stevens concludes that a total prohibition will not stand because "[t]he essential 'liberty' that animated the development of the law in cases like Griswold, Eisenstadt, and Carey surely embraces the right to engage in nonreproductive, sexual conduct that others may consider offensive or immoral." Id. at 218.
in the negative because the state failed to show that homosexuals lacked the same interest in liberty that others have, and because the state could not provide a reason for applying a generally applicable law to certain persons and not others.

The Court's decision in Bowers identifies two "natural rights" issues that underlie the alleged right of consensual homosexual sodomy and which lend themselves to analysis under the Lockean moral philosophy approach. First, the Court rejected an argument for a fundamental right to engage in consensual homosexual sodomy that hinged on "the freedom an individual has to choose the form and nature of [his] intensely personal bonds." Second, the Court found that the governmental interest in promoting morality was strong enough to justify a total ban on consensual homosexual sodomy, an affirmation of the principle that the government should have a broad role in regulating certain forms of intimate relationships.

The first step in the Lockean moral philosophy approach is to identify the true nature of the privacy interest asserted. This privacy interest emerges from Locke's idea of personhood and his discussion of the marriage relationship. As noted above, Locke articulates a rational liberty view of personhood that stresses individual worth in terms of rational and free deliberation and self-direction:

The Freedom then of Man and Liberty of acting according to his own Will, is grounded on his having Reason, which is able to instruct him in that Law he is to govern himself by, and make him know how far he is left to the freedom of his own will.

Viewing personhood in this light means that, under the Lockean liberal tradition, the types of rights protected as fundamental in the privacy area will be those which enable the individual to foster his or her own self-definition and identity.

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261. Noting that the principle that "all men are created equal" means at least "that every free citizen has the same interest in 'liberty' that the members of the majority share," Stevens concluded: From the standpoint of the individual, the homosexual and the heterosexual have the same interest in deciding how he will live his own life, and, more narrowly, how he will conduct himself in his personal and voluntary associations with his companions. State intrusion into the private conduct of either is equally burdensome. Id. at 218-19.

262. Stevens noted that the state had not supported its "policy of selective application . . . by a neutral and legitimate interest—something more substantial than a habitual dislike for, or ignorance about, the disfavored group." Id. at 219.

263. See supra notes 32-38 and accompanying text.

264. J. Locke, supra note 18, bk. II, § 63 (emphasis in original).

265. The rational liberty approach to self-definition has been identified in many of the Court's decisions. Recently, the Court wrote that it is "the ability independently to define one's identity that is central to any concept of liberty." Roberts v. United States Jaycees, 468
Merging the importance of individual decisionmaking with Locke's view of the marriage relationship produces a particularly strong argument in favor of freedom to choose the nature of one's own intimate sexual relationships. Although Locke took special pains to ensure a right of privacy within the marriage relationship as a whole, closer examination of his thought reveals that he did so in order to ensure that the marriage relationship was first and foremost a relationship involving the intimacies of two distinct individuals. Describing marriage as "a voluntary Compact between Man and Woman[,]"\(^2\) Locke further delineated its individualistic nature by arguing that its terms are somewhat negotiable, that the husband's authority is limited solely to matters of common concern, and that when children no longer need support, it can be terminated by divorce.\(^2\) Thus, for Locke, the marriage relationship is a vehicle that aids each individual in fully defining his or her personhood through rational deliberation and virtually unrestricted selection of the way in which he or she orders intimate personal relationships.\(^2\)

There emerges, then, from the Lockean liberal tradition a strong case in support of a "fundamental interest all individuals have in controlling the nature of their intimate associations with others,"\(^2\) including relationships involving consensual homosexual sodomy. This characterization of the true nature of the liberty interest asserted in *Bowers* is evident in several of the

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\(^{267}\) J. Locke, *supra* note 18, bk. II, § 78; *see supra* note 157 and accompanying text.

\(^{268}\) *See supra* notes 158-60 and accompanying text.

\(^{269}\) The Court has taken a very similar view of the marriage relationship in *Eisenstadt*, 405 U.S. at 438:

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

*Id.* at 453 (emphasis in original). Implicit in such a statement is a recognition that the marriage relationship is merely one means of ordering intimate "matters ... affecting a person." *See also* Smith v. Organization of Foster Families, 431 U.S. 816, 844 (1977) ("Thus the importance of the familial relationship, to the individuals involved and to the society, stems from the emotional attachments that derive from the intimacy of daily association, and from the role it plays in 'promot[ing] a way of life . . . .'" (quoting Wisconsin v. Yoder, 406 U.S. 205, 231-33 (1972))); Cleveland Bd. of Educ. v. La Fleur, 414 U.S. 632, 639-40 (1974) ("This Court has long recognized that freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment.").

\(^{270}\) *Bowers*, 478 U.S. at 206 (Blackmun, J., dissenting).
dissenting Justices’ statements. First, Justice Blackmun noted that “individuals define themselves in a significant way through their intimate sexual relationships with others.” Accordingly, he concluded that the Court has protected as fundamental decisions regarding marriage and procreation not because they protect the family and contribute to the general welfare, but rather “because they form so central a part of an individual’s life.”

Similarly, Justice Stevens stated that “the homosexual and the heterosexual have the same interest in deciding how he will live his own life, and, more narrowly, how he will conduct himself in his personal and voluntary associations with his companions.” These statements are essentially identical to Locke’s view of personal liberty: A man has “a Liberty to dispose, and order, as he lists, his Person, Actions, Possessions, and his whole Property, within the Allowance of those Laws under which he is; and therein not to be subject to the arbitrary Will of another, but freely follow his own.”

Analysis of the societal interests implicated by consensual homosexual relationships under the Lockean liberal tradition leads to conclusions inconsistent with those reached by the Bowers majority. As noted in the earlier discussion of the Griswold decision, societal regulation of decisions regarding the course of intimate personal relationships could be sustained only if the capacities for rational deliberation and self-direction in others would be too greatly endangered by that course of action. Because consensual homosexual relationships do not restrict the rational liberties of others, the state’s interest is minimal and the conduct is protected. Accordingly, one reaches a situation almost identical to that in Griswold, where the societal interests actually support, rather than limit, the privacy right asserted.

Allowing an individual freedom in choosing the nature of his or her intimate associations with others substantially furthers societal interests in fully developing an individual’s capacity for rational deliberation and self-direction. The Lockean rational liberty view would not permit governmental regulation of an individual’s freedom of decisionmaking in order to enforce any sort of morality such as “conformity to religious doctrine”:

[S]ince the nature and degree of individual talents and inclinations along these lines vary, many different sorts of pursuits of happiness are still appropriate. In fact, the goal of promoting rational liberty not only permits but encourages considerable diversity in ways of life, even as it indicates how a secure and noncompetitive sense of self-worth can be

271. Id. at 205.
272. Id. at 204. Further characterizing the nature of these past decisions, Blackmun noted that the Court “has recognized a privacy interest with reference to certain decisions that are properly for the individual to make.” Id. (emphasis in original).
273. Id. at 218-19 (Stevens, J., dissenting).
274. J. Locke, supra note 18, bk. II, § 57 (emphasis in original).
275. See supra notes 168-73 and accompanying text.
obtained by all. The standard itself implies that all people should not make the cultivation of their rational capacities their single goal, for most persons are sufficiently multifaceted to find such a course so narrow and frustrating as to be self-defeating. Furthermore, differences in individual abilities, temperaments, and tastes mean that people will, on reflection, make different choices about the activities that are most likely to lead them to satisfactions consistent with continued self-direction. The rational liberty position therefore does not justify any public effort to transform or "educate" persons according to some single standard of proper human consciousness. For the most part, it encourages people to be themselves.276

Instead, the Lockean liberal tradition posits that moral regulation of individual decisionmaking is a consequence of the law of nature that each individual knows by reason; it is not a function of the legislative power in civil society. Hence, a legislative prohibition of consensual homosexual relationships based upon "the presumed belief of a majority of the electorate in Georgia that homosexual sodomy is immoral and unacceptable"277 fails for overbreadth because it interferes with society's deeper interest in protecting how an individual "will conduct himself in his personal and voluntary associations with his companions."278 Analysis under the Lockean moral philosophy approach of the various interests asserted in the Bowers opinions produces a result that is wholly inconsistent with the Bowers decision. The Lockean liberal tradition recognizes a broad and fundamental right of privacy inherent in intimate relationships and "the freedom an individual has to choose the form and nature of these intensely personal bonds."279 Moreover, although the Lockean liberal tradition might allow the legislative authority to proscribe public acts of consensual homosexuality in order to protect the public good, it would find, as did the dissenters in Bowers, that legislation regulating private sexual conduct wrongfully interferes with the liberties of rational "persons" and is contrary to the best interests of society.

CONCLUSION

Contrary to Justice White's misgivings in Bowers v. Hardwick,280 the Supreme Court can continue to legitimately engage in substantive due process analysis in the right to privacy cases, provided it follows a Lockean moral philosophy approach to discovering individual privacy rights. This Lockean approach is appropriate for several reasons. In the first place, Lockean

276. R. Smith, supra note 10, at 200-01.
278. Id. at 218-19 (Stevens, J., dissenting).
279. Id. at 205 (emphasis in original).
280. 478 U.S. 186 (1986); see supra text accompanying note 1.
moral philosophy is consistent with the values and principles that underlie American constitutional law and form the basis of the American political regime. Moreover, Lockean principles provided the basic approach for the Court's first major utilization of substantive due process analysis during the *Lochner* era.

In addition, reliance on Lockean principles provides a more consistent, predictable and principled theoretical basis for modern substantive due process analysis without granting to the Court any authority that it does not already exercise. Because this approach to interpreting the fourteenth amendment "would direct attention to the sorts of concerns to secure basic freedoms that provided the amendment's chief historical impetus," it provides "a more detailed and appropriate theory of the basic liberties that can be protected under [substantive] due process." In other words, it gives definite content to the interests protected by the due process clause while at the same time directing decisionmakers, be they judges, legislators or ordinary citizens, to the proper philosophical questions.

Adherence to the Lockean liberal tradition thus requires courts first to determine whether the asserted privacy right is fundamental—whether it truly fosters the individual's capacity for rational deliberation and self-direction. If the right is deemed fundamental, then the state regulation will be permitted only if it serves a compelling societal interest—that the exercise of that right will inhibit the capacity for rational liberty in others. This emphasis on society's duty to protect and foster the rational liberty of the individual will still ensure significant protection of minority interests because a civil society can only prohibit conduct wholly incompatible with the rational deliberation and self-direction of all.

Rethinking *Griswold v. Connecticut*, *Roe v. Wade* and *Bowers v. Hardwick* in light of these principles demonstrates that a Lockean moral philosophy approach to substantive due process analysis provides a highly organized and equitable method for resolving issues raised by the modern privacy cases. It supports the Court's result in *Griswold* because the interest of married individuals in practicing contraception in the marital relationship is consistent with the broader interests of civil society in promoting freedom.

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281. "Locke ... remains the most exemplary liberal theorist precisely because—as the founding generation recognized—he reveals most powerfully the fundamental ends that early liberalism proposed for political life and that America's constitutionalists promoted." R. Smith, supra note 10, at 16; see also id. at 13 ("THE WRITINGS of John Locke, taken as a whole, remain the best examples of the Enlightenment liberalism that most heavily shaped the framing of the American Constitution.").

282. Id. at 239.

283. Id. at 238.

284. 381 U.S. 479 (1965).


286. 478 U.S. at 186.
of decision regarding intimate aspects of an individual’s relationships. However, it rejects the Roe Court’s assertion that the state cannot deny a woman’s fundamental right to privacy in decisions regarding abortion. This right may be regulated because the state has a sufficiently compelling interest in protecting and fostering the potential of the unborn fetus to become a mature, rational individual. Similarly, it rejects the Court’s decision in Bowers because that case presents issues almost identical to those in Griswold. The interests of the individual to engage in private, consensual homosexual sodomy are again consistent with civil society’s deeper interest in promoting privacy and freedom in decisions regarding intimate personal relationships.287

Since our constitutional heritage is one whose foundation rests ultimately upon the Lockean liberal tradition, any attempt by the Court to substantively discern the scope and content of an individual’s due process liberty interests must be consistent with these principles. One possible standard was articulated by Justice Harlan, who wrote: “Due process . . . . has represented the balance which our Nation, built upon postulates of respect for the liberty of the individual, has struck between that liberty and the demands of organized society . . . . having regard to what history teaches are the traditions from which it developed . . . .”288 Because the Lockean liberal tradition, which emphasizes protection of the rational capacities of the individual, is a tradition from which our country has developed and because it strikes an appropriate balance between the liberty interests of individuals and the demands of society, it provides a proper benchmark for thinking through and resolving the issues raised by the modern privacy cases.

287. The conclusion here is only that a civil society which in large part traces its philosophical roots to, and draws its legal principles from, the Lockean liberal tradition may not proscribe by positive law the practice of consensual homosexual sodomy. This Note does not suggest in any way that consensual homosexual relationships are morally “right” as a matter of natural or divine law.
